CAPACITY, PARTICIPATION AND VALUES IN COMPARATIVE LEGAL PERSPECTIVE

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10

Values and Participation of Individuals Without Mental Capacity in Hong Kong

Daisy Cheung

Introduction

Mental capacity law in Hong Kong, much like most areas of law pertaining to those with mental disability, is riddled with deficiencies, both in terms of its theoretical basis and the problematic values that underpin its regimes.[1] This chapter examines the latter, exploring in particular the role of the subjective values of the individual without capacity, as well as the participation of such individuals in hearings granting the power to make decisions on their behalf. The chapter begins with a brief introduction to the two key mental capacity law regimes in Hong Kong, the Part II Committee regime and the Part IVB adult guardianship regime of the Mental Health Ordinance (Cap 136) (MHO). It then examines the extent to which the views and wishes of the individual without capacity are ascertained and considered in decisions under both regimes. The chapter further considers whether such individuals take part in these decisions, and where they do, what the nature of this participation involves. A critical evaluation of these aspects of the two regimes is then provided, and the chapter ends with a brief conclusion.

[1] Efficiency is another concern, which, while beyond the scope of this chapter, is discussed briefly in relation to *SPLP v Guardianship Board* [2019] 3 HKLRD 670 later in this chapter.

Overview of legislative framing

Definitions

The MHO is the primary piece of legislation that regulates matters relating to persons with mental disability, with many of its provisions inherited from various versions of the Mental Health Act in the UK. The MHO approach to mental capacity is highly piecemeal in nature, with separate regimes regulating different aspects of an individual's affairs, as will be discussed further later in this chapter. While the concept of 'mental incapacity' is defined at the outset, the relevant definitions fail to include a general functional capacity test, although various functional capacity tests are then included in the different regimes to assess the individual's decision-making ability in those particular contexts.

Under the MHO, mental incapacity is defined in s 2 with two similar and equally problematic terms.[2] The first is 'mental incapacity', which is defined as 'mental disorder or mental handicap'. This definition incorrectly equates mental incapacity with mental disability, with no functional capacity test to assess the decision-making ability of the individual in question, as already mentioned. The second is 'mentally incapacitated person', which is defined as:

> (a) for the purposes of Part II, a person who is incapable, by reason of mental incapacity, of managing and administering his property and affairs; or
> (b) for all other purposes, a patient or a mentally handicapped person, as the case may be.

While sub-section (a) of this definition does contain a functional capacity test, the applicability of this test is limited to the Part II Committee regime of the MHO, which will be discussed later in this chapter. Subsection (b), which applies generally to all other uses of the term 'mentally incapacitated person' in the MHO (unless otherwise defined in a specific Part), does not contain any test of capacity, and is largely similar to the definition of 'mental incapacity' already discussed, except that the term 'patient' is used instead of 'mental disorder'. The term 'patient', which definitionally includes both persons suffering from and appearing to suffer from mental disorder, is significantly wider than 'mental disorder'. This is a cause for concern because according to this part of the definition, a person who merely *appears* to be suffering from mental disorder would qualify as a 'mentally incapacitated

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[2] See further Daisy Cheung, 'Mental Health Law in Hong Kong: The Civil Context' (2018) 48 Hong Kong Law Journal 461.

person' under the MHO, which is both stigmatising and represents a simply incorrect understanding of mental incapacity. Practically, however, even though the label of 'mentally incapacitated person' could be given to any such person, the functional capacity tests contained in the various regimes are generally applied prior to the use of any powers under those regimes (such as the taking of decisions on behalf of a person deemed to lack mental capacity).

The dual regimes

The MHO contains two separate regimes for individuals who are deemed as lacking mental capacity.[3] The first, which deals with property and affairs,[4] is found in Part II (Management of Property and Affairs of Mentally Incapacitated Persons) of the MHO, which is inherited from Part VII of the Mental Health Act 1983 of the UK. Under s 11, if the Court is satisfied that the individual alleged to be mentally incapacitated is incapable of managing and administering their property and affairs, the Court may appoint a 'committee of the estate' (Committee) and direct the Committee to exercise a wide range of functions and powers in relation to the administration of the individual's property and affairs.[5] These functions and powers, listed in ss 10A and 10B of the MHO respectively,[6] include, among others, those that relate to the maintenance or other benefit of the individual and their family, the sale and purchase of the individual's property, the execution of a will for the individual and the conduct of legal proceedings in the individual's name or on their behalf. In carrying out these powers and functions, s 10A(2)(a) provides that the Court shall have as a paramount consideration the requirements of the mentally incapacitated person.

The second, which deals with health and well-being, is contained in Part IVB (Guardianship) of the MHO. Under this Part, if an individual who is 18 years of age or above fulfils the relevant criteria, they can be received into guardianship via an application made to the Guardianship Board (Board), a quasi-judicial tribunal tasked with responsibilities such as the appointment,

3 Note that provisions in the MHO generally only apply to those with mental disorder or mental handicap as defined in the MHO.

4 While the phrase 'property and affairs' can be interpreted widely, this regime deals primarily with financial matters.

5 MHO, ss 11(1) and 11(2). The Committee can consist of one or more family members, or in cases where there is family conflict or hostility, an independent professional such as an accountant may be appointed instead. Usually no more than two people will be appointed as part of a Committee.

6 It should be noted, however, that s 10B does not extend the powers under s 10A, but is merely a non-exhaustive list of examples as to how powers under s 10A might be exercised (see further *Re CYL* [2007] 4 HKLRD 218 [30]).

monitoring and supervision of guardians, and the making and reviewing of guardianship orders. Once an individual has been placed under guardianship,[7] the initial order lasts for one year, and is renewable for a period of three years at time.[8] Hong Kong follows the essential powers approach adopted by the UK in the Mental Health Act 1983,[9] and a guardianship order can confer one or more of the powers listed in s 59R(3) of the MHO on the guardian. These powers are extensive, granting the guardian the ability to decide a range of matters on behalf of the individual under guardianship.

In terms of who is able to act as guardian, a list of selection criteria is laid out in s 59S of the MHO.[10] What is of particular interest are the criteria contained in sub-sections 59(1)(S)(f) and (g), the implications of which I discuss later in this chapter. The two criteria are:

(f) the interests of the mentally incapacitated person will be promoted by the proposed guardian, including overriding the views and wishes of that person where the proposed guardian (once appointed) considers such action is in the interests of that person;
(g) despite paragraph (f), the views and wishes of the mentally incapacitated person are, in so far as they may be ascertained, respected.

Substantially similar wording subsequently appears in s 59S(3), in relation to how a guardian is to perform any of the functions or exercise any of the powers granted under the MHO.

Questions of capacity law in Hong Kong are thus generally addressed through these two regimes, where substitute decision-making on behalf of persons who lack capacity occurs in the realms of (1) property and affairs and (2) health and well-being respectively.[11] Courts and quasi-judicial tribunals are heavily involved in both regimes – Committees can only be appointed by the courts, and guardianship orders can only be granted by the Board.

The current distinction between decisions regarding property and affairs (or financial matters) and health and well-being has been subjected to judicial

[7] The criteria that need to be met for an individual to be placed under guardianship are contained in s 59O(3) of the MHO.
[8] MHO, s 59R.
[9] *LWY v Guardianship Board* [2009] HKCU 319.
[10] While family members are often appointed as guardians, the Director of Social Welfare is appointed as public guardian in cases where the Guardianship Board is of the view that the family members are unsuitable. I discuss this in further detail later in this chapter.
[11] In addition to these two regimes, decisions may also be made on behalf of individuals without capacity under Part IVC (in relation to medical treatment) and under the court's inherent jurisdiction, which I will discuss later in the chapter.

critique. In *SPLP v Guardianship Board*,[12] Lok J argued that, among other concerns, matters relating to the welfare of individuals without capacity should not be handled under two separate regimes. This is because (1) the court is unable to consider all relevant matters relating to the welfare of the individual if it has to focus on one particular aspect only; (2) the necessity of going through both procedures in some cases causes additional financial and emotional burden on family members; and (3) there is a duplication of effort by the Guardianship Board and the court when dealing with related matters, as well as a lack of communication between agencies that are responsible for the respective processes.[13]

While this distinction was inherited from the Mental Health Act 1983 of the UK, which also had separate regimes for property and affairs (Part VII) and guardianship (Part II), the UK has since moved away from this piecemeal approach and enacted the Mental Capacity Act 2005, which brings together all decisions to be made on behalf of individuals lacking mental capacity under the jurisdiction of the Court of Protection.[14] This is arguably a much better approach that allows for the consideration of all related aspects of the individual's welfare in a coherent and holistic manner. There is no principled basis for distinguishing between matters of finance and matters of health and well-being, and in particular for the very different mechanisms by which these applications and decisions are made.[15]

Medical and dental treatment

In addition to the dual regimes, Part IVC (Medical and Dental Treatment) of the MHO also contains separate provisions regulating the treatment of those who are incapable of giving consent. Like Part II and Part IVB, Part IVC has its own capacity test, which is formulated as the '[incapability] of understanding the general nature and effect of the treatment or special treatment'[16] as defined in the interpretation section (s 59ZA) of Part IVC. Under s 59ZF, treatment may be provided without consent to a mentally incapacitated person to whom Part IVC applies if the medical practitioner or dentist 'considers that as a matter of urgency that treatment is necessary

12 [2019] 3 HKLRD 670.

13 Ibid [39].

14 See Rebecca Stickler, 'Mental Capacity Law in England and Wales: A Value-Laden Jurisdiction', Ch 2 in this volume.

15 See also Law Commission, *Report on Mental Incapacity* (Law Com No 231, 1995) para 2.45, where the Law Commission comments that the legal context of their review of the Mental Health Act 1983 (on which the current division is based) is 'one of incoherence, inconsistency and historical accident'.

16 Section 59ZB(2), MHO.

and is in the best interests of the mentally incapacitated person'.[17] I will return to the concept of best interests later.

Values in the legislative framing and the status of P's subjective values

The substitute decision-making regimes for those who lack mental capacity in Hong Kong are primarily driven by paternalistic concerns of protecting such individuals, and both the relevant legislation and case law suggest that P's subjective values have not generally been given a high priority.

Part IVB: guardianship

As already discussed, the sections dealing with guardians under Part IVB require the guardian to (1) ascertain and respect the views and wishes of the individual,[18] and (2) promote the interests of the individual, which may mean overriding their expressed views and wishes if the guardian considers this to be in the individual's interests.[19] While the term 'respect' is used in relation to the individual's views and wishes, the ease with which such views and wishes can be overridden suggests that they have not been placed in a sufficiently primary position to be considered respect.[20]

This is demonstrated by the selection of decisions published by the Board. A review of these decisions reveals that there is no systematic consideration of P's views and wishes, which are rarely mentioned.[21] Where P's views and wishes have been made known to the Board and/or mentioned in the

[17] The medical practitioner or dentist must also take reasonable steps to ascertain whether a guardian who is able to consent to the treatment on behalf of the individual has been appointed (see further s 59ZF(2)).

[18] In addition to the guardian, the social inquiry report prepared by a social worker for consideration by the Board is also to contain the views and wishes of the individual, insofar as they may be ascertained (MHO, s 59P(3)).

[19] This wording is also used in sub-sections 59K(2)(a) and (b), in relation to the Board's performance of its functions or exercise of its powers.

[20] See Daisy Cheung, 'Bringing the Adult Guardianship Regime in Line with the UNCRPD: The Chinese Experience' (2021) 35 International Journal of Law, Policy and the Family ebab016, https://doi.org/10.1093/lawfam/ebab016, for a more detailed argument on this point (accessed 8 January 2023).

[21] In some cases this was because the P is unable to express views or wishes at all due to mental impairment. GB/P/2/09 is a rare instance in which it was stated that the Board attempted to ascertain the wishes of the subject in various ways (see para 17) but this appeared to be because the nephew of the subject had accused the relevant parties of not being able to understand P's real wishes. Ultimately the wishes of P were not referenced in either the reasoning or decision.

text of the decision, these have not once appeared in the 'Decision' section of these cases, and have generally not been given much importance by the Board.[22] For example, the Board expressly stated that the will and wishes expressed by a particular P at her hearing would 'carry little weight' due to her poor memory and cognitive deficiencies.[23] On occasion, the Board has explicitly disregarded P's wishes. A particularly problematic example of this is a case involving L.[24] There had been clear evidence of L's wish to live with her son K, the proposed guardian, and to have K be her guardian.[25] The appointment of K as guardian was supported by the social enquiry report maker, as well as several of L's other children, but the Board decided to override the wishes and opinions of all of these parties and appoint the Director of Social Welfare as the public guardian of L. The reason for this was because there was intense conflict reported between one sibling and the rest of the siblings (including K).[26] While family conflict is clearly not preferable, it is difficult to see why this would justify explicitly opposing the wishes of L and all the other parties in support of the arrangement.[27]

Instead of the Ps' will and wishes, the focus in these decisions is generally placed on the objective best interests of the P.[28] While the concept of 'best interests' has not generally been elaborated upon in these decisions, the Board employed the definition of the term (as defined in Part IVC in relation to the carrying out of medical treatment) in s 59ZA of the MHO[29] in a recent case

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22 The rare instances in which P's wishes are taken into consideration appear to be where these are consistent with their objective best interests (see, for example, GB/P/4/15 and GB/P/4/10).

23 GB/P/2/15, para 10(c). This case was particularly problematic in that the 'will and wishes expressed at the hearing' were not reported in the decision itself, further highlighting the lack of emphasis that is placed on them.

24 GB/P/8/15.

25 Ibid [8], [18].

26 The reasoning of the Board was that a decision made by the guardian would unlikely be supported by the other side and that implementation of the decision would be difficult (see ibid [33]), but given that the guardian would have legal powers to implement the decision, it is hard to see why this would be the case.

27 See also GB/P/9/15, a similar case in which the Board appointed a public guardian due to family conflict even though P expressed a clear preference for her third daughter, whose proposed guardian appointment was supported by several other children and the solicitor.

28 See, for example, GB/P/7/10, where the paramount concern as stated by the Board is to safeguard P's best interests, and GB/P/2/15, where guardianship is considered necessary to safeguard P's personal safety and long-term welfare interests.

29 In the best interests (符合最佳利益), in relation to the carrying out of treatment or special treatment, as the case may be, in respect of a mentally incapacitated person, means in the best interests of that person in order to –

(a) save the life of the mentally incapacitated person;

(b) prevent damage or deterioration to the physical or mental health and well-being of that person; or

involving C.[30] This definition focuses primarily on the individual's medical best interests, although the definition includes the term 'well-being', which could be interpreted more widely. In *Re C (Emergency Medical Treatment)*,[31] for example, Hartmann J (as he then was) was of the view that the term 'well-being' is a broad, inclusive term that concurs with the common law meaning of 'best interests'. In particular, he noted the importance of the subjective wishes of the person lacking mental capacity: 'Those best interests were not limited simply to what was necessary to keep her clinically alive but embraced a broader range of factors, especially what she herself would have wished'.[32]

The Board appears to take a very narrow view of 'best interests', however, focusing not only primarily on medical best interests, but also medical best interests as defined by medical practitioners giving evidence to the Board. Returning to the case of C, where there was a disagreement between C's mother and C's doctors, the Board deferred to the doctors' treatment plan as being in C's best interests without any further explanation, even though the mother appeared to have rational reasons for refusing treatment.[33]

Subjective wishes also do not appear to feature in the best interests assessments of the Board. In a case involving LSC,[34] a guardianship order was granted in the best interests of P in order to keep her within a care home for the elderly. Although it was made clear that LSC had repeatedly requested and attempted to leave the home, this was not at all considered in the assessment of what LSC's best interests would entail. Instead, the Board simply 'register[ed] that it was not in issue that the subject's continuation of institutional care would be in her best interests'.[35]

Part II: Committee

Turning to the Committee regime under Part II of the MHO, the legislative regime arguably places even less importance on the subjective values of the individual lacking capacity, with no mention of the views and wishes of the individual alleged to be mentally incapacitated in any of its provisions.

(c) bring about an improvement in the physical or mental health and well-being of that person.

30 GB/P/2/20 [8].

31 [2003] 1 HKC 245.

32 Ibid [30].

33 See further ibid [7], where the mother referred to previous problems caused by similar treatment and second opinions obtained from other doctors.

34 GB/P/4/08.

35 Ibid [12]. It is also worthy of note that, in this case, the social enquiry report maker was against the making of the guardianship order because she did not feel it was necessary.

The Court is to have the 'requirements' of the individual as its paramount consideration in exercising its powers and functions, but it is unclear from the legislation itself what this would encompass. In the case of *Re S*,[36] Hon Lam J (as he then was) said:

> 3. [T]he paramount consideration of the court is the requirements of the mentally incapacitated person … It follows that all factors relevant to the welfare of the mentally incapacitated person ['MIP'] should be carefully considered with necessary information and evidence before the court. By way of example (and without being exhaustive), one must usually have regard to the existing and future care arrangement for the MIP and the costs thereof, his life expectancy and health condition and the maintenance of his family members. The income and expenditure of the family as a whole will be relevant. How the properties and affairs of a MIP should be managed obviously depend on these factors as well as how much he could afford to spend …
> 4. The court will also take into account the views of those who were close to the MIP and those who might potentially be affected including those who have an interest in the estate of the MIP in the event of his death.[37]

While the judge's list of factors was not intended to be exhaustive, it is also clear that the subjective values and wishes of the individual are not a primary consideration.[38] Indeed, until the recent case of *C v B (Re A: Mental Health)*,[39] which I will discuss in further detail, cases dealing with this regime have generally placed very little emphasis on the individual's views and wishes, if at all.

Cases under this regime cover a range of issues, including the appointment of Committee (as well as subsequent disputes in relation to the membership of the Committee), the making of statutory wills, directions and/or orders from the Court in relation to the property and affairs of the individual, and other procedural matters. Apart from cases involving statutory wills, where the legal test involves a consideration of what the individual would

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36 [2004] HKEC 637.

37 Ibid [3]–[4].

38 Interestingly, while the focus of the judge's instructions about notifying and ascertaining views in these paragraphs was in relation to relatives and other interested parties, this was interpreted to include the ascertaining of the views of the person lacking capacity in *Practice Direction 30.1: Applications under Part II of the Mental Health Ordinance (Cap 136)*, para 2.11.

39 [2018] HKCFI 467.

have reasonably done if restored to 'full mental capacity, memory and foresight',[40] these cases generally demonstrated a lack of interest in either the ascertainment or consideration of the individual's views and wishes, both past and present.[41] The individual's 'requirements', or best interests, are considered from an objective point of view, without inquiry into the wishes of the individual, even where personal matters such as emotional ties to family are involved. In *Re LWO*,[42] for example, where the Court considered whether and how the brother of the individual should repay a sum of money taken out of the individual's settlement to acquire a property in the brother's name, the Court said:

> On the face of it, it might sound like a sanction for an interest free loan to the brother for the purchase of the property and the brother enjoyed a free ride in the rise in the value of the property over the years. However, in the present circumstances, it may not be fair to consider the matter solely from that perspective. *Given the affinity and support provided by the siblings to the MIP in the past, it is of great importance that they should continue to maintain a harmonious relationship of trust and confidence with the MIP.* In the exercise of its power under Part II of the Mental Health Ordinance, the court should not look at the matter purely from a monetary point of view.[43]

The individual in this case was described as 'intellectually functioning within the lower range of the Borderline range',[44] and even though higher cognitive functioning was described as grossly impaired, the individual would presumably have been able to indicate at least his feelings and preferences for close family members. It is problematic that the Court would come to conclusions about the interest of P, in particular that a 'harmonious

[40] See, for example, *Re CYL* (n 6), where the objective element of the test is emphasised. In this case, CYL had expressed her wish to give her assets to her daughter, but the Court, noting that the test is not purely subjective and that caution is needed where the individual is not of full mental capacity, nonetheless made provision for another individual as well, considering the various circumstances.

[41] A notable exception is *Re THM* [2008] HKEC 1343, where in considering the appointment of Committee, the judge briefly set out relevant principles from *Heywood & Massey: Court of Protection Practice*, which include the need to consider P's own wishes and feelings. While the present wishes of the individual were not considered, presumably because he was in a coma, the judge did consider the individual's past actions and what he would likely have wanted in the present. A more recent exception is discussed in detail later in this chapter.

[42] [2005] HKEC 1011.

[43] Ibid [13], emphasis added.

[44] Ibid [1]. He was also stated to be 'almost independent in simple self-care tasks'.

relationship of trust and confidence' with such siblings would be of great importance to him, without at least consulting his views on the matter, even if such views and wishes are not determinative.

In addition, similar to the Board, the Court generally tends to opt for independent Committees in cases of family conflict, without any consideration of the views and wishes of the individual. In the case of *Re A (Mentally Incapacitated Person: Committee)*,[45] for example, the question was whether the Committee should consist of an independent professional accountant only, or whether one of Mr A's daughters (B) should be included as well. In deciding that B should not be added to the Committee, the Court reasoned that, given the conflicts between B and another daughter (C), adding B to the Committee would 'inevitably compromise the independent judgement of the Committee'.[46] While acknowledging that the Committee is 'set up to assist the Court as regards steps that should be taken to protect the interests of Mr A', and despite the presence of Mr A at the hearing, the views and wishes of Mr A were not ascertained or considered, nor was there any discussion as to whether Mr A was capable of expressing any views and wishes.

The case of *C v B (Re A: Mental Health)* has signalled a possible opportunity for change, albeit limited, in relation to the emphasis placed on the views and wishes of the individual. This case involved an individual, Mrs A, who already had an enduring power of attorney (EPA) in place. A key issue was whether a Committee should nonetheless be appointed to investigate whether Mrs A had executed certain documents with sufficient mental capacity and without undue influence.[47] In deciding against appointing a Committee, the judge reiterated that the prime consideration in such cases is always the best interests or requirements of the individual.[48] He then spent 14 paragraphs elaborating on what the weight given to Mrs A's views and wishes should be,[49] stating clearly that in determining the best interests and requirements of an individual, the Court should give proper weight to the views and wishes of the individual where they can be ascertained, although limiting this to the views and wishes of the individual *before* becoming mentally incapacitated.[50] Citing human rights jurisprudence and cases from the UK, the judge then went as far as to say that unless the views and wishes of the individual are plainly contrary to her well-being, the Court cannot

[45] [2009] 2 HKLRD 159. See also *Re LSMH* [2006] HKEC 11 [14].

[46] *Re A (Mentally Incapacitated Person: Committee)* (n 45) [17].

[47] *C v B (Re A: Mental Health)* [2018] 2 HKLRD 1105 (CFI) [1].

[48] Ibid [116].

[49] See section C.1.2. of *C v B* (n 47) [126]–[140].

[50] Ibid [127]. No authority is given for the claim that only view and wishes prior to incapacity should be taken into account.

substitute its own view for that of the individual as to what is in her best interests ('the plainly contrary proposition').[51] He did, however, note that, as per Munby J, the 'weight to be attached to the MIP's wishes and feelings will always be case-specific and fact-specific … depend[ing] on the individual contexts and circumstances of each particular case'.[52]

This decision was then appealed to the Court of Appeal (CA) on the basis that the judge had wrongfully employed the substituted judgement standard in considering Mrs A's views and wishes.[53] In dismissing the appeal, the CA reasoned that the judge had not regarded Mrs A's views and wishes as conclusive, and that he had only attached weight to these views and wishes as he deemed appropriate in that context.[54] While the CA held that the plainly contrary proposition was too wide,[55] it stated:

> These human rights underpinnings for the principle of self-determination with regard to a person's estate and affairs must inform the courts in Hong Kong in the interpretation as well as the application of s.10A(2) of the Mental Health Ordinance when considering how the power under Part II should be exercised in light of the requirements of the MIP. In our judgment, in order to be Art.14 and Art.105 compliant and proportionate, due weight has to be attached to the wishes and feelings of a MIP in the application of the best interests test.[56]

Thus, it can be seen that the approach taken by both the Court of First Instance (CFI) and the CA in this case placed much more emphasis on the individual's views and wishes than had been done in past cases, although it is unfortunate that the CA did not take the opportunity to address the importance of current wishes. As such, *C v B* limits the views and wishes that should be taken into account to those which are expressed prior to incapacity, which problematically suggests that these are the only ones that are of possible relevance and importance.

While *C v B* has the potential to at least change the Court's approach in relation to past views and wishes, this has not yet been demonstrated in subsequent cases.[57] It may be that the emphasis on views and wishes in *C v B*

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51 Ibid [135].

52 Ibid [138].

53 *C v B (Re A: Mental Health)* [2019] HKCA 321 (CA).

54 Ibid [35], [50].

55 Ibid [61].

56 Ibid [45].

57 See, for example, *Re LHHK* [2020] HKCFI 2552, where, in appointing Committee, the Official Solicitor was chosen over the individual's younger sister without ascertainment or consideration of his views.

was merely due to the clearly executed EPA. As the CFI in *C v B* stated, 'the policy objectives behind the [EPA] regime are to give deference to the wishes of the donor and to avoid the need for committeeship'.[58]

Inherent jurisdiction

In addition to the two regimes discussed, a brief mention should be made of the inherent jurisdiction of the Court to deal with matters relating to persons who are assessed to be lacking mental capacity but which are not covered by the MHO. Because most situations involving such persons are covered by Parts II (Committee), IVB (Guardianship) and IVC (Medical and Dental Treatment), there are relatively few decisions made under this jurisdiction.[59]

In the case of *Re CML*,[60] the court considered the importance of the individual's views and wishes in the context of an order to grant access to the individual. In considering what would be in the best interests of CML, the Court noted the case of *Re S (Hospital Patient: Court's Jurisdiction)*,[61] and in particular Millett LJ's view that 'the task of the court is to ascertain the MIP's wishes, or "if they cannot be ascertained, by determining what is in his best interest and inferring that that is what he would wish?"'. This was interpreted by the Court to mean that it has to 'place itself in the position of CML, to act as "her surrogate decision-maker", and to infer what she would have wanted'.[62] The Court then reasoned as follows:

> There is no serious dispute that CML, prior to her incapacity, used to enjoy, to say the least, 'normal' relationship with all her daughters and their families. CML is an elderly woman who is in the late stage of her life, and family bonding is always considered to be a virtue treasured by a decent elderly person. Under such circumstances, the court can

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58 *C v B* (n 47) [144].

59 Interestingly, the inherent jurisdiction has not generally been invoked in cases involving comatose persons or persons in a persistent vegetative state, despite it being unclear whether the definition of 'mental incapacity' in the MHO is inclusive of such persons and whether the provisions of the MHO therefore apply to them (this concern was also identified in the 2006 Report of the Law Reform Commission of Hong Kong on 'Substitute Decision-Making and Advance Directives in relation to Medical Treatment'; see in particular paras 6.6–6.21). In some cases, such persons have automatically been assumed to fall within the MHO definition without further analysis (see, for example, *Re C (Emergency Medical Treatment)* (n 31) and *Re YCK* [2006] HKCU 274).

60 [2020] 3 HKLRD 481.

61 [1995] All ER 290.

62 *Re CML* (n 60) [36].

> safely say that what CML would want now, if she still has the mental capacity, is to enjoy the company of all her family members.[63]

While it is commendable that CML's past views were considered, there is again regrettably no discussion of what her current views and wishes are, or whether it is possible to ascertain what they are – it is merely stated at the beginning that all parties agree CML is a mentally incapacitated person within the meaning of the MHO. Here, again, the assumption appears to be that the only views of possible relevance are those of CML prior to incapacity, and, additionally and somewhat bizarrely, what a 'decent elderly person' would presumably treasure.

Participation in proceedings

Both legislative regimes contain provisions that relate to the participation of the individual lacking capacity in the respective proceedings.[64] In relation to the adult guardianship regime, s 25(4) of the Mental Health Guardianship Board Rules (MHGBR) provides that any party may appear at the hearing and take such part in the proceedings as the Board thinks proper, and that the Board is to hear and take evidence from the individual lacking capacity insofar as is practicable. The section also provides that this individual and any applicant, proposed guardian or guardian, doctor, and the Director of Social Welfare can all hear each other's evidence, put questions to each other, call witnesses and put questions to any witness or other person appearing before the Board. Section 25(5) then provides that the individual lacking capacity is to be given a further opportunity to address the Board.

A review of the decisions demonstrates that the majority do not mention whether the individual without capacity attended the hearing. Of those that do, the individual does not appear to have participated by asking questions, calling witnesses or addressing the Board, with participation generally limited to being interviewed by the Board. While it is not made clear why this is the case, the case of *Director of Social Welfare v A and B*[65] is particularly worrisome. In para 9.2, the Board said:

> At the beginning of the hearing, the son had asked why the subject had not attended the hearing. After clarifying with the social report maker, the Board confirmed that the subject had never made a request to attend (with reference to section 25(2) of the MHGBR). Additionally, the

63 Ibid [37].

64 Neither regime includes any formal requirements to consult the individual without capacity, so this section focuses on participation in proceedings only.

65 GB/P/2/17.

> Board was of the view that the subject had been determined to be a mentally incapacitated person by doctors, and in the past few months, the opinions that the subject had expressed about her care arrangements were often erratic. Because the emphasis of this case is on elder abuse and abandonment of one's closest family, the Board decided to continue the hearing without the presence of the subject. (Translation)

Putting aside the issue of whether more effort was necessary to secure the attendance of the individual, what is more worrying is how this absence was justified. First, there is the suggestion that elder abuse or abandonment cases do not require the input of the individual involved. Second, and perhaps more problematically, there is the implication that incapacity and erratic opinions nullify any need for an individual to be present or heard in proceedings about them.

In relation to the Committee regime, s 8 of the MHO requires that reasonable notice of the time and place for the hearing be given to the person alleged to be without capacity. This is subject to the proviso that, if it appears the individual is in such a state that personal service would be ineffectual, the Court may direct substituted service of the notice. Section 9 of the MHO provides the Court with the power to require the individual alleged to be without capacity to attend a hearing for the purpose of being examined by the Court or anyone else.

Similar to the adult guardianship regime, there does not appear to be meaningful participation by individuals without capacity in the majority of cases under the Committee regime.[66] Where such individuals do attend the hearing, this is generally for the purpose of being examined by the court to determine incapacity[67] or other procedural issues,[68] and where such an examination was not necessary, the judgments generally did not mention any form of participation by the individual.[69]

Critical evaluation

It is quite clear from the preceding analysis that the views and wishes of an individual without capacity are generally given very little weight or emphasis

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[66] One interesting exception is *Re LYO* [2005] HKEC 1184, which considered whether a Part II hearing could be conducted while the individual was out of the jurisdiction. LYO was not present in Hong Kong and therefore did not attend the hearing, but nonetheless participated through instructing his solicitors on various matters.

[67] Although this is not often necessary as the inquiry is often determined on the basis of medical evidence alone.

[68] *Re Madam A* [2004] HKEC 308.

[69] See *Re A* (n 46). In some cases, there are references to meeting the individual but no elaboration on what was discussed apart from what the court decided on the basis of the discussion (see, for example, *Re TBS* [2019] HKCFI 2919 [25]).

in Hong Kong. Looking at the relevant legislation, there is no mention of views and wishes at all in Part II of the MHO, and even though the adult guardianship regime requires P's views and wishes to be respected, this section is tellingly placed in a position of lower priority, *after* the section providing that P's views and wishes can be overridden in the promotion of their interests (as determined by the guardian). The concept of 'best interests' itself, as defined in relation to the carrying out of medical treatment, does not contain any reference to P's views and wishes.[70]

Turning to the cases, it appears that even where views and wishes are considered (and this is rare), this is generally limited to past views and wishes. P's current views and wishes are rarely ascertained in Committee cases, and in Board decisions they are generally either given very little weight, or in some cases even disregarded. As the Board explicitly stated in a case,[71] 'the views and wishes expressed by the subject (if any) are not key to the decision of whether a guardianship order should be made'.[72] In fact, in a book published by the recently retired Chairperson of the Board,[73] it was made clear that he was of the opinion that the phrase 'views and wishes' as used in the Part IVB guardianship legislation referred to 'wishes expressed by the person before he lost his mental capacity or during guardianship but expressed during lucid moments'.[74] He goes on to say that 'the person's present views and wishes, due to mental incapacity, may likely carry little weight in decision-making'.[75]

It is thus abundantly clear that there is a great reluctance to consider and place weight on the views and wishes of those who are already lacking in mental capacity. What is perhaps particularly disturbing is the way in which the affairs of individuals without capacity are discussed. In the earlier quote from *Re CML*, for example, the Court arguably speaks about what CML would have wanted in a way that suggests she is no longer there. Once incapacitated, the P's views and wishes become irrelevant – what is left of that individual seemingly disappears. While the extensive discussion and emphasis on views and wishes in *C v B* provides some hope that the courts will afford at least past wishes more significance in decision-making, this has not yet been demonstrated.

70 Although the phrase 'well-being' has been interpreted as capable of encompassing subjective wishes (see *Re C (Emergency Medical Treatment)* (n 31)).

71 GB/P/3/16.

72 Ibid [16].

73 Charles C.Y. Chiu, *Mental Capacity and Related Issues* (Guardianship Board 2021). Mr Chiu was the Chairperson of the Board from 2003 and retired in January 2021.

74 This is by no means a settled point. If the views and wishes mentioned in the legislation were referring only to capacitous views and wishes, it would arguably be problematic for them to be overridden with such ease by the guardian.

75 Chiu, *Mental Capacity and Related Issues* (n 73) 151.

The lack of emphasis on the subjective views and wishes of P has in turn resulted in an absence of meaningful participation, even where P is able and chooses to attend the proceedings. Most of the cases make no mention of whether P was in attendance, and where P is noted to have attended, a detailed description of the nature of this participation is generally unavailable.

This situation can be said to stem from the very paternalistic approach that remains at the heart of the implementation of the MHO and any other areas of law that relate to persons deemed to be lacking in capacity. This paternalism can be thought of as resulting from the conception of the sick, vulnerable and disabled in Hong Kong and, more generally, societies in which Confucian culture still remains influential.[76] While these three categories of experiences are vastly different in nature, the Confucian response is similar: such persons are viewed as objects of protection and care.[77] In the Book of Rites, for example, a description of an ideal society includes the following:

> Thus men did not love their parents only, nor treat as children only their own sons. A competent provision was secured for the aged till their death, employment for the able-bodied, and the means of growing up to the young. *They showed kindness and compassion to widows, orphans, childless men, and those who were disabled by disease, so that they were all sufficiently maintained.* [Emphasis added][78]

Those who fall into these categories are seen as weak and unable to take care of themselves or make decisions on their own. Writing from the Taiwanese context, Tai and Tsai demonstrate this point powerfully: 'There

[76] An in-depth exploration of the conception of disability from the Confucian perspective is complex and beyond the scope of this chapter. See, for example, Yuexin Zhang and Sandra Rosen, 'Confucian Philosophy and Contemporary Societal Attitudes Toward People with Disabilities and Inclusive Education' (2018) 50 Educational Philosophy and Theory 1113.

[77] For sick persons, see for example, Ruiping Fan and Benfu Li, 'Truth Telling in Medicine: The Confucian View' (2004) 29 Journal of Medicine and Philosophy 179, 185; Daniel Fu Chang Tsai, 'How Should Doctors Approach Patients? A Confucian Reflection on Personhood' (2001) 27 Journal of Medical Ethics 44, 48. For disabled persons, see, for example, Zhang and Rosen, 'Confucian Philosophy and Contemporary Societal Attitudes' (n 76) and Linda Chiang and Azar Hadadian, 'Raising Children with Disabilities in China: The Need for Early Interventions' (2010) 25 International Journal of Special Education 113.

[78] Translated from the original Chinese (故人不獨親其親，不獨子其子，使老有所終，壯有所用，幼有所長，矜寡孤獨，廢疾者，皆有所養) by James Legge: J. Legg, *Li Chi: Book of Rites: An Encyclopedia of Ancient Ceremonial Usages, Religious Creeds and Social Institutions*, vol 1 (Kessinger Publishing 2003).

is an informed consent, but it is not given by the patient but rather by the father or the husband of the patient because the patient is regarded as too vulnerable to take the news'.[79]

In the Hong Kong context specifically, persons with mental disorder or mental handicap, whether or not they are deemed to have mental capacity, are often infantilised by those interacting with them. For example, they are instructed to be 'well-behaved' and 'obedient',[80] or are referred to like children despite being of adult age.[81] This can be seen as a manifestation of the deeply ingrained view that persons without mental capacity, like young children, do not know what is best for themselves and need to be taken care of and protected. It is thus perhaps unsurprising that the views and wishes of those deemed as lacking mental capacity will be given little weight, if at all, in particular where these views and wishes conflict with what those around them consider to be in their best interests. This kind of conception of persons without mental capacity aligns with the medical model of disability, where the individual is seen as an object of protection, a 'passive recipient of medical care', which in turn leads to the 'objectification of that person',[82] and is a model that is arguably no longer compatible with modern standards ushered in by the UN Convention on the Rights of Persons with Disabilities (CRPD) in 2008.

In addition to the general disregard for P's views and wishes, there have been certain situations in which the Court and the Board will even question the value of the weight accorded to the views of P's family – what may often be considered a good proxy of P's own views and wishes if they cannot express them. This manifests itself in a consistent pattern of cases. That is, where there is conflict among family members, the Court and the Board will generally take decision-making power away from any one family member and place it in the hands of a 'neutral and independent' third party. It may perhaps be surprising that this is the case, given the significant role that the family plays in decision-making in Hong Kong and in Chinese culture

[79] Michael Cheng-tek Tai and Tsung-Po Tsai, 'Who Makes the Decision? Patient's Autonomy vs Paternalism in a Confucian Society' (2003) 44 Croatian Medical Journal 558, 560.

[80] Interviews conducted with persons on conditional discharge under s 42B of the MHO in April 2021 by author, see further Daisy Cheung, 'Control in the community: A qualitative analysis of the experience of persons on conditional discharge in Hong Kong' (2022) 82 International Journal of Law and Psychiatry 101791 https://doi.org/10.1016/j.ijlp.2022.101791.

[81] Anecdote relayed by member of Chosen Power (People First), an independent organisation of persons with intellectual differences in Hong Kong, on 27 November 2020.

[82] Peter Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' (2012) 75 Modern Law Review 752, 758.

more generally.[83] The reason that decision-making power may be taken away from the family in these very specific circumstances may be because of the importance of harmonious relationships in Confucianism, and the corresponding magnification of the negative aspects of familial conflict. Harmony, or harmonisation, is considered one of the most important values in Confucianism and Chinese culture more widely.[84] Thus, while the reasons given for removing family members from a position of decision-making power is often stated to be practical in nature,[85] it is conceivable that the desire to avoid conflict or strife and maintain harmony is an underlying factor contributing to the way the Court and the Board makes decisions in these types of cases.

Sociocultural motivating factors aside, an approach that permits what may be a good proxy of P's views and wishes to be cast aside easily on the basis of the paternalistic determination that only independent and conflict-free decisions can be in their best interests is problematic, and in some cases, unjustifiably deprives P of a family member as decision-maker.[86] As one of the daughters in a case involving an individual, S, pointed out: why is 'a child not better than a social worker as the legal guardian'?[87]

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[83] See, for example, Ho Mun Chan, 'Informed Consent Hong Kong Style: An Instance of Moderate Familism' (2004) 29 Journal of Medicine and Philosophy 195; Ruiping Fan, 'Self-Determination vs. Family-Determination: Two Incommensurable Principles of Autonomy' (1997) 11 Bioethics 309; Chun-Yan Tse and Julia Tao, 'Strategic Ambiguities in the Process of Consent: Role of the Family in Decisions to Forgo Life-Sustaining Treatment for Incompetent Elderly Patients' (2004) 29 Journal of Medicine and Philosophy 207.

[84] Chenyang Li, 'The Confucian Ideal of Harmony' (2006) 56 Philosophy East and West 583, 583. In the medical decision-making context, see, for example, Xiaoyang Chen and Ruiping Fan, 'The Family and Harmonious Medical Decision Making: Cherishing an Appropriate Confucian Moral Balance' (2010) 35 Journal of Medicine and Philosophy 573, 580–84.

[85] See, for example, GB/P/1/19 [14], where the Board states that the reason for appointing a public guardian is because, in light of the family conflict, a private guardian may not be able to make decisions timely and efficiently due to challenges from the other family members. This does not appear to be a valid reason given the guardian has full authority in relation to decisions under the purview of the decision-making powers they have been granted, and any legal challenges will not affect the immediate ability of the guardian to make those decisions. Furthermore, these claims do not appear to have any empirical basis. Even if they were true, the possibility of challenges or further conflict with family members is arguably not a strong reason to prevent a person who is more likely to intimately know P's views and wishes to be the substitute decision-maker of that individual, in particular where P is also in favour of this arrangement.

[86] While in some cases P may still be able to live with the person they wish to live with even with a public guardian, the appointment of a guardian has implications extending beyond the place of residence, given that the guardian is often granted a range of decision-making powers.

[87] GB/P/9/15 [10].

Conclusion

Hong Kong's archaic and paternalistic construction of the individual without capacity as a passive object of protection has resulted in a worrying absence of concern for their subjective values in the two main regimes that deal with how decisions on behalf of individuals without capacity should be made. While past views and wishes have on occasion been taken into consideration, this has not been done regularly or systematically. What is of particular concern is how P is viewed after losing capacity. Once mentally incapacitated, P's views and wishes are seen as irrelevant, and their participation in proceedings about their views and wishes is seen in most cases as dispensable.

Much thought needs to be given to how Hong Kong's mental capacity law can be brought in line with modern standards, and in particular those championed by the CRPD, to which Hong Kong is a signatory.[88] A comprehensive review and overhaul of current legislative provisions in relation to mental incapacity is urgently needed,[89] and this would need to include an examination of the coherence and effectiveness of having entirely separate regimes to deal with different aspects of substitute decision-making on behalf of persons lacking mental capacity.[90] The problematic paternalistic values underlying these legislative provisions will also need to be addressed. At the minimum, legislative provisions about best interests and how decisions should be made on behalf of persons without capacity (if at all) should mandate the consideration of *both* the past and current views and wishes of the person lacking capacity. Practice Directions issued by the Courts and other such policy documents and/or guidance should emphasise the need for and encourage persons lacking mental capacity to attend and participate in court and tribunal hearings about them where they are able to do so.

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[88] See Cheung (n 20) for a discussion of the Hong Kong adult guardianship regime's lack of compliance with even a weak interpretation of the CRPD's obligations.

[89] See Daisy Cheung and Rebecca Lee, 'The Proposed New Law on Advance Directives in Hong Kong: A Piecemeal Attempt at Codification?' in Daisy Cheung and Michael Dunn (eds) *Advance Directives Across Asia: A Socio-legal Analysis* (Cambridge University Press, 2023) for an argument for the overhaul of mental capacity law in Hong Kong in the context of advance medical directives.

[90] While beyond the scope of this article, such an overhaul would also need to consider and implement measures to support persons lacking mental capacity to make decisions for themselves.

Index

References to tables appear in in **bold** type. References to endnotes show both the page number and the note number (231n3).

A

'abnormal state of mind' 151
AC v Hickey, Cork University Hospital and Ors (AC) 73
Adelson, Naomi 109
Ad Hoc Joint (Health and Social Services, and Justice) Committee 53
Adult Guardianship Act 1996 (AGA) 112
adult guardianship regime 176
Adult Support and Protection (Scotland) Act 2007 28
Adults with Incapacity (Scotland) Act 2000 (AWIA) 5, 27–9, 31, 40, 41
  adult's voice 33–4
  and advance planning measures 35
  'incapable adult' 32
  least restrictive option 33
  limitations on adult's voice and participation 35–8
  principles promoting participation 32–3
Advance Care Planning Policy 63, 64
advance directives 215–16
advance planning 37
  measures, AWIA and 35
  MHA and 40
'advocacy services' 37
A.H. v Fraser Health Authority 112, 119
Aintree University Hospitals NHS Foundation Trust v James and others 14
Airedale NHS Trust v Bland 76
Alcoholism and Drug Addiction Act 1966 150
'alleged lunatic' 68
American Bar Association (ABA) 94
American law of guardianship 85
anti-discriminatory component 49
artificial nutrition and hydration (ANH) 75
Asian values 196
Assisted Decision-Making (Capacity) Act 2015 (ADMCA) 5, 65, 67, 129, 130, 240
  procedural values in 81–2
  substantive values in 83–4
Australian Capital Territory 134, 135
Australian Capital Territory Law Reform Advisory Council (ACTLRAC) 128
Australian constitutional arrangements 6, 120
Australian federalism 120–1
Australian guardianship jurisdictions 120
Australian guardianship laws 124, 138, 141
  Australian federalism 120–1
  first generation of 121–2
  second generation of 122–4
  third generation of 124–30
  values in 130–41
Australian Law Reform Commission (ALRC) 127, 128
autonomy 6, 18, 22, 29, 31, 35, 51, 61, 79, 102, 110, 112, 114, 117, 119, 145, 153, 154, 158, 198, 223, 224, 228, 230, 231, 248

B

Bamford, David 50, 52
Barnsley Hospital NHS Foundation Trust v MSP 19
Basic Law 203
  Art. 2 Basic Law (German constitution) 219
  Art. 104 of 219
basic law of guardianship 92
'best interests' approach 36, 217
Briggs v Briggs (No 2) 17
British colonialism 244
British Columbia Representation Agreement Act 6, 103–5
British Columbia's substitute decision-making legislation 106–8
British legal system 191
BUV v BUU 190

C

Canadian Charter of Rights and Freedoms 6, 113
Canadian mental capacity law 100, 102–3
capacity determinations 88–9
capacity law 30–2
capacity-related jurisdiction 82
Cardiff and Vale University Health Board v PS 13
Care of Children Act 2004 149n27
cases of conflict 77–8
child law 37
Children (Northern Ireland) Order 1995 63
Children's and Young People's Well-Being Act 1989 143
Chong, Yue-En 238, 249
Civil Code
  s 1821, para 1 of the 212
  s 1827 of the 216
  s 1848 of the 223
  section 1827 of the 215
civil law jurisdiction 7, 228, 243
civil law systems 203, 244
civil rights 48
clinically assisted nutrition and hydration (CANH) 17
CML 174, 175, 177
co-decision-maker agreement 83
co-decision-making 129
Code of Health and Disability Services Consumer Rights 146, 159
Code of Practice 35, 38, 55–7, 61
Code of Rights 146, 157
Codes of Practice 54
coercive measures 220–1
colonialism and oppression 244–7
Comaroff, John L. 244
common law jurisdictions 7
Commonwealth of Australia Constitution Act 1901 121
A Comprehensive Legislative Framework 50
'compulsory psychiatric treatment' 107
Compulsory Treatment Order 35
Confucian culture 178
Confucianism 180
Confucian values 196, 198
Congressional regulation of guardianship 86
conservatorships 6
constitutional framework and human rights protection 144–7
constitutional justice values 82
Constitution of Ireland 84
Court of First Instance (CFI) 173
Court of Protection (CoP) 3n1, 4, 10, 20, 23, 71, 82, 166, 234, 247, 248
Court of Protection Rules (CoPR) 2017 10, 189, 190
Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) (CPMIPA) 152n42, 153n42
CRPD Committee *see* United Nations Convention on the Rights of Persons with Disabilities
Cruzan v Director, Missouri Department of Health 87
cultural information and evidence 117, 118
C v B (Re A: Mental Health) 170, 172

D

decision-making processes 12, 15, 54, 112, 119, 141, 153, 249
  ability 24, 28, 57, 64, 126
  arrangements **106**
  in Canada 101–2
  legislation 103
  model 128
  regimes 42, 44, 110
Decision Support Service (DSS) 65
deputyship application process 192–4
Director of Social Welfare v A and B 175
domestic law 7
Donnelly, Mary 235
durable power of attorney (DPA) 90
duties and tasks of the guardian 211–13
Dworkin, Ronald 237

E

end-of-life decision-making 123
enduring powers of attorney (EPAs) 149, 154
England and Wales Mental Capacity Act 83, 183
English common law 87, 145
  traditions 147, 183
equitable decision-making processes 6
European Convention on Human Rights (ECHR) 30, 31, 45, 49, 65, 145
  Art. 5 of 30, 49
  Art. 6(1) of 71
  case law 28
European Court of Human Rights 30, 71

F

family
  role of 179
  weight placed upon views compared to that of P 228
Family Justice Courts (FJC) 192, 195
Family Justice Courts Practice Directions (PD) 187
Family Justice Rules 2014 (FJR) 184–9, 193
  r 22(1)(b) of 201
Federal Constitutional Court 204, 205, 208, 220–2
Federal Court of Justice 216
federalism 85–8
Fleming v Reid 102
Fraser Health Authority 112, 114

G

German Civil Code 207
German Federal Court of Justice 218
German guardianship law 7, 203, 215, 217, 224
German law 203, 208, 241
  on guardianship 225
  guardianship law
    principles and procedures of 209–14
    and PsychKHG 204–7
  involuntary interventions 218–23
  patients' rights law 209
  substitute decision-making for medical decisions 214–18
  system is civil law system 203
  UN Convention on the Rights of Persons with Disabilities (CRPD) 207–8
German legal reform 243
German legal system 204, 205n3, 223
Good Friday Agreement 48, 49
Gooding, Piers 44
Government of Ireland Act 1920 48
gradual westward settlement of US 86
Guardian ad Litem (GAL) 74, 74n64
guardians, appointments of 89–92
Guardianship Act 1987 (NSW) 123
Guardianship and Administration Act 1993 (SA) 133
guardianship law 120, 124, 142, 243
  principles and procedures of 209–14
  and PsychKHG 204–7
guardianship system 94, 243
G v West Lothian Council 36

H

Hart, H.L.A. 237
Health and Disability Commissioner Act 1994 146
Health and Personal Social Services (NI) Order 1972 48
Health and Social Care Trust Panel 58
Health Care (Consent) and Care Facility (Admission) Act 1996 (HCCFA) 106, 107
healthcare decision-making 136, 235
Health Service Executive (HSE) 77, 80
Heart of England NHS Foundation Trust v JB 12
Hedley, Sir Mark 66
Hong Kong, mental capacity law in 162
  critical evaluation 176–80
  legislative framing 163–7
  participation in proceedings 175–6
  values in legislative framing and status of P's subjective values 167–75
Hopu and Bessert v France 146
human dignity 126
human rights
  assessments 42, 45
  framework in Scotland 30–2
  jurisprudence 172
Human Rights Act 1993 145
'Human Rights and the Mental Health (Compulsory Assessment and Treatment) Act 1992' 158
Human Rights Committee of the UN 146

I

'incapable adult' 32
incapacitated person
  interests, wishes and values of 134–5
  participation in decision-making 136–8
Independent Mental Capacity Advocate (IMCA) 20
Independent Review of Learning Disability and Autism 30
indigenous peoples
  with disabilities 100, 108–14, 118, 119, 246
  indigeneity and disability 110
  Indigenous American tribes 87
  indigenous communities 247
  indigenous housing 109
individual's participation 247–9
informal decision-making 69, 235
inherent jurisdiction 174–5
Integrated Family Application Management System (IFAMS) 192, 193
Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCRA) 152, 153, 156, 158, 159
intellectual disability-based detention 144
International Covenant on Civil and Political Rights 1966 (ICCPR) 145, 146
international human rights law 28, 44
interstate sale of medical equipment 86
involuntary
  hospital admission 219–20
  interventions 224
  treatment 221–3
Irish capacity law 67, 69
Irish law post-independence 68
Irish legal databases 70

J

Johnson, Shelly 115n82
Johnston, Laura 108
Judging Values project 247
judicial process, participation in 71–5
judicial reasoning 70
Judicial Review Procedure Act 2016 145n10
judicial values
  capacity and the role of law 67–70
  cases of conflict 77–8
  operation of ADMCA 81–4
  participation in judicial process 71–5
  transparency in exercise of wardship jurisdiction 70–1
  treatment withholding/withdrawal 79–80

values in legal process 70
values in substantive resolution 75–6
jurisdictional workloads 131
jurisdictions
civil law 7, 228, 234, 243
common law 3, 7, 20, 228
cross-jurisdictional considerations 8
federal 4, 5–6, 86–8, 101, 120–3, 203–5, 223–4

K

Katzenbach v McClung 86
Kong, Camillia 66, 67, 71

L

law of guardianship 85
law of healthcare decision-making 85
law reform
drivers for reform 5, 48–9, 240–1
recommendations 114–18
reforms in individual states 5, 6, 9, 24, 28, 46–8, 49–54, 81–2, 94–6, 98–9, 121–30, 183
least restrictive option 33
'least restrictive' principle 155
legal authorisation 221
Legal Issues Working Committee 50
legal process, values in 70
legal test of capacity 185–6
legislative framing 101–2, 163–7
values in 12–14, 167–75
liberal neutrality 236, 241
liberal politico-legal imagination 242
Lunacy Regulation (Ireland) Act 1871 5, 65

M

Matter of Jane (Guardianship) 137
McClelland, Roy 50
medical and dental treatment 166–7
Medical Order on Life-Sustaining Treatment 90, 91
Medical Treatment Planning and Decisions Act 2016 127
medical values, changing 80
mental capacity 237
Mental Capacity Act (MCA) (England and Wales) 1, 3n1, 9, 18, 38, 45, 166, 217, 227, 229, 230, 233, 238, 242, 247
Mental Capacity Act (Northern Ireland) Act 2016 5, 46, 47, 54, 59, 63
'Mental Capacity Act Application' 193
Mental Capacity Act Code of Practice (2007) 9
mental capacity assessments 41
mental capacity laws 1–3, 6–11, 26, 110, 114, 116, 118, 119, 226–8, 231, 234, 237–41, 243, 249
critical evaluation 20–5
frameworks 246
in Hong Kong (*see* Hong Kong, mental capacity law in)
myth of 'neutrality' in 232–41
in Northern Ireland 46–8
implementation and ongoing debates 59–63
participation and values in development of mental capacity act 49–53
participation and values in mental capacity act 54–9
principled tensions in 228–31
P's participation in decision-making 18–20
P's subjective values 14–18
regimes 245, 247
relationship between individual and state 241–9
values in legislative framing 12–14
mental disabilities 5, 31, 41–2, 162
persons with 5, 7, 28, 29, 31–3, 40, 42, 43, 45, 163, 250
mental disorder 27, 39, 51, 151, 163, 204, 223
Mental Disorder and Treatment Act 182, 194
mental health 30–2, 144
facilities 107
law 49, 52, 159
legislation 151–3
patients 39
problems 64
services 208
Mental Health Act (MHA) 5, 28–31, 41, 49, 72, 107, 151n35, 152, 153, 159–61, 163–6
Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHA) 151, 156
Mental Health (Scotland) Act 2015 40
Mental Health Action Plan 47
Mental Health and Learning Disability 50
Mental Health Assistance Laws 203, 204–5
Mental Health Guardianship Board Rules (MHGBR) 175
Mental Health (Northern Ireland) Order 1986 46, 47, 49, 60, 62, 64
Mental Health Ordinance (Cap 136) (MHO) 162–5
Mental Health Review Tribunals 152
Mental Health (Care and Treatment) (Scotland) Act 2003
and advance planning 40
principles promoting participation 39–40
significantly impaired decision-making ability (SIDMA) 38–9
Mental Health Strategy 2021–31 47
Mental Health Tribunal for Scotland 40, 42
The Mental Health Trust & Ors v DD 24
mental impairments 1, 152n42
mental incapacity 133, 163, 181
'mentally incapacitated person' 163
Mental Welfare Commission for Scotland 37, 39–41
Millan Committee 38
minimally conscious state (MCS) 75

Māori concepts of spirituality 239
Māori law 146

N

National Decision-Making Principles 127, 128
National Guardianship Association (NGA) 94
National Guardianship Symposium 94
National Safeguarding Committee 72
National Standards for Financial Managers 139–41
National Standards of Public Guardianship 138
National Taskforce on Human Rights Leadership 31
natural will 223
New South Wales Civil and Administrative Tribunal (NCAT) 130
New South Wales Law Reform Commission (NSWLRC) 129, 130
New Zealand 143
 constitutional framework and human rights protection 144–7
 legislative framework for capacity 147–53
 values 153–9
New Zealand Bill of Rights Act 1990 (NZBORA 1990) 145, 154, 159n56
New Zealand Law Commission 161
New Zealand Māori Council v Attorney-General 146
non-consensual psychiatric care 35, 38
non-guardianship 85
Northamptonshire Healthcare NHS Foundation Trust v AB 19
Northern Ireland, mental capacity laws in 46–8
 implementation and ongoing debates 59–63
 participation and values in development of mental capacity act 49–53
 participation and values in mental capacity act 54–9
Northern Ireland Human Rights Commission 52

O

Ong, Debbie 200
Ontario Mental Health Act 102
'Operating in Darkness: BC's Mental Health Act Detention System' 108
Optional Protocol of the CRPD 101
Oranga Tamariki Act 1989 143, 144

P

parens patriae 92, 122, 147, 159
 interventions 153
 jurisdiction 105, 121
participation
 barriers 191–4
 beliefs and values 10, 13–15, 22, 23, 57, 61, 83, 107, 244
 direct 19–22, 29, 189
 in decision-making 2, 18–20, 99, 136–8, 226
 indirect 189
 in judicial proceedings 153
 reality in practice 4, 7, 17–18, 21–2, 26, 35–8, 41–2, 71–5, 137–138, 141, 167–8, 175–7, 190–2, 201, 249
 significance in statute 71
 will and preferences 6, 24, 29, 39, 41–4, 58, 72, 75, 77, 78, 81, 83, 117, 120, 128–30, 137–9, 141, 142, 208, 216, 218, 224, 239, 243
 wishes and feelings 10, 14, 17, 18, 22–5, 33–7, 39, 40, 52, 61, 173, 192, 194–5, 199, 240, 241
Patient Self-Determination Act 1990 87
patients' rights law 209, 216
people with disabilities 46, 103, 105, 108, 124–6, 140, 201
people with mental disorders 203, 204, 206, 207, 218, 220, 223–4
 in German Law (*see* German Law)
Perlin, Michael 116
persons with mental disabilities 5, 7, 28, 29, 31–3, 40, 42, 43, 45, 163, 250
Physician Order on Life-Sustaining Treatment 91
Powers of Attorney Act 69n30, 127
practice
 distinguishing from theory 44, 62, 232–3, 249
 relative weight compared to statute 4, 22, 66–7, 247–9
pre-hearing processes 140
'presumed will' 213
presumption of competence 148
prior judicial hearing 214
Privacy Act 2020 159n56
procedural law 213–14
procedural participation 72
procedural protection 71
procedural values in ADMCA 81–2
Protection of Personal and Property Rights Act 1988 (PPPRA) 144, 147, 150, 153, 154, 159, 160
Protection of Personal and Property Rights Amendment Act 2013 149n31
psychiatric advance directive 218
PsychKHGs 204–7, 224

Q

Queensland scheme 137

R

Razack, Sherene H. 118
Re A (Mentally Incapacitated Person: Committee) 172

Re a Ward of Court 80
Re BKR 186, 190, 194, 201, 238
Re C (Emergency Medical Treatment) 169
reformed law on guardianship 209
Relevant Person's Representative (RPR) 20
Re LP 194, 195
Report on Incapable Adults 32
Representation Agreement Act 1996 (RAA) 104, 107, 119
representative decision-making 129
Re S (Hospital Patient: Court's Jurisdiction) 174
'reservation of consent' 213
Ruck Keene, Alex 33, 72
Rule 181(1) of the FJR 2014 187
Rule 182(1) of the FJR 2014 188
rule of law 232

S

Scholten, Matthé 7
Scotland Act 1998 30
Scottish law 45
  reform 30
Scottish Law Commission 32, 33
Scottish legislation and policy 30
Section 4 of the MCA 2008 185
Section 6(7) of the MCA 2008 183n5
Section 13(8) of the MCA 2008 183n4
Section 1821 of the Civil Code 211
Sections 1(2)– (4) of the AWIA 32
self-determination and authenticity 225
'severe substance addiction' 150, 155
Short Term Detention Authorisations 62
significantly impaired decision-making ability (SIDMA) 41
Sinclair, Murray 116
Singaporean jurisdiction 243
Singapore Mental Capacity Act (MCA) 2008 182, 183, 184–9, 194, 200, 201, 238, 239
Smye, Victoria 111
SPLP v Guardianship Board 162, 166
Standards of Practice 94, 95
Starson v Swayze 102
Stavert, Jill 240, 243
Substance Addiction (Compulsory Assessment and Treatment) Act 2017 (SACATA) 144, 150, 153, 154–6, 159, 246
substantive resolution, values in 75–6
substitute decision-making 217
  in Canada 105–6
  legislation 106
  regimes 167
'substituted judgement' approach 99, 217
supported decision-making 98, 103–5, 129, 207
Supreme Court of Canada (SCC) 102
surrogate decision-making, culture of 195–9

T

Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 143
therapeutic jurisprudence 116
traditional doctrinal analysis 66
transparency 26, 70–1, 81, 82, 84, 235
Treaty of Waitangi 146, 246
Trust Panel process 62

U

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act 94
Uniform Guardianship and Protective Proceedings Act 1997 (UGPPA) 93, 94
Uniform Law Commission 88, 94
'uniform laws' 88
United Nations Convention on the Rights of Persons with Disabilities (CRPD) 1, 2, 5, 7, 19, 24, 28, 29, 45, 52, 57, 65, 77, 101, 117, 124–6, 129, 130, 135, 141, 158, 160, 179, 181, 207–8, 210, 229, 239–41, 244, 247, 250
  Art. 5 of 19
  Art. 12(3) of 19
  Art. 12(4) of 44
  Art. 12 of 19, 29, 37, 42–3, 66n5, 101, 115, 117, 158, 207–8, 246
  Article 12(3) of 44
  CRPD Committee 28, 33, 37, 41–3, 52, 65, 135
  in General Comment No 1 43
  CRPD Delivery Plan 31
United Nations Covenants or Conventions on Human Rights 145
Universal Declaration of Human Rights 1948 155
US conservatorship law 6
US guardianship law 92
US state law 88
UVB v UVC 195

V

values
  autonomy 79
  communitarianism 7, 117, 160, 180, 184, 195–9, 238–9
  in decision-making 22, 23, 120, 141, 167
  of judges 195
  individualism 160, 184, 238–9
  in judicial proceedings 81–4
  objectivity 233
  of P 7, 15, 16, 85, 96–9, 201, 232, 233
  paternalism 231

pluralism 230, 231
of professionals 21
reality in practice 7, 96–9, 141
significance in statute 6–7, 12–13, 14, 26, 81–4, 134–5, 136–8, 153–60, 169–70, 210–11, 230
subjectivity 233
Victorian Law Reform Commission (VLRC) 126, 127

W

wardship jurisdiction 69–71, 74
will and preferences 6, 24, 29, 39, 41–4, 58, 72, 75, 77, 78, 81, 83, 117, 120, 128–30, 137–9, 141, 142, 208, 216, 218, 224, 239, 243
Wye Valley NHS Trust v Mr B 14, 20, 22

X

X v K 19