

## WHOSE DUTY OF ELDER CARE? EXAMINING AGING LAW AND POLICY IN TAIWAN

CHAO-TIEN CHANG \*

### ABSTRACT

This article challenges the assumption that elder care is a family's duty by arguing, instead, that it is the collective responsibility of the whole community. Although families have been the cornerstone in caring for their elderly, the capacity of families has been declining in this rapidly aging society. Family caregiving may also unfairly burden informal caregivers who are unpaid and are mostly women. This article examines the allocation of obligations for elder care, taking the experience of Taiwan as an example. Preserving the tradition of filial piety, the filial responsibility law is law in action in Taiwan and has a cultural foundation. However, the 2010 amendments allow the court to waive or exempt adult children's obligations to their parents when they were abused or abandoned by their parents, meaning that the family no longer bears an absolute obligation to care for their elderly. On the other hand, the Taiwanese Constitution endorses the principle of welfare state, where the state should provide appropriate assistance and relief to the elderly. Welfare legislation has occurred, which embodies the constitutional mandate and authorizes the state to protect and promote the welfare of the elderly. Nevertheless, when implementing the law, the state has shown a tendency to remain in a supplementary role and to prioritize the families' duties. The disparity between law and practice in Taiwan reveals the assumption that elder care is an individual and familial moral obligation. This article argues that caregiving should be regarded as a shared responsibility because it is a process central to our humanity and everyone could be a caregiver or a care-recipient at certain stages in life. The state

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\* Assistant Professor, National Chiao Tung University School of Law, Taiwan; S.J.D., University of Pennsylvania Law School. This article is a part of the research results sponsored by the Ministry of Science and Technology, Taiwan (funding no. 107-2410-H-009-006-MY2). The author also benefited from the feedback receiving from the Aging, Law and Society workshop of the Law and Society Annual Conference on May 30, 2019 in Washington D.C., where a draft of this article was presented. The author also thanks the editorial board of the *Wisconsin International Law Journal* for valuable comments and editing. However, all remaining errors are mine.

is urged to support informal caregivers, to reward them, and to recognize the publicness of caregiving.

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### INTRODUCTION: THE DUTY OF ELDER CARE RECONSIDERED

The aged group is growing rapidly around the world<sup>1</sup> and the need for care is inevitably increasing. According to the United Nations, however, the need for elder care has not yet been met by the state, as 48% of the global population is not covered by any national legislation of long-term care, while 46% is subject to means-testing programs whereby the services are only available for people living below the poverty line.<sup>2</sup>

The family has been the backbone of elder care. Most elderly around the world stay with their family members, where they receive both financial assistance and care, according to a study by the United Nations.<sup>3</sup> Those who take care of family members at home for no payment are called informal caregivers, in contrast to professional caregivers who are paid.<sup>4</sup> Despite the fact that informal caregivers carry out essential roles in society, they often gain few rewards and suffer great losses, both material and non-material. A study cited by the National Center for Elder Abuse of the United States indicated that 20% of caregivers are worried that they will become violent toward their care recipients.<sup>5</sup> A user on the forum of

<sup>1</sup> In 2017 people aged 60 or over comprised 13% of the world's population, and this aged group is expected to be doubled in 2050 and tripled in 2100, growing faster than all younger aged people. *Aging*, UNITED NATIONS, <https://www.un.org/en/sections/issues-depth/ageing/> [https://perma.cc/8E3X-73WG].

<sup>2</sup> Dep't of Econ. and Soc. Affairs, *EGM on Care and Older Persons*, UNITED NATIONS (Dec. 5-7, 2017), <https://www.un.org/development/desa/ageing/meetings-and-workshops-2/egm-care-and-older-persons.html> [https://perma.cc/Z22H-22GV].

<sup>3</sup> See Shahra Razavi, *Long Term Care for Older People: The Role of Unpaid Care Work*, UNITED NATIONS 7-8 (Dec. 5-7, 2017), [https://www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2017/11/Razavi\\_Paper\\_EGM\\_UCW-Older-Persons.pdf](https://www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2017/11/Razavi_Paper_EGM_UCW-Older-Persons.pdf) [https://perma.cc/WB5M-LV3T] (using the data of people aged 80 plus living with family members around the world to analyze the status of care reliance of the aged group).

<sup>4</sup> See *Informal Caregiving, Compassion in Action*, ASSISTANT SEC'Y FOR PLANNING & EVALUATION, DEP'T OF HEALTH & HUMAN SERVS. 1, 1 (June, 1998), <https://aspe.hhs.gov/pdf-report/informal-caregiving-compassion-action> [https://perma.cc/6UFH-8WYL] (defining "informal caregiving" as "unpaid care given voluntarily to ill or disabled persons by their families and friends"); *Selected Long-Term Care Statistics*, FAMILY CAREGIVER ALLIANCE (2009), <https://www.caregiver.org/selected-long-term-care-statistics> [https://perma.cc/7ZCK-5WE4] (defining "informal caregiver" as a synonym of "family caregiver," both referring to those who are "unpaid individuals such as family members, partners, friends and neighbors who provide care"). Informal caregivers also include those who provide care for children and seriously ill family members. Due to the focus of this article, the term "informal caregivers" only refers to those providing care for elder family members.

<sup>5</sup> Lori Johnston, *Left Unchecked, Caregiver Burnout Can Lead to Abuse and Violence*, AGINGCARE, <https://www.agingcare.com/articles/caregivers-kill-parents-commit-suicide-150336.htm> [https://perma.cc/A7RS-LHSX].

AgingCare.com left a message saying, “*I truly feel that the only thing that keeps me from taking my own life is that there will be no one to take care of my mother,*”<sup>6</sup> which elucidates the love and pain of caregiving. A Japanese study also noted the perils of familial elder care, where among the 272 intra-familial murder or attempted murder cases in 2014, one-third involved an attack on a parent by their offspring, and one-third of perpetrators attributed their motive to “concerns about the future.”<sup>7</sup> The stress of caregiving taken by the family, especially with the rapidly aging population, is an emerging issue common around the world.

Given the overload of responsibility on families as well as on informal caregivers, the allocation of the duty of elder care has to be reconsidered. Duty of care in common law is that which requires a person to provide reasonable care when one’s conduct creates a risk to another, a statute imposes the duty, or a person is involved in special relationships where one has a greater ability to impact the other’s safety or property, such as the relationship between a common carrier and a passenger.<sup>8</sup> In corporate law, duty of care requires directors and officers to make decisions in the manner a reasonably prudent person would, because they serve as corporate fiduciaries.<sup>9</sup> However, the duty of caregiving for elders imposed on family members seems to be different from those outlined above. Informal caregivers engage in neither risky conduct nor risky transactions with elderly care recipients, and they do not have professional skills or a fiduciary duty. Their duty is driven by affection, morality, or social norms. Informal caregivers are not under the same scrutiny as corporate fiduciaries, but they are under rather strict scrutiny in terms of their ability to take care of a loved one’s physical and emotional health almost constantly. Meanwhile, if everyone becomes a care recipient in late life that burdens another, then each person has to take on the duty of elder care. The full allocation of the duty of elder care to the family, especially to informal caregivers at home, is far from fair. Elder care is a duty that everyone in the community needs to share.

This article examines the issue of the allocation of the duty of elder care, taking the experience of Taiwan as the case study, and argues

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<sup>6</sup> *Id.*

<sup>7</sup> Alastair Gale, *In Graying Japan, Caregiving Concerns Drive Some Families to Murder*, WALL ST. J. (Apr. 11, 2017), <https://www.wsj.com/articles/in-graying-japan-caregiving-concerns-drive-some-families-to-murder-1491887001> [<https://perma.cc/3SGS-J58T>].

<sup>8</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 40 (AM. LAW. INST. 2010).

<sup>9</sup> *Duty of Care*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/duty\\_of\\_care](https://www.law.cornell.edu/wex/duty_of_care) [<https://perma.cc/R5LP-8AR5>].

that caregiving for elders should be a collectively shared responsibility. As Taiwan is located in East Asia and shares the Confucian culture, the tradition of filial piety has influenced Taiwanese society and law. Taiwan is also faced with a more severe aging issue than many countries in the world. Having just officially become an aged society with more than 14% of its population aged sixty-five or older in 2018, Taiwan is expected to rapidly become a super-aged society with an aged population of over 21% within only eight years, which is much faster than other developed countries in the world.<sup>10</sup> Taiwan's Long-Term Care Services Act was passed in 2015, and it became effective in 2017 with the implementation of the Long-Term Care Plan 2.0.<sup>11</sup> These laws attempt to share the heavy burden of elder care with the family, while the Taiwanese government also has to tackle the expected financial deficits of the social welfare system. This challenge is universal, and Taiwan's experience could serve as a model for other countries in the world.

Following this introduction, Part I introduces the challenges of elder care in Taiwan. According to the tradition of filial piety, children have a moral obligation to support their parents, and therefore, the family should take the duty of caring for their elderly members. However, long-term care for elders has become a heavy burden for modern families as well as for informal caregivers. Imposing the duty of elder care on the family also further entrenches gender inequality; that is, women are more involved in caregiving than men. Following this observation, Part II begins to examine the Taiwanese filial responsibility law. Based on the tradition of filial piety, the law imposes both civil and criminal liability to enforce adult children's obligations to maintain their parents when the parents cannot do so themselves. The filial responsibility law was amended in 2010 to grant adult children relief or exemption from their obligations when their parents mistreated them. The amendment reveals that the family's duty of elder care is no longer absolute. Part III introduces the law and policy of Taiwan whereby the state attempts to share the burden of elder care. The Constitution mandates that the state provide appropriate assistance and relief for elders, and there have been social welfare laws

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<sup>10</sup> George Liao, *MOI: Taiwan Officially Becomes an Aged Society with People over 65 Years Old Breaking the 14% Mark*, TAIWAN NEWS (Apr. 10, 2018), <https://www.taiwannews.com.tw/en/news/3402395> [<https://perma.cc/4NQY-YBXJ>].

<sup>11</sup> A brief legislative history of the Long-Term Care Services Act can be found here: *Long-Term Care Services Act Legislative/Regulatory History*, LAW BANK, <https://db.lawbank.com.tw/Eng/FLAW/FLAWDAT07.aspx?lsid=FL077101> [<https://perma.cc/5ZDF-GCMV>]; for a detailed introduction of this Act and the Long-Term Care Plan 2.0, see *infra* notes 121–40 and accompanying text.

authorizing the state to play an active role in protecting the welfare of elders. However, the administrative sectors and the court still consider that the family should take the primary responsibility of elder care while the state plays a supplementary role. Part IV then argues that caregiving should be a collective responsibility shared by the whole community. Through examining the developing laws and policies that attempt to mitigate the pressure of elder care on the family, this article proposes empowering informal caregivers by not only supporting them, but also rewarding and recognizing their contributions to the community. Part V concludes the article.

## I. CHALLENGES OF ELDER CARE IN TAIWAN

### A. THE FILIAL PIETY TRADITION

Filial piety is a value deeply affecting the family relationship as well as elder policy in Taiwan. Taiwan is an East Asian country with a population of twenty-three million, among which 95% claim Chinese Han ancestry.<sup>12</sup> Traditional Chinese culture, especially Confucianism, has widely influenced all aspects of Taiwanese society, including the legal system.<sup>13</sup> Filial piety was a fundamental moral principle in ancient Chinese times, and it became widely spread as a key aspect of Confucianism in the Han Dynasty (206 B.C. to A.D. 220).<sup>14</sup> Confucianism deemed filial piety the foundation of a harmonious and benevolent family and society.<sup>15</sup> An old Chinese saying, “*Of all virtues, filial piety is the first,*” also demonstrates the preeminence of filial piety in Chinese culture.<sup>16</sup> Filial piety remains a significant value shared in locales and

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<sup>12</sup> *About Taiwan*, TAIWAN.GOV.TW, <https://www.taiwan.gov.tw/about.php> [<https://perma.cc/M2TM-8CDY>].

<sup>13</sup> Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805, 810 n.15 (2011) (citing scholars recognizing that Confucianism as a distinctive tradition provides a solid foundation for a modern democratic constitution in East Asian countries, including Taiwan).

<sup>14</sup> Edward R. Canda, *Filial Piety and Care for Elders: A Contested Confucian Virtue Reexamined*, 22 J. ETHNIC & CULTURAL DIVERSITY SOC. WORK 213, 213–14 (2013).

<sup>15</sup> *Id.*

<sup>16</sup> Aris Teon, *Filial Piety (孝) in Chinese Culture*, GREATER CHINA J. (Mar. 4, 2016), <https://china-journal.org/2016/03/14/filial-piety-in-chinese-culture/> [<https://perma.cc/J6BL-3BTZ>].

communities influenced by the Chinese Confucian heritage,<sup>17</sup> and Taiwan is no exception.

The concept underlying filial piety is that parents gave life to children and nurtured them until adulthood, which is considered a contribution that children can never fully repay.<sup>18</sup> Adult children are eternally obligated to reward their parents in their old age by offering material support and emotional care and respect.<sup>19</sup> However, the reciprocal parent-child relationship is not based on the exchange of benefits but rather on morality and virtues.<sup>20</sup> Filial piety often includes an order that family elders and parents have a duty to correct their children, while children are expected to obey the instruction and respond with respect.<sup>21</sup> Children's obligations to parents and family elders is regarded as compulsory, unconditionally obedient, and self-sacrificing.<sup>22</sup> The tradition of filial piety influences elder care in the family and in society in both positive and negative aspects. Filial piety motivates children to care for elderly family members and encourages public policy to share the responsibility of elder care.<sup>23</sup> On the other hand, concerning some characteristics of modern life, such as the shrinking family size, population mobility, and rapidly aging population, it becomes difficult for many people to fulfill the filial obligation, thereby causing conflicts and dissatisfaction within the family.<sup>24</sup> At the public policy level, filial piety has also been used to justify limited governmental support for elder care, leaving the burden to the family regardless of the family's capacity.<sup>25</sup> Appealing to the tradition of filial piety also seems to reinforce the hierarchical and gendered labor division in the family, which could result in unfairly imposing the elder care obligation on daughters-in-law or children of disadvantaged socioeconomic status.<sup>26</sup>

Despite being a modernized democratic country, Taiwan has preserved the Chinese Confucian culture. A study found that filial piety

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<sup>17</sup> Canda, *supra* note 14, at 215.

<sup>18</sup> *Id.*; Teon, *supra* note 16.

<sup>19</sup> Canda, *supra* note 14, at 215–16; Teon, *supra* note 16.

<sup>20</sup> Canda, *supra* note 14, at 215.

<sup>21</sup> Barbara W.K. Yee, *Filial Piety*, in *ENCYCLOPEDIA OF MULTICULTURAL PSYCHOLOGY* 214, 214 (Yo Jackson ed., 2006).

<sup>22</sup> Canda, *supra* note 14, at 216; Teon, *supra* note 16.

<sup>23</sup> Canda, *supra* note 14, at 217.

<sup>24</sup> *Id.*; Yee, *supra* note 21, at 214.

<sup>25</sup> Canda, *supra* note 14, at 218.

<sup>26</sup> Teon, *supra* note 16; Yee, *supra* note 21, at 214.

remains influential on the parent-child relationship, family decisions on elder care, as well as long-term care policy;<sup>27</sup> that is, most adult children still consider it their moral obligation to care for their parents. The family is expected to be the primary caregiving unit. One study showed that more than 60% of adults expect to receive care from their spouses or children in their old age, and more than 70% of elders consider home-based care the most appropriate long-term care approach.<sup>28</sup> In other words, most Taiwanese people consider elder care to be their obligation, while they also expect their family members and offspring to look after them when they are old and/or disabled.

#### B. CHANGES OF THE DEMOGRAPHIC STRUCTURE AND CHALLENGES TO FILIAL CAREGIVING

Elder care relying upon the family is nevertheless challenged by the changes of the demographic structure. While the filial piety tradition was originally based on the large extended family in the agricultural society, an official report found the family constructs in the 21<sup>st</sup> century to be small and monolithic—more than 50% are nuclear families, more than 20% are single-person households, and around 17% are traditional stem families.<sup>29</sup> Given the low birth rate and aging population, the official report estimated that the average population of each household would decrease from 3.0 in 2000 to lower than 2.0 in 2042.<sup>30</sup> Given this

<sup>27</sup> See, e.g., Tsuo Hsin-Ying (鄒欣榮) & Kuo Tsuann (郭慈安), *Xiaodao Jiazhiguan Yu Zhaogu Yali Fuhe Guanxi – Yi Zhangzhao Jigou Zhumin Zinu Weili (孝道價值觀與照顧壓力負荷關係—以長照機構住民子女為例)* [The Relationship Between Filial Piety and Caregiving Burdens: Using Long-term Care Residents' Children as an Example], 12(2) TAIWAN LAONIAN YIXUE (台灣老年醫學) [TAIWAN GERIATRICS & GERONTOLOGY] 104, 111–13 (finding that most adult children of residents of long-term care institutions in Taiwan continue to feel the pressure of caregiving and visit their parents frequently, which is correlated to most adult children's perceived value of filial piety); see also Yen-Jen Chen, *Strength Perspective: An Analysis of Ageing in Place Care Model in Taiwan Based on Traditional Filial Piety*, *Ageing Int'l* 183, 183–84 (2008) (elucidating that the Taiwanese long-term care policy in 2001 focusing on community care reflected the values underlying filial piety, such as trust between neighbors, benevolent social networks, and reciprocity).

<sup>28</sup> Ke Wen-Chuan (柯文娟), *Zhangqi Zhaohu Qushi Yu Moshi Tantaotao (長期照護趨勢與模式探討)* [Discussion on Trends and Patterns in Long-Term Care], 44(9) QUOHUI YUEKAN (國會月刊) [CONGRESS MONTHLY] 36, 39 (2017).

<sup>29</sup> Chen Hsin-Mu (陳信木) et al., *我國家庭結構發展推計 (106 年至 115 年)* [Taiwan Household Projections 2017–2026], NATIONAL SCIENCE COUNCIL 1, 26 (Oct. 2017), [https://www.ndc.gov.tw/News\\_Content.aspx?n=E4F9C91CF6EA4EC4&s=A6F127ED8DE2D161](https://www.ndc.gov.tw/News_Content.aspx?n=E4F9C91CF6EA4EC4&s=A6F127ED8DE2D161) [https://perma.cc/2CVN-4D3L].

<sup>30</sup> *Id.* at i., v.

reduction, the official report also indicated the necessity of public policy or market mechanisms to supplement families' shrinking capacity to provide support and share risk.<sup>31</sup> Despite the fact that receiving care and support from the family is preferred, many Taiwanese families do not have the capacity to fulfill the obligation.

Even within families with stronger interpersonal connections and support, long-term care remains a heavy burden. According to the Ministry of Health of Taiwan, the average duration a person is bedridden before death is 7.3 years, and the total long-term care cost is around \$1.75–\$3 million NTD (\$56,116–\$113,168 USD),<sup>32</sup> equal to 2.2–4.5 times the average annual income of a Taiwanese citizen.<sup>33</sup> That number is even likely to be underestimated. A survey conducted by a Taiwanese media company revealed that many caregivers responded that the monthly cost of long-term care is at least half of or even equal to the median monthly income.<sup>34</sup> Many Taiwanese people are also worried that the cost of providing long-term care for other family members would push the family into financial difficulties.<sup>35</sup>

The above-mentioned costs of long-term care do not count the costs covered by informal caregivers at home.<sup>36</sup> For instance, the cost of hiring a full-time, professional caregiver or living in a long-term care institution is estimated to be two to four times the cost of community-based care,<sup>37</sup> despite the fact that the lower cost of the community-based

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<sup>31</sup> *Id.* at i.

<sup>32</sup> Chu Hsia-Lei (區夏蕾), 一次搞懂長照險 [Understanding Long-Term Care], BUSINESS TODAY (Oct. 13, 2016), <https://www.businesstoday.com.tw/article/category/80392/post/201610130041/一次搞懂長照險> [<https://perma.cc/2T2A-WCDQ>].

<sup>33</sup> The average annual income of Taiwanese citizens is around \$25,000 USD, *see Latest Indicators*, NATIONAL STATISTICS (REPUBLIC OF CHINA, TAIWAN), <https://eng.stat.gov.tw/point.asp?index=1> [<https://perma.cc/8WBJ-MHEV>].

<sup>34</sup> 27.1 percent of caregivers in a 2017 survey replied that the cost of long-term care is \$30,000–\$40,000 NTD per month (equal to \$11,778–15,704 USD per year), while 8.3 percent replied the cost is more than \$50,000 NTD per month (equal to \$19,630 USD per year), *see* Liang Yu-Fang (梁玉芳), 我命換你命 兩代同垮 長照無力 [The Exchange of a Life for a Life: Long-Term Care Overwhelms Two Generations], UDN.COM (Aug. 13, 2017), <https://vision.udn.com/vision/story/11411/2639351> [<https://perma.cc/Q3B2-5UFH>].

<sup>35</sup> *Id.*

<sup>36</sup> Another major workforce supporting the long-term care of Taiwan is foreign caregivers, who have contributed to elder care at a much lower price than native professional caregivers. However, this topic is beyond the scope of this article. *See* Timothy Ferry, *Foreign Caregivers Fill the Gap*, TAIWAN BUS. TOPIC (Oct. 18, 2018), <https://topics.amcham.com.tw/2018/10/foreign-caregivers-fill-the-gap/> [<https://perma.cc/NUH3-WTGT>].

<sup>37</sup> Li Hsueh-Wen (李雪雯), 一張表直接幫你算「長照成本」有多高! [A Graph to Tell You How Costly the Long-Term Care Is!], BUSINESS WEEKLY (Jan. 13, 2017),

care is actually subsidized by family members' unpaid caregiving during evenings or holidays. A 2017 statistic showed that more than 85% of Taiwanese elders live with family, while only 1.9% live in an institution,<sup>38</sup> which means that informal caregivers still make up the bulk of the long-term care workforce. However, the familial burden of care is likely to become heavier, due to an aging society and a dwindling birth rate. The potential support ratio is 6.2 working-aged persons to one elder in 2014, but it is estimated that it will be 1.2 working-aged persons to one elder by 2061 (i.e., there will be more elderly to care for, per working-aged person).<sup>39</sup> The current available caregiving workforce of each family with a disabled member is only 0.4 persons,<sup>40</sup> and so the work overload of informal caregivers at home is poised to worsen with the progress of population aging.

C. "LONG-ILL FATHER YIELDS NO FILIAL SON":  
INFORMAL CAREGIVERS' OVERLOAD

Another challenge to elder care as a private obligation concerns the capacity of informal caregivers. The filial piety tradition in the Taiwanese society shapes the culture of caregiving by children and offspring for their seniors as a moral obligation. However, informal caregivers suffer both material and non-material losses from the relentless and unpaid task driven by morality and love. Informal caregivers are mostly women, which reflects the tradition that women are responsible for domestic work. Considering elder care to be the family's duty disproportionately imposes the burden on females, thereby deepening the existing structural inequality.

The US literature has found that informal caregivers in the family suffer great losses, both financially and emotionally. Informal caregivers

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<https://wealth.businessweekly.com.tw/GArticle.aspx?id=ARTL000078882>[<https://perma.cc/V9LV-H5RS>].

<sup>38</sup> Ministry of Health and Welfare, *中華民國 106 年老人狀況調查報告 [Report of the Senior Citizen Condition Survey 2017]* 13, 17 (Sept. 2018), <https://www.mohw.gov.tw/dl-48636-de32ad67-19c8-46d6-b96c-8826f6039fcb.html> [<https://perma.cc/ZZL7-L4FJ>].

<sup>39</sup> *The Coming of a "Super-Aged Society": How Taiwan, the Fastest Ageing Population, Is Responding*, SOC. ENTER. INSIGHT (June 2, 2017), <https://en.seinsights.asia/2017/06/12/the-coming-of-a-super-aged-society-how-taiwan-the-fastest-ageing-population-is-responding/> [<https://perma.cc/EH5X-UKD5>].

<sup>40</sup> Chu Hsia-Lei, *supra* note 32.

are often faced with lost income due to time and energy spent on care.<sup>41</sup> They also bear non-financial costs, such as decreased health status, less time for social interactions and recreation, and loss of self-esteem.<sup>42</sup> While caregiving by family members seems to reduce social welfare costs and save family expenses, the cost is actually transferred to the informal caregivers. There is also a gender disparity among informal caregivers. About 75% of US informal caregivers are female, and they contribute 50% more time to providing care than males do.<sup>43</sup> Females unfairly shoulder the burden of elder care if it is considered a family obligation.

Similar issues exist among informal caregivers in Taiwan, while slight differences can be found against the cultural background of filial piety. According to a 2017 survey conducted by the Ministry of Health and Welfare of Taiwan on 469 main family caregivers for elders, most respondents were children, spouses, or co-residents.<sup>44</sup> Respondents usually provided care lasting for 7.8 years, while their daily working hours averaged 11.06.<sup>45</sup> The number reveals that informal caregivers are serving a long-term job that requires to regularly work overtime. The survey also found that many main family caregivers suffered losses of income, health, and social interactions. Almost 70% of respondents were full-time caregivers; 9.38% quit their original job for caregiving; 32.21% among those who worked at the same time felt their work was affected by caregiving.<sup>46</sup> Moreover, 42.86% of respondents suffered health problems during caregiving;<sup>47</sup> 27.29% considered their social relationships were negatively affected by caregiving.<sup>48</sup> There was also a gender disparity, in

<sup>41</sup> MARTHA B. HOLSTEIN, *Long-Term Care, Feminism, and an Ethics of Solidarity*, in CHALLENGES OF AN AGING SOCIETY 156, 162 (Rachel A. Pruchno & Michael A. Smyer eds., 2007); Allison K. Hoffman, *The Reverberating Risk for Long-Term Care*, 15 YALE J. HEALTH POL'Y L. & ETHICS 57, 61–62 (2015) [hereinafter *Reverberating*]; *Caregiving*, FAMILY CAREGIVER ALL. (2009), <https://www.caregiver.org/caregiving> [<https://perma.cc/PVN5-A5C9>] [hereinafter *Caregiving*].

<sup>42</sup> HOLSTEIN, *supra* note 41; *Reverberating*, *supra* note 41, at 62; *Caregiving*, *supra* note 41.

<sup>43</sup> *Caregiver Statistics: Demographic*, FAMILY CAREGIVER ALL. (Apr. 17, 2019), <https://www.caregiver.org/caregiver-statistics-demographics> [<https://perma.cc/LS6M-3T9N>] [hereinafter *Caregiving Statistics*].

<sup>44</sup> Ministry of Health and Welfare, *106 年老人狀況調查: 主要家庭照顧者調查報告* [Report of the Senior Citizen Condition Survey 2017: Surveys on Main Family Caregivers], at 1, <https://www.mohw.gov.tw/dl-48637-569c9e80-81f7-4c5f-a48c-6547e86543e8.html> [<https://perma.cc/SFV5-QTFF>] [hereinafter *Surveys on Main Family Caregivers*].

<sup>45</sup> *Id.* at 6.

<sup>46</sup> *Id.* at 3–4.

<sup>47</sup> *Id.* at 8.

<sup>48</sup> *Id.* at 11.

that more than 60% of main family caregivers were female.<sup>49</sup> Female caregivers are more likely to resign from their jobs for caregiving than males.<sup>50</sup> They are also more likely to suffer physical health issues and emotional stress from caregiving than males.<sup>51</sup> Some characteristics of Taiwanese main family caregivers may reflect a sense of family solidarity based on the filial piety tradition. For instance, most main family caregivers live with the care recipients<sup>52</sup> and rely on support from other family members,<sup>53</sup> only very few of them consider that caregiving worsens their familial relationships.<sup>54</sup>

Nevertheless, the filial piety tradition also imposes a particularly strong sense of pressure on informal caregivers. There have been several caregiver-related tragedies in the past few years in Taiwan. In January 2019, the media reported that a middle-aged man committed suicide after killing his 80-year-old father, leaving a suicide note saying, “*I took Father away and I take all responsibility.*”<sup>55</sup> This is not an isolated incident. Statistics show that since June 2016, there has been almost one caregiver suicide or homicide each month, and the number has been going up annually since 2013.<sup>56</sup> Within the filial piety tradition, the children owe an everlasting moral debt to their parents and seniors in the family. Therefore, informal caregivers usually have a sense of responsibility that can be so strong that they contribute their entire lives to fulfill the duty. A report described long-term care as the “exchange of a life for a life” between parents and children, which vividly reveals the culture of devoted caregiving as well as the reality of the financial, physical, and emotional overload of informal caregivers.<sup>57</sup> The old Chinese saying, “Long-ill father yields no filial son,” may capture the deep helplessness and frustration of modern informal caregivers who remain morally condemned in spite of the fact that they have carried out the obligation for a long time. The filial piety tradition reflects the morality that enhances

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<sup>49</sup> *Id.* at 1.

<sup>50</sup> *Id.* at 3.

<sup>51</sup> *Id.* at 8, 10.

<sup>52</sup> *Id.* at 5.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 10.

<sup>55</sup> Chen-fen Chen, *Government Must Heed Caregivers*, TAIPEI TIMES (Jan. 27, 2019) (emphasis added), <http://www.taipeitimes.com/News/editorials/archives/2019/01/27/2003708710> [https://perma.cc/5TX9-DG7M].

<sup>56</sup> *Id.*

<sup>57</sup> Liang Yu-Fang, *supra* note 34.

intergenerational reciprocity and consolidates familial relationships. Meanwhile, this tradition can also be overwhelming for many informal caregivers in modern society.

Given the filial piety tradition deeply rooted in Taiwanese society, the legal system mainly deems elder care a family obligation if the elders cannot support themselves. Meanwhile, the Taiwanese Constitution also embraces the welfare state principle in the German jurisprudence; that is, the state has the obligation to protect vulnerable groups and ensure that they equally enjoy a life of human dignity and share in the general prosperity.<sup>58</sup> The government has been making long-term care policies to share the familial burden of elder care. The reforms on the scope of the family's duty of elder care and the notion that the state should share the duty can be found in the law of Taiwan. However, in practice, the division of duty has been unfair; that is, both policies and judicial decisions still assume that the family should be the first responsible for the caregiving of elders.

## II. THE DUTY OF ELDER CARE BY THE FAMILY: FILIAL RESPONSIBILITY LAW

Filial responsibility law requires adult children to provide necessary support for their parents when their parents are unable to do so themselves.<sup>59</sup> The law is on the books in almost thirty US states, but it has rarely been enforced until the last few decades.<sup>60</sup> Supporters of the revival

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<sup>58</sup> The principle, also known as the *social welfare state principle*, can find its legal basis from Article 20(1) and other clauses of the German Constitution. See Roderic O'Gorman, *The Irish "Bail-Out" and Cuts to Social Protection Spending—the Case for a Right to a Subsistence Minimum in EU Law*, 15 GER. L.J. 569, 575 (2014); Anika Klafki, *Legal Harmonization Through Interfederal Cooperation: A Comparison of the Interfederal Harmonization of Law Through Uniform Law Conferences and Executive Intergovernmental Conferences*, 19 GER. L.J. 1437, 1450 (2018). Being influenced by German jurisprudence, the principle has been deemed as a fundamental constitutional principle. See generally Chan Chen-Jug (詹鎮榮), *She Yuan Qiyuan Han Ji Fan Xiaoli (社會國原則起源、內涵及規範效力) [The Origin, Content, and Normative Effects of the Welfare State Principle]*, 41 YUE DAN FA JIAOSHI (月旦法學教室) [TAIWAN JURIST] 32 (2006) (describing the origin, the substances of the welfare state principles in the German jurisprudence and analyzing the normative effects of articles implementing this principle in the Taiwanese Constitution).

<sup>59</sup> Donna Harkness, *What Are Families For? Re-evaluating Return to Filial Responsibility Laws*, 21 ELDER L.J. 305, 321 (2014); Allison Ross, Note, *Taking Care of Our Caregivers: Using Filial Responsibility Laws to Support the Elderly Beyond the Government's Assistance*, 16 ELDER L.J. 167, 168–69 (2008).

<sup>60</sup> Twyla Sketchley & Carter McMillan, *Filial Responsibility: Breaking the Backbone of Today's Modern Long Term Care System*, 26 ST. THOMAS L. REV. 131, 160–63 (2013); Harkness, *supra*

of filial responsibility law consider it a vigorous means to reduce social welfare expenses, while opponents contend the law ignores the new forms of family with declining caregiving capacities and the reality of voluntary caring by informal caregivers.<sup>61</sup> Although some US literature describes a changing history of the children's obligation to support their parents,<sup>62</sup> the filial responsibility law in Taiwan has a strong cultural foundation. However, the tradition and its derivative maintenance obligations of adult children to their parents have been compromised by the rise of other conflicting values, such as children's benefits and intergenerational reciprocity. The filial responsibility law in Taiwan today does impose an absolute duty of elder care on the family. On the other hand, most people take care of their old family members due to moral or other concerns rather than legal obligations. Nevertheless, the law does not address the rewards and the fair division of labor of this most prevalent part of filial caregiving.

#### A. FILIAL RESPONSIBILITY: LAW IN ACTION

The filial responsibility law in Taiwan includes civil and criminal liabilities, both of which have been regularly enforced. The filial responsibility law is based on the filial piety tradition; nevertheless, revisions of the law in 2010 include relief or exemption clauses for children who were abused or neglected by their parents.<sup>63</sup> The 2010 amendments reflect the changing concept of filial piety, where the familial relationship is based on reciprocity rather than hierarchy.

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note 59, at 326; Ross, *supra* note 59, at 173–77; Robert A. Mead, *Getting Stuck with the Bill? Filial Responsibility Statutes, Long-Term Care, Medicaid, and Demographic Pressure*, 302 ELDER L. ADVISORY NL 1 (2016). For instance, in Pennsylvania the filial responsibility law has existed, but it became frequently applied after the case of *Health Care & Retirement Corp. of America v. Pittas*, 46 A.3d 719 (Pa. Super. Ct. 2012) was decided in 2012. See Harkness, *supra* note 59, at 308–09; Mead, *supra*.

<sup>61</sup> See *infra* notes 83, 85 and accompanying text.

<sup>62</sup> The US filial responsibility law can be traced to the colonial era whose measure of poverty was influenced by Elizabethan Poor Law of 16<sup>th</sup> century in England. Forty-five out of fifty states in the US once had filial responsibility laws, but many were repealed as Medicaid became the major focus of poverty relief. See Katherine C. Pearson, *Filial Support Laws in the Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents*, 20 ELDER L.J. 269, 271 (2013). Harkness also pointed out that the California Supreme Court considered no duty of supporting indigent parents by adult children at common law, while the court also recognized the long history of societal customs of this duty. See Harkness, *supra* note 59, at 328 (citing and discussing the case *Swoap v. Super. Ct. of Sacramento Cty.*, 516 P.2d 840 (Cal. 1973)).

<sup>63</sup> See *infra* notes 71–77 and accompanying text.

The Civil Code requires the filial duty among familial relatives. Under the Maintenance Chapter of the Civil Code, there is a mutual obligation to maintain each other among spouses, close blood or marital relatives, and co-residents,<sup>64</sup> among which the maintenance obligation to the closest degree of elder lineal relatives by blood, mostly parents, is prioritized over other personal obligations.<sup>65</sup> The maintenance obligation exists when the obligee “cannot support the living” and is “unable to earn the living.”<sup>66</sup> However, adult children’s obligation to parents is broader than those to others. Parents are entitled to maintenance as long as they “cannot support themselves,” regardless of whether they also fulfill the other criterion of “unable to earn the living.”<sup>67</sup> Moreover, despite the fact that an indigent exemption is granted to an obligor when he can no longer support himself, adult children cannot be exempted from—but can only be relieved of—their maintenance obligations to their parents.<sup>68</sup> This relief-only clause was added to the amendment of the Family Part of the Civil Code in 1985, where the legislators also added a clause explicitly stipulating, “[c]hildren shall be filial to and respect their parents.”<sup>69</sup> The legislators then considered filial piety to be the solution to strengthen social networks and enhance social solidarity in the rapidly changing modern world with increasingly isolated human relations.<sup>70</sup> Resonating with the legalizing of the filial piety tradition, adult children’s maintenance obligations also reflect the traditional assumption that children owe moral debts to their parents. In the words of an old Chinese saying, “parents can do no wrong to their children.”

By contrast, the amendment in 2010 adopted an evolving view of filial piety based on intergenerational reciprocity. A newly added clause, Article 1118-1, Paragraph 1, grants a maintenance obligor the right to ask

<sup>64</sup> Min Fa, Ch’ in Shu Pien (民法—親屬) [Civil Code, Family], art. 1114, FAWUBU FAGUI ZILIAOKU (法務部法規資料庫) (amended 2019) (Taiwan), <https://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?pcode=B0000001> [hereinafter Civil Code].

<sup>65</sup> *Id.* art. 1115, ¶¶ 1–2.

<sup>66</sup> *Id.* art. 1117, ¶ 1. The criterion of “cannot support the living” means that a person cannot sustain himself, while “unable to earn the living” means that a person lacks the ability to work. See Grace Ying-Fang Tsai, *Elderly Maintenance in Taiwan: A Legally Pluralistic Perspective*, 2004 (2) L. SOC. JUST. & GLOBAL DEV. J. (2004), [https://warwick.ac.uk/fac/soc/law/elj/igd/2004\\_2/tsai/](https://warwick.ac.uk/fac/soc/law/elj/igd/2004_2/tsai/) [https://perma.cc/G7KH-D9AE].

<sup>67</sup> Civil Code, *supra* note 64, at art. 1117, ¶ 2.

<sup>68</sup> *Id.* art. 1118, ¶ 2.

<sup>69</sup> *Id.* art. 1084, ¶ 1.

<sup>70</sup> See LAW BANK, *Historical Provisions and Legislative Reasons: Civil Code, Article 1084*, <https://db.lawbank.com.tw/FLAW/FLAWDOC01.aspx?lsid=FL001351&lno=1084> [https://perma.cc/4XUV-2VJ7].

the court to mitigate his obligation when the entitled person (1) has “intentionally maltreated, insulted or committed severe misconduct, physically and spiritually” to the obligor himself or the obligor’s spouse or close relatives or (2) did not fulfill his maintenance obligation to the obligor without justifiable reasons. Paragraph 2 further stipulates that when (1) or (2) reaches a severe degree, the obligor may even ask the court to exempt him from the maintenance obligation. The amendment of Article 1118-1 was proposed by some legislators who found increasing numbers of cases of family abandonment, domestic violence, and domestic sexual assault, among which child abuse by parents made up the majority.<sup>71</sup> Despite the fact that adult children’s maintenance obligations to parents is not necessarily conditional on the quality of parents’ nurturing, legislators regarded it inhumane to impose the obligation on adult children who have suffered abandonment or abuse from parents.<sup>72</sup> Compared to the 1985 amendment endorsing filial piety, the 2010 amendment rather focused on the interests of children.<sup>73</sup> The 2010 amendment recognized that many parents have wronged their children. Therefore, adult children’s filial duty to parents is no longer absolute or unconditional.

There is also criminal liability for abandonment, specifically a maintenance obligor’s failure to perform his legal obligation, stipulated in Article 294 of the Criminal Code. According to the precedents by the Supreme Court of Taiwan, the scope of Article 294 includes noncompliance of maintenance obligations under the civil law.<sup>74</sup> The punishment may be increased by up to one-half on offenses committed by a person against his lineal blood ascendant.<sup>75</sup> An amendment to the

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<sup>71</sup> Lin Hsiu-Hsiung (林秀雄), *Fuyang Yiwu Zhi Jianqing Huo Mianchu* (扶養義務之減輕或免除) [*Relief or Exemption of the Maintenance Obligation*], 181 TAIWAN FAXUE ZAZHI (台灣法學雜誌) [TAIWAN LAW JOURNAL] 115, 115–16 (2011).

<sup>72</sup> *Id.* at 116–17.

<sup>73</sup> *Id.* at 118. Lin further contended that the 2010 amendment assumed “children can do no wrong to their parents,” because the parents cannot ask the court to [relieve] or exempt their maintenance obligation to a minor child based on that they were mistreated by the child, according to Article 1118-1, Paragraph 3. *See id.*

<sup>74</sup> Hsu Tze-Tien (許澤天), *Yiqi Zui Zhi Yanjiu – Dai Liqing Baohu Fayi De Juti Weixian Fan* (遺棄罪之研究—待釐清保護法益的具體危險犯) [*A Study of the Crime of Abandonment: The Unclarified Legally Protected Interests for the Punishment of Concrete Crime of Danger*], 22(2) SOOCHOW FALU XUEBAO (東吳法律學報) [SOOCHOW L. REV.] 1, 6 (2010).

<sup>75</sup> Hsing Fa (中華民國刑法) [Criminal Code of the Republic of China], art. 295, FAWUBU FAGUI ZILIAOKU (法務部法規資料庫) (amended 2019) (Taiwan), <https://law.judicial.gov.tw/LAWENG/FLAW/dat02.aspx?lsid=FL001424> [hereinafter Criminal Code].

Criminal Code in 2010, along with the above-mentioned Civil Code amendment, added Article 294-1 as an exemption clause to the criminal liability.<sup>76</sup> The court may waive punishment to the maintenance obligor if he was assaulted, abused, or abandoned without justifiable reasons in severe circumstances by the entitled person.<sup>77</sup> The amendment shared the same legislative purpose as the Civil Code amendment: to protect children's interests. The 2010 amendment seems to reveal the utilitarian and punitive aspects of the criminal law, that is, compelling parents to fulfill their obligations to children and punishing bad parents.<sup>78</sup> An opponent of the criminal liability contended that penalizing the failure to perform maintenance obligation makes the scope of the abandonment offense overbroad.<sup>79</sup> The abandonment offense was intended to protect the helpless whose lives are endangered; however, simple non-fulfilment of maintenance obligations does not necessarily jeopardize a person's life imminently and thereby departs from the original legislative purpose of making abandonment an offense.<sup>80</sup>

With the society rapidly aging, there seems to be an increasing number of filial responsibility lawsuits in Taiwan. According to a statistic from the Legal Aid Foundation, a major non-governmental group providing legal aid for indigent citizens, the number of maintenance cases has increased in the past few years, from 1,435 in 2011 to 3,164 in 2017.<sup>81</sup> However, the number is affected by complicated structural factors, and it could be linked to the requirements of receiving social welfare benefits.<sup>82</sup>

Some critiques of US filial responsibility laws can also be applied to Taiwan. One critique of US filial responsibility laws points out that many indigent parents are unwilling to sue their children and that forcing

<sup>76</sup> See LAW BANK, *supra* note 70.

<sup>77</sup> Criminal Code, *supra* note 75, art. 294-1.

<sup>78</sup> Huang Yuan-Sheng (黃源盛), *Lixing Zhijian – Cong Gongyang Youque Dao Yiqi Zunqinshu (禮刑之間—從供養有關到遺棄尊親屬)* [Between Li and Xing: From Maintenance Lack to Abandonment of Lineal Ascendant], 23 FAZHI SHI YANJIU (法制史研究) [J. LEGAL HIST. STUD.] 67, 108–09 (2013) (Taiwan).

<sup>79</sup> Hsu Tze-Tien, *supra* note 74, at 37. The author also argued to delete Article 294-1, because the newly added provision, despite providing exemptions, implicitly reinforces precedents that include the failure to perform maintenance obligation into the scope of Article 294. *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Teng Shyue-Ren (鄧學仁), *Laoren Zhi Fuyang Wenti Yu Duice (老人之扶養問題與對策)* [The Issues of Elder Maintenance and Countermeasures], 286 YUEDAN FAXUE (月旦法學) [TAIWAN L. REV.] 74, 75 (2019). The maintenance lawsuits in these statistics include all kinds of lawsuits among family members, but lawsuits in which elder parents are suing adult children is likely to occupy the majority in the rapidly aged society.

<sup>82</sup> See *infra* notes 150–53 and accompanying text.

them to sue would often cause indigent elders to feel afraid, unsafe, or dependent.<sup>83</sup> Enforcement of the filial responsibility law would also ruin familial relationships, because the lawsuit requires disclosure of the family's dirty laundry in order to determine whether the parent has been involved in abuse or neglect that would exempt or relieve a child of his liability.<sup>84</sup> The law is also likely to encourage family members to sue each other, or to incentivize adult children to take defensive measures, such as insulating themselves from the parent, or taking over the parent's life and property.<sup>85</sup> Those disadvantages of the filial responsibility law also apply to Taiwan, especially given its Confucianism culture which endorses a harmonious order and discourages lawsuits. The old Chinese saying, "family shames must not spread abroad," also reflects a culture that disfavors lawsuits among family members. The linkage of social welfare benefits with the filial responsibility law also reveals that the caregiving function of the family has been eroded. Those who are forced to file filial responsibility lawsuits often prefer to receive help from other resources rather than from their family, and the enforcement of the filial responsibility law provides little help to consolidate the family.

To summarize, the filial responsibility law compels adult children to perform the duty of elder care. However, the 2010 amendments have made the previously absolute filial obligations conditional. Moreover, the filial responsibility law simply covers a small part of familial elder care, applying only to legally indigent parents.<sup>86</sup> There are still many elders who are not legally indigent but are still in need of care. As Part I mentioned, most Taiwanese elders rely on family caregiving. These informal caregivers provide support to their elders for moral or emotional reasons, even if they are not legally obliged to do so.

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<sup>83</sup> Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Consideration*, 9 J.L. & POL'Y 709, 728 (2001).

<sup>84</sup> Sketchley & McMillan, *supra* note 60, at 151.

<sup>85</sup> *Id.* at 153–55.

<sup>86</sup> A 2018 statistic shows that the low-income population in Taiwan who are age sixty-five or older is 34,878 persons, while the whole elder population is more than 3 million persons, *see* Statistics Division, 低收入戶人數按款別及年齡別分 [*Persons of Low-Income Families by Class and Age*] (2018 Quarter 1), MINISTRY OF HEALTH AND WELFARE, <https://dep.mohw.gov.tw/DOS/cp-2972-13781-113.html>; Central News Agency, *Taiwan's Aging Index Hits New High*, TAIWAN NEWS (Feb. 11, 2018), <https://www.taiwannews.com.tw/en/news/3361692> [<https://perma.cc/9NR9-PDND>] (indicating that Taiwan has 3.26 million people age sixty-five and over).

B. INVISIBLE CONTRIBUTIONS: FAMILY CAREGIVERS GAIN LITTLE  
COMPENSATION BY LAW

Although the filial responsibility law in Taiwan affirms the filial piety tradition of adult children's maintenance obligations to their parents, the legal system of Taiwan offers filial caregivers little compensation. The lack of recognition of filial caregiving entrenches the unequal domestic division of caregiving work. The legal system implicitly considers filial caregiving to be a moral obligation that should be gratuitous and unpaid. The moral nature of filial caregiving nevertheless depresses informal caregivers and even results in their exploitation.

The lack of compensation for filial caregiving can be found from lawsuits among siblings or maintenance obligors. According to the filial responsibility law, maintenance obligors should share the obligation based on their economic status.<sup>87</sup> However, this law does little to help promote the equality of division of caregiving work in the family, because most filial caregiving is not compelled by the filial responsibility law. A civil court decision serves as an example to reflect the gap between the filial responsibility law and real family caregiving.<sup>88</sup> The petitioner was the younger half-sister of the male respondent who was born by the same mother. The elderly mother was diagnosed with dementia, delusional disorder, and depression, and she began to need intensive medical treatments a year prior to the lawsuit. The petitioner contended that the respondent became unwilling to take care of the mother since the mother became sick. The respondent left the duty of care to the petitioner, refused to let the mother enter his home, and sent all the mother's belongings to the petitioner. The petitioner's claim against the respondent was based on unjust enrichment, arguing that the older brother, who was more financially secure than her, should pay a shared part of the mother's living expense each month and the mother's medical expenses that had been paid by the petitioner. However, the court found that the mother owned property and cash valuing over \$1 million NTD (around \$33,000 USD). Given the mother's property, she was not eligible for the entitlement of maintenance, which requires that she be unable to support herself (i.e., own no property). Neither the brother nor the sister was liable to provide support to the mother. The petitioner argued that the mother needed the

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<sup>87</sup> Civil Code, *supra* note 64, art. 1115, ¶ 3.

<sup>88</sup> Shilin Difang Fayuan, (士林地方法院), 105 Jia Qin Sheng Kang Zi No. 46 (105年度家親聲抗字第46號裁定) (士林地方法院) [Shilin District Court], Minshi (民事) [Civil Division] 2016 (Taiwan).

children's maintenance because she had been mentally incompetent to manage her property to support herself. The court nevertheless denied this argument, because legally, the mother remained a competent person given that no petition for the mother's guardianship had been granted. The court concluded that the petitioner's care of the mother was simply the performance of moral obligations and that an undue enrichment claim against the brother could not stand.

The above case reveals the weakness of the Civil Code with respect to elder care. First, the civil liability of the filial responsibility law only covers necessary living support provided by obligors out of legal obligation, but caregiving is broader than providing necessary support. Other than financial support, caregiving also includes devotions of labor, accompaniment, and affection. The Civil Code only requires minimum material support, while other forms of contributions are overlooked in the law. Secondly, many elders who are not eligible for maintenance entitlements actually need care. The mother in the case was a person who was legally competent and considered able to sustain herself, although she was in fact mentally ill and aged.<sup>89</sup> The care needs of those legally competent people, and the contributions by those responding to the need, are omitted by the Civil Code. Informal caregivers such as the petitioner fill the gap not seen by the law, but the law does not recognize the value of the daughter's efforts. Thirdly, the decision represents an unfair division of caregiving labor. Those who tend to take the burden of caregiving, usually the women, gain no compensation. The court held that the petitioner was performing her *moral obligation*, implying that the petitioner was volunteering. Feminists have criticized the assumption of voluntariness, that is, if the woman is the only person who would be condemned for not giving care, then her caregiving cannot be regarded as an autonomous choice.<sup>90</sup> Long-term care causes informal caregivers great material and non-material costs, but many family caregivers continue to bear the burden compelled by social norms, despite the lack of legal obligation.<sup>91</sup> The Civil Code and the aforementioned case demonstrate the

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<sup>89</sup> See *id.* The decision did not mention the real age of the mother in the decision, but the respondent was of age 62, so it is very likely that the mother was an "old-old" (i.e., an elder over age 75).

<sup>90</sup> HOLSTEIN, *supra* note 41, at 159, 161; Julian J.Z. Polaris, *Personal Networks: Health Coverage Status and the Invisible Burden on Family and Friends*, 39 HARV. J.L. & GENDER 115, 153 (2016).

<sup>91</sup> Allison K. Hoffman, *Reimagining the Risk of Long-Term Care*, 16 YALE J. HEALTH POL'Y, L. & ETHICS 147, 175–76 (2016); Polaris, *supra* note 90, at 152–54.

unfairness of filial caregiving, yet the unfairness is usually disguised under the name of virtue or love.

The Succession Part of the Civil Code also fails to recognize informal caregivers' contributions. One provision stipulates that a person shall forfeit his right to inherit "where he seriously ill-treated or insulted the deceased and has been forbidden to inherit by the deceased."<sup>92</sup> According to a precedent from the Supreme Court of Taiwan, the criterion that someone "seriously ill-treated or insulted the deceased" includes cases in which a person maliciously refuses to perform the obligation of maintenance to the deceased.<sup>93</sup> Following the precedent, the law has been interpreted as a mechanism to enforce filial duty by disqualifying a person's right to inherit.<sup>94</sup> A bill proposed in 2016 also attempted to turn the judicial precedent into a written law.<sup>95</sup> However, scholars criticized that the succession provision does not incentivize adult children to actively take on the burden of caring for parents.<sup>96</sup> Further, informal caregivers usually gain no compensation on succession, despite their contributions to the lives of the deceased. A well-known example is the Constitutional Court decision *J.Y. Interpretation No. 728*.<sup>97</sup> In this case, the daughter-petitioner was not eligible to inherit the ancestor worship guild despite that she had been the main caregiver of the deceased, because according to the guild's charter, only male lineal heirs were eligible to be successors.<sup>98</sup>

<sup>92</sup> Civil Code, *supra* note 64, art. 1145, ¶ 5.

<sup>93</sup> Zuiyao Fayuan (最高法院) [Supreme Court], 74 Tai Shang Zi No. 1870 (74年台上字第1870號判例, Minshi (民事) [Civil Division], Pan Li (判例) [Precedent] 1985) (Taiwan).

<sup>94</sup> Lin Hsiu-Hsiung (林秀雄), *Sangshi Jichengquan Zhidu Zhi Xiuzheng—Minfa Di 1145 Tiao Xiuzheng Caoan Zhi Pingxi* (喪失繼承權制度之修正—民法第1145條修正草案之評析) [*Amendments of the Law of Forfeiture of the Right to Inherit—An Analysis to the Draft Bill of Article 1145 of the Civil Code*], 169 YUEDAN FAXUE JIAOSHI (月旦法學教室) [TAIWAN JURIST] 30, 36–37 (2011); Huang Sieh-Chuen (黃詩淳), *Buxiao Zimu Tiaokuan?—Taiwan Pingdong Difang Fayuan 105 Niandu Jia Su Zi Di 22 Hao Panjue Pingxi* (不孝子女條款?—臺灣屏東地方法院105年度家訴字第22號判決評析) [*A Clause of Unfilial Children? An Analysis to the Taiwan Pingdon District Court 105 Jia Su Zi No. 22*], 56 YUEDAN CAIPAN SHIBAO (月旦裁判時報) [COURT CASE TIMES] 22, 23–24 (2017).

<sup>95</sup> Lin Hsiu-Hsiung, *supra* note 94, at 36–37; Huang Sieh-Chuen, *supra* note 94, at 23–24.

<sup>96</sup> Lin Hsiu-Hsiung, *supra* note 94, at 37 (arguing that the precedent and the draft bill are in conflict, because as long as the legacy left implies that the deceased was able to sustain himself before death, the deceased's children were not legally obliged to furnish maintenance); Huang Sieh-Chuen, *supra* note 94, at 26–28 (arguing that the precedent as well as the draft bill would increase disputes among heirs because an heir might ask the deceased to forbid other heirs).

<sup>97</sup> Judicial Yuan, Interpretation No. 728 [*Qualifications for Successors of Ancestor Worship Guilds Case*], Judicial Yuan Const. Ct. (2015), <http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=728> [https://perma.cc/7YRX-4WJH].

<sup>98</sup> *Id.*

Despite the law governing the ancestor worship guild requires that the successors should not be limited to male offspring and that the successors must include female offspring who fulfill the criteria of succession, the law allows exceptions for a guild's self-governance if the guild was established before the promulgation of the law.<sup>99</sup> Therefore, in this case the guild's charter was allowed to govern even though it disqualified female successors.<sup>100</sup> The Constitutional Court denied the daughter-petitioner's challenge to the constitutionality of the law, which endorsed the validity of an ancestor worship guild's internal regulation, affirming the law as well as the internal regulation based on the freedom of contract.<sup>101</sup> Similar unfairness on succession protected under the name of freedom of contract or freedom of choices can still be seen in many Taiwanese families, where female successors are often disadvantaged,<sup>102</sup> in spite of the fact that female family members may have contributed more to caring for the deceased.

As feminists have pointed out, informal caregivers do not voluntarily choose to take the responsibility nor is their work translated into wages or compensation.<sup>103</sup> Filial caregiving as an unpaid moral obligation reinforces the disadvantages of informal caregivers, because they often have to sacrifice time, work opportunities, and social relationships for caregiving. The filial responsibility law and the succession laws, however, fail to address this unfairness.

### III. THE DUTY OF ELDER CARE BY THE STATE: ELDER CARE LAWS AND POLICY IN TAIWAN

While Taiwanese law mostly assumes the family is responsible for elder care, the state is also obliged to perform the duty. The Constitution of Taiwan requires the state to protect and promote the welfare of elders. There have been welfare laws and policies embodying this state obligation. However, the family is still considered the primary source of caregiving

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Civil Code, *supra* note 64, art. 1141. Po-sheng Chiu & Lin Ko, *More Women than Men Waive Their Right to Inheritance in Taiwan*, FOCUS TAIWAN (Apr. 9, 2017), <http://focustaiwan.tw/news/asoc/201704090014.aspx> [<https://perma.cc/W67L-ELFK>] (describing statistics in 2017 showing that more than half of the people who waived their rights to an inheritance were women, while more than 60% of estate and gift taxpayers were men).

<sup>103</sup> HOLSTEIN, *supra* note 41, at 161; Hoffman, *supra* note 91, at 176; Polaris, *supra* note 90, at 152–54.

in policies and judicial decisions in spite of the fact that the law has promulgated the state's duty of elder care. The state only shares the heavy burden of caregiving in a limited way, assuming that the duty should lie with the family.

#### A. THE DUTY OF ELDER CARE AS A STATE OBLIGATION

##### *I. Constitutional Basis*

There has been a basis in the Taiwanese Constitution mandating the state to take responsibility for long-term care, including clauses as follows. Article 15 stipulates people's right to existence.<sup>104</sup> Article 19 stipulates that citizens' obligation to pay taxes derives from a corresponding state obligation to protect the lives of citizens.<sup>105</sup> According to Article 155 under the Chapter of Fundamental National Policy, the state must implement social insurance programs or provide appropriate assistance and relief to aged, disabled people and victims of unusual calamities.<sup>106</sup> The 10<sup>th</sup> Amendment, Paragraph 7 asserts the state's obligations to guarantee disabled people insurance, medical care, support, and assistance for everyday life, while Paragraph 8 prioritizes the budgets of social relief and assistance and Paragraph 9 protects veterans' welfare.<sup>107</sup> The above constitutional clauses declare the state's obligation as well as authorize it to launch a long-term care system assuring elder welfare.<sup>108</sup>

In addition, Constitutional Court decisions have addressed a constitutional basis for the state's obligation on long-term care. For instance, in its decision in *J.Y. Interpretation* No. 316, the Constitutional Court invalidated an administrative interpretation under the Public Functionaries Insurance Act that limited an insured's entitlement to disability benefits when the insured was in a comatose condition and many

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<sup>104</sup> MINGUO XIANFA art. 15 (1947) (Taiwan).

<sup>105</sup> *Id.* art. 19; Chung Pingcheng (鍾秉正), *Lun Changqi Zhaohu Zhidu Zhi Xianfa Baozhang* (論長期照護制度之憲法保障) [*The Constitutional Protection over the Long-Term Care System*], in SHEHUI FA YU JIBEN QUAN BAOZHANG (社會法與基本權保障) [SOCIAL LAW AND FUNDAMENTAL RIGHTS PROTECTION] 199, 219 (2010).

<sup>106</sup> MINGUO XIANFA art. 155.

<sup>107</sup> MINGUO XIANFA amend. 10, ¶¶ 7–9 (2005).

<sup>108</sup> Chung Pingcheng, *supra* note 105, at 218–23.

medical treatments were no longer necessary.<sup>109</sup> The Constitutional Court also noticed that professional care was more critical for the comatose and required the government to promptly reexamine and rectify the insufficiency of the insurance policy for public servants.<sup>110</sup> Later, in *J.Y. Interpretation No. 701*, the Constitutional Court invalidated a provision of the Income Tax Act stipulating that medical expenses for the long-term care of disabled persons may be tax-deductible only when the expenses are paid to certain hospitals prescribed in the Act.<sup>111</sup> The provision in question excluded many long-term care expenses paid to other lawful healthcare providers from deductions, and was inconsistent with the principle of equality and thereby unconstitutional.<sup>112</sup> The Constitutional Court declared that the government is obliged to take measures assisting those who need long-term care under Article 15 and Article 155 of the Constitution.<sup>113</sup> Heightened scrutiny was applied to examine the different treatment of tax deductions because it affects people's right to existence.<sup>114</sup> The concurring opinion of Justice Chang-fa Lo pointed out that the provision unconstitutionally excluded those expenses on home care, which was as essential as medical treatments to patients.<sup>115</sup> These judicial decisions affirmed and further clarified the foundation of the state's obligation on long-term care in the Constitution.

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<sup>109</sup> Judicial Yuan, Interpretation No. 316 [translated by Dr. C.Y. Huang] Judicial Yuan Const. Ct. (1993), <http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=316> [<https://perma.cc/XS6H-Z8VV>].

<sup>110</sup> *Id.* ¶ 3.

<sup>111</sup> Judicial Yuan Interpretation No. 701 [*Discrimination on Itemized Deductions of Medical Expenses for Long-Term Care*] [translated by Huai-Ching Tsai] Judicial Yuan Const. Ct. (2012), <http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=701> [<https://perma.cc/S6KH-5RRK>].

<sup>112</sup> *Id.* ¶¶ 1, 6, 8.

<sup>113</sup> *Id.* ¶ 4.

<sup>114</sup> *Id.*

<sup>115</sup> Judicial Yuan Interpretation No. 701, Judicial Yuan Const. Ct. (2012) (Grand Justice Chang-Fa Lo, concurring) at ¶¶ 4–5, <https://www.judicial.gov.tw/FYDownload/uploadfile/C100/釋701%20協同意見書-%20羅大法官昌發.pdf> (Justice Lo also considered the right to health, namely the right to access to healthcare equally in this case, as the constitutional basis to invalidate the provision in question). The differences on tax deductions could affect the economic status of those taxpayers who bear heavy burden of long-term care, thereby indirectly affecting the right to access to healthcare by those who need long-term care. *Id.* at ¶¶ 9–10.

## 2. Elder Care Laws and Policies

### a. Elder Care Laws

There have been laws authorizing the government to launch a long-term care program in Taiwan, among which the two most relevant laws for elders are the Senior Citizens Welfare Act (hereinafter the “Senior Welfare Act”) and the Long-Term Care Services Act (hereinafter the “LTC Act”).

The Senior Welfare Act’s original legislative purpose in 1980 was to recognize the traditional ethics of respect for elders and filial piety, which was originally the duty carried out by the family. With the growth of the aging population and the shrinking size of families, families began to need assistance from the government and society with elder care. In response to the emerging need of families, the Senior Welfare Act was enacted based on Article 155 of the Constitution where the state should provide appropriate assistance and relief for elders.<sup>116</sup> A 1997 amendment highlighted the protection of elder rights and dignity by adding expanded contents of welfare and a chapter on elder protection.<sup>117</sup> However, it was not until the large-scale amendment in 2007 that the Senior Welfare Act had provisions guiding the long-term care program.<sup>118</sup> The Senior Welfare Act in force today declares that the principles of elder care service are “holistic care, localized aging, health promotion, postponement and alleviation of disabilities of elders, and diversified continuing care.”<sup>119</sup> Based on these principles and the needs of elders, the local competent authorities should provide home-based, community-based, or institution-

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<sup>116</sup> Chen Jwushang (陳竹上), *Woguo Laoren Baohu Tixi Zhi Fazhan Jiqi Zhengyi Ketu Zhi Tantaoyan* (我國老人保護體系之發展及其爭議課題之探討) [*An Analysis of the Development and Issues of the Elder Protection Systems in Taiwan*], 271 YUEDAN FAXUE (月旦法學) [TAIWAN L. REV.] 137, 138 (2017).

<sup>117</sup> *Id.* at 139.

<sup>118</sup> See LAW BANK, *Historical Provisions and Legislative Reasons: Senior Welfare Act, Article 16*, <https://db.lawbank.com.tw/FLAW/FLAWDOC01.aspx?lsid=FL002543&lno=16> [<https://perma.cc/S5F8-RSBR>] (showing the legislative history and purposes of Article 16 of the Senior Welfare Act amended in 2007).

<sup>119</sup> Laoren Fuli Fa (老人福利法) [Senior Citizens Welfare Act] (promulgated by Ministry of Justice, January 16, 1980, amended December 9, 2015), art. 16, para. 1, FAWUBU FAGUI ZILIAOKU (法務部法規資料庫) (Taiwan), <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=D0050037> [hereinafter Senior Citizens Welfare Act].

based services to elders and set relevant rules of management for the above services.<sup>120</sup>

Another law governing the state's obligation on long-term care is the LTC Act, which was passed in 2015 and became effective in 2017.<sup>121</sup> The legislation is a response to the rapidly aging population and corresponding issues of caregiving.<sup>122</sup> The LTC Act authorizes the central government's competent authority to stipulate the scope of long-term care services, qualifications, and procedure for citizens to apply for long-term care services and to stipulate the proportions of subsidies provided by the central government to the local governments.<sup>123</sup> The central government is obliged to make long-term care development plans or take necessary measures by considering people's needs, regional resources, and cultural diversity, and it should build a regional network of long-term care services to mitigate regional disparities.<sup>124</sup> The central government is also obliged to build an information system that enhances openness and transparency of information of long-term care services.<sup>125</sup>

There have been debates on the framework of the long-term care program, specifically on whether the program should be financed by tax revenues or social insurance premiums. Former President Ma Ying-jeou and the then-ruling party Kuomintang considered a social insurance system similar to the current National Health Insurance and proposed a draft bill along that line in 2015, the Long-Term Care Insurance Act.<sup>126</sup> Some agreed on the advantages of a social insurance system, regarding it as financially sustainable with steady resources to improve the quality of services.<sup>127</sup> However, Tsai Ing-wen of the Democratic Progress Party,

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<sup>120</sup> *Id.* ¶ 2.

<sup>121</sup> Wendy Zeldin, *Taiwan: Amendment of Long-Term Care Act*, LIBR. OF CONG.: GLOB. LEGAL MONITOR (Mar. 23, 2017), <https://www.loc.gov/law/foreign-news/article/taiwan-amendment-of-long-term-care-act/> [<https://perma.cc/KCJ9-A2VC>]. Timothy Ferry, *Long-Term Care for Taiwan's Elderly*, TAIWAN BUS. TOPICS (Mar. 10, 2017), <https://topics.amcham.com.tw/2017/03/caring-taiwans-elderly/> [<https://perma.cc/MCL7-ZHED>].

<sup>122</sup> Ferry, *supra* note 121.

<sup>123</sup> Changqi Zhaogu Fuwu Fa (長期照顧服務法) [Long-Term Care Services Act], art. 8, FAWUBU FAGUI ZILIAOKU (法務部法規資料庫) (amended 2017) (Taiwan), <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=L0070040> [hereinafter LTC Act].

<sup>124</sup> *Id.* art. 14.

<sup>125</sup> *Id.* art. 16.

<sup>126</sup> Ferry, *supra* note 121; Matthew Fulco, *Taiwan Primes for Old Age Apocalypse with Long-Term Care Plan*, THE NEWS LENS (Oct. 16, 2018), <https://international.thenewslens.com/article/106124> [<https://perma.cc/D94V-XL8A>].

<sup>127</sup> Ferry, *supra* note 121; Fulco, *supra* note 126.

inaugurated in 2016, determined the long-term care program to be a tax-based system.<sup>128</sup> The Tsai Administration contended that a tax-based system would facilitate the redistribution of wealth and would better fulfill most people's needs.<sup>129</sup> The LTC Act promulgates a special fund for long-term care services, whose financial sources include increased taxes on estates and gifts, tobacco, and alcohol; governmental budgets; welfare and health surcharges on tobacco; donations; and others.<sup>130</sup> Although the LTC Act has been described as a milestone in policy responding to an aging society, it does not provide a concrete framework of a long-term care system but instead delegates the task of shaping the program to the government.<sup>131</sup>

#### b. Elder Care Policies: Long-Term Care Programs Taking a Community-Based Approach

The long-term care program in Taiwan started earlier than the LTC Act. The Senior Welfare Act amended in 2007 has authorized the government to subsidize or provide long-term care services.<sup>132</sup> The National Ten-Year Long-Term Care Plan (Long-Term Care Plan 1.0, hereinafter "Plan 1.0") was proposed in 2007, and its purpose was to create a universal, quality, community-based long-term care system.<sup>133</sup> Plan 1.0 provided eight categories of services, mainly home or community care related, for elderly people with functional limitations or people with

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<sup>128</sup> Ferry, *supra* note 121; Fulco, *supra* note 126.

<sup>129</sup> See also Ferry, *supra* note 121, at 18, for a discussion of financing options considered to fund the Long-Term Care Act 2.0; Fulco, *supra* note 126, at 17.

<sup>130</sup> LTC Act, *supra* note 123, arts. 21–41. The Act passed in 2015 did not include taxes on estate and gift and taxes on tobacco and alcohol as the financial sources. The 2015 Act required the government to budget \$1.2 billion NTD (around \$386 million USD) to finance the long-term care service fund in five years. Given governmental financial difficulties, the Act was revised again in 2017 to expand the financial sources for long-term care programs. See Zeldin, *supra* note 121; LawBank, *Long-Term Care Law*, <https://db.lawbank.com.tw/FLAW/FLAWDOC01.aspx?lsid=FL077101&lno=15> [<https://perma.cc/5AHU-U246>] (showing the legislative history and purposes of Article 15 of the LTC Act as amended in 2017).

<sup>131</sup> The scope of the LTC Act is actually not limited to the governmental long-term care program. It also provides regulation over workforces, institutions, and other aspects of long-term care services, in both public and private sectors. See LTC Act, *supra* note 123, chs. 3–4.

<sup>132</sup> See *supra* notes 118–20 and accompanying text.

<sup>133</sup> Hsiu-Hung Wang & Shwn-Feng Tsay, *Elderly and Long-Term Care Trends and Policy in Taiwan: Challenges and Opportunities for Health Care Professionals*, 28 KAOHSIUNG J. MED. SCI. 465, 466 (2012).

disabilities.<sup>134</sup> Later in 2016, the government approved the Long-Term Care Plan 2.0 (“Plan 2.0”), which expanded the elderly and disabled group eligible for applying for services and increased the categories of services to seventeen.<sup>135</sup> An essential part of Plan 2.0 is to construct a comprehensive network that integrates long-term care services with medical care and other community-based support services.<sup>136</sup> Service sites are divided into three levels. Tier A service sites are community-integrated service centers that coordinate care service resources and establish a localized delivery system. Tier B service sites are combined service centers that are responsible for increasing the community’s capacity and the diversity of care services provided. Tier C service sites are long-term care stations around the blocks that provide respite services and preventive health programs in the neighborhood.<sup>137</sup>

It is worth noting that both Plan 1.0 and 2.0, following the concept of aging in place in the Senior Welfare Act, mainly offer services of home or community care, rather than institutional care. The focus of community-based care also resonates with the assumption of the family as the primary source of elder care, that is, the family should take the major responsibility of care while the governmental elder care services are only supportive and cover a limited part of the need of caregiving. A critique of the community-based approach also mentioned that the burden of caregiving remained disproportionately placed on family caregivers, namely women.<sup>138</sup> Moreover, despite the fact that the long-term care program was launched in 2007 and has been in place for over 10 years, most Taiwanese elders and families have not utilized the services. A governmental survey conducted in 2016 also found that although 83% of respondents had heard about the long-term care program, 54.9% of respondents still completely relied upon their family members when they needed long-term care.<sup>139</sup> The governmental statistics in 2017 also found that only 21.75% of respondents who were main family caregivers had used the long-term care

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<sup>134</sup> *Id.*; Pau-Ching Lu, *Long-Term Care 2.0 in Taiwan - Respond to An Aging Society*, MINISTRY OF HEALTH & WELFARE (Aug. 2017), at 10, 12, <https://www.mohw.gov.tw/dl-42432-61129c17-ed43-4c84-a471-0482742450d7.html> [<https://perma.cc/F8BG-FZMWJ>].

<sup>135</sup> Pau-Ching Lu, *supra* note 134, at 10, 12.

<sup>136</sup> *Id.* at 13.

<sup>137</sup> *Id.*; Ferry, *supra* note 121, at 15–16.

<sup>138</sup> Chung Ping-cheng, *supra* note 107, at 228.

<sup>139</sup> 衛福部公布 105 年長期照顧電話民調結果 [Ministry of Health and Welfare Publishes Results of Telephone Survey on Long-Term Care], MINISTRY OF HEALTH & WELFARE (May 13, 2016), <https://www.mohw.gov.tw/cp-2627-19120-1.html> [<https://perma.cc/GX24-GP9A>].

service in the past year, while many of respondents considered economic factors and geographic distance problems hindering their access to the services.<sup>140</sup> The number reveals that the coverage of the long-term programs is limited, while informal caregivers in the family carry out most of the elder care duty.

#### B. SOCIAL WELFARE AS SUPPLEMENTARY

The social welfare system, in addition to the long-term care programs, also provides aid for elders, as a response to the call that the state should share the responsibility of elder care. Nevertheless, the assumption that the family should take the primary duty of care prevails in the legal system, where the social welfare system tends to maintain a supplementary role.

The interpretation of the Senior Welfare Act can serve as a significant example. Article 41, Paragraph 1 provides: “[s]hould the elder encounter difficulty or danger to life or health due to the inadvertence, mistreatment or desertion of their inferior lineal relatives by blood or contractual supporters,” the local government should provide short-term protection and settlement.<sup>141</sup> Paragraph 3 provides that the local government should ask those maintenance obligors in Paragraph 1 to reimburse the expenses for elderly protection and settlement that have been paid by the government.<sup>142</sup> However, the application of law becomes complicated when the maintenance obligors have been relieved of or exempted from their obligations.

In a decision delivered by the Supreme Administrative Court (“SAC”),<sup>143</sup> the plaintiff-appellant was the son of an elder who was homeless and had been placed in an institution for two months by the local government. The appellant was asked to reimburse the expenses totaling \$37,450 NTD, but in his defense, he claimed that his obligation of maintenance had been reduced to \$3,000 NTD each month by the civil court according to Article 1118-1 of the Civil Code. The reduction was due to the fact that his father had not performed his obligation to raise him and had in fact abused him. Nevertheless, the SAC rejected the appellant’s defense, upholding the local government’s claim of reimbursement to the

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<sup>140</sup> *Surveys on Main Family Caregivers*, *supra* note 44, at 14–17.

<sup>141</sup> Senior Citizens Welfare Act, *supra* note 119, art. 41.

<sup>142</sup> *Id.* ¶ 3.

<sup>143</sup> Zuigao Xingzheng Fayuan (最高行政法院) [Supreme Administrative Court], Xingzheng (行政) [Administrative Division], 101 Pan Zi No. 562 (101 年度判字第 562 號判決) (2012) (Taiwan).

appellant. The SAC held that the governmental claim of reimbursement is a public law claim based on the Senior Welfare Act, not a subrogation claim based on the elder's maintenance entitlement against his adult children under the Civil Code. The SAC then cited the legislative purpose of the Senior Welfare Act in the amendment of 2007, which pointed out that in developed countries, social welfare has been a mechanism to mutually share social risks as well as a basic entitlement owned by citizens rather than a program of charity. Article 41 is the measure of social risk sharing taken by the legislature in order to reach the purpose of protecting elders' dignity and health. The appellant's maintenance obligation to his father remained because the obligation was only partly relieved by the civil court. Therefore, the appellant, as the obligor, was still responsible for reimbursing the expenses of settlement.<sup>144</sup>

The SAC's decision revealed the complexity of sharing the duty of care between the state and the family. Distinguishing a public law claim from a private law claim of the maintenance entitlement implies that the court considers that the family should take the primary obligation of elder care<sup>145</sup> regardless of whether the family members have any civil liability to the elder.<sup>146</sup> The Senior Welfare Act promulgates the state's duty to protect elders, where Article 41 provides the state's responsibility to protect and settle elders when their life or health is in danger. Under Article

<sup>144</sup> *Id.*, the SAC's decision also rendered that the appellant need only reimburse according to the portion of his maintenance obligation, given that there are still other maintenance obligors (the appellant's siblings).

<sup>145</sup> Liang Che-wei (梁哲璋), *Laofu Fa Di 41 Tiao Zhaohu Laoren Feiyong Changhai Qingqiu Quan Zhi Dingxing Jiqi Yu Minfa Fuyang Yiwu Jianqing Zhi Quanxi --Zuigao Hangzheng Fayuan 101 Niandu Pan Zi Di 562 Hao Panjue Pingxi* (老福法第 41 條照護老人費用償還請求權之定性及其與民法扶養義務減輕之關係—最高行政法院 101 年度判字第 562 號判決評析) (*Defining the Nature of the Claim for Reimbursing Expenses of Elder Protection of Article 41 of the Senior Citizens Welfare Act and Its Relations with the Relief of the Maintenance Obligation of the Civil Code—An Analysis of Zuigao Xingzheng Fayuan 101Pan Zi No. 562*), 66 YUEDAN CAIPAN SHIBAO (月旦裁判時報) [COURT CASE TIMES] 17, 22–23 (2017).

<sup>146</sup> Another critique considered that the state may ask for reimbursement only when the perils of the elder resulted from the obligor's abuses or other misconducts, according to Article 41, Paragraph 1. However, in this case the elder's need of settlement was not caused by the obligor and the SAC wrongly applied Article 41. Sun Naiyi (孫迺翊), *Minfa Fuyang Yiwu Yu Laoren Fuli Fa Di 41 Tiao Baohu Anzhi Feiyong Changhai Zhi Shiyong Wenti --Jianping Zuigao Hangzheng Fayuan 101 Niandu Pan Zi Di 562 Hao Panjue* (民法扶養義務與老人福利法第 41 條保護安置費用償還之適用問題—簡評最高行政法院 101 年度判字第 562 號判決) (*Issues Regarding the Application of the Maintenance Obligation of the Civil Code and the Reimbursement of Elder Protection or Settlement Expenses of Article 41 of the Senior Citizens Welfare Act—A Brief Analysis of Zuigao Xingzheng Fayuan 101 Pan Zi No. 562*), 66 YUEDAN CAIPAN SHIBAO (月旦裁判時報) [COURT CASE TIMES] 5, 14–16 (2017).

41, the state's duty here is to assist elders in emergency, not to force maintenance obligors to fulfill their duty.<sup>147</sup> The SAC's decision nevertheless interpreted the state's duty to protect endangered elders narrowly, assuming that the duty should be referred back to the family.

Another example showing that the state stays supplementary and prioritizes the family's responsibility is the practice of the Public Assistance Act. Article 5, Paragraph 3, Subparagraph 9 (known as "Clause 539") stipulates that when calculating the applicant's household income, a household member can be excluded when the member has failed to carry out the obligation due to special reasons and has consequently caused the applicant to live in hardship. In addition, the exclusion is suggested by the local competent authority that has reviewed and evaluated the entire case in the best interest of the applicant.<sup>148</sup> Article 5, Paragraph 4 also provides that the local competent authority should assist the applicant with receiving alimony from the person who fails to carry out the maintenance obligation. Clause 539 intends to enhance substantive assistance in poor households, especially for elders who are not connected with their adult children.<sup>149</sup> Nevertheless, in practice, the local competent authority usually hesitates to apply Clause 539; instead, it requires and assists elders to file filial responsibility lawsuits against their adult children.<sup>150</sup> Clause 539 applies only after the court has ordered that adult children be relieved of or exempt from the obligation by the Civil Code.<sup>151</sup> As a result, the application for public assistance becomes a major cause of filial responsibility lawsuits, where elders are compelled to file cases against

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<sup>147</sup> Liang Che-wei, *supra* note 145, at 32.

<sup>148</sup> See Article 5 of the Public Assistance Act, stipulating the scope of household members when calculating a household's income, which is key to the eligibility of receiving subsidies or welfare under this Act. Article 5, Paragraph 3 provides: "Any household members listed above shall be excluded from the calculation if one or more of the following applies: . . . 9. In the case where individuals who have failed to carry out the obligation due to special reasons, and has consequently caused the applicant to live in hardship, the entire case must be reviewed and evaluated by the municipality or county (city) competent authority. Usually, it is not suggested to be listed in the calculation." Public Assistance Act, art. 5 FAWUBU FAGUI ZILIAOKU (1980) (amended 2015) (Taiwan).

<sup>149</sup> Chen Bo-Ren (陳柏仁), *Min Fa Di 1118 Tiao Zhi 1Yu Laoqin Fuyang Zhi Sifa Shizheng Yanjiu* (民法第 1118 條之 1 於老親扶養之司法實證研究) [An Analysis of Court Cases Regarding Civil Code Article 1118-1 in Taiwan: Judging Children's Maintenance Obligation to Aged Parents] 105, 108 (Nov. 2013) (Master's Thesis, National Taiwan University), <https://hdl.handle.net/11296/xmw83j> [<https://perma.cc/J3LW-T5B7>].

<sup>150</sup> *Id.* at 138; Teng Shyue-Ren, *supra* note 81, at 75.

<sup>151</sup> Chen Bo-Ren, *supra* note 149, at 138; Teng Shyue-Ren, *supra* note 81, at 75.

their adult children in order to qualify for public assistance.<sup>152</sup> Research also finds that in many of these filial responsibility lawsuits, the elder plaintiff is not enthusiastic about enforcing his entitlement to maintenance from the adult children, responding that they “have nothing to say” in response to adult children’s defenses of past abuses or abandonment.<sup>153</sup> The practice of Clause 539 reveals that the administrative sector tends to let the social welfare system stay in a supplementary role to the family’s duty, despite the fact that the Public Assistance Act has granted the administrative sector discretion to take the duty without resorting to the family beforehand.

### C. THE DISPARITY BETWEEN LAW AND PRACTICE

From the above development of Taiwanese law, a trend can be found that the Constitution, Constitutional Court decisions, and laws have declared the state’s obligation to share the burden of caregiving with the family. However, in practice, the law has been interpreted to keep the state in a supplementary role to the family rather than an active role before the family. Despite the principle of the welfare state in the Constitution, the long-term care programs are community-based, providing support and services designed upon the existence of caregivers in the family. Article 41 of the Senior Welfare Act was interpreted by the court narrowly, in that the adult child was required to reimburse his elderly father’s expenses regardless of the scope of his civil liability of maintenance, assuming that the child was responsible for his father. The competent authority hesitated to grant benefits to the elderly applicant who had been disconnected from his adult children, even though Clause 539 of the Public Assistance Act authorizes the competent authority to do so. The self-restraint of the competent authority on enforcing Clause 539 also keeps the state in a supplementary role to the family in terms of elder care.

There are several reasons that may support the state’s supplementary role but have to be reexamined. One is the tradition of filial piety, where most elders expect care from their children and offspring. However, the amendments of the filial responsibility law have shown the revision of the tradition, whereby adult children no longer bear an absolute duty to their elderly parents. Meanwhile, filial piety is so deeply rooted in the Taiwanese culture and so essential to our morality that people support

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<sup>152</sup> Teng Shyue-Ren, *supra* note 81, at 75.

<sup>153</sup> *Id.* at 78.

their elderly family members even when no legal obligation exists. The state, therefore, should take an active role to help its people realize human dignity and pursue happiness.

The practice of the state's supplementary role can be supported by the jurisprudence of the principle of subsidiarity. However, the application of the principle should be reexamined when many families' elder care becomes dysfunctional. Originating from the natural law tradition and Roman Catholic social teachings, the principle of subsidiarity considers that the state provides aid to individuals or small social groups only when these small units cannot cope on their own; otherwise, the state should not interfere with individual or social activities.<sup>154</sup> The underlying rationale of this principle is cooperation between the state and society, whereby people are linked through the communities or institutions to society so that people have greater freedom, while the state serves to provide necessary conditions for individuals to achieve independence.<sup>155</sup> The principle endorses governance by the smallest and least centralized competent authority;<sup>156</sup> in the field of social welfare, that is the family. The principle of subsidiarity has been prevalent in many fields of European law,<sup>157</sup> which has influenced the law of Taiwan.<sup>158</sup> The above-mentioned practices seem to be consistent with the principle of subsidiarity by prioritizing the function of families; nevertheless, these practices ignore the fact that the family could be dysfunctional. The number of elderly people living alone with little support from family members has been increasing.<sup>159</sup> Further, the strong pressure of long-term care has become a commonly recognized fact in the modern family, while many intra-familial tragedies are related with the strain of providing long-term care

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<sup>154</sup> Jessica Dixon Weaver, *Beyond Child Welfare—Theories on Child Homelessness*, 21 WASH. & LEE J.C.R. & SOC. JUST. 17, 43 (2014).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 42–43.

<sup>157</sup> See generally Gabriël A. Moens & John Trone, *The Principle of Subsidiarity in EU Judicial and Legislative Practice: Panacea or Placebo?*, 41 J. LEGIS. 65 (2015) (analyzing the principle's application at the level of European Union by both the judicial and the legislative sectors).

<sup>158</sup> See, e.g., Sun Naiyi, *supra* note 146, at 9; Chung Ping-cheng (鍾秉正), *Shehui Fuli Zhi Xianfa Baozhang — Jianlun Xiangguan Xianfa Jieshi* (社會福利之憲法保障—兼論相關憲法解釋) [*Constitutional Protection for Social Welfare—And A Review of Concerning Constitutional Court Decisions*] in SHEHUI FA YU JIBEN QUAN BAOZHANG (社會法與基本權保障) [SOCIAL LAW AND FUNDAMENTAL RIGHTS PROTECTION] 1, 13 (2010).

<sup>159</sup> Chin-feng Su & Jason Pan, *Charity Highlights Plight of Elderly People Living Alone*, TAIPEI TIMES (Dec. 8, 2012), <http://www.taipetimes.com/News/taiwan/archives/2012/12/08/2003549659> [https://perma.cc/82HT-M4F5].

for elders.<sup>160</sup> Therefore, state intervention to aid the elderly is still necessary even under the principle of subsidiarity.

The state's hesitation to intervene could also be attributed to limited budgets and cost reductions. The National Health Insurance and pension funds have faced deficits and the risk of bankruptcy with the aging population.<sup>161</sup> The long-term care program has also encountered the challenge of financial sustainability.<sup>162</sup> However, the SAC's decision and Clause 539 of the Public Assistance Act both involve poor elders whose life or health is endangered. The number of similar cases is not so overwhelming that it could imperil the welfare system. In addition, cost reduction means transferring costs to the private sector as well as informal caregivers, which amplifies structural inequality. Informal caregivers bear great economic, physical, and mental costs. They are also vulnerable, socially isolated, politically powerless, and their voices are seldom heard.<sup>163</sup> Cost reductions cannot simply justify the unfair cost transfers to informal caregivers and the irresponsibility of the state in the matter of elder care.

#### **IV. THE DUTY OF ELDER CARE BY THE WHOLE COMMUNITY: SHARING THE BURDEN WITH INFORMAL CAREGIVERS**

The meaning of caregiving and the allocation of the duty of elder care have to be reconsidered. Taiwanese law mandates that the state share the duty of elder care, but the assumption that the family should be the primary source for elder care prevails. There should be ethical and policy discussions on the meaning of caregiving so that the practice of prioritizing the family obligation can be reconsidered. This article argues that caregiving should be a collective responsibility shared by the whole community and that the state therefore is obliged to take active measures to share the burden with the family rather than maintaining a supplementary role. In addition, informal caregivers should be rewarded

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<sup>160</sup> See *supra* notes 55–57 and accompanying text.

<sup>161</sup> See Tim Ferry, *Will Healthcare Bankrupt Taiwan?* THE NEWS LENS (Mar. 13, 2017), <https://international.thenewslens.com/article/63425> [<https://perma.cc/DSM9-4USG>] (indicating experts predicting that the national health insurance will turn into a deficit after 2020); *Pension System in Taiwan*, PENSION FUNDS ONLINE, <https://www.pensionfundsonline.co.uk/content/country-profiles/taiwan> [<https://perma.cc/7FRR-HTJ7>] (indicating that the Taiwanese government introduced reforms to tackle the bankruptcy crisis with the military pension fund, teachers' and labor insurance systems, and the civil servants' pension scheme).

<sup>162</sup> Ferry, *supra* note 121; Fulco, *supra* note 126.

<sup>163</sup> HOLSTEIN, *supra* note 41, at 163.

and empowered, given that through their caregiving, they are not only fulfilling their individual moral obligations, but also contributing to the public good.

#### A. CAREGIVING AS A COLLECTIVE RESPONSIBILITY

##### 1. Ethical Analysis of Caregiving

There have been ethical analyses sharing the idea that caregiving is not simply an individual obligation, but a collective responsibility that everyone shares. According to feminism, caregiving is a public responsibility or a public good, and therefore, the state should support informal caregivers because of their contribution to the commons.<sup>164</sup> The feminist perspective considers that dependency is inevitable for each person at a certain stage of human life, and correspondingly, caregiving is the duty of everyone.<sup>165</sup> Caregiving also invisibly subsidizes all of us; that is, social activities work well with the support of caregivers, while caregivers consume their time, energy, and resources but gain few rewards.<sup>166</sup> Further, the work of caregiving has been unfairly imposed on women and the poor who do not have a choice.<sup>167</sup>

By criticizing the structural unfairness that devalues caregiving, feminism calls for a collective response to provide caregivers public resources. The works of caregiving should be shared by both men and women.<sup>168</sup> Taking this feminist view, caregiving should be a responsibility shared by the community with institutional support rather than simply considered a private obligation.

Medical ethicist Arthur Kleinman proposed the morality of caregiving, which resonates with the feminist view that caregiving should be a shared responsibility. Kleinman likened the meaning of caregiving to that of humanity; that is, caregiving is so fundamental that it is what makes a person human.<sup>169</sup> Kleinman described the experience of taking care of

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<sup>164</sup> Hoffman, *supra* note 91, at 154, 172–73.

<sup>165</sup> HOLSTEIN, *supra* note 41, at 167.

<sup>166</sup> *Id.* at 167–68.

<sup>167</sup> *Id.* at 168.

<sup>168</sup> *Id.* at 169.

<sup>169</sup> Arthur Kleinman, *Caregiving: The Odyssey of Becoming More Human*, 373 THE LANCET 292, 293 (2009) [hereinafter *Odyssey*]; Arthur Kleinman, *Caregiving as Moral Experience*, 380 THE LANCET 1550, 1551 (2012) [hereinafter *Moral Experience*].

his wife, who had been the main caregiver of other family members and had become a care receiver as a patient with dementia.<sup>170</sup> The experience was what gave him and other family caregivers a sense of love, solidarity, and shared awareness of human suffering and limitations.<sup>171</sup> Caregiving stands on a reciprocity with morality, emotional sensibility, and social capital of human relationships that is different from the reciprocity of financial exchanges.<sup>172</sup> In Kleinman's view, caregiving is so central to humanity that everyone should practice and experience it.<sup>173</sup> Based on this view, caregiving can be seen as a basic individual need, and the state should provide the conditions necessary for each individual to practice this essential part of humanity. The state's support for caregiving serves as the foundation for each person to realize human dignity.

Some scholars have also taken the perspective of sharing social risk to justify the notion that the responsibility of caregiving should be collectively shared. Becoming a caregiver is a social risk independent from becoming a care recipient, but it has not been seriously considered by the healthcare or other social security systems. Julian Polaris argued that the US health policy discourses have overlooked the interests of family and friends; that is, a person can be severely affected by the health status of another person in his personal network.<sup>174</sup> Besides care recipients whose interests have been addressed by health coverage institutions, caregivers should also have independent interests.<sup>175</sup> Polaris found that even without legal obligations, personal networks usually choose to care, which is driven by social pressure, affection, or the lack of public support.<sup>176</sup> These caregivers bear the heavy burden that would have otherwise been taken by the state.<sup>177</sup> Polaris's argument supports the necessity for public policy to share the burden of becoming a caregiver, especially as it is an unchosen duty for many. Allison K. Hoffman also described people's responsibility to provide long-term care for loved ones as a social risk, which she named the "next-friend risk."<sup>178</sup> Hoffman contended that the next-friend risk

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<sup>170</sup> *Odyssey*, *supra* note 169, at 292–93.

<sup>171</sup> *Id.* at 293.

<sup>172</sup> *Moral Experience*, *supra* note 169, at 1551.

<sup>173</sup> *Odyssey*, *supra* note 169, at 293; *Moral Experience*, *supra* note 169, at 1551–52.

<sup>174</sup> Polaris, *supra* note 90, at 139–45.

<sup>175</sup> *Id.* at 118–21.

<sup>176</sup> *Id.* at 152–53.

<sup>177</sup> *Id.* at 154–55.

<sup>178</sup> *Reverberating*, *supra* note 41, at 58; Hoffman, *supra* note 91, at 152–54.

shares similar attributes with what we consider a serious social risk—the next-friend risk is common, in that anyone could end up responsible for taking care of others.<sup>179</sup> Despite being emotionally rewarding, long-term care is not a responsibility that most people would like to embrace due to its potential for significant costs.<sup>180</sup> Hoffman argued that the next-friend risk provides a justification for the state to take measures to share the risk collectively because people are likely to agree with it as long as they have the experience of caring or worry about their responsibility to their family.<sup>181</sup> Both Polaris and Hoffman regarded caregiving as a social risk and called for public policy to actively mitigate it.

Despite holding different rationales, the above arguments all recognize that caregiving should be a collective responsibility and that the state should provide support and share the burden. The arguments also criticize the privatization of care, that is, the assumption that a person should be responsible for his own welfare and the personal network should bear the burden of caregiving.<sup>182</sup> That assumption is mainly based on individualism, which states that every individual should be responsible for his personal life. Caregiving means a lot to personal life, but it is not simply a private obligation; it is a common experience in each person's life, and we should collectively share its benefits and risks.

## 2. Examining the Duty of Elder Care in Taiwanese Law

The ethical arguments of caregiving as a collective responsibility are strong with a constitutional basis under the Taiwanese legal system. Article 155 and other clauses of the Constitution explicitly mandate that the state provide appropriate assistance and relief for elders. The state's supplementary role taken by the court and the administrative sectors could be inconsistent with the constitutional mandate. Caregiving is a collective responsibility that should be shared by the whole community, especially when long-term care for elders could be overwhelming to a modern family or when many elders lack familial support. In addition, sharing the responsibility of elder care would not bankrupt the government because most family and friends are still willing to take the duty of care out of a sense of love or moral obligation.

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<sup>179</sup> Hoffman, *supra* note 91, at 188.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 174.

<sup>182</sup> *Id.* at 174–75; Polaris, *supra* note 90, at 154–55.

## B. EMPOWERING CAREGIVERS

The meaning of caregiving has been overlooked and needs to be readdressed in Taiwan. By taking caregiving as a collective responsibility, the morality and the contribution of being a caregiver should be highlighted. There should be both supports and rewards for people who take on the duty of elder care.

Besides the filial responsibility law that requires adult children to maintain their parents if they cannot support themselves, there have been few regulations regarding informal caregivers in Taiwanese law despite the fact that they play an essential role in society.<sup>183</sup> The most related provisions concern the governmental supportive services for informal caregivers. Article 13, Paragraph 1 of the LTC Act stipulates that the government should provide informal caregivers supportive services. These include the following: “1. Provision and referral of relevant information; 2. Long-term care knowledge and technical training; 3. Respite care services; 4. Emotional support and referral of group services; 5. Other services that help promote the capability of family caregivers and the life quality thereof.”<sup>184</sup> The long-term care programs Plan 1.0 and 2.0 both offer supportive services to informal caregivers, such as limited hours of residential care, daycare, and food delivery.<sup>185</sup> Nevertheless, these supportive services only help informal caregivers continue the work of care or give them temporary relief. Despite these supportive services, informal caregivers, who contribute greatly to the care recipients, to their families, and to the public good of the whole community, still bear a heavy burden.

As Kleinman noted, caregiving can be a tiring and emotionally draining process, but remains central to cultivating a person’s humanity.<sup>186</sup> Giving care to others is a moral obligation that everyone should fulfill, while each of us is likely to become a care recipient at a certain stage of life. What is critical is not to completely relieve us of the burden of caregiving but to empower caregivers, especially informal caregivers. The following paragraphs of this Part examine some developing laws and policies on empowerment.

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<sup>183</sup> For instance, the LTC Act provides quite detailed regulations on the long-term care institutions (see Article 21 through Article 41 of the LTC Act), but only one provision is related to informal caregivers. LTC Act, *supra* note 123, arts. 21–41.

<sup>184</sup> Senior Citizens Welfare Act, *supra* note 119, art. 31.

<sup>185</sup> Pau-Ching Lu, *supra* note 134, at 12–13; Ferry, *supra* note 121.

<sup>186</sup> *Odyssey*, *supra* note 169, at 293.

### 1. Supporting Informal Caregivers

The first group of empowering laws and policies is related to supportive measures that recognize the contributions of informal caregivers. Many US studies have mentioned tax reductions or tax incentives for caregiving,<sup>187</sup> which demonstrates recognition of the need to share the costs that should have been borne by the government. The Taiwanese Cabinet approved a draft bill in April 2019 that provides an income tax deduction to taxpayers with disabled family members in need of long-term care, except taxpayers with high incomes.<sup>188</sup> The “special tax exemption for long-term care” for middle- and low-income households can be considered a policy affirming the social contributions of informal caregiving. Nevertheless, taxpayers are not necessarily caregivers at home, and tax reductions do not necessarily benefit informal caregivers.

Another measure that has been proposed is to increase employment support for informal caregivers. US scholars have proposed that employers should assume responsibility for elder care; for instance, the Family and Medical Leave Act should be amended to provide better working conditions and increased flexibility for employees, which would encourage employees to take filial responsibility.<sup>189</sup> Employers would also be obliged to provide supportive services, such as daycare centers for all generations and counseling services.<sup>190</sup> In Taiwan, the Act of Gender Equality in Employment allows employees to request up to seven days a year of family care leave for taking care of seriously ill family members.<sup>191</sup> The family care leave is counted as a part of personal leave, which should not exceed fourteen days a year and is unpaid.<sup>192</sup> The leave is obviously

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<sup>187</sup> See, e.g., Harkness, *supra* 59, at 339–40; Sketchley & McMillan, *supra* note 60, at 158–59; H. Hunter Bruton, *Improving Familial and Communal Eldercare in the United States: Lessons from China and Japan*, 102 MINN. L. REV. HEADNOTES 1, 42–43 (2018).

<sup>188</sup> Chuan Ku & Lin Ko, *Cabinet Approves Draft Bill on Long-Term Care Tax Rebate*, FOCUS TAIWAN (Apr. 18, 2019), <http://focustaiwan.tw/news/aip/201904180025.aspx> [<https://perma.cc/KSB2-QHXW>].

<sup>189</sup> See, e.g., Harkness, *supra* note 59, at 340–42; Moskowitz, *supra* note 83, at 729–30; Sketchley & McMillan, *supra* note 60, at 157; Bruton, *supra* note 187, at 42–44.

<sup>190</sup> Moskowitz, *supra* note 83, at 730.

<sup>191</sup> Xingbie Gongzuo Pingdeng (性別工作平等法) [The Act of Gender Equality in Employment], art. 20, ¶ 1, FAWUBU FAGUI ZILAOKU (法務部法規資料庫) (2002) (amended 2016) (Taiwan), <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=N0030014> [<https://perma.cc/TTH5-NWK8>].

<sup>192</sup> *Id.*; Laogong Qingjia Guize (勞工請假規則) [Regulations of Leave-Taking of Workers], art. 7, FAWUBU FAGUI ZILAOKU (法務部法規資料庫) (1985) (amended 2019) (Taiwan)

too short, given that informal caregivers provide care for elders for an average of 7.8 years.<sup>193</sup> In addition, the unpaid leave implies that caregiving for family members is a private obligation rather than a shared responsibility. Civic groups have proposed a bill granting employees long-term care leave made up of thirty days of paid leave and one hundred fifty days of unpaid flexible leave.<sup>194</sup> Civic groups have also proposed increasing the labor insurance by 1% to compensate for the first thirty days of leave, where employees are paid 60% of their original salary.<sup>195</sup> The long-term care leave proposal is inspired by legislation in Japan, which offers employees ninety-three days of paid leave to reduce family-related job losses.<sup>196</sup> The long-term care leave better fits the idea of caregiving as a collective responsibility given that it is partly paid, offers longer periods of leave, and shares the burden of informal caregivers. Additionally, letting informal caregivers fulfill their filial duty without needing to quit their job empowers them. Informal caregivers are therefore able to remain financially independent and socially connected.

## 2. Rewarding Informal Caregivers

The second group of empowering laws and policies is related to rewards for informal caregivers. Informal caregivers often receive non-monetary rewards for their work, while many of them quit their original jobs and enter a state of “derivative dependence.”<sup>197</sup> The gendered obligation of caregiving also broadens the income gap between male and female workers, as female workers are more likely to quit their jobs for caregiving.<sup>198</sup> Some countries provide informal caregivers monetary compensation or subsidies for hiring alternative caregivers or buying institutional care. This has led to debates on whether monetary

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<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=N0030006> [<https://perma.cc/72JS-4YWC>].

<sup>193</sup> *Surveys on Main Family Caregivers*, *supra* note 45, at 6.

<sup>194</sup> Tiffany Chien, *Civil Groups Urge “Long-Term Care Leaves” into Law*, PTS News Network (May 16, 2019), <https://news.pts.org.tw/article/431915> [<https://perma.cc/9N65-5C37>]; Hsin-yun Wu & Emerson Lim, *Groups Want 180-day ‘Long-Term Care Leave’ for Workers*, FOCUS TAIWAN (May 16, 2019), <http://focustaiwan.tw/news/asoc/201905160019.aspx> [<https://perma.cc/HCP3-2ABV>].

<sup>195</sup> Tiffany Chien, *supra* note 194; Hsin-yun Wu & Emerson Lim, *supra* note 194.

<sup>196</sup> Tiffany Chien, *supra* note 194.

<sup>197</sup> HOLSTEIN, *supra* note 41, at 168.

<sup>198</sup> *Id.* at 161–62; *Surveys on Main Family Caregivers*, *supra* note 45, at 3.

compensation ties women to the caregiver role.<sup>199</sup> Hoffman argued that the key point is to let informal caregivers choose between caregiving themselves or paying others to do it.<sup>200</sup> In Taiwan, the laws and court decisions have shown little recognition of informal caregivers' contributions.<sup>201</sup> Laws such as the succession laws of France, Switzerland, Germany, Japan, and South Korea authorize the court to consider successors' contributions to the lives of the deceased on partition of inheritance; this could be regarded as a mechanism rewarding informal caregivers.<sup>202</sup> Caregiving is not simply a personal virtue but a communal obligation. Those who bear the burden for the whole community cannot simply be deemed altruistic, especially given that most informal caregivers make choices under social constraints. Their contribution to the public good deserves to be rewarded.

The above discussions only address a small part of the difficulties, challenges, and unfairness encountered by informal caregivers. In addition to support or compensation for informal caregivers, the publicness of caregiving should also be highlighted in the legal system and in the culture. Influenced by the filial piety tradition, many informal caregivers in Taiwan expect themselves to fulfill their moral obligation to care for recipients perfectly. However, moral pressure is often the cause of the mental distress of caregivers or even caregiving-related tragedies. Caregiving as a collective responsibility relieves informal caregivers of the moral burden and mandates that the state as well as the community share it.

## V. CONCLUSION: NOT JUST PITY

In Taiwan's culture of filial piety, children owe permanent moral debts to their parents; thereby, they should support and obey their parents. Elder care is the duty of adult children and offspring in the family. However, given the aging demographic, shrinking size of the modern family, and increasing pressure of long-term care due to prolonged lifespans and illnesses, the family is less able to fulfill the duty. Informal caregivers, who bear the heavy burden of caregiving at home, are overloaded and suffer great losses, both material and non-material. The caregiving obligations are also gendered; that is, women are expected to

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<sup>199</sup> HOLSTEIN, *supra* note 41, at 171–72; Hoffman, *supra* note 91, at 223–25.

<sup>200</sup> Hoffman, *supra* note 91, at 194.

<sup>201</sup> See *supra* Part II.B.

<sup>202</sup> Huang Sieh-Chuen, *supra* note 96, at 28.

respond to the need of care more actively than men according to social norms. The filial piety tradition—which highlights children’s moral obligations to parents—further stresses informal caregivers. Long-term care for elders by family has been described as “the exchange of a life for a life” between caregivers and care recipients; this reveals the amount of effort, affection, as well as frustration and distress in the relationships. The increasing number of caregiving-related suicides and homicides also means Taiwanese society must face the difficulties of informal caregivers.

Taiwanese lawmakers have been debating the allocation of the duty of caregiving between the state and the family. The filial responsibility law is supported by the filial piety tradition. However, the 2010 amendments allow adult children to be relieved of or exempt from their obligations of maintenance to parents based on parents’ past misconduct or mistreatment; this means that the family no longer bears an absolute obligation of elder care. Meanwhile, the Taiwanese Constitution endorses the welfare state principle with clauses that require the state to provide appropriate assistance and relief to elders. The constitutional mandate for the state to actively aid elders has been embodied in welfare laws, such as the Senior Welfare Act and Clause 539 of the Public Assistance Act. Nevertheless, in practice, the judiciary and the administrative sectors still regard the family as the primary unit to take care of elders. The long-term care programs Plan 1.0 and 2.0 both focus on community-based or home-based services, which also assume caregiving is provided mainly by the family. Despite the fact that the state has attempted to share the duty of elder care, the family and informal caregivers still carry a heavy burden.

This article has argued that caregiving should be a collective responsibility shared by the whole community. The state should take measures to support and reward informal caregivers. These measures should not only relieve caregivers of their workload and stress but also recognize and reward their contribution to the public good. Some developing laws and policies in Taiwan, such as tax reductions and leave for long-term caregivers, resonate with the idea that caregiving is a collective responsibility rather than a private obligation at home.

In a recent Taiwanese criminal case, a middle-aged man committed the crime of abandonment, which ultimately caused his mother’s death. The court gave the man a reduced sentence according to a commutation clause in the Criminal Code—“the circumstances of the

commission of the offense were so pitiable,”<sup>203</sup> given that the man had been so stressed by taking care of his mother with dementia for four years while taking care of his newborn baby at the same time.<sup>204</sup> However, pity is not enough. Every member of the community is responsible for the duty of elder care, because each of us is likely to become a caregiver as well as a care recipient at a certain stage of life. The laws and policies should regard elder care as a collective obligation shared by the community rather than simply impose the duty on the family and leave the burden to informal caregivers.

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<sup>203</sup> Criminal Code, *supra* note 75, art. 59 provides: “A punishment may be reduced at discretion if the circumstances of the commission of the offense are so pitiable that even the minimum punishment is considered too severe.”

<sup>204</sup> Taiwan Gaodeng Fayuan (台灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 108 Shang Su Zi No. 71 (108 年度上訴字第 71 號) (2019) (Taiwan).