

Elder care: is legislation of family responsibility the solution?

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ABSTRACT

With ageing of populations and the number of frail older people requiring care increasing, the need for care by either family members or government agencies is growing. In Hong Kong, adult children only have a moral duty to provide financial support to their elderly parents. However, in many other regions, such as Singapore, China, the United States and Canada, adult children are required by law to support their elderly parents. Legislation may have a negative effect on family harmony and may not be effective, as it is difficult to enforce. Filial responsibility may best be encouraged by incentive schemes and community support services that are of help to family carers.

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INTRODUCTION

With the ageing of populations worldwide, the need of the frail elderly for care by either family members or government agencies is growing. Although there is an assumption that the family should take care of elderly members in the same way that children are cared for by parents, in reality government health and social services have taken a dominant role. In contrast to care of children, where parents bear the legal responsibility,¹ adult children in Hong Kong do not have any legal responsibility to take care of their elderly parents.

The traditional Chinese culture of filial propriety is diminishing, partly because of barriers (including economic barriers) and the change in values between younger and older generations. The elderly tend not to rely on financial support from their children to maintain their living standards after retirement.¹ This is also partly the result of the increase in nuclear families which has weakened traditional extended family support.² Thus, it has become increasingly difficult for elderly parents to seek financial support from their children.²

To maintain a living, the elderly can rely on personal savings, family or government support. In Hong Kong, the main sources of income for most

elderly parents are their personal savings and their children's support.³ As there is no statute requiring adult children to support their parents in Hong Kong, adult children only have a moral duty to provide financial support. However, in many other regions, such as Singapore, China, the United States and Canada, adult children are required by law to support their elderly parents. Legislation of parental support explicitly states that it is the responsibility of the family, rather than the government, to care for their elderly parents. Nonetheless, it is uncertain whether legislation is the best way to ensure optimal care for elderly parents.

This paper discusses (1) the filial responsibility laws in different regions, (2) whether such laws can effectively protect the elderly parents' interest, and (3) ways to encourage family support for elderly parents.

Filial responsibility laws in different regions

Although the filial responsibility law varies in different regions, the general principle is to allow elderly parents to obtain financial support from their adult children. The policy objective is to ensure that elderly parents are given at least a minimum standard of living if their children are financially able to give support.⁴

Singapore

The filial responsibility law in Singapore focuses on the parents' and children's financial situations. Under the Maintenance of Parents Act⁵ (the Act), when a parent (the applicant) is over 60 years old and he is unable to maintain himself through work or from his property or other sources, he can bring a civil action against his adult child (the respondent). If the respondent is able to provide maintenance to the applicant, the judge will grant an order to the applicant. To determine whether to grant this order, the judge will consider the following⁶: (1) the applicant's financial needs; (2) the applicant's income, earning capacity, property and other financial resources and the manner in which the applicant spent savings or dissipated financial resources; (3) the applicant's physical or mental disabilities; (4) the respondent's income, earning capacity, property and other financial resources; (5) the respondent's expenses in supporting his spouse or children; and (6) the respondent's contributions made towards the applicant.

Claims are handled by a tribunal which is set up under the Act.⁷ The Act came into effect on 1 June 1996. From 1996 to 1999, there were 424 applications under the Act and 328 successful orders compelling support.⁸ In other words, 4 out of 5 applicants successfully obtained an order to compel their children to support them.

China

The Chinese filial responsibility law only states general principles. Under the Law on Protecting the Rights and Benefits of Older Persons, family members have a duty to take care of their elderly parents.⁹ The children have a duty to give financial and emotional support to their elderly parents.¹⁰ In cases of dispute, the elderly parents can ask the organisation in which the children are employed, the neighbourhood committees or the villagers' committee to mediate. They can also bring a lawsuit directly to the People's Court.¹¹ However, as the provisions are very general, it is considered that they fail to protect the elderly parents' rights effectively.¹²

The United States

30 states have adopted filial responsibility laws in

the United States.¹³ It is a civil action, but criminal penalty is also imposed in 12 states.¹⁴ The law requires children who have the financial ability to do so to provide necessary food, clothing, shelter or medical attendance for their elderly parents who are unable to provide for themselves.¹⁵

Nonetheless, there are limitations on the children's responsibility. Firstly, if a parent abandons his child when the child is a minor, the child does not have to support his parent.¹⁶ However, if the parent can show good cause for the abandonment, the child still has a duty to support the parent.¹⁷ *Denny v. Public Welfare Division*¹⁷ is one such case where the son argued that he had no duty to support his mother because his mother had placed him in foster care. The mother claimed that by placing her son in foster care she could make a living for herself and her son. The court agreed that the mother had good cause for abandonment and so ruled that the son was liable for support for his mother. A second consideration of the courts is the parent's past treatment of the child.¹⁸ If a parent carries out a malicious act with the intention of injuring the child, the parent would not be given support or the support would be limited to minimum needs.¹⁸ This is the 'doctrine of unclean hands'. Thirdly, in a family where the parents are divorced, the court considers the parent's support payments to the child after the divorce. If a parent does not support the child after the divorce, the court will relieve the child of the filial support obligation.¹⁹

Canada

All provinces in Canada have enacted filial responsibility laws. The laws in Canada also take into account the parents' past treatment of the child. In Ontario, under the Family Law Act,²⁰ adult children are required to support their parents who have cared for them in their childhood.²¹ In considering whether adult parents can claim the support, the court firstly considers whether the parent has supported the child in the past, then secondly the parent's history of care. The court adopts 'reasonable care' to determine the degree of care.²² Reasonable care includes housing, food, clothing, health, proper recreation, vacations, travelling expenses, nursing and medical attention, etc.²² The quality of care provided by the parent determines the amount the child is responsible for in terms of the parent's support. As with other countries, if the parent abandons the child when the child is a

minor, the child is relieved from the filial obligation. Thirdly, the court considers the parent's financial need by taking the parent's age, employment situation, health and physical capabilities into account.²¹ The court then considers the child's financial ability to provide support for the parent.

Can filial responsibility law effectively protect elderly parents' interests?

In Hong Kong, there is no filial responsibility law. It was proposed by the Provisional Legislative Council in 1998, but was voted down because elderly parents did not support such legislation.²³ One of their concerns was family harmony.²⁴ It is argued that family harmony is affected when the law compels adult children to support their parents.²⁵ Adult children may then give financial support to their parents grudgingly. The view is that it is undesirable for the government to impose law and to intervene in family life. However, it is also argued that the filial responsibility law can be applied when family support breaks down; there is a need and it is justifiable for the law to intervene into family matters under such circumstances.⁴ Such legislation may also have an impact on elder abuse.

If legislation on filial responsibility exists, it can provide a safety net for the elderly when they cannot support themselves but their children are financially able to support them.²⁵ However, the potential effectiveness of the law is uncertain, as elderly parents may not be willing to bring lawsuits against their children because of the effect on family relationships. For the same reason, laws on filial responsibility in different countries are rarely enforced.²⁶ As a result, it is recommended that filial responsibility for elderly parents should be rewarded and encouraged through ways other than legislation.²⁶

Ways to encourage family support for elderly parents

In Hong Kong, if a person gives support to a parent or grandparent, a dependent parent/grandparent allowance of HK\$30 000²⁷ or elderly residential care expenses of HK\$35 000²⁸ can be deducted from salary taxation.

Apart from tax deductions and allowances, the government could also impose restrictions

on inheritance. In Taiwan, legislation is proposed to prohibit children from inheriting their parents' property if the children do not provide support for their parents or if they abandon their parents before their parents' death.²⁹

To encourage family support and adult children living with their elderly parents, the government could change housing policy and provide loans to families. In Japan, although there are laws on filial responsibility, there are other policies on housing and medical care to encourage family support for elderly parents. Housing design has been improved to make it more convenient for the elderly to live with the family. In addition, there are loans to families to build or remodel homes so that the elderly can live with them. Similarly in Hong Kong, the Housing Authority has launched a special scheme for families with elderly members.³⁰ Under the scheme, families with two elderly members are given priority to move into a public housing estate.

Japan also has a national health insurance programme which covers almost all residents. In the hope of reducing medical expenses, the government promotes home care over hospitalisation by providing tax benefits to those who need to buy and rent medical products or equipment to provide health care for the elderly at home. The government has also increased the number of home helpers and day-care centres for the elderly. There are also preventive health care programmes to avoid future hospitalisation. In addition, Japan has modified employment policies to allow post-retirement employment, so that the elderly can continue to have an income after retirement.³¹

CONCLUSION

Filial responsibility law provides a safety net for the elderly in terms of maintaining a minimum living standard if their children are financially able to support them. However, if the law is imposed, it may affect family harmony and have other social effects. If one assumes that the majority of people are morally and culturally responsible and would look after their elderly parents, efforts targeted at understanding the obstacles to providing care may be more productive in motivating and facilitating elder care by families. In this regard, the law on filial responsibility may be regarded as both a solution and a problem in elder

care. Government has an important role to play in formulating policies that reward and encourage care of the elderly by their families, in order to avoid dependence on the government for elder care.

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