

## XU VS. THE HOSPITAL AND HIS GUARDIAN – INVOLUNTARY INPATIENT TREATMENT

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### I. INTRODUCTION

China's first Mental Health Law (hereinafter, MHL) came into force on 1 May, 2013. It was praised as a landmark for rights protection of persons with mental disabilities in China<sup>1</sup>. The MHL reflects typical "rights-based" mental health legislation, in which involuntary inpatient treatment<sup>2</sup> is only permitted when a person with severe mental disorder is seen to pose a risk of harm to self or others.<sup>3</sup> Compared with the municipal mental health regulations before the MHL, it is believed to introduce a higher threshold for involuntary inpatient treatment.<sup>4</sup> For example, under the Shanghai Municipal Mental Health Regulation (before being amended according to the MHL), a person with mental disorder can be involuntarily committed and treated if he or she were regarded as lacking insight and in need of treatment.<sup>5</sup> Because of the gap between the threshold of involuntary inpatient treatment before and after the MHL, it was commonly believed that many people involuntarily hospitalised would be discharged after MHL's entry into force. For example, Yongqiang Lin predicted that in Guangdong Province, 90% of patients currently hospitalised would leave hospital because they would not meet the new criteria.<sup>6</sup> It is now two years since the coming into force of the MHL, and no evidence is observed that those patients in Lin's prediction can be successfully discharged. An explanation as to why this is the case may be offered by the case of Mr. Xu,<sup>7</sup> a man who unsuccessfully sued both his appointed guardian and the hospital that sought his involuntary hospitalisation, claiming that his right to liberty had been denied.<sup>8</sup>

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<sup>1</sup> X. Zhao and J. Dawson, 'The New Chinese Mental Health Law' (2014) 21 *Psychiatry, Psychology and Law* 669.

<sup>2</sup> The MHL does not make a distinction between involuntary commitment and involuntary treatment, but adopts the term 'inpatient treatment' that combines detention and treatment in Article 30. For English version, see 'Translated and Annotated Version of China's New Mental Health Law' (2012) 24 *Shanghai Archives of Psychiatry* 305.

<sup>3</sup> Sascha Mira Callaghan and Christopher Ryan, 'Is There a Future for Involuntary Treatment in Rights-Based Mental Health Law?' (2014) 21 *Psychiatry, Psychology and Law* 747.

<sup>4</sup> Yang Shao and others, 'Current Legislation on Admission of Mentally Ill Patients in China' (2010) 33 *International Journal of Law and Psychiatry* 52.

<sup>5</sup> Article 30 of the Shanghai Municipal Mental Health Regulation, entry into force on 7 April 2002. For a more detailed comparative research, see Yang Shao and Bin Xie, 'Approaches to Involuntary Admission of the Mentally Ill in the People's Republic of China: Changes in Legislation From 2002 to 2012' (2015) 43 *Journal of the American Academy of Psychiatry and the Law Online* 35.

<sup>6</sup> Yang Chen, 'Involuntary Commitment Is Only For People Who Are Both Severely Ill and Dangerous', *XKB Newspaper* (Guangzhou, 18 December 2012) A09. The report is available at <http://epaper.xkb.com.cn/view/834408>, accessed on 1 December 2015.

<sup>7</sup> (2015) 沪一中民一(民)终字第2018号 [*Xu vs. the Hospital and his Guardian – Involuntary Inpatient Treatment*, First Civil Court of Shanghai No.1 Intermediate People's Court, Final No. 2018, 15 September 2015] (translated by Author).

<sup>8</sup> Article 82 of MHL states "Persons with mental disorders and their guardians and close relatives who believe that administrative bodies, medical facilities, other relevant agencies, or individuals have violated the provisions of this law and infringed on the legal rights and interests of persons with mental disorders may legally initiate a lawsuit. But in Xu's case, Xu's capacity to litigate was challenged and

Based on the search on *China Judgments Online*<sup>9</sup>, the official website for open judgments operated by the Supreme People's Court of the People's Republic of China, Xu's is the first case that a hospitalised person sued for his discharge under the MHL. As will be argued in this case note, Xu's failure suggests that the MHL needs stronger safeguarding measures, such as independent review body and periodic re-evaluation, to achieve its rights-protecting purpose. It can be also argued, through Xu's case, that the change in criteria for involuntary inpatient treatment would not result in the discharge of patients who no longer satisfy the criteria unless the court adopts an explicit approach in identifying whether a patient has the capacity to "complete hospital discharge procedures" in Article 45. In addition, the case of Xu raises concerns about whether the law and practice in China is compliant with the UN Convention on the Rights of Persons with Disabilities (hereinafter, CRPD), which China ratified on 26 June 2008. It is outside of the scope of this case note to provide a detailed analysis of the tensions between the MHL and China's obligations under the CRPD, nonetheless Xu's case offers some insights into the potential implications of the CRPD in the way the MHL is operating.

It is worth noting that, unlike most mental health laws or legislation in common law jurisdictions that focus on authorising and regulating involuntary commitment and treatment, the MHL covers broader issues including promotion of psychological well-being and prevention of mental disorder (Chapter II), diagnosis and treatment of mental disorders (Chapter III), rehabilitation of mental disorders (Chapter IV), and measures necessary to implement the law such as financial input (Chapter V). Among them, Article 21, which states "... if it appears that a family member may have a mental disorder, other family members shall help them obtain prompt medical care, provide for their daily needs, and assume responsibility for their supervision and management", reaffirms family responsibility for the care of people with mental disorders. The family's total responsibility and access to community-based support are important factors in this case, as well as in many other cases, but this case note only addresses the provisions on inpatient treatment and discharge that are applied in the court's decision.

This case note will present the case of Xu with a view to examining the operation of the MHL in Chinese courts. The following two sections will look at the facts and the decision in this case. The fourth section will then discuss the interpretation and application of the MHL in Xu's case and provide some insights from the perspective of the CRPD. The case note concludes with a brief summary of the main points of the article, and highlights the need for ongoing research into the operation of the MHL in China.

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then settled through an assessment of Xu's capacity to litigate. An analysis on this issue, see Bo Chen, 'Right to Litigate of Persons with Psychosocial Disabilities in China: From Mental Health Law to the UN Convention on the Rights of Persons with Disabilities', *Disability Rights Study in China 2015* (Social Science Academic Press, Beijing 2015).

<sup>9</sup> <http://www.court.gov.cn/zqcpwsw/>, accessed on 1 February 2016.

## II. FACTS

Xu is a male Chinese citizen who was born in the 1960s. Xu was hospitalised by a mental hospital in Shanghai in the December of 2001 for the first time. His second involuntary inpatient treatment, which continues at the time of writing, commenced on 12 July 2003.<sup>10</sup>

Prior to his hospitalisation, Xu lived in Australia between 1989 and 2000. According to the medical record provided to the court, Xu had been diagnosed with mental disorder in 1997 and become unemployed, “ill-tempered for no reason”<sup>11</sup>, depressed, and was gambling. Xu was repatriated by the Australian government in 2000. After repatriation to China, he insisted on returning to Australia and it was reported that he had behaved dangerously towards others. The report indicates that his first hospitalisation following repatriation was committed by the Mental Health Centre in Putuo District in December 2001, where he was diagnosed with schizophrenia. He was prescribed Chlorpromazine and the medical record described the administration of the drug as “very effective”. But when he stopped the medication after leaving the hospital, his condition deteriorated. He started to refuse food and suspected that the food was poisoned by his family. Two weeks before his second hospitalisation, his condition became much worse. The report also recorded that he had broken his father’s nose in a conflict. This was also the trigger for this hospitalisation to the Shanghai Qingchun Mental Health Rehabilitation Hospital (hereinafter, the hospital).<sup>12</sup>

The information above, which was recorded in Xu’s medical report, was accepted by the court and quoted in the judgment.

In the second half of 2008, Xu’s father passed away and his older brother was appointed as his guardian by the neighbourhood committee in the place of his residence (hereafter, neighbourhood committee).<sup>13</sup>

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<sup>10</sup> His commitment was facilitated by his father who signed the consent form. *Xu vs. the Hospital and his Guardian – Involuntary Inpatient Treatment*, p. 1

<sup>11</sup> This term “ill-tempered for no reason” is translated by Author from “无故发脾气”, a piece of description on the medical record and quoted by the judgment. See *Xu vs. the Hospital and his Guardian – Involuntary Inpatient Treatment*, p. 1.

<sup>12</sup> *Xu vs. the Hospital and his Guardian – Involuntary Inpatient Treatment*, p. 1.

<sup>13</sup> No information on how or why the older brother was appointed as Xu’s guardian is given in the judgment. However, it is a tradition in China that the older brothers and sisters are expected to play the role of parent if the father or mother is unavailable. The appointment of guardian for adults with no/limited capacity for civil conduct is addressed in Article 17 of General Principles of the Civil Law of the People’s Republic of China (hereinafter, GPCL): A person from the following categories shall act as guardian for a mentally ill person without or with limited capacity for civil conduct: (1) spouse; (2) parent; (3) adult child; (4) any other near relative; (5) any other closely connected relative or friend willing to bear the responsibility of guardianship and having approval from the unit to which the mentally ill person belongs or from the neighbourhood or village committee in the place of his residence. In case of a dispute over guardianship, the unit to which the mentally ill person belongs or the neighbourhood or village committee in the place of his residence shall appoint a guardian from among his near relatives. If disagreement over the appointment leads to a lawsuit, the people’s court shall make a ruling. If none of the persons listed in the first paragraph of this article is available to be the guardian, the unit to which the mentally ill person belongs, the neighbourhood or village committee in the place of his residence or the civil affairs department shall act as his guardian.

Xu requested the hospital to permit him to leave a number of times. On 7 April 2011, the hospital approached Xu's older brother and informed him that the hospital wanted him to take Xu out, because Xu had already been detained in the hospital for eight years. The hospital also had concerns about the fact that Xu attempted to escape once.<sup>14</sup> The older brother, however, "begged" the hospital to keep Xu committed because he said he could not handle the caring of and monitoring of Xu. The older brother also declared that "if something bad happens during the hospitalisation, I will take the full responsibility and have no claim to the hospital."<sup>15</sup> Xu did not regain his liberty because his older brother refused to take him out. Later on, Xu made a complaint to the local committee of his neighbourhood about his hospitalisation. The local committee tried to negotiate with his older brother, but it failed again.<sup>16</sup>

In order to leave the hospital, Xu asked his mother to replace his older brother as his guardian. In 2012, his mother raised the motion on the ground that the older brother failed to fulfil the duty of a guardian. She claimed that the older brother worked in another province and paid no attention to Xu. Although Xu's mother expressed her willingness to act as the guardian and Xu favoured it too, the court held that, given her age, housing condition and low income, his mother lacked the ability to provide care. The court also held that the older brother fulfilled his duties as a guardian. In this case, the court instructed a research institution on forensic examination to carry out an examination in which Xu was found with residual schizophrenia and with limited capacity for civil conducts.<sup>17</sup>

Having failed in all the attempts to leave, Xu sued the hospital and his older brother for jointly violating his right to personal liberty on 6 May 2013, five days after the entry into force of MHL. Xu had three claims in this case: a. acknowledgment that his right to liberty was violated by the hospital and his older brother; b. an immediate end to the deprivation of his liberty; and c. compensation to be paid by the hospital and his older brother amounting to 10,000 RMB (approximately 1,500 euros).<sup>18</sup>

Because of the administrative rules of the hospital, Xu could not leave the hospital to personally lodge his claim. However, following lodgement by his representing lawyer, the court immediately refused to accept the case because the court thought Xu was incapable of litigating. After a number of rounds of negotiation and communication, and a specific assessment of Xu's capacity to litigate, the case was deemed admissible by the court.<sup>19</sup> The first hearing took place five months after the date the

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<sup>14</sup> The judgment provides no further reason for why the hospital wanted Xu's older brother to take Xu out. But it quoted from Xu's forensic examination report that Xu was assessed "with residual schizophrenia" and "in remission of symptom" in 2012.

<sup>15</sup> *Xu vs. the Hospital and his Guardian – Involuntary Inpatient Treatment*, p. 2.

<sup>16</sup> *Ibid*, p. 1-2.

<sup>17</sup> Capacity for Civil Conduct is a legal term in the GPCL. It has a similar meaning as legal capacity to exercise rights in civil affairs, or decision-making capacity in common law traditions. Article 13 of GPCL states: "[a] mentally ill person who is unable to account for his own conduct shall be a person having no capacity for civil conduct and shall be represented in civil activities by his agent ad litem. A mentally ill person who is unable to fully account for his own conduct shall be a person with limited capacity for civil conduct and may engage in civil activities appropriate to his mental health; in other civil activities, he shall be represented by his agent ad litem or participate with the consent of his agent ad litem." And Article 14 states: "[t]he guardian of a person without or with limited capacity for civil conduct shall be his agent ad litem."

<sup>18</sup> *Xu vs. the Hospital and his Guardian – Involuntary Inpatient Treatment*, p. 3.

<sup>19</sup> *Ibid*, p. 2-3.

claim was submitted. Xu claimed that he had recovered from his mental health problem but the hospital refused to release him because his guardian refused to take him out. Xu pointed out the fact, again, that his older brother was working in another province, did nothing for him and had no intention of fulfilling his duty of guardianship. Xu also noted in his claim that his older brother occupied an apartment under his name and took the rent.

Xu's older brother did not attend the hearings. The hospital submitted to the court that they made their best effort to allow Xu leave. They contacted his older brother many times, but his older brother repeatedly refused to consent to his release. They also argued that the "principle of voluntary inpatient treatment" did not apply to Xu, because he was involuntarily hospitalised in 2003.

Before giving the judgment, the court contacted Xu's mother, the older brother, Xu's other brother and the director of the neighbourhood committee<sup>20</sup> for their opinions. Although his mother wanted Xu to leave, she could not bear the actual responsibility for Xu's daily life. The other three agreed that keeping Xu in the hospital was the best option, while the older brother also expressed his willingness to take Xu out when he retires in several years.<sup>21</sup>

### III. DECISION

The court of first instance recognised the result of the assessment in the previous guardian-replacement case that Xu was a person with limited capacity for civil conducts. Also, in the forensic examination to determine Xu's capacity to litigate, Xu was found not to have fully recovered from his mental health problem. Based on these assessments, the court of first instance held that Xu's status of limited capacity to civil conduct remained and the guardian should be in place for activities outside the scope of his ability.

The court held that Xu's older brother fulfilled his duty as a guardian<sup>22</sup> by putting Xu in the hospital. The court acknowledged that keeping Xu in the hospital was the best choice that the older brother could make. The court pointed out, in particular, that along with the guardian's duty, "a guardian also enjoys the right to choose reasonable method of fulfilling the guardianship."<sup>23</sup>

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<sup>20</sup> The neighbourhood committee is not a branch of government but bears some local administrative duties, mediating conflicts between residents for example. In the matter of this case, the neighbourhood committee also holds the right to appoint guardians based on Article 17 of the GPCL.

<sup>21</sup> *Xu vs. the Hospital and his Guardian – Involuntary Inpatient Treatment*, p. 4.

<sup>22</sup> In this case, Xu's older brother's role of guardian was legally recognised by the court in the previous guardian-replacement case. Generally, the appointment of guardians is covered by the GPCL in conjunction with the Civil Procedure Law of People's Republic of China on identifying a person with no/limited capacity to civil conduct. However, the MHL sets that "guardians for mentally disordered patients are to be those eligible under the provisions of GPCL". For a discussion on this, see X. Zhao and J. Dawson, 'The New Chinese Mental Health Law' (2014) 21 *Psychiatry, Psychology and Law* 669, 680.

<sup>23</sup> *Xu vs. the Hospital and his Guardian – Involuntary Inpatient Treatment*, p. 1. It is also addressed by Article 18 of the GPCL that "A guardian's rights to fulfil his guardianship in accordance with the law shall be protected by law".

The court also held that the Article 44 of MHL, which states “[p]ersons with mental disorders who are voluntarily admitted to the hospital may request discharge at any time and medical facilities shall comply with such requests”, did not apply because “Xu was involuntarily committed by his father with assistance of the neighbourhood committee on grounds of dangerous behaviour”, as such “leave was subject to the approval of his guardian”.<sup>24</sup> Since the guardian did not consent to Xu’s discharge, the hospital’s refusal to Xu’s request of discharge then did not violate his right.<sup>25</sup> Therefore the court of first instance held that there was no violation of Xu’s right to liberty. All of Xu’s claims were rejected by the court. Xu appealed against this decision.

On 15 September 2015, the Shanghai No.1 Intermediate People’s Court rejected Xu’s appeal on the basis that the finding and application of law in the first instance was correct. This was the final decision of the case.<sup>26</sup>

#### IV. DISCUSSION

Based on the fact that the court attempted but failed to find a suitable person to take charge of Xu’s life in the community<sup>27</sup>, it can be assumed that the decision would be possibly different if Xu could access adequate community-based services. Having this in mind, the court’s decision is still questionable for its interpretation of the rules of involuntary inpatient treatment. It can be argued that the MHL should be amended with periodic reviews and an independent review body on involuntary inpatient treatment. It also notes that the court did not fully address the question whether Xu had the capacity to leave by himself without his guardian’s consent.

Then, a brief analysis based on the CRPD will follow. It can be argued that the decision in the case failed to protect Xu’s right to legal capacity, liberty and community living under the CRPD that China ratified without reservation.

##### *A. Voluntary Inpatient Treatment in MHL*

The MHL introduced the principle of voluntary inpatient treatment in Article 30. Article 30 also states “[i]f the result of the psychiatric evaluation indicates that a person has a severe mental disorder, the medical facility may impose inpatient treatment if the individual meets one of the following conditions: (1) self-harm in the immediate past or current risk of self-harm; (2) behaviour that harmed others or endangered the safety of others in the immediate past or current risk to the safety of others.” However, for patients harmful or dangerous to themselves, their guardians can refuse the inpatient treatment, while guardians of patients found harmful or dangerous to others can only demand a re-evaluation and a formal medical certification if they do not agree with the treatment. If the results of re-evaluation and medical certification favour the involuntary inpatient treatment, it will happen regardless of the guardian’s opinion.<sup>28</sup> Under the

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> In principle, the second instance of civil cases is the last instance. See Article 10 of the Civil Procedure Law of People’s Republic of China.

<sup>27</sup> Ibid, p. 3-4.

<sup>28</sup> Article 31, 32, and 35 of the MHL.

rule of voluntary inpatient treatment, a voluntary patient can request to leave at any time and the hospital should allow the discharge.<sup>29</sup>

The court held that Xu was hospitalised involuntarily because he was diagnosed with mental disorder and once injured his father in their conflict, but it seems problematic that Xu has to continue being involuntarily hospitalised after twelve years, especially considering there is no other evidence suggesting Xu has been dangerous to others since then. The court's decision implies that if a person were involuntarily hospitalised once, he or she could be involuntarily hospitalised indefinitely.<sup>30</sup>

This can be a particularly dangerous interpretation as the MHL does not set any specific duration, interval for re-evaluation, or independent and impartial ongoing review of the detention. It has been argued by Chinese psychiatrists that a similar safeguarding effect can be achieved by Article 44 which states “[w]hen there are changes in the clinical status of a patient with a mental disorder receiving inpatient treatment because they met conditions specified in the second clause of Article 30, the medical facility shall promptly arrange for registered psychiatrists to conduct an evaluation. When the evaluation finds that the patient no longer requires inpatient treatment, the medical facility shall immediately inform the patient and the guardians.”<sup>31</sup> Xu's case raises a doubt as to the effectiveness of this safeguarding measure.

There are a number of articles addressing the inadequate safeguards in the MHL, and most of them propose an independent review body.<sup>32</sup> These proposals echo some safeguarding standards in other jurisdictions. For example, the member states of the European Union were recommended to adopt safeguards on involuntary placement and treatment for persons with mental disorders that decisions to subject a person to involuntary placement or to involuntary treatment should be “taken by a court or another competent body” and “formally reviewed.”<sup>33</sup> Zhao and Dawson pay particular emphasis on the proactive, regular and formal scrutiny and the involvement of experienced legal professionals and laypersons representing legal and community perspectives of the review body.<sup>34</sup> However, an in-depth analysis on this issue is beyond the scope of this case note. For Xu's case, it can be argued that the result would be different if periodic re-evaluations could be inserted into the internal procedure of the hospital. It is reasonable to assume that, after a period of inpatient treatment, Xu might be assessed as no longer with severe mental disorders or dangerous to himself or others and thus converted to a voluntary patient whose request for discharge should be complied with by the hospital. This relates to the “capacity to complete hospital discharge procedures” in the MHL.

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<sup>29</sup> Article 44 of the MHL.

<sup>30</sup> It is shown in the judgment that Xu's older brother told the judge that Xu once attacked a female gate-keeper when he attempted to escape from the hospital during the commitment. See *Xu vs. the Hospital and his Guardian – Involuntary Inpatient Treatment*, p. 4. But no evidence shows that this statement was confirmed by the hospital or cross-examined in the court.

<sup>31</sup> Michael R Phillips and others, 'China's New Mental Health Law: Reframing Involuntary Treatment' (2013) 170 *American Journal of Psychiatry*, 588.

<sup>32</sup> Chunyan Ding, 'Involuntary Detention and Treatment of the Mentally Ill: China's 2012 Mental Health Law' (2014) 37 *International Journal of Law and Psychiatry* 581; Zhao and Dawson (n 1).

<sup>33</sup> Article 12 of the Recommendation Rec(2004)10 of the Committee of Ministers to member States concerning the protection of the human rights and dignity of persons with mental disorder.

<sup>34</sup> Zhao and Dawson (n 1) 677.

### *B. Capacity to Leave Hospital or to Lead a Good Life?*

The hospital in Xu's case requested his older brother to take Xu out and expressed in the hearing that the only obstacle to release was the guardian's refusal. Article 45 of the MHL states that "[w]hen persons with mental disorders are unable to complete hospital discharge procedures themselves, these procedures shall be completed by their guardians." Xu used it as a basis to argue that his older brother failed to do his duty, but the court held that it was a legitimate choice as a right of being a guardian.

This relates to the ambiguous decision-making power between Xu and his guardian. The essence of this question lies on whether Xu had the capacity to leave the hospital independently.

Xu was found to have limited capacity to civil conduct, which means he can independently make civil conduct that falls within the scope of his capacity.<sup>35</sup> The court's decision mentioned this in principle but did not give any clear finding on what Xu was capable of doing independently. The decision does not reflect any effort made by the court to identify whether a guardian was needed in this specific task: Xu's discharge.

It could be possibly argued that the rationale of the court in making its decision was that Xu lacked the capacity to take care of himself out of hospital. It is not an unreasonable concern, given that no community-based service and support for independent living was available. Yet this is not what the MHL requires to be considered. Instead, the MHL requires consideration of whether or not Xu had the capacity to "complete hospital discharge procedure by himself".

In fact, based on empirical research on the cause of long-term hospitalisation after the implementation of MHL in a mental health institution, 64.6% of 370 respondents who have been hospitalised for more than one year could not be discharged because their family members refused, and only 20.5% believed that they could not leave because of doctors' disapproval.<sup>36</sup> Ji and Li argue that it has been a serious issue that many patients who should be discharged had to be kept in hospitals because of guardians' refusal.<sup>37</sup> They propose that hospitals should allow patients disqualified to involuntary inpatient treatment to complete the discharge procedure independently and they call for guidance to be provided by relevant authorities.<sup>38</sup> The decision in Xu's case failed to bring about such a change.

### *C. Compliance with the CRPD*

The previous sections critically considered the safeguards provided in the MHL. This section will briefly outline some of the requirements of the CRPD in relation to these issues.

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<sup>35</sup> Article 13 of the GPCL.

<sup>36</sup> Lixin Luo, Xiangjiao Liao, Zhimei Xie, et al., 'The Cause of Long-term Hospitalisation after the Implementation of Mental Health Law' (2014) Vol 22, No. 12, China Journal of Health Psychology 1769.

<sup>37</sup> Yongzhang Ji and Guohai Li, 'Confusions and Thoughts about the Rules of Discharge in the Mental Health Law' (2015) 1 Vol 26 Jiangsu Health Management 146.

<sup>38</sup> *Ibid*, 147.



Articles 12, 14 and 19 are relevant to the case of Xu, as the decision raises significant concerns about Xu's right to liberty, legal capacity and living independently and being included in the community. These articles, in particular, appear to have been compromised in the case of Xu with no remedy provided by the Chinese courts. It has been argued by the UN Committee on the Rights of Persons with Disabilities (hereinafter, Committee) in the Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities (hereinafter, Guideline on Article 14), that these rights are closely interrelated and interdependent.<sup>39</sup> The Committee's "Concluding Observations" on the Initial Report of China (hereinafter, Concluding Observations) two years before the decision of the Xu's case are of note. The Committee recommended law reforms, which included introducing positive obligations to promote these above-mentioned rights.<sup>40</sup>

Meanwhile, the emphasis here is given to the fact that the court relied on the guardianship system to override Xu's preference to leaving hospital. Article 12 of the CRPD requires member states to recognise that persons with disability enjoy their legal capacity on an equal basis with others in all aspects of life and provide access to support in exercising their legal capacity, as well as safeguards.<sup>41</sup> Respecting the will and preference is also the core of the General Comment No.1 on Equal Recognition before the Law (hereinafter, General Comment No.1) that interprets Article 12 as prohibiting substitute decision-making systems, which would include guardianship in Xu's case. General Comment No. 1 states:

"[t]he denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention. States parties must refrain from such practices and establish a mechanism to review cases whereby persons with disabilities have been placed in a residential setting without their specific consent."<sup>42</sup>

It has been a highly controversial question as to whether mental health legislation authorizing involuntary treatment and commitment is permissible under the CRPD<sup>43</sup>, and giving an answer to this question is far beyond the scope of this case note. However, unlike many debates on legal capacity and General Comment No.1, there was no such controversy on whether or not substitute decision-making should play the role as a last resort with support possibly given.<sup>44</sup> The uncertainty in current theoretical debates and law reform proposals surrounding "hard cases"<sup>45</sup> should not affect Xu who has no difficulty in understanding and expressing his decision and poses no more risk to himself or others than anyone else. The hospital also acknowledged that the

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<sup>39</sup> Paragraph 8 and 9 of the Guideline on Article 14.

<sup>40</sup> UN Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of China, adopted by the Committee at its eighth session (17–28 September 2012).

<sup>41</sup> Article 12 of the CRPD.

<sup>42</sup> Paragraph 40 of the General Comment No.1.

<sup>43</sup> See Callaghan and Ryan (n 3); Tina Minkowitz, 'Why Mental Health Laws Contravene the CRPD-An Application of Article 14 with Implications for the Obligations of States Parties' (2011) Available at, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1928600](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1928600) accessed 19 December 2015.

<sup>44</sup> John Dawson, 'A Realistic Approach to Assessing Mental Health Laws Compliance with the UNCRPD' (2015) International Journal of Law and Psychiatry.

<sup>45</sup> Piers Gooding, 'Navigating the "Flashing Amber Lights" of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns' (2015) 15 Human Rights Law Review 45.

only obstacle to his discharge was the guardian's refusal. The court's decision did not follow the CRPD even in a conservative sense, or try to respect Xu's will and preference as much as possible along with the existence of the guardianship system.

In addition, because China is not a member state of the Optional Protocol of CRPD, Xu cannot submit his complaint to the Committee.

#### IV. CONCLUSION

This case provides an insight into how the MHL is operating and how the courts have responded to cases such as this one. Although it is just one case, Xu's case is significant in being the first case where an involuntarily hospitalised person sought discharge based on the new MHL. This article discussed the court's decision with a critical view on its application of the principle of voluntary inpatient treatment and the guardian's role. The final section offered a brief account of how Xu's case relates to the CRPD, particularly noting that Xu was not among those "hard cases" in legal capacity-related debates.

Based on the reflection of Xu's case, the MHL could not fulfil its full potential of rights promotion unless a stronger safeguarding approach were adopted.<sup>46</sup> More research is required to explore the necessary development and reform of the MHL and mental health service in the new era of the CRPD.

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<sup>46</sup> Shao and Xie (n 5).