

RESEARCH ARTICLE

Construction of Socio-Legal Dignity for Old Persons: Narrative Perspectives from Taiwan

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Abstract

Contemporary laws have been responding to the challenges of ageing societies. Elder people have gradually become a special, if not disadvantaged, social group to be protected, cared for, and even censored by law in the name of protection. The UN has long discussed a Convention to protect the distinctive human rights of old persons while invoking the Convention on the Rights of Persons with Disabilities to protect the dignity of senior citizens. Under national laws, adult-guardianship, welfare, and medical laws are strengthened in the name of better elder care, yet forcing old people to give up the freedom and autonomy that they have enjoyed throughout adulthood. This paper thus argues for the socio-legal construction of “elderhood” to respond to the special needs of senior citizens to maintain individual dignity. By observing narrative accounts of elders in care, socio-legal images of Taiwan elderhood may be presented for analyses. A proposal is then made to suggest the socio-legal construction of the individual dignity of elder people.

Keywords: dignity; autonomy; adult guardianship; CRPD; human right

1. Purpose of research

This century has witnessed the inevitable socio-legal challenges of an ageing society under globalization.¹ The advanced world thus endeavours to make legislative mechanisms to face this global phenomenon.² The international advocacy groups have long promoted a Convention to protect the human rights of old persons.³ For the time being, Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) is generally availed of to argue for the equal protection of elders in care. Others urge the provision of welfare services for senior citizens, including an adult-guardianship system, and long-term-care measures.⁴ This state-paternalism school of thought endeavours to improve the quantity of welfare and quality of elderly care at the expense of the freedom and autonomy of “disabled persons.”⁵

This paper presupposes that legally defined disabilities with care may infringe the individual dignity of old persons.⁶ Field visits and narrative analyses are thus adopted to

¹ Shee (2016).

² Elder (1984), pp. 294–5; Muramatsu and Akiyama (2011), pp. 431–2.

³ For details on the making of a Convention on older persons, see Harpur (2016); Herro (2017).

⁴ Shee (2017c).

⁵ Zhang et al. (2012), p. 589.

⁶ The original ideas of this paper were posted in the conference presentation entitled “Socio-Legal Reconceptualisation of Elderhood with Dignity,” at the Law & Society Association (LSA) Annual Conference 2019, Washington, DC, 30 May–2 June 2019.

observe the living images of dignity that are depicted by the words of elders in care.⁷ The Senior Citizen's Welfare Act⁸ of Taiwan sets up an ideal promise to guarantee an autonomous and positive role for senior members of society. The newly amended Civil Code also adopts the "voluntary guardianship system" to respect the autonomy of old persons who may become mentally or physically impaired.⁹ By using findings in the field, this paper intends to identify the challenges envisaged by the Taiwan aged society to maintain the autonomy and dignity of elders in care. Proposals may then be found to suggest a paradigm shift for the best governance of the ageing society of Taiwan.¹⁰

2. Taiwan laws to promote the dignity and autonomy of senior citizens

The welfare and medical laws of Taiwan have in recent years aimed to protect the autonomy and dignity of senior citizens. The Civil Code has also moved towards a voluntary guardianship system that respects the right of people to plan for elderhood in which they may face mental or physical impairments.¹¹ This section will look into the detailed provisions to see how the legislative purpose for ageing with dignity may be written into the law.

2.1 Civil Code

Under Article 6 of the Civil Code, the capacity to possess rights commence from birth and ends at death. However, in the name of protection, minor persons have restricted legal capacities to act.¹² This protectionism extends to regulate the legal capacity to act of elders by the adult-guardianship system without considering the experiences and feelings of a person who has lived to make decisions as well as take responsibilities.¹³ On the other hand, Article 1113 regulates that "[u]nless otherwise provided by the provisions of this Section, the provisions concerning the guardianship over minors shall apply mutatis mutandis to the guardianship over adults." In practice, it further reduces the special needs of elders under guardianship to those of minors.¹⁴

An elder who "is not able to make declaration of intention, receive declaration of intention, or who lacks the ability to discern the outcome of the declaration of intention due to

⁷ "Older people value different aspects of their autonomy and independence highly. The vast majority of older people want to see their right to autonomy and independence officially recognised by their governments or the United Nations. This is the key finding in a report by the Global Alliance that was published just ahead of the 10th session of the UN Open-Ended Working Group on Ageing (OEWG) in New York in April 2019. The report is based on a consultation with 1,063 older people from ten countries in Africa and Asia. The participants were asked about six aspects of autonomy and independence that were discussed previously at the 9th session of the OEWG. The report presents recommendations for normative elements of autonomy and independence based on the participants' views." Quotation from the Global Alliance for the Rights of Older People (2019).

⁸ Art. 1 of the Senior Citizen's Welfare Act (9 December 2015 amended) provides: "The Act is formulated to assert the dignity and health, postpone and alleviate the disable condition of elders, to maintain the standard of living, to protect the rights and to facilitate the welfares of elders." <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=D0050037> (accessed 15 October 2019).

⁹ According to Art. 1112 of the Civil Code (as amended on 19 June 2019): "When enforcing guardianship relating the ward's life, treatment, and financial management, the guardian shall respect the ward's intent." <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000001> (accessed 1 October 2019).

¹⁰ Such ideas were first presented in Shee (2017b).

¹¹ Shee (2019b).

¹² Art. 13 provides: "(I) The minor, who has not reached their seventh year of age, has no capacity to make juridical acts; (II) The minor, who is over seven years of age, has a limited capacity to make juridical acts; (III) The married minor has the capacity to make juridical acts."

¹³ Huang (2017), pp. 1–5.

¹⁴ Teng (2013), pp. 16–7.

mental disability” is treated in the same way as a person under the age of seven,¹⁵ who enjoys no legal capacity to act, is treated.¹⁶ Under the modern adult-guardianship system, a guardian will be appointed by the court to make substitute decisions for the ward.¹⁷ Upon the appointment of a guardian, the Taiwan court is instructed by law to respect the opinion of the ward for his/her best interests.¹⁸ Yet, judicial records in recent years show that more than 90% of legally appointed guardians have been the spouse, children, and close relatives.¹⁹ Leading scholars have observed that, in most adult-guardianship cases, upon reviewing paper evidence including medical reports, the court appoints the petitioner as the guardian in as far as it is considered to be in line with the interests of the ward, and thus the opinions of the ward might not have been heard, let alone respected.²⁰

It should also be noticed that, under Article 1112, “[w]hen enforcing guardianship relating the ward’s life, treatment, and financial management, the guardian shall respect the will of the ward.” In practice, how the “will of the ward” may be “respected” depends on the guardian.²¹ Since the ward is deprived of the legal capacity to act upon the petition of the guardian, Article 1112 may only serve as moral guidance instead of a mandatory provision.²²

In June 2019, provisions to govern voluntary guardianship were added to the Civil Code.²³ The official legislative purpose was set to respond to the needs of accelerating ageing in Taiwan society as well as to protect the individual dignity and autonomy of older persons by setting up the voluntary guardianship system with an agreement made between the future ward and self-appointed guardian(s).²⁴ Under Article 1113–2(I),

¹⁵ Art. 14(I) provides: “With respect to any person who is not able to make declaration of intention, receive declaration of intention, or who lacks the ability to discern the outcome of the declaration of intention due to mental disability, the court may order the commencement of guardianship at the request of the person in question, his/her spouse, any relative within the fourth degree of kinship, a prosecutor, a competent authority, an organization of social welfare, an assistant, an agent of adult guardianship by agreement or any other interested person.” Art. 1110 provides: “A person who has become subject to the order of commencement of guardianship shall be appointed to a guardian.”

¹⁶ Art. 75 provides: “The expression of intent of a person who has no capacity to make juridical acts is void. An expression is also void which is made by a person who, though not without capacity to make juridical acts, in a condition of unconsciousness or mental disorder.”

¹⁷ Art. 1110 provides: “A person who has become subject to the order of commencement of guardianship shall be appointed to a guardian.” Art. 15 provides: “A person who has become subject to the order of the commencement of guardianship has no capacity to perform any juristic act.”

¹⁸ Art. 1111–1 provides: “When electing guardians, for the best interest of the ward, the court shall first take the ward’s opinion and every other things into consideration; the following things shall be paid attention to: (1) the ward’s physical and spiritual health, his/her life and finance. (2) relations between the ward and his/her spouse, children, and others living in the same household. (3) occupation, experience, opinion of the guardian and relations between the guardian and the ward. (4) when a juristic person is the guardian, the category and content of its business; and relations between the juristic person and its representative and the ward.”

¹⁹ Art. 1111 (I) provides: “When ordering commencement of guardianship, the court shall elect one or more guardians among spouse, any relative within the fourth degree of kinship, relative resides together in recent year, competent authority, organization of social welfare or other proper person; and the court shall also appoint persons for drawing up an inventory of the ward’s property.”

²⁰ Hu (2018), pp. 1–3; Lin (2009), pp. 139–40; Tai (2014), pp. 155–6.

²¹ Field findings also support the same observation. Please see the later part of this paper.

²² Shee, *supra* note 11.

²³ For the legislative purposes and principles of law amendments, see Ministry of Justice (Taiwan), The Bill for the Amendment of the Chapter of Relatives of the Civil Code (Voluntary Adult Guardianship). <https://www.moj.gov.tw/dl-25680-c7cf51ae51e14366b5acfd5b5298b54c.html> (accessed 23 August 2019).

²⁴ Teng (2014), pp. 154–6.

[g]uardianship over adults by agreement²⁵ is an agreement whereby parties agree that one of them appoint the other party as his/her guardian when he/she has become subject to the order of commencement of guardianship, and the latter agrees to do so.

When the day comes on which a guardianship case is heard before the court, this agreement will be enforced unless it is obviously against the interests of the ward.²⁶

The voluntary as opposed to the legal guardianship may respect the choice of a person with full legal capacity. In this sense, the law protects individual dignity and autonomy. However, once a person is declared as a ward under guardianship, the legal effects of substitute decision-making prevail. It is then up to the guardian to decide how the “agreement” shall be enforced, which in reality does not guarantee “supported decision-making” (SDM) as the enjoyment of autonomy requires.²⁷

2.2 Welfare and medication laws

According to Article 1 of the Senior Citizen’s Welfare Act,²⁸ the purpose of legislation is “to assert the dignity and health, postpone and alleviate the disable condition of elders, to maintain the standard of living, to protect the rights and to facilitate the welfares of elders.” Article 16 follows to mandate that

[t]he elders care services should be processed under the principle of holistic care, localized ageing, health promotion, postpone and alleviate the disable condition of elders, and diversified continuing care. Based on the rule stated in preceding sentence and the need of the elder, the municipal and city/county authorities concerned shall provide home-base, community-base or institution-base services to elders. Furthermore, care management rules shall be set for the above services.

The law manifests the ideal of the welfare state, but the goal is too far to reach.²⁹ The nature of welfare law in Taiwan is that it is up to the capacities of the concerned public and private organs to make efforts to reach the goal. On the other hand, it is up to the policy-makers and practitioners to decide what constitutes the “dignity” and “rights” of elders.³⁰ In practice, as in many countries, because of the general shortage of manpower and budget, it is a big challenge for the welfare system, especially with long-term-care mechanisms, to maintain individual dignity and autonomy.³¹ All kinds of tied-up tools

²⁵ Art. 1113–3 provides: “The conclusion, modification of an adult guardianship agreement shall be made in the notarization made by the notary public. The notary public shall give a written notice to the court for the place of the domicile of the ward within seven days after the agreement notarized.”

²⁶ Art. 1113–4 provides: “(I) Upon making a ruling pronouncing a declaration of commencement of guardianship, the court shall designate a guardian agreed in the guardianship agreement and simultaneously appoint a person who shall provide consultation and assistance to draw up an inventory of property together with the designated guardian . . . (III) Before the declaration of the preceding paragraph, if there is enough fact which indicates that the guardian does not act for the interest of the ward, or other reasons indicate that the guardian should not be the guardian, the court may order guardianship to other proper person.”

²⁷ Lee (2015).

²⁸ The English translation of the Act is available at <https://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=D0050037> (accessed 15 October 2019).

²⁹ Hu, *supra* note 20.

³⁰ Lin (2018).

³¹ Scharlach et al. (2000), pp. 536–8.

and facilities are availed of to protect elders in care from possible dangers.³² The use of empowerment measures to keep one's physical and psychological integrity is expensive and time-costing. When resources are restricted, the self-respect and self-worth of a person are easily sacrificed.³³

In order to protect the rights of elders under care, the Long-Term Care Services Act³⁴ was promulgated on 26 January 2017.³⁵ Article 1 urges that the purpose of this specific law is to “guarantee the dignity and the interest of the persons receiving the services and the care providers.”³⁶ The principle is reinforced by Article 44,³⁷ which not only requires long-term-care institutions and their personnel to provide proper care and protection for the elders in care, but also prohibits infringements on the physical freedom or other interests of the cared person.

Apart from the ideal law to promote “welfare with dignity,” the Taiwan Legislature also made the Patient Right to Autonomy Act to uphold “medication with dignity.”³⁸ Article 1 of the law makes it clear that “[t]he Act is stipulated to respect patient autonomy in health-care, to safeguard their rights to a good death, and to promote a harmonious physician-patient-relationship.” The Act allows a person with full legal capacity to act to make, revoke, or later use an “advance decision (prior written and signed statement)” to “express the willingness of a person to accept or refuse life-sustaining treatment, artificial nutrition and hydration, or other types of medical care and a good death when he/she is in specific clinical conditions.”³⁹

Therefore, similarly to the legal effect of “voluntary guardianship,” the right of a patient to autonomy is protected while that person could still make sound decisions under the judgment of medical and legal experts. When an elder is subjected to assistance or guardianship under the Civil Code, his/her right to informed consent is correspondingly restricted together with related medication decisions.⁴⁰

³² On 4 June 2016, major Taiwan news delivered a report under the title “The Tied-Up Elder in a Care Institute,” which raised the issue of “care for elders: protection or dignity.” <https://www.youtube.com/watch?v=VQSB7VLGXRM> (accessed 15 October 2019).

³³ Knight (2018).

³⁴ The English translation of the Act is available at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=L0070040> (accessed 15 October 2019).

³⁵ Chung (2015), pp. 225–35.

³⁶ Art. 1 provides: “(I) This Act is established in order to complete a long-term care service system providing long-term care services, to ensure the quality of care and support services, to develop universal, diversified and affordable services and to guarantee the dignity and the interest of the persons receiving the services and the care providers. (II) In providing long-term care services, there shall be no discrimination that differentiates based on the gender, sexual orientation, gender identity, marriage, age, physical or mental disabilities, illness, social class, race, religious belief, nationality or place of residence of the persons receiving the services.”

³⁷ Art. 44 provides: “Long-term care institutions and their personnel shall provide proper care and protection for the users of long-term care services and shall not abandon, physically or mentally abuse, discriminate, harm, restrict physical freedom or engage in any other matters that infringes upon their interests.”

³⁸ For the official translation of the 2016 Patient Right to Autonomy Act, please visit <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=L0020189> (accessed 15 October 2019).

³⁹ Art. 8 provides: “Persons with full disposing capacity may make advance decisions, and may revoke or alter them in writing at any time.”

⁴⁰ Art. 5 provides: “(I) When a patient seeks medical care, the medical institution or physician must inform the patient of the diagnosis of his or her disease, treatment policy, proposed procedures, medications, prognosis, possible negative reactions, and other related issues at the appropriate time and in an appropriate manner as judged by the medical institution or physician. In the absence of clear objections from the patient, the parties concerned may also be informed. (II) In the cases when the patient has no or limited legal capacity to act, is subject to an adjudication of the commencement of assistance, or unable to express ideas or understand ideas expressed by others, the medical institution or physician shall inform both the patient and the parties concerned in an appropriate manner.”

3. Narrative accounts of elders in community care

As mentioned above, the main legislative purposes of the new “voluntary guardianship law” are first to respond to the care needs of ageing society and second, but more importantly, to protect the individual dignity and free will of the person under guardianship. However, if the basic design of guardianship to deprive a ward of the legal capacity to act, how can individual dignity and free will be guaranteed simply because a contract has been made in advance? Instead of interviews conducted with experts, my teaching team decided to take the students of the “Elderly Rights Clinic” course to visit elders in care who were eligible to appoint a legal or voluntary guardian.⁴¹ Narrative accounts of elders in care were taken to understand how they picture dignified ageing.⁴²

3.1 Methods for fieldwork

Before we set off to conduct field studies, students were given introductory lessons on the “human rights of elders in care,” “methods of communicating with vulnerable social groups,” “narrative analyses of law and society,” “Taiwan laws concerning elder rights and care,” as well as “CRPD and older persons.” Under the pedagogy of “learning by doing,” students were instructed to learn to “chat” with old people and thereby gather information.⁴³ Such field work did not aim to do formal interviews, but simply to understand old people under care by listening to their complaints and daily difficulties.⁴⁴ After teamwork visits, narrative accounts were taken back to the classroom to share and discuss. With the help of interdisciplinary experts who visited our classes, students were led to analyze concerned human rights issues connected to “law in action.”⁴⁵

The traditional use of a “case” to train law students is to pick up a legal provision to develop “facts” for students to learn how to apply and understand the law. In this course, a conversational learning approach is adopted by leaving the design of “a story for analyses” to student teamwork based on the narrative accounts derived in the field. Equipped with “learning by doing” techniques, students first approached one or a group of elders (with/without the families) to do mutual self-introductions, followed by daily-life chats derived from classroom-prepared open-ended questions. Instead of acting as a professional to tell people what to do, students (and the instructor) listened to the life stories of a person or a family, collected words, and wrote a story as the “case-study” for later classroom activities.⁴⁶ As formal notes were not taken from interviewed elders, nor was any name or community identified in our joint studies, we explained in detail to the interviewed persons and their families that the noted accounts during the “chats” would be used in later classroom discussions and published papers, and thus oral agreements were obtained instead of signing informed-consent forms.

⁴¹ Interviews were not conducted with elder people who had had guardians because, by law, a person under guardianship could not give trustable information. For detailed information of the course, see Shee & Kao (2018), pp. 1–38.

⁴² For the detailed narrative accounts derived from the field, see Shee (2018a). For the methods of narrative inquiries, see Wells (2011) and Riessman (2008).

⁴³ The pedagogy was shared in Shee (2019c) for comments.

⁴⁴ For the methods for analyzing the life stories of elders in care, see Doran et al. (2019) and Grøndahl et al. (2017).

⁴⁵ The methods for applying global human rights discourses in the fieldwork are presented in Shee (2017a).

⁴⁶ Shee & Kao, *supra* note 41, p. 26.

3.2 Images of elderhood dignity from narrative accounts

From the chats with elders in care, we memorized noteworthy statements in relation to dignity and autonomy. Many accounts bear similar denotations. This paper picks some represented ones to share:

1. My children simply want me to spend less to save for their inheritance.
2. I simply regret what I decided yesterday, not forgetting what I have said.
3. I told my children to let me die, but they said I had been out of my mind.
4. I wish I could go out for a dinner with my old friends.
5. No one listens to me. How can I tell the court?!
6. When you voluntarily give up your property, you give up yourself.
7. I can never escape from the palm of my Buddha wife.
8. Throughout my life I had been an unreasonable person before the court said it.
9. Even my grandson has more say in family decisions.
10. They water the plants nicer than feeding me.⁴⁷

3.3 Core concepts of dignity derived from the fieldwork

Apart from the above quotations for readers or listeners to feel for oneself, my team also extracted from the field accounts some core concepts of elder dignity⁴⁸:

1. Self-determination, autonomy, making choice: Most elders in care cannot decide their own daily schedule and are forced to get up and go to bed at the same time every day, to eat the same dishes on Mondays, to join the arranged activities, and so on.
2. Independence: Elders wish to be allowed to enjoy privacy while using the toilet or taking a shower as well as to eat on their own.
3. Care with respect: Elders complain that their caretakers have treated them like “vegetables” and are “deaf” (not listening).
4. Filial piety: For the generation of 65- to 85-year-old parents, they have enjoyed parental authority and expect the Confucius “filial piety”⁴⁹ devoted by children including not only financial support, but most importantly respect and reverence.
5. Company and family contacts: Apart from intrusive care, elders in care are mostly left unattended and cannot expect visits paid by families or friends.
6. Friendship and social participation: Many physically or mentally disabled elders wish to have help to go out from home/institutes to enjoy fresh air, have a meal with family and friends, watch a movie, go shopping, and so on.

4. Prospects for elderhood dignity under Taiwan law and society

In order to define the “dignity” of old people in care, my team read the CRPD to pick up keywords and concepts. According to CRPD Article 1:

(I) The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with

⁴⁷ The accounts are partly presented in Shee, *supra* note 11; Shee, *supra* note 43.

⁴⁸ These concepts were discussed in the conference paper of Shee (2019a).

⁴⁹ Under the Confucius “filial piety” for parents, “The filial piety nowadays means the support of one’s parents. But dogs and horses likewise are able to do something in the way of support; without reverence, what is there to distinguish the one support given from the other?” <https://www.enbus.cn/en/3191.html> (accessed 15 October 2019).

disabilities, and to promote respect for their inherent dignity. (II) Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

It may be availed of to protect elders in care. Under the guardianship system, an elder in care may be deprived (fully or in part) of their legal capacities to act. Our presumption was that such “barriers” may in practice “hinder their full and effective participation in society on an equal basis with others.”

4.1 Essence of individual dignity

The concepts and keywords (essence of individual dignity) derived from the CRPD to develop interview guidelines include: (1) respect for inherent dignity; (2) individual autonomy: the freedom to make one’s own choices, and independence of persons; (3) full and effective participation and inclusion in society; (4) respect for differences and acceptance of persons with disabilities as part of human diversity and humanity.

According to Article 12 of the CRPD, persons with disabilities should enjoy legal capacity on an equal basis with others in all aspects of life and appropriate measures must be taken to provide access by persons with disabilities to the support they may require in exercising their legal capacity, and the measures shall respect the rights, will, and preferences of the person.⁵⁰ With respect to application to an elder with physical or mental impairments, the Convention mandates the state to take appropriate and effective measures to ensure the equal rights of the elder to own property and to control their own financial affairs.⁵¹ In order to render the needed support with proper measures, the “reasonable accommodation” under Article 2 should be provided to generate the necessary and appropriate modification and adjustments to ensure the enjoyment or exercise of rights and freedom by an elder on equal bases with others.

Taiwan has made a CRPD Implementation Law⁵² to enforce the above provisions as national law⁵³ and thus measures taken under Article 12 for elders in care shall “safeguard their full and equal participation in society, politics, the economy and culture, and

⁵⁰ Art. 12 provides: “States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.”

⁵¹ Harpur, *supra* note 3, p. 1027.

⁵² The Act to Implement the Convention on the Rights of Persons with Disabilities was promulgated on 20 August 2014. For the official English translation of the Act, see <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=D0050194> (accessed 15 October 2019).

⁵³ Art. 1 provides: “This Act is made to implement the Convention on the Rights of Persons with Disabilities (hereafter the Convention) adopted by the United Nations in 2006 to protect the rights of all persons with disabilities, safeguard their full and equal participation in society, politics, the economy and culture, and promote their individual independence and development.”

promote their individual independence and development.”⁵⁴ However, the guardianship law has deprived the ward of the right to act, and thus the ward loses control over financial matters and ownership of property. Most importantly, the legal effects of substitute decision-making in many ways hinder the freedom and autonomy of elders in care.⁵⁵

4.2 SDM⁵⁶

According to General Comment No. 1 of the CRPD, in order to implement SDM, the state should not make laws or enforce measures to deprive any person with disabilities of the right to equal recognition before the law. Debates over whether the guardianship system is in line with the CRPD may remain a hot issue of human rights for further research. Yet, in terms of the real life of elders who are subjected to the care of families or institutions, deprivation of the capacity to act is done under the justification of “protection” after expert assessments.⁵⁷ In contrast to Article 12 of the CRPD, these elders in care cannot “enjoy legal capacity on an equal basis with others in all aspects of life” as a result of the exercise of the guardianship system.⁵⁸ Before the law can be amended, it may be beneficial to available of Article 1112 of the Civil Code that “[w]hen enforcing guardianship relating the ward’s life, treatment, and financial management, the guardian shall respect the will of the ward.” And thus useful and appropriate measures may be taken to provide the elders with the support they may require in exercising their legal capacity.⁵⁹ For such a purpose, the SDM system may operate to promote the autonomy of elders in care.⁶⁰

The General Comment No.1 of the CRPD has mandated the States Parties to replace substitute decision-making regimes (including adult guardianship) with SDM.⁶¹ SDM is generally urged to be an alternative to guardianship that allows an elder in care (and the family) to work with a team of experts to make choices and daily-life decisions.⁶² One advantage of the SDM is similar to that of voluntary guardianship to allow a mentally competent elder to designate experts and laypersons as members of the support network who will work together to promote the freedom, autonomy, and independence of the elder, including to negotiate with caretakers on daily details and legal matters.⁶³ If SDM is adopted in the exercise of guardianship, especially emphasizing Article 12 of the Civil Code, the appointed guardian(s) together with family and caretakers may work together in the best interests of the elder to offer needed support to make reasonable decisions.⁶⁴

⁵⁴ “The United Nations Convention on the Rights of Persons with Disabilities (CRPD) recognized that people with disabilities should have the right to exercise their legal capacity and identified ‘supported decision-making’ as a means by which people with disabilities can be directly involved in.” Quoted from introduction to the book of Shogren (2018).

⁵⁵ Huang (2018).

⁵⁶ Supported decision-making (SDM) is a series of relationships, practices, arrangements, and agreements designed to assist an individual with a disability to make and communicate to others on decisions about their life. See <http://supportmydecision.org/> (accessed 8 October 2019).

⁵⁷ Haberstroh et al. (2017).

⁵⁸ Huang (2014).

⁵⁹ Keeling (2016), pp. 38–44; Craigie et al. (2018).

⁶⁰ Williamson (2015), pp. 12–3; Dabove (2017).

⁶¹ Werner (2012), pp. 1–27.

⁶² Raikhola and Kuroki (2009), pp. 80–2.

⁶³ Huang (2016).

⁶⁴ Perlin (2012), pp. 1–3.

4.3 Suggestions for socio-legal policy reform

In Taiwan society, it is a common expectation that life needs to be extended to the maximum. Long-term care constitutes a substantial part of the government expenditure. We learned from the field that spouses and children avail of the guardianship system to protect their future “inheritance interests” in the name of “filial piety.”⁶⁵ Elders in care are deprived of freedom and autonomy in the name of protection.⁶⁶ Therefore, even with the law of voluntary guardianship, interviewed elders (who can still make sound communications) stated that, even with the agreement made with caretakers, they are still “in the hands of” the people who would treat them as a person of “no capacity.”⁶⁷

It is the shared suggestion of leading scholars in this field that the special needs of “elderhood” shall be taken seriously by policy-makers to create a socio-legal environment for “supported ageing” with interdisciplinary measures of reasonable accommodation that deliver support for a person (and the family) during the process of ageing.⁶⁸ The welfare and medication laws have enshrined SDM principles that are put into practice with budgeted programmes.⁶⁹ The replacement of substitute decision-making by SDM is the final goal, but law in books cannot change social practice without practical measures to inspire and steer changes.⁷⁰ Government-paid and NGO-led programmes to promote “protection with freedom” and “care but independence” may lead to socio-legal transition.⁷¹ SDM needs to link from global theory, interdisciplinary research to local practice to enhance the self-determination and quality of elderly life.⁷² For the middle-aged generation, “self-planned elderhood” may be advocated to avoid a sudden limit or deprivation of legal capacity.⁷³

5. Concluding remarks

The functions of the modern family in the ageing/aged society may face legal challenges in the reforms of social welfare, long-term care, and adult-guardianship systems as well as laws pro human dignity to guarantee patient autonomy, SDM, and living wills.⁷⁴ The contemporary Taiwan society still worships “filial piety” as a moral command. Reinforced by the traditional epitome “to treat elders as children,” elders in care are generally treated like little children with no reasoning capacities.⁷⁵ As an ageing person myself whose parents are way over 80 years old, I feel uneasy in the practice of family law in cases involving elders in care.⁷⁶ The very essence of family law is love—love between spouses, love between parents and children, and hopefully love among family members.⁷⁷ Yet, when interactions of family relations switch from love to unbearable responsibilities, individual dignity may be sacrificed under the disguise of protection.⁷⁸

⁶⁵ Lee et al. (2012), pp. 198–9.

⁶⁶ Moye et al. (2007), pp. 591–603.

⁶⁷ Malek and Razzak (2017), pp. 284–5.

⁶⁸ Tai, *supra* note 20, pp. 152–6; Eastman and Winchell (2015), pp. 63–6.

⁶⁹ Moye et al. (2013), pp. 170–1.

⁷⁰ Arai et al. (2012), pp. 16–22; Dinerstein (2012).

⁷¹ Lin, *supra* note 30, pp. 1–5.

⁷² Shogren, *supra* note 54.

⁷³ Huang, *supra* note 55.

⁷⁴ Herro, *supra* note 3, pp. 107–8; Ory et al. (2003), pp. 164–71.

⁷⁵ Kohn (2003), pp. 201–2.

⁷⁶ Shee, *supra* note 48.

⁷⁷ Shee (2018b).

⁷⁸ Control Yuan, Taiwan (2017), pp. 1–4.

This paper has no concluding remarks to make, as it is simply an effort to draw more attention to the issue. There is, though, a scene in my mind to share:

I hosted a couple of my age whom I know more than ten years.
 During the dinner I realized that the wife has dementia symptoms.
 She repeatedly asked the same questions many times.
 Her conditions reminded me of my mother at the early stage of dementia.
 I am sure that her husband noticed this but takes her as a normal partner.
 I think that this may be a way to treat a human being as a respectable person.
 It is not easy.
 I did not talk about her conditions with him.
 But we had a good time.

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