

**The Implementation of Article 12 of the UN Convention
on the Rights of Persons with Disabilities in China:
Understanding and Reforming Relevant Law and Legal
Culture**

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Abstract

This thesis is centred on Article 12 of the Convention on the Rights of Persons with Disabilities (the CRPD) - equal recognition before the law - and its implementation at the national level in China. Based on an in-depth understanding of Article 12 and the empirical research conducted in China regarding the relevant Chinese legal culture, this thesis closely examines the challenges concerning the implementation of Article 12 in China and the symbiotic relationship between the implementation of Article 12 in China and the relevant cultural context.

It begins by developing a framework to theorize the implementation of Article 12, a piece of international human rights law, at the national level. Based on this theoretical framework, the full implementation of Article 12 at the national level necessitates an in-depth understanding of Article 12 and the relevant cultural context. The meaning, implications, and values of Article 12 should be fully rendered at the national level in a culturally sensitive way to ensure that they can be fully understood and effectively utilized by local people.

By conducting analysis of both Article 12 and relevant Chinese law, this thesis identifies some of the fundamental gaps between the current Chinese law on legal capacity and adult guardianship and Article 12. By conducting and analyzing the empirical research of relevant legal culture in China, this thesis examines the legal culture-related challenges that should be taken into account in the implementation of Article 12 in China. Drawing on the analysis of Article 12 and relevant Chinese law and legal culture, this thesis reflects on reforming the domestic law to transpose Article 12 at the national level in a culturally sensitive way and the potential social changes that could be fostered by the implementation of Article 12.

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Abbreviations

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|----------------------|--|
| CRPD | United Nations Convention on the Rights of Persons with Disabilities |
| CRPD Committee | United Nations Committee on the Rights of Persons with Disabilities |
| CDPF | Chinese Disabled Person Federation |
| General Comment No.1 | Convention on the Rights of Persons with Disabilities General comment No. 1 (2014): Article 12: Equal recognition before the law |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| ICCPR | International Covenant on Civil and Political Rights |
| UDHR | Universal Declaration of Human Rights |
| OHCHR | Office of the UN High Commissioner for Human Rights |

Chapter 1: Introduction

1. The Objectives and Scope of this Thesis

This thesis is centred on Article 12 of the Convention on the Rights of Persons with Disabilities (the CRPD) - the right to equal recognition before the law- and its implementation at the national level in China. Based on an in-depth understanding of Article 12 of the CRPD and the empirical research conducted in China regarding relevant Chinese legal culture, this thesis will closely examine the challenges concerning the implementation of Article 12 in China and the potential that the implementation of Article 12 in China may bring about positive changes to the social and cultural context. This thesis will reflect on the symbiotic relationship between the implementation of Article 12 and the relevant social and cultural context, especially legal culture, in China. It will, on the one hand, reflect on the importance of implementing Article 12 in China in a culturally sensitive way and identify the cultural-related issues to be taken into account, and on the other, examine the degree to which the cultural elements could be transformed into useful resources for the implementation of Article 12 and the implementation of Article 12 could serve as an innovator to foster positive social changes. While this thesis is centred on the implementation of Article 12 in China, it may provide relevant insights regarding the implementation of Article 12 in other jurisdictions. It may also potentially feed into the theoretical inquiries regarding the implementation of international human rights law in China, or even in a broader sense.

The CRPD has been identified as 'a catalyst for change' that enshrines a 'paradigm shift' from seeing disabled people as the 'objects of charity, medical treatment and social protection' to recognizing disabled people as 'subjects of

rights'.¹ As stated in Article 1 of the CRPD, the Convention aims to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities, and to promote respect for their inherent dignity'.² China ratified the CRPD in 2008. As a state party to the CRPD, China has an obligation to ensure and promote the full realization of all of the human rights recognized in the CRPD at the national level.³

Article 12 of the CPRD affirms that the right to equal recognition before the law should be enjoyed by disabled people. The text of Article 12 is as follows:

Article 12: Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with

¹ 'Statement by Louise Arbour, UN High Commissioner for Human Rights to the Resumed 8th Session of the Ad Hoc Committee on the Convention on the Rights of Persons with Disabilities' (2006) available at: <http://www.un.org/esa/socdev/enable/rights/ahc8hrcmsg.htm>.

² Convention on the Rights of Persons with Disabilities 2007 (adopted 24 January 2007) Article 1.

³ *ibid* Article 4.

disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.⁴

This thesis aims to explore challenges concerning the full implementation of Article 12 of the CRPD at the national level in China and how the implementation of Article 12 may be influenced by, and have an influence on, the legal, social and cultural context at the national level.

The jurisdiction studied in this thesis is the People's Republic of China. The analysis in this thesis is limited to the scope of adults' right to equal recognition before the law in the field of civil law in China. However, that is not to say that it is not recognized that Article 12 may also have an influence on associated issues in the field of criminal law and the law regarding minors' right to equal recognition before the law.

2. The Relevant Social and Legal Context in China

As a State Party to the CRPD, China has the obligations, under Article 12 of the CRPD, to holistically examine all areas of domestic law to ensure that disabled people's right to be recognized as persons before the law is not restricted on an unequal basis with others.⁵ As will be analysed in detail in Chapter 4, Article 12 poses significant challenges to current Chinese law especially the law on legal capacity and adult guardianship. Some of the conflicts between domestic law and Article 12 are contained in the law made after China's ratification of the CRPD in 2008. While China has the State Parties' obligation to make its domestic law compliant with Article 12,⁶

⁴ *ibid* Article 12.

⁵ Committee on the Rights of Persons with Disabilities, 'Convention on the Rights of Persons with Disabilities General Comment No. 1 (2014): Article 12: Equal Recognition before the Law' (19 May 2014) CRPD/C/GC/1 para 7, 24.

⁶ CRPD (n 2) Article 4; see, also, Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 24; Committee on the Rights of Persons with Disabilities,

appropriate measures have not yet been taken to modify or repeal the domestic law, which conflicts with Article 12.

According to the latest data published by the Chinese Disabled Persons' Federation (the CDPF), in 2010, the population of disabled people in China was about 85.02 million, among whom, about 12 million people are with mental disability.⁷ As will be analysed in detail in Chapters 4, 6 and 7, the implementation of Article 12 at the national level will potentially influence the life of all of these disabled people and perhaps their families.

Given the legal and social context in China, research on the implementation of Article 12 in China is essential for both China's fulfillment of its obligation under the CRPD at the international level and the protection of individuals' rights at the national level.

3. Theoretical Framework

The full and effective implementation of Article 12, a piece of international human rights law, at the national level requires much more than using Article 12 as a 'model law' or template and copying it into domestic law.⁸ It is predictable that the implementation of Article 12 may foster changes in domestic law,⁹ and, as Lord and Stein have pointed out, such changes should be brought about in a way that is compatible with the given legal system and culture.¹⁰

To explore the implementation of Article 12 at the national level in China, this thesis will proceed by applying the argument raised in comparative law

'Concluding Observations on the Initial Report of China, Adopted by the Committee at Its Session (17–28 September 2012)' (2012) CRPD/C/CHN/CO/1 para 21, 22.

⁷ The data is published on the official website of Chinese Disabled Person's Federation, at http://www.cdpc.org.cn/sjzx/cjrgk/201206/t20120626_387581.shtml (last access: 2016/10/19)

⁸ Michael Stein and Janet Lord, 'The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities' (2008) 83 *Washington Law Review*.

⁹ *ibid.*

¹⁰ *ibid.*

scholarship that the relationship between law and cultural context of a jurisdiction is an intricate interrelationship.¹¹ The culture may have an influence on how the law is understood and applied,¹² and at the same time, the law may bring about 'simultaneous and complementary change' to relevant cultural contexts and social fields.¹³ Such interrelationship offers the possibility for law to be moved from one context to another,¹⁴ and thus the possibility for the implementation of international human rights law at the national level.¹⁵

In this thesis, the implementation of international human rights law at the national level and its interrelationship with the given cultural context are considered in conjunction with the debate of the universality and cultural relativity of international human rights law. Article 12 of the CRPD, as a piece of international human rights law, is closely tied to the claim of universality.¹⁶ However, given the interrelationship between the law and cultural context, the given culture may have an influence on how Article 12 is understood and applied at the national level. A position of weak cultural relativism will be adopted in this thesis.¹⁷ This means that the exploration of the implementation of Article 12 in China will start with an affirmation of the universality of Article

¹¹ For a discussion, see, Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *The Modern Law Review* 11; Esin Örüçü, 'Law as Transposition' (2002) 51 *The International and Comparative Law Quarterly* 205; Esin Örüçü, 'Legal Culture and Legal Transplants' (XVIIIth International congress of comparative law 2010); William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 *The American Journal of Comparative Law* 489; Julie Mertus, 'From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society' (1999) 14 *American University International Law Review*.

¹² For a discussion, see Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 *The Modern Law Review* 159; Jedidiah Kroncke, 'Law and Development as Anti-Comparative Law' (2012) 45 *Vanderbilt Journal of Transnational Law* 477.

¹³ see, Teubner (n 11); Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University Of Chicago Press) <<https://www.dawsonera.com/readonline/9780226520759#>> accessed 7 March 2014.

¹⁴ see, Teubner (n 11); Esin Örüçü, 'Law as Transposition' (n 11); Esin Örüçü, 'Legal Culture and Legal Transplants' (n 11).

¹⁵ For a discussion, see, Mertus (n 11); Merry (n 13).

¹⁶ For a discussion, see Federico Lenzerini, *The Culturalization of Human Rights Law* (OUP Oxford 2014); Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281; Jack Donnelly, 'Human Rights as Natural Rights' (1982) 4 *Human Rights Quarterly* 391.

¹⁷ Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 400.

12.¹⁸ The given social and cultural context will be studied and understood for the purpose of expressing and elaborating the meaning, implication and value of Article 12 in a culturally sensitive way to enable people in the cultural context to understand correctly and apply effectively.¹⁹ While Article 12 will be transposed at the national level to suit the cultural context,²⁰ it will retain its fundamental meaning, implication, and value.²¹ Besides, given the interrelationship between law and cultural context, the implementation of Article 12 at the national level has the potential to bring about changes to the cultural context.²² Such potential will also be explored in this thesis as a part of the exploration of the implementation of Article 12 in China.

Based on the theoretical framework analyzed above, the exploration of the implementation of Article 12 in China in this thesis will be built on an in-depth understanding of both the meaning, implication and value of Article 12 and relevant cultural context. This thesis will focus on relevant legal culture in China. To understand the legal culture, the anthropological approach to studying legal culture, developed by Sally Engle Merry,²³ will be adopted as the underpinning methodological framework for the empirical study of legal culture. Based on this methodological framework, this thesis will empirically investigate the relevant legal culture by exploring and understanding the knowledge, experience, attitudes, opinions, and expectations held by people towards the domestic law and legal system that are relevant to the implementation of Article 12.²⁴ Given that, as explained in previous sections, this thesis examines the implementation of Article 12 in China within the scope of adult's rights to equal recognition before the law in the field of civil law,

¹⁸ *ibid.*

¹⁹ For a discussion of cultural variations, see, Merry (n 13); Donnelly, 'Cultural Relativism and Universal Human Rights' (n 17); Alison Dundes Renteln, 'Relativism and the Search for Human Rights' (1988) 90 *American Anthropologist* 56.

²⁰ Esin Özücü, 'Law as Transposition' (n 11).

²¹ Merry (n 13); Douglas Lee Donoho, 'Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights' (2001) 15 *Emory International Law Review* 391; Renteln (n 19).

²² see, Merry (n 13); Teubner (n 11).

people who are involved in, or influenced by the issues regarding adult's right to equal recognition before the law will be selected to participate in the empirical research.

4. Normative Framework

Article 12 of the CRPD elaborates the right to equal recognition before the law in the specific context of human rights and disability.²⁵ Given different contexts and purposes, the conception of disability can be understood in a variety of ways. To explore the implementation of Article 12 in China, this thesis will proceed by taking the relational approach of the social model of disability, which, as understood in this thesis, can facilitate the human rights perspective in disability rights studies. Premised on the relational approach of the social model paradigm, disability is understood as being created not solely by impairments, but also by various societal barriers.²⁶ As explained in previous sections, this thesis will explore the implementation of Article 12 in China with a perspective of Chinese legal culture. It will thus put a focus on the societal barriers resulting from the law and the prevailing legal culture, examine the way in which such societal barriers influence disabled people's life, and explore the degree to which the implementation of Article 12 in China has the potential to remove such societal barriers.

The rights and obligations elaborated in Article 12 are under the broad heading of equal recognition before the law, and equality has been regarded as one of

²³ Sally Engle Merry, 'What Is Legal Culture? An Anthropological Perspective' (2010) 5 Special issue of *Journal of Comparative Law* 40.

²⁴ *ibid*; see, also, Lawrence M Friedman, 'Is There a Modern Legal Culture?' (1994) 7 *Ratio Juris* 117.

²⁵ see, Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 1.

²⁶ Rannveig Traustadóttir, 'Disability Studies, the Social Model and Legal Developments', *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Martinus Nijhoff Publishers 2009).

the overarching ideals and the leitmotif of the CRPD.²⁷ This thesis will proceed on the understanding that achieving equality for disabled people is one of the most important aims of the implementation of Article 12 in China. The conception of equality, as understood in this thesis, encompasses both formal and substantive equality. The right to equal recognition before the law, as elaborated in Article 12, will be understood in this thesis as entailing a claim of equality of opportunity regardless of the presence or absence of impairment, and differences in treatment for the purpose of achieving substantive equality.²⁸ This also means that to achieve the equality regarding disabled people's right to be recognized as persons before the law, the potential duty bearers may have not only negative obligations to refrain from discriminatory denial of disabled people's right but also positive obligations to protect and promote disabled people's enjoyment of this right.²⁹ In addition, the achievement of equality is understood in this thesis as having the implication and potential to entail proactive structural changes.³⁰ To examine and evaluate the degree to which the equality for disabled people can be achieved by the implementation of Article 12 in China, the societal barriers that have

²⁷ see, for example, Oddný Mjöll Arnardóttir, 'A Future of Multidimensional Disadvantage Equality?' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities European and Scandinavian Perspectives* (BRILL 2009); Gerard Quinn, 'A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities' in Gerard Quinn and Lisa Waddington (eds), *European Yearbook of Disability Law* (Intersentia 2009).

²⁸ Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future' (2006) 34 *Syracuse Journal of International Law and Commerce* 429.

²⁹ For a general discussion of formal and substantive equality, see, for example, Sandra Fredman, 'Equality: A New Generation?' (2001) 30 *Industrial Law Journal* 145; Sandra Fredman, 'Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?', *Disability rights in Europe : from theory to practice / edited by Anna Lawson and Caroline Gooding*. (Hart Publishing 2005); Dagmar Schiek and others, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart 2007); Arnardóttir (n 27).

³⁰ see, for example, Marcia H Rioux, Lee Ann Basser Marks and Melinda Jones, *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff Publishers 2011); Schiek and others (n 29).

long been suffered by disabled people and the social construction of inequality that has built into this class of people will be taken into account in this thesis.³¹

5. Structure of the Thesis

The literature to date on Article 12 has developed insights into the right to equal recognition before the law from a rich variety of perspectives and illuminated the significance of this right to dignity, autonomy and integrity of individuals. This thesis focuses on exploring the implementation of Article 12 at the national level in China. The journey is critically built on Merry's argument that the implementation of international human rights law should recognize the implications and fundamental values of human rights law in the local context, and it should enable those who need rights protection to recognize their entitlement and assert their rights by using the law.³² To this end, the discussions in this thesis are divided into seven main chapters.

Chapter 2 explores the framework to theorize the implementation of international human rights law at the national level and analyses how this theoretical framework will be applied to explore the implementation of Article 12 in China in this thesis. To develop the theoretical framework, Chapter 2 enquires into two main theoretical issues by referring to comparative law scholarship. One is the degree to which the meaning, implication and value of the law can be moved from one jurisdiction to another. The other is the debate regarding the universality and cultural relativity of human rights law and its implications for the implementation of international human rights law at the national level. Based on the theoretical framework developed in Chapter 2, the full implementation of Article 12 in China necessitates a comprehensive understanding of both Article 12 and the legal, social and cultural context at the national level. Chapter 2 also examines Merry's anthropological approach to

³¹ For a discussion of the structural inequality suffered by disabled people, see, for example, Rioux, Basser Marks and Jones (n 30); Iris M Young, 'Structural Injustice and the Politics of Difference1' in Thomas Christianoessor and John Christman Associateessor (eds), *Contemporary Debates in Political Philosophy* (Wiley-Blackwell 2009); Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Harvard University Press 2002).

³² Merry (n 13).

studying legal culture, and this forms the preliminary methodological framework for the empirical research on relevant Chinese legal culture to be conducted in this thesis.

Chapter 3 conducts a comprehensive analysis of the content, meaning, implication and value of Article 12. The analysis is focused on two key conceptions in Article 12. One is the conception of legal capacity, and the other is the conception of support in the exercise of legal capacity. The core question in Chapter 3 is what are the meanings, implications and values of Article 12 that should be implemented at the national level?

Chapter 4 provides a critical analysis of the current Chinese law and legal system relevant to the implementation of Article 12. The analysis explores two issues. The first is, what are the status and force of law accorded to international human rights law within the domestic legal system in China? To examine this issue, the relevant law and legal principles that prescribe the effect of international law at the national level will be discussed together with the relation between international law and domestic legal systems. It also examines how other pieces of international human rights law have been given effect at the national level in China. The second issue is, which parts of current Chinese law are not in compliance with Article 12 of the CRPD? The focus of the analysis is the current Chinese law on legal capacity and adult guardianship.

Chapter 5 outlines the empirical research design for the study of legal culture regarding issues of legal capacity and adult guardianship in China. Merry's anthropological approach to studying legal culture, analysed in Chapter 2, forms the underpinning methodological framework for the empirical study and her approach is critically adapted to fit the research purpose and questions of this thesis. Chapter 5 provides a detailed analysis of the research methods used, the recruitment and selection of the research participants, the steps of data processing and analysis, and key ethical concerns. It also casts light on the idea of emancipatory research and the emancipatory elements involved in the empirical research conducted in this thesis.

Chapter 6 presents and analyses the empirical research findings of legal culture regarding issues of legal capacity and adult guardianship in China. The main issues illustrated by the empirical research findings are how the current law on legal capacity and guardianship are known, understood and practised by people, the people's attitudes towards the relevant law, and the degree to which people are willing to assert their rights by using the law. With critical self-reflexivity, the empirical research data is presented and analysed from the subjective perspective of the research participants rather than in the context of other standards or criteria. Therefore, many quotations are used in this chapter to illuminate the context of the participants' conversations and discussions in the empirical research.

Chapter 7 conducts further analysis of the implications of the empirical research findings in the context of Article 12. The analysis identifies legal culture-related issues to be taken into account in the implementation of Article 12 in China. It also examines how the relevant legal culture may have an influence on or create tension with the full implementation of Article 12 in China. The analysis explores the degree to which the issues raised in the empirical research findings can be linked to the issues put forward in the existing research conducted in other contexts. It also tries to shed light on some previously neglected aspects of legal capacity and support in the exercise of legal capacity.

Drawing on the previous analysis of Article 12 and relevant Chinese law and legal culture, Chapter 8 reflects on reforming domestic law in China to achieve consistency with Article 12 of the CRPD. The analysis in Chapter 8 explores how Article 12 can be transposed into domestic law in a culturally sensitive way while maintaining its fundamental meaning, value and implication. It also explores how the proposed changes in domestic law have the potential to bring about changes to the relevant legal culture and to serve as an innovator for a wider social change.

Chapter 9 provides the conclusion of the whole thesis.

Chapter 2: Theoretical and Methodological Framework

1. Introduction

Given the transformative vision of the CRPD and Article 12 in particular, the implementation of Article 12 at the national level is likely to foster changes in domestic disability law and policy.³³ The full implementation of Article 12 will require much more than using Article 12 as a 'model law' or template and copying it into domestic law.³⁴ As pointed out by Lord and Stein, the CRPD provides a framework, within which states parties' domestic law may be assessed and modified in a way that is compatible with a given legal system and culture.³⁵

This chapter aims to explore and develop a framework to theorize the implementation of international human rights law at the national level. This framework will then be adapted and applied to the current context - an exploration of the implementation of Article 12 in China. To this end, this chapter draws on the work of comparative law theorists with regard to two main issues. One is the degree to which the meaning, implications and values of the law can be moved from one jurisdiction to another. The other is the theoretical inquiries in the debate regarding the universality and cultural relativity of international human rights law and their implications for the implementation of international human rights law at the national level.³⁶

The discussion in this chapter is divided into three main sections. Section 2 critically reviews the theory of legal transplant. Particular attention is paid to

³³ see, for example, Stein and Lord (n 8).

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ For the discussion of the debate of universalism and cultural relativism of human rights law and the implementation of human rights law, see, for example, Lenzerini (n 16).

the academic debates regarding the degree to which the meaning, implication, and value of law can move from one jurisdiction to another. Section 3 examines the debates on the universality and cultural relativity of human rights law, and how these two concerns may influence the implementation of international human rights law at the national level. Section 4 investigates how the metaphor of legal transplant and the universality and cultural relativity of human rights law can be combined as a theoretical framework for the discussion regarding the implementation of Article 12 at the national level in China. Sally Engle Merry's anthropological approach to studying legal culture will be reviewed in this section, and this provides the methodological basis for the empirical research of relevant Chinese legal culture to be conducted in this thesis.

2. The Metaphor of Legal Transplant

This section critically reviews the theory of legal transplant for the purpose of theorizing the implementation of international human rights law at the national level. It is noted that with regard to legal transplant, Watson has argued for the possibility of legal transplant,³⁷ while Kahn-Freund has argued against it.³⁸ Legrand, who builds his opinion on both Watson's and Kahn Freund's arguments, also argues for the impossibility of legal transplant.³⁹ Both Teubner and Örüçü have developed their arguments from Kahn Freund's,⁴⁰ and Örüçü has provided a more positive point of view regarding the possibility of successful legal transplant.⁴¹ The following two subsections examine these debates in detail with two key inquiries. One is whether the metaphor of legal

³⁷ see, Alan Watson, 'Legal Transplants and Law Reform' (1976) *Law Quarterly Review*; Alan Watson, 'Comparative Law and Legal Change' (1978) 37 *The Cambridge Law Journal* 313.

³⁸ see, O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *The Modern Law Review* 1.

³⁹ see, Pierre Legrand, 'Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

⁴⁰ see, Teubner (n 11); Esin Örüçü, 'Law as Transposition' (n 11).

⁴¹ Esin Örüçü, 'Law as Transposition' (n 11).

transplant can enable not only the text, but also the meaning, implication and value of the law to move from one legal system to another; and the other is the degree to which such legal transplant can succeed.

2.1 The subject of legal transplant

Watson has argued that law can move easily.⁴² However, it is not clear what law means in Watson's theory. Legrand has argued that the 'law' in Watson's theory is reduced to 'law as rules' and 'rules as bare propositional statement'.⁴³ Thus, according to Legrand, the formula of legal transplant is one rule, 'words a + meaning x', which moves elsewhere and becomes the second rule, 'words a + meaning y'.⁴⁴ However, the 'law' in Watson's theory appears to be more than legal rules and also encompasses ideas.⁴⁵ According to Watson, legal rules operate on the level of ideas. Legal rules in one legal system may be borrowed because the lawmaker in another legal system can get benefit from, not the abstract form of words, but the idea contained in the legal rule.⁴⁶ To borrow the substantial idea of the legal rule, the history of legal rules, their origin, development, transformation, what they do and what is demanded from them shall all be studied.⁴⁷ Moreover, Watson pointed out that although modification may happen during the transmission of the law, the alterations may only have limited significance.⁴⁸ What can be inferred from Watson's argument is that in a legal transplant, not only the words but also the meanings of the legal rule are transplanted, because the meaning can convey the ideas contained in the rule. If the meaning of the rule has changed, such alteration of the transplanted law should be regarded as significant.

⁴² Alan Watson (n 37).

⁴³ Legrand (n 39).

⁴⁴ *ibid.*

⁴⁵ Alan Watson, 'Legal Transplants and European Private Law' [2000] *Electronic Journal of Comparative Law*; Ewald (n 11).

⁴⁶ Watson (n 37).

⁴⁷ *ibid.*

⁴⁸ *ibid.*

2.2 To what degree can legal transplant be successful

If it is agreed that the meaning of a legal rule is the subject of legal transplant, the next question to be considered is, to what degree can the meaning be successfully transplanted? According to Legrand, only an autonomous entity unencumbered by historical, epistemological or cultural context can be transplanted. Meaning simply does not lend itself to transplantation because it is culturally conditioned.⁴⁹

Regarded as a simple rebuttal to Legrand's point of view, Watson has pointed out that Legrand overlooks the importance of comparative legal history,⁵⁰ in which it is a truism that innovation is only responsible for a small amount of legal change while the larger parts are occupied by imitation and borrowing.⁵¹ There are also predictions that the future development of law will be closely linked to the transmigration of ideas and institutions.⁵² From this perspective, the Chinese legal history can also offer ample examples of how legal transplant has been applied in law making as a legislative technique.⁵³ However, this rebuttal may not have very solid ground, because legal transplant does not necessarily lead to a positive result.

Many scholars are sceptical about the consequences of legal transplants.⁵⁴ Kroncke, for example, examined the failure of legal transplant through the 'law

⁴⁹ Legrand (n 39).

⁵⁰ Alan Watson (n 45); Anthony Joseph Forsyth, *The 'Transplantability' Debate in Comparative Law and Comparative Labour Law: Implications for Australian Borrowing from European Labour Law* (University of Melbourne, Faculty of Law, Centre for Employment and Labour Relations Law 2006).

⁵¹ Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39 *The American Journal of Comparative Law* 1.

⁵² *ibid.*

⁵³ *see, for example, Zeng Xianyi, Zhongguo Fazhi Shi (3rd edn, Beijing Daxue Chubanshe 2013); Xin Chunying, 'Falv Yizhi de Lilun Yu Shijian' (2007) 1 Beifang Faxue; Guangmin LI and others (eds), Text book on International Law (Tsinghua University Press 2006).*

⁵⁴ *see, for example, Kevin E Davis and Michael J Trebilcock, 'The Relationship Between Law and Development: Optimists versus Skeptics' (2008) 56 American Journal of Comparative Law 895.*

and development' programme in the US and criticized it as 'locked in repeating cycles of failure and optimism'.⁵⁵ According to Kroncke, there are three broad foundational critiques around legal transplant, namely instrumentalism, formalism, and idealization.⁵⁶ This thesis would like to argue further that central to these three critiques is the notion of 'universal best practice'. The idea of 'universal best practice' assumes that the law in one country can be copied into a foreign legal system without any problem.⁵⁷ It may also assume that the law will bring the same outcomes anywhere, and therefore one solution is the best for any society.⁵⁸ It can be argued that such assumptions ignore the fact that the institutional and jurisprudential logics in different legal systems may be very different.⁵⁹ They also ignore the fact that the people in a specific social context are not only the subjects but also the actors of the law. Their understanding of 'best practice' will be based on their own epistemological assumptions, which are conditioned by the specific social context. Hence, they will turn 'best practice' to their own ends, and the expected same outcomes may not be achieved.⁶⁰ Moreover, as pointed out by Kroncke, 'law and development' shows that the use of 'universal best practice' in the legal transplant project does not simply result from ignorance of the interaction between law and social context.⁶¹ Rather, it intends to take advantage of these interactions to achieve Western hegemonism and parochialism.⁶² According to Kroncke, 'law and development' is, in fact, a cultural policy intending to force social change by imposing legal institutions.

⁵⁵ Jedidiah J. Kroncke, 'Law and Development as Anti-Comparative Law' (2011) 45 *Vanderbilt Journal of Transnational Law* 477.

⁵⁶ *ibid.*

⁵⁷ Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Carnegie Endowment 2011).

⁵⁸ Ralf Michaels, "'One Size Can Fit All' – On the Mass Production of Legal Transplants' in Günter Frankenberg (ed), *Order from Transfer Comparative Constitutional Design and Legal Culture* (Edward Elgar Pub 2013).

⁵⁹ Carothers (n 57).

⁶⁰ Mertus (n 11).

⁶¹ Jedidiah J. Kroncke (n 55).

⁶² *ibid.*; see, also, James Q Whitman, 'Western Legal Imperialism: Thinking About the Deep Historical Roots' (2009) 10 *Theoretical Inquiries in Law*.

This is one of the reasons for the recurrent flaws and resistance faced by such legal transplant projects.⁶³

As a further response to the scepticism around legal transplant, a more complex but stronger rebuttal to the impossibility of legal transplant can be developed. It may also provide some insight into how to avoid the negative consequences of legal transplant. This rebuttal is developed and analysed through two steps.

The first step in analysing the rebuttal is to examine the relation between law and social context. According to Legrand, the law and the understanding of the law are firmly embedded in the whole cultural ambience, and it will be different if put in another place or era.⁶⁴ Since the meaning of the law is culture-specific, the meaningful legal transplant- both the law and its invested meaning are transported from one social and cultural context to another- cannot happen.⁶⁵ Legrand's argument indicates that from his point of view, law is closely related to, instead of being independent of, the other social factors. Based on such relation between law and social context, Legrand put emphasis on how the meaning and understanding of law is 'conditioned by' the social context.⁶⁶ However, Legrand's argument raises one important question that even if the law is closely related to, instead of being independent of, the social context, does such relation necessarily lead to the impossibility of meaningful legal transplant? The following analysis examines the relation between law and social context in more detail.

Kahn-Freund has pointed out that the degree of transferability of the law depends on a range of factors such as geographical, economic and political

⁶³ Jedidiah J. Kroncke (n 55).

⁶⁴ Legrand (n 39).

⁶⁵ *ibid.*

⁶⁶ *ibid.*

factors. Knowledge of the social context around law is thus necessary.⁶⁷ Öürücü has moved a step forward from Kahn-Freund and pointed out that 'transposition' is a better word than 'transplant' to describe the transnational or cross-border spread of law-both legal institutions and ideas.⁶⁸ According to Öürücü, when the law travels from one society to another, it should go through 'a process of transposition, tuning and fitting'.⁶⁹ This means that not only is knowledge of the social context around the law necessary, but the law should also be transposed to suit the particular social-legal culture and the needs of the recipient. The local conditions should be carefully considered by the recipient to determine an appropriate 'tuning', and this is the key to whether the legal ideas, institutions and structures can successfully find its way from one society to another.⁷⁰ Teubner has explored the law's binding arrangements with other social systems. Teubner has argued that not only should law be transposed to suit the local condition, but the transplanted law may also change the local condition.⁷¹ According to Teubner, the degree of transferability will be higher if the law has only a loose connection with the social context, but lower if the law is tightly bound with other social discourses.⁷² Referring to the implementation of the 'good faith' principle to British contract law as an example, Teubner has further argued that in the case where the two are tightly bound, the legal transplant may cause 'irritations' to the relevant social fields by bringing about a 'simultaneous and complementary change'.⁷³ As argued in this thesis, Teubner's arguments regarding the 'binding arrangement' and 'irritations' suggest an interaction, rather than a one-way influence between law and other social factors.

⁶⁷ Kahn-Freund (n 38).

⁶⁸ Esin Öürücü, 'Law as Transposition' (n 11).

⁶⁹ *ibid.*

⁷⁰ *ibid.*; Esin Öürücü, 'The United Kingdom as an Importer and Exporter of Legal Models in the Context of Reciprocal Influences and Evolving Legal Systems' in J Bridge (ed), *UK Law for the Millennium* (UKNCCL, BIICL 1998).

⁷¹ Teubner (n 11).

⁷² *ibid.*

⁷³ *ibid.*

The analysis so far makes one point clear: that the relationship between law and social context is neither non-existent nor simply one reflecting the other. Instead, it is a subtle and intricate interrelationship.⁷⁴ It is such interrelationship between law and social context that offers the possibility of meaningful legal transplant.

The second step in analysing the rebuttal is to examine the interrelationship between law and social context under the trend of globalization, and this may further evidence the potential and feasibility of legal transplant. According to Mertus's observation of 'transnational civil society',⁷⁵ under the trend of globalization, territorial units may no longer show differences that lead to mutual exclusion, but share a certain degree of similarity or uniformity.⁷⁶ As Mertus has pointed out, because of globalization, local people have been exposed to outside features, and states and non-state actors have interacted in 'transnational civil society'.⁷⁷ Therefore, more common consciousness will be developed on a global scale, and the local context is no longer something that remains unchanged.⁷⁸

Based on the interrelationship between law and social context discussed above, it can be further argued that the growing universality of culture and other social factors will increase the universality of law. Since similar problems are shared by territorial units, similar responses, global solutions or interrelated local solutions may be required. The legal ideas or institutions in other jurisdictions may be borrowed, or referred to, at least to improve local

⁷⁴ Ewald (n 11).

⁷⁵ Mertus (n 11).

⁷⁶ Zdravko Mlinar, 'Individuation and Globalization: The Transformation of Territories Social Organization' in Zdravko Mlinar (ed), *Globalization and territorial identities* (Avebury 1992); Mertus (n 11).

⁷⁷ Mertus (n 11).

⁷⁸ Michaels (n 58); Mertus (n 11); Louis E Wolcher, 'Cultural Diversity and Universal Human Rights' (2012) 43 *Cambrian Law Review* 44.

responses.⁷⁹ The universality of law in the context of globalization has also been proved by the empirical study conducted by Merry.⁸⁰ In her study of human rights law and gender violence, she found that although there is some reframing or reforms to fit local conditions, a high degree of similarity is shared by the programmes, law and institutions being adopted in India, mainland China, Fiji, Hong Kong and the United States.⁸¹ According to Merry, such universality results from the process of globalization, under which human rights activists in these areas acquire information from international meetings, global conferences or training programmes, and therefore bring global consciousness into these regions.⁸²

Premised on both Mertus's theoretical analysis and Merry's empirical research findings, it will be argued here that the growing universality of the law under the trend of globalization may bring more possibilities for successful legal transplant. However, as Mertus has pointed out, globalization may take place in different ways. If it were to homogenize the world through the so-called 'McDonaldization',⁸³ which means by minimizing the competing cultural perspectives, it would result in forced impositions of outside ideas on local matters and strong resistance.⁸⁴ Regarding legal transplant, such globalization would bring the transplant back to the pitfall of 'universal best practice', and result in what Grief has called a 'contaminant' to the local context.⁸⁵ To avoid such negative consequences, legal transplant should be further analysed from two perspectives.

⁷⁹ Esin Örucü, 'Law as Transposition' (n 11).

⁸⁰ Merry (n 13).

⁸¹ *ibid.*

⁸² *ibid.*

⁸³ Benjamin R Barber, *Jihad Vs McWorld* (Random House 2010).

⁸⁴ Mertus (n 11).

⁸⁵ Nicholas Grief, 'The Pervasive Influence of European Community Law in the United Kingdom' in P. B. H. Birks (ed), *What are Law Schools For? Pressing Problems in the Law*, vol 2 (Bournemouth University 1996).

First, it may be necessary to distinguish the universality of law from 'universal best practice' as criticized by Kroncke.⁸⁶ The logic underlying these two notions is different. In the case of 'universal best practice', the universal practice is selected by dominant groups, imposed on other societies and expected to bring the same outcome everywhere without being concerned with recipients' desires and needs.⁸⁷ By contrast, the universality of law in the context of globalization comes from the similar needs and common consciousness in different territorial units.⁸⁸ Hence, a universal response is desired, rather than imposed on a specific society.⁸⁹ Secondly, legal transplant can be guided by the appropriate 'tuning', as stated by Örucü. Since the relation between law and social context is interactive, whether the law serves as a corrective or a contaminant can be a choice in accordance with the desire of the recipient. To avoid making legal transplant a contaminant, the discussion of legal transplant here will be combined with an understanding of social context instead of simply minimizing the competing cultural perspectives. The study of the social context can be helpful to identify the needs of the recipient country, based on which, the appropriate 'tuning' can be developed to guide the legal transplant. Thus, by adopting this method, the improper approach to legal transplant can be avoided.

To summarize the analysis so far, given the interrelationship between law and social context and the trend of globalization, the growing global consciousness may contribute to the increasing universality of social elements including law. Therefore, the metaphor of legal transplant offers the possibility to enable not only the text but also the meaning, implication and value of the law to move from one legal system to another. However, the existing examples of the failure of legal transplant illustrate that legal transplant based on minimizing the

⁸⁶ Jedidiah J. Kroncke (n 55).

⁸⁷ *ibid.*

⁸⁸ Mertus (n 11).

⁸⁹ Esin Örucü, 'Law as Transposition' (n 11).

competing cultural perspectives may fall into the pitfall of 'universal best practice'. Accordingly, legal transplant should be premised on a comprehensive understanding of the socio-legal culture and the needs of the recipient.

To apply this theoretical framework to the implementation of Article 12 at the national level in China, it can thus be argued that the implementation of Article 12 should be premised on a comprehensive understanding of both the meaning of Article 12 and the relevant social context of China.

3. The Universality of Human Rights Law in a Multicultural World

The last section concluded that the possibility of successful legal transplant depends largely on the degree of universality of the law, and to avoid the improper approach to legal transplant, it recognized the necessity of exploring cultural relativity. Since Article 12 of the CRPD is a piece of human rights law, this section looks into the universality and cultural relativity of human rights law. The purpose of the discussion in this section is to examine the degree to which the universality and cultural relativity of human rights law should be combined and balanced in the analysis of the implementation of international human rights law at the national level.

Human rights law is closely tied to the claim of universality. Three aspects of such universality can be analysed. First, human rights can be regarded as an abstract concept of rights that one enjoys simply because one is human. Therefore, it shall be universal and equal.⁹⁰ The universality in this sense is now also underpinned by the trend of globalization. Mertus has pointed out

⁹⁰ see, for example, Donnelly, 'The Relative Universality of Human Rights' (n 16); Lenzerini (n 16) 31.

that globalization brings a growing element of global consciousness.⁹¹ It can be further argued that the human rights concept as a whole is also a kind of global consciousness. By learning new ideas, ways of doing things and new forms of social organization brought by globalization, people may be increasingly willing to accept human rights norms within a local context.⁹² Second, when human rights values are codified into international human rights law, they may also obtain a certain degree of substantive universality. The substantive universality of human rights law can first come from its binding force on State Parties. This is the 'international legal universality' as named by Donnelly.⁹³ By ratifying international human rights law, State Parties accept that the list of human rights in the law should be universal and implemented at the domestic level. With such ratification, this list of norms has a certain degree of binding force on State Parties. In most cases, human rights violations might not make State Parties lose their legitimacy in international law, though they do have an influence on their political legitimacy.⁹⁴ Third, the international legal universality is further strengthened by what Van Dijk terms 'functional universality'.⁹⁵ According to Van Dijk, functional universality refers to the creation of an international supervisory mechanism, and its accepted competence to supervise the human rights law enforcement and ensure that the human rights law is universally implemented in State Parties.⁹⁶ Van Dijk argues that construed in this way, the universality of human rights will be sufficiently solid.⁹⁷

⁹¹ Mertus (n 11).

⁹² *ibid.*

⁹³ Donnelly, 'The Relative Universality of Human Rights' (n 16).

⁹⁴ *ibid.*

⁹⁵ Kirsten Hastrup, *Human Rights on Common Grounds: The Quest for Universality* (Martinus Nijhoff Publishers 2001) 46.

⁹⁶ Pieter van Dijk, 'Common Standard of Achievement - About Universal Validity and Uniform Interpretation of International Human Rights Norms, A' (1995) 13 *Netherlands Quarterly of Human Rights* 105.

⁹⁷ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers 2001) 7; van Dijk (n 96).

Considering that, as discussed before, the law and other social factors interact with each other, this may raise the question of the degree to which the diverse cultures may influence the universality of human rights law. Accordingly, it is necessary to examine the universality of human rights law further in the context of the multicultural world.

First, the universality of human rights may still retain its solid ground when diverse cultures are concerned.⁹⁸ Each culture may contain a variety of comprehensive doctrines, among which there are diversities as well as a certain degree of overlapping consensus. This overlapping consensus may enable human rights values and law to find their ground in different cultural contexts.⁹⁹ In addition, culture is evolving. The compatibility between a specific form of culture and human rights may be changing.¹⁰⁰ Donnelly has pointed out that no culture is by nature compatible or incompatible with human rights. The key concern is whether the members of a culture support human rights.¹⁰¹ He further argues that if western religious and philosophical doctrines, after rejecting human rights throughout a long period in history, can endorse human rights law today, there is no reason why other culture sectors, such as Asian culture, cannot be interpreted to support human rights law.¹⁰² Moreover, as suggested by Donnelly, State Parties' commitment to human rights law and monitoring mechanisms may not necessarily be rooted in their culture. Instead, it may be a choice made under the inexorable trend of social, economic and political transformations of modernity.¹⁰³ Accordingly, it can be argued that the global trend of modernity provides more solid ground or an

⁹⁸ Lenzerini (n 16) 1–32.

⁹⁹ see, Donnelly, 'The Relative Universality of Human Rights' (n 16); Lenzerini (n 16) 1–32.

¹⁰⁰ Donnelly, 'The Relative Universality of Human Rights' (n 16).

¹⁰¹ *ibid.*

¹⁰² Donnelly, Jack, 'Human Rights and Asian Values: A Defense of "Western" universalism' in Joanne R. Bauer and Daniel A. Bell (eds), *The East Asian challenge for human rights* (Cambridge University Press 1999).

¹⁰³ Donnelly, 'The Relative Universality of Human Rights' (n 16); see, also Robert Howse and Ruti Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 1 *Global Policy* 127.

external force for the universality of human rights law. This may make it more difficult for the power of cultural elements to override the universality of human rights law.

For the reasons discussed above, diverse cultural factors may not have the power to erode the universality of human rights law. However, the potential influences of cultural factors on human rights law should not be overlooked. The universality of human rights law leaves room for an ample degree of pluralism in its understanding and implementation.¹⁰⁴ The significance of cultural relativity can be further illustrated from three perspectives.

First, different from the law in the commercial or financial realm, for example contract law, which is mainly rules made by people for certain purposes, it can be argued that human rights conceptions always reflect some ultimate value and are therefore rooted in the culture more deeply, or they can be regarded as a part of a culture.¹⁰⁵ As pointed out by Lord Hoffmann, key questions about the understanding and application of a specific human rights law, such as why certain human rights should be protected and how to apply human rights in practice, are culturally determined.¹⁰⁶ Accordingly, cultural factors may have an essential influence on how human rights law is understood, interpreted and applied in legal reasoning at the domestic level. Secondly, the universality of human rights law as discussed before may lead to the universal possession of human rights rules or norms, but may not necessarily lead to the universal enforcement of human rights law.¹⁰⁷ Merry has pointed out that whether human rights law is codified into local law and documents is only half

¹⁰⁴ see, Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001); Lenzerini (n 16) 11.

¹⁰⁵ Roger Cotterrell, 'Comparative Law and Legal Culture', *The Oxford Handbook of Comparative Law* (Oxford University Press, Incorporated 2006); Christopher McCrudden, 'Judicial Comparativism and Human Rights', *Comparative Law: A Handbook* (Hart Publishing Limited 2007).

¹⁰⁶ Lord Hoffmann (n 12); see, also, Yvonne Donders, 'Do Cultural Diversity and Human Rights Make a Good Match?' (2010) 61 *International Social Science Journal* 15; Lenzerini (n 16) DeSelle, 'The Relative Universality of Human Rights' (n 16).

of the question, and it should also be asked whether the law can really be used by local people, and whether those who are most vulnerable and in need of rights protection recognize their entitlements and assert their rights.¹⁰⁸ Thirdly, respecting the culture of people and their own understanding of human rights conceptions reflects the value of equality, which is an ultimate value guaranteed by human rights law.¹⁰⁹ To maintain the consistency with ultimate human rights values, the implementation of international human rights law at the national level should entail the careful study of the local culture.

4. Implementing Article 12 into Chinese Law with a Cultural Perspective

Specific to the implementation of Article 12 at the national level in China, this section analyses the cultural factors to be considered in this thesis and how they will be explored. It may be helpful to clarify that the study of cultural factors in this thesis, as has been discussed before, is for the purpose of full and effective implementation of Article 12 at the national level in China. It does not mean that Article 12 is less universal than other human rights law.

4.1 The cultural factors to be examined in this thesis

The term culture can be understood in different ways. It is noted that culturists are always criticized for misusing culture, and, as pointed out by Merry, some allegedly objective studies may be criticized for understanding culture in an improper way.¹¹⁰ In her empirical study of the Bulubulu practice in Fiji, Merry suggests that it may be impossible for experts to gain detailed knowledge of the social conditions in every country. They, therefore, may treat all countries

¹⁰⁸ Merry (n 13).

¹⁰⁹ Elisabeth Reichert, 'Human Rights: An Examination of Universalism and Cultural Relativism' (2006) 22 *Journal of Comparative Social Welfare* 23; Lenzerini (n 16) 11.

¹¹⁰ Merry (n 13).

more or less the same and rely on the well-established category of harmful traditional practices.¹¹¹ Understood in this way, culture often refers to ways of doing things that are justified by their roots in the past and is therefore reduced to traditions and customs.¹¹²

Such a narrow understanding of culture can hardly be justified for the purpose of this thesis. Instead, the term culture adopted in this thesis should be understood in a broader sense, as referring to not only beliefs and values but also practices, habits, commonsensical ways of doing things, institutional arrangements, political structures and legal regulations.¹¹³ In addition, given the trend of globalization as discussed before, this thesis argues that culture is not homogeneous or contained within stable borders, but is continually changing and open to new ideas and influences from other cultural systems.¹¹⁴ Based on this broader understanding of culture, however, it may not be possible for one thesis to investigate the whole culture of a country. Considering that culture relativity is discussed in this thesis for the purpose of implementing Article 12 of the CRPD in China and carrying out law reform, this thesis focuses on investigating China's legal culture. With this focus, the analysis may also touch upon the relation between the legal culture and other deeper cultural factors.

It is observed that the definition of legal culture varies under different theoretical origins.¹¹⁵ For the purpose of this discussion, this thesis will refer to the definition given by Nelken and Friedman from a socio-legal perspective. According to Nelken, the term legal culture concerns how culture constitutes and reveals the place of law in the society, and how features of law are

¹¹¹ *ibid.*

¹¹² *ibid.*

¹¹³ *ibid.*; see, also Lenzerini (n 16) 7.

¹¹⁴ Merry (n 13).

¹¹⁵ Merry (n 23).

embedded in larger frameworks of social structure.¹¹⁶ The definition given by Friedman is more specific in that legal culture refers to the ideas, values, attitudes and opinions held by people in a certain society towards law and the legal system.¹¹⁷ According to Friedman, social force changes the law by changing the entire society and the way people see their society. Thus, the legal culture can be regarded as the source of law, as it will create legal norms and determine its impact on society.¹¹⁸

4.2 The extent of cultural variation

Two essential and interrelated questions underlie the exploration of legal culture in this thesis. One is how to balance the influence of cultural factors and the universality of Article 12 as a piece of human rights law. The other is the extent to which cultural variation can be permitted in the implementation of Article 12 at the national level in China.

Donnelly has identified two kinds of cultural relativism, namely strong and weak cultural relativism.¹¹⁹ Strong cultural relativism takes the position that rights are culturally determined, while weak cultural relativism starts with a presumption of the universality of the law and that culture is regarded as playing the role of checking the potential excesses of universalism.¹²⁰ The previous analysis has already illustrated the universality of human rights. Accordingly, the further discussion of the implementation of Article 12, as a piece of human rights law, will adopt weak cultural relativism and start with the presumption of the universality of Article 12.¹²¹

¹¹⁶ David Nelken, 'Towards a Sociology of Legal Adaptation', *Adapting legal cultures* (Hart 2001).

¹¹⁷ Friedman (n 24).

¹¹⁸ *ibid.*

¹¹⁹ Donnelly, 'Cultural Relativism and Universal Human Rights' (n 17).

¹²⁰ *ibid.*

¹²¹ A similar approach to understanding the cultural relativity of international human rights law is taken in Lenzerini (n 16) 216.

According to Donnelly, cultural variations in the law may happen at three levels, namely in its form, interpretation and substance.¹²² Variations in the form or interpretation of the law might not constitute a conflict with its universality in an important sense, while variations in substance will show more extreme relativity that constitutes a challenge to the universality of the law.¹²³ Merry, by presenting and analysing an empirical study, takes a more specific view. Her study illustrates that she has disaggregated human rights into three levels, namely human rights value, the rights framework and the expression of human rights ideas.¹²⁴ This further suggests that cultural variation happens only at the level of the expression of human rights law and ideas.¹²⁵ In her study of human rights and gender violence, culture is considered because human rights law and values should be 'translated' into the version that grassroots local people can understand, accept and use.¹²⁶ It shows that culture should not influence what kind of value is implemented, but only how to make people understand, accept and use these values. Once it has been implemented in the local cultural context, human rights law may be elaborated and presented in familiar cultural terms. However, they retain their fundamental grounding, and this is not challenged by the local condition.¹²⁷

Merry's study has illuminated her strong position that the values underlying human rights law should be firmly insisted upon rather than altered to fit the local culture.¹²⁸ If part of the value is in conflict with the local condition, human rights law should challenge the existing social conditions by providing a radically different frame of thinking. According to Merry, this is the power and capacity of human rights law and values.¹²⁹ In addition, she points out that

¹²² Donnelly, 'Cultural Relativism and Universal Human Rights' (n 17).

¹²³ *ibid.*

¹²⁴ Merry (n 13).

¹²⁵ *ibid.*

¹²⁶ *ibid.*

¹²⁷ *ibid.*; see, also Donoho (n 21); Renteln (n 19).

¹²⁸ Merry (n 13).

¹²⁹ *ibid.*

human rights law should positively provide a new rights framework for local people to think about their problems. Although this new rights framework may not necessarily replace the existing culturally rooted one, it should bring changes to the local context by leading local people to think and act in a new way.¹³⁰ By placing Merry's empirical work in the three levels of cultural variation identified by Donnelly, it can be argued that only the variations in the form of human rights law will be permitted under Merry's arguments.

It has been discussed before that the full implementation of Article 12 should implement not only the text, but also the meaning, implication and value of Article 12 into Chinese law and practice. Therefore, this thesis critically follows Merry's footsteps and argues that to implement Article 12 in China, cultural variations should be considered only for the purpose of developing the proper form or expression of the meaning, implication and value of Article 12. In addition, given the previous discussion regarding the interrelationship between law and social context, it further follows Merry's argument and argues that when there is a conflict between Article 12 and the local culture, the implementation of Article 12 might bring 'irritants' by challenging the existing social conditions, rather than bending to them.

4.3 Analysable dimensions of legal culture

As a relatively practical issue, Teubner pointed out that cultural factors may be too portmanteau to be operationalized.¹³¹ Friedman also acknowledged that it might be difficult to use his definition of legal culture as a tool of analysis in practice.¹³² To study the legal culture, it may be necessary to disaggregate it into defined and analysable aspects.¹³³

¹³⁰ *ibid.*

¹³¹ Teubner (n 11).

¹³² Friedman (n 24).

¹³³ Teubner (n 11).

The empirical study of legal culture in this thesis is inspired by Merry's anthropological approach to legal culture. According to Merry, legal culture can be broken down into four analysable dimensions, namely the practice and ideologies within the legal system, the public's attitude towards the law, legal mobilization and legal consciousness.¹³⁴ It is believed that disaggregating legal culture into these four dimensions makes it more amenable to empirical study.¹³⁵

The first dimension of legal culture refers to the practices and ideologies within the legal system. The key question to be raised in this dimension is how legal practitioners think about the legal rules, the legal systems and the kinds of people who use them.¹³⁶ According to Merry, legal practitioners' attitudes may be shaped by multiple factors, such as their training, the cultural understanding within legal institutions, and the cultural ways of doing things.¹³⁷ The second dimension of legal culture refers to the public's attitudes towards the law. The main questions to be examined are how ordinary people, without legal expertise, experience the law, and what their views and expectations about how the legal system works.¹³⁸

It can be argued that the categorization of people with and without legal expertise reflects Friedman's classification of internal and external legal cultures.¹³⁹ Such a classification entails a further question regarding who defines legal culture. According to Friedman, the external legal culture, which refers to the public's attitude towards law under Merry's classification, is much stronger than the internal culture and, to a large degree, shapes the latter.¹⁴⁰

¹³⁴ Merry (n 23).

¹³⁵ *ibid.*

¹³⁶ *ibid.*

¹³⁷ *ibid.*

¹³⁸ *ibid.*

¹³⁹ Lawrence Meir Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975).

¹⁴⁰ *ibid.*

Different opinions are held by, for example, Watson, who has argued that the occupational culture of lawyers and lawmakers is crucial, and it shapes the legal culture and promotes legal change autonomously without being influenced by external social forces.¹⁴¹ Regarding these two contrasting arguments, Cotterrell has pointed out, with more support of Friedman, that when considering the culture's causal significance in legal change, it is necessary to investigate how general philosophical currents influence and shape the experience of legal elites, and are transformed by them.¹⁴² Merry, who takes a relatively neutral position, argues that there is no sharp divide between external and internal legal culture.¹⁴³ Both the internal and external legal cultures will be explored in the empirical research conducted in this thesis.

The third dimension of legal culture is legal mobilization. The main issue in this dimension is the extent to which people are willing to define their problems in legal terms and resort to law for help or settlement.¹⁴⁴ According to Merry, the focus of the study should be put on people's actions rather than the legal rules.¹⁴⁵ The fourth dimension of legal culture is legal consciousness. The main question to be examined in this dimension is the degree to which people see themselves as entitled to legal protection. This dimension is closely connected to legal mobilization and sometimes regarded as a precondition for legal mobilization.¹⁴⁶ According to Merry, legal mobilization and legal consciousness may be shaped by various factors and are highly contextual.¹⁴⁷ Among the various factors - how the legal system works and what kinds of intervention the law provides - may also influence legal mobilization and legal consciousness. Those who experience support for their legal claims may have

¹⁴¹ Alan Watson, 'Legal Change: Sources of Law and Legal Culture' (1983) Scholarly Works.

¹⁴² Cotterrell (n 105).

¹⁴³ Merry (n 23).

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*

a greater sense of entitlement, and develop a different legal consciousness from those who have negative experiences with the law.¹⁴⁸

These four dimensions of legal culture, as discussed above, will form the preliminary methodological framework for the empirical study of the legal culture in China. This approach is adopted for three main reasons. First, it will help to analytically specify the scope of the legal culture to be analysed in this thesis. Second, Merry's illustrations of these four dimensions help to highlight the areas that should be focused on in the empirical study of the legal culture. Third, this approach offers the methodological framework to study not only the legal rules but also different people's experiences, attitudes and subjectivities with regard to the law. This, therefore, enables the participation of people with or without legal expertise and provides opportunities for different people to speak for themselves. Considering that the ultimate purpose of the empirical study of the legal culture in China is to facilitate the discussion of the full implementation of Article 12 in China, it is argued that the anthropological approach to legal culture offers great potential to ensure that the empirical study is consistent with the fundamental values underlying Article 12.

4.4 The criticism of cultural relativism

There are four main criticisms of incorporating cultural relativism into the study of international human rights law. First, it is noted that the term culture is sometimes misused as over-determined, over bounded and xenophobic. Cultural factors may sometimes be an excuse to reject law reform.¹⁴⁹ Secondly, some discussions of culture may ignore the differences between rights and traditions, or good and old. They may oversimplify the understanding of culture by equating these different conceptions and values

¹⁴⁸ *ibid.*

¹⁴⁹ David Nelken, 'Using Legal Culture: Purpose and Problems' (2010) 5 Special issue of *Journal of Comparative Law* 1.

with moral validity.¹⁵⁰ Thirdly, some discussions of culture may overlook the fact that authoritarian politics may have an influence on people's attitudes towards culture, and fail to explore whether local people actually value some forms of culture or just tolerate them.¹⁵¹ Lastly, some discussions of culture may ignore the fact that culture is changing, and is influenced by states, markets and other social forces.¹⁵²

In response to these criticisms, reference may be made to Glenn's view that culture should not be treated as 'super-organic' or 'substantive bounded entities'.¹⁵³ Instead, culture will be understood, for the purposes of the current discussion, as one of the factors determining the way in which new institutions and practices are adopted and transformed.¹⁵⁴ In addition, the complexity of the local legal culture and how such a culture is formed will not be overlooked. Furthermore, the culture will not be understood as unchanged. An attempt will be made to respect the culture of the society concerned,¹⁵⁵ and to avoid biases in the analysis.¹⁵⁶ At the same time, however, in line with the approach of Merry discussed above, it is acknowledged that human rights law and values should have the power to challenge some forms of culture. The purpose of studying legal culture is not to defend any unwillingness regarding law reform or corresponding human rights infringements. Instead, the aim is to find a culturally sensitive way of implementing Article 12 of the CRPD, and ensuring that the domestic law reform in the light of Article 12 can deliver its meaning and value correctly and enable local people to use the law to defend their rights effectively.

¹⁵⁰ Donnelly, 'The Relative Universality of Human Rights' (n 16).

¹⁵¹ *ibid.*

¹⁵² *ibid.*

¹⁵³ Glenn HP, 'Legal Cultures and Legal Traditions', *Epistemology and methodology of comparative law* (Hart Pub 2004).

¹⁵⁴ Merry (n 23).

¹⁵⁵ Melville Jean Herskovits, *Cultural Relativism: Perspectives in Cultural Pluralism* (Random House, Vintage Books 1972).

¹⁵⁶ John J Tilley, 'Cultural Relativism' (2000) 22 Human Rights Quarterly 501.

5. Conclusion

This chapter developed the framework to theorize the implementation of international human rights law at the national level, and analysed how this theoretical framework is applied to the current context - an exploration of the implementation of Article 12 in China. The theoretical framework was developed in this chapter by drawing on the categories of those who discuss comparative law as a process of transplantation and the debate regarding the universality and cultural relativity of international human rights law.

Section 2 critically reviewed the theory of legal transplant. Based on the analysis, it argued that the metaphor of legal transplant, as analysed in this chapter, offers the possibility to enable not only the text, but also the meaning, implication and value of law to move from one legal system to another. The effect of legal transplant will be influenced by both the universality of the law and the relevant social and cultural context. By applying this theoretical framework to the implementation of Article 12 at the national level in China, the central point raised is that the implementation of Article 12 should be premised on a comprehensive understanding of both the meaning of Article 12 and the relevant social context of China.

Section 3 explored the universality and cultural relativity of human rights law, and how these two concerns may influence the implementation of international human rights law at the national level. It concluded that human rights law possesses a high degree of universality. Diverse cultural factors may not have the power to erode the universality of human rights fundamentally, but will influence how human rights law is understood, interpreted and applied in legal reasoning or by people at the domestic level.

Section 4 investigated how the metaphor of legal transplant and the universality and cultural relativity of human rights law can be combined to theorize and empirically investigate the implementation of Article 12 of the CRPD in China. It specified that this thesis will focus on investigating China's legal culture, and that the legal culture should influence not the meaning or value of Article 12, but only the expression of its meaning, implication and value. The legal culture will be studied by using certain anthropological methods, and Merry's anthropological approach to legal culture will provide the preliminary methodological framework for the empirical study.

Finally, it clarified that the exploration of the legal culture in China is premised on the understanding that Article 12 of the CRPD shall be universal, and studying the legal culture in the discussion regarding implementing Article 12 does not mean that Article 12 is less universal than other human rights laws. The purpose of studying the legal culture is not to defend any unwillingness regarding law reform or corresponding human rights infringements. Instead, it aims to develop a culturally sensitive way of implementing Article 12 of the CRPD, and therefore ensuring that Article 12, as implemented at the domestic level, is comprehensible, acceptable and accessible to the local people.

Chapter 3: Understanding the Right: Article 12 of the Convention on the Rights of Persons with Disabilities

1. Introduction

This chapter aims to develop an in-depth understanding of the text, meaning and implications of Article 12. The literature to date has shown the diverse ways in which Article 12 may be interpreted. This chapter focuses on how the Article is understood and interpreted by the UN Committee on the Rights of Persons with Disabilities (CRPD Committee). For this purpose, reference will be made to General Comment No.1 and the Concluding Observations on State Parties' reports. In addition, where appropriate, reference will be made to records of the debates on legal capacity issues in the negotiation stages of the CRPD, submissions for General Comment No.1 and academic debates. These materials are referred to with the purpose of drawing a comprehensive understanding of how Article 12 is interpreted by the CRPD Committee, and why it is interpreted in that way. A thorough understanding of Article 12 serves one of the essential threads of this thesis.

The following analysis contains three main sections. The normative content of Article 12 will be examined in Section 2. Sections 3 and 4 will focus on two specific conceptions elaborated in Article 12, namely legal capacity and support.

2. Normative Content of Article 12

The title of Article 12 affirms the right to equal recognition before the law. This is the core and foundational right guaranteed by Article 12. The following rights

elaborated in Article 12 should therefore be understood under the framework of the right to equal recognition before the law.

Article 12 (1) reaffirms the right of disabled people to be recognized as persons before the law¹⁵⁷ and therefore guarantees that a disabled person is respected as a person possessing legal personality.¹⁵⁸ As explained in General Comment No.1, recognition as a person before the law is the precondition for an individual to be recognized as having legal capacity. Article 12(1) reflects the language of Article 6 of the Universal Declaration of Human Rights (UDHR)¹⁵⁹ and Article 16 of the International Covenant on Civil and Political Rights (ICCPR)¹⁶⁰.

Article 12 (2) grants disabled people the right to legal capacity on an equal basis with others in all areas of life.¹⁶¹ According to General Comment No.1, the term legal capacity has two components. One is the legal capacity to be a rights holder, which entitles a person to the full protection of his or her rights. The other is the legal capacity to be an actor under the law, which recognizes the person as having the power to engage in transactions and create, modify or end legal relationships.¹⁶² Additionally, legal capacity should be distinguished from mental capacity. As explained in General Comment No.1, mental capacity refers to the decision-making skills of a person.¹⁶³ It is not an 'objective, scientific and naturally occurring phenomenon',¹⁶⁴ but is highly controversial and contingent on the social and political context.¹⁶⁵ General Comment No.1 clearly provides that under Article 12 of the CRPD, perceived

¹⁵⁷ CRPD (n 2) Article 12, para 1.

¹⁵⁸ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5).

¹⁵⁹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)).

¹⁶⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

¹⁶¹ CRPD (n 2) Article 12 para 2.

¹⁶² Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5).

¹⁶³ *ibid* para 13.

¹⁶⁴ *ibid* para 14.

¹⁶⁵ *ibid* para 14.

or actual deficits in mental capacity can never justify the denial of legal capacity.¹⁶⁶

Article 12 (3) further obliges state parties to 'take appropriate measures' to provide support that may be needed by disabled people in exercising their legal capacity.¹⁶⁷ The CRPD Committee provides an open-ended definition of support in the exercise of legal capacity. It recognizes support as 'a broad term that encompasses both informal and formal support arrangements of varying types and intensity'.¹⁶⁸ The CRPD Committee also recognizes that the support measures provided for different individuals may differ significantly because of the diversity of the needs and situations of disabled people, and that some people may not be willing to have support in the exercise of legal capacity.¹⁶⁹

Article 12 (4) outlines the safeguards that must be presented in a system of support in the exercise of legal capacity.¹⁷⁰ General Comment No.1 indicates that central to the safeguards for the exercise of legal capacity with support is ensuring that the support respects disabled people's 'rights, will, and preferences'.¹⁷¹ The CRPD Committee has emphasized that to ensure that disabled people enjoy the right to legal capacity on an equal basis with others, the 'will and preferences' paradigm must replace the 'best interests' paradigm.¹⁷² Similar concerns are also stated in the Concluding Observations of State Parties' reports. It is further clarified in General Comment No.1 that the support and safeguards to the exercise of legal capacity should not amount to

¹⁶⁶ *ibid.*

¹⁶⁷ CRPD (n 2) Article 12, para 3.

¹⁶⁸ Committee on the Rights of Persons with Disabilities, 'Draft General Comment on Article 12 of the Convention - Equal Recognition before the Law' (2013) CRPD/C/11/4.

¹⁶⁹ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 18&19.

¹⁷⁰ CRPD (n 2) Article 12, para 4.

¹⁷¹ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 20.

¹⁷² *ibid.*

allowing substituted decision-making, and that all regimes of substituted decision-making should be abolished.¹⁷³

Article 12 (5) deals with disabled people's rights specifically concerning financial and economic affairs. It obliges State Parties to take measures to ensure that disabled people can exercise legal capacity in financial and economic matters on an equal basis with others.¹⁷⁴

General Comment No.1 explains that the rights granted in Article 12 should be regarded as civil and political rights, and therefore, State Parties are obliged to take steps immediately to fulfil their obligations under Article 12.¹⁷⁵ By elaborating the core right to equal recognition before the law, and the derivative rights to legal capacity and support in the exercise of legal capacity on an equal basis, it has been argued that Article 12 of the CRPD recognises a universal paradigm of legal capacity with differences in treatment that ensures the achievement of substantive equality.¹⁷⁶ The CRPD Committee has emphasized in General Comment No.1, as well as most of the Concluding Observations on State Parties' reports, that Article 12 has strong connectivity with other provisions in the CRPD. It is closely connected to, on the one hand, the general principle outlined in Article 3¹⁷⁷ and deeper values such as dignity, autonomy and freedom, affirmed in the preamble;¹⁷⁸ and on the other hand, virtually all other rights affirmed in the CRPD.¹⁷⁹

A preliminary overview of the normative content and work of the CRPD Committee on Article 12 illuminates how the CRPD Committee interprets

¹⁷³ *ibid* para 26-30.

¹⁷⁴ CRPD (n 2) Article 12, para 5.

¹⁷⁵ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 30.

¹⁷⁶ Dhanda (n 28).

¹⁷⁷ CRPD (n 2) Article 3.

¹⁷⁸ *ibid* preamble.

¹⁷⁹ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 31-49.

Article 12. However, areas of concern have been raised by State Parties, scholars and civil society actors that have not been sufficiently addressed. To develop a comprehensive understanding of the connotations of Article 12, this chapter looks into Article 12 and General Comment No.1 in more detail in conjunction with debates and documents concerning its drafting process and the on-going academic discussions. The discussions before the final version of both Article 12 and General Comment No.1 are not used to create ambiguity, or override the final version. Rather, it may be helpful to illustrate the different concerns and interests underlying Article 12, and how they have been considered, negotiated and balanced in the drafting process. Such an analysis may further provide an insightful understanding of the implications and value of Article 12.

3. Legal Capacity

The first term to be analysed in Article 12 is legal capacity. Many debates centred on this term during the drafting process of Article 12 and the drafting process of General Comment No.1, and these debates may continue. The records of the debates show that the main divergences lie in two issues: one is the identification of the components of legal capacity, and the other is the distinction between legal capacity and mental capacity. This section looks into these two issues in detail.

3.1 The components of legal capacity

General Comment No.1 confirms that the term legal capacity in Article 12 contains two components: the legal capacity to be a rights holder and the legal capacity to be an actor under the law.¹⁸⁰ It states that 'legal capacity means that all people, including persons with disabilities, have legal standing and

¹⁸⁰ *ibid.*

legal agency simply by virtue of being human',¹⁸¹ and emphasizes the inseparability of these two strands of legal capacity.¹⁸²

Although the components of legal capacity are clearly confirmed in General Comment No.1, the complexity and controversies around this issue may still need to be recognized. Early in the drafting process of the CRPD, the components of legal capacity (Article 9(2) in the draft process) triggered different views.¹⁸³ State Parties demonstrated different responses to this issue. State Parties such as Egypt had made a declaration and reservation on Article 12 that legal capacity under Egyptian law does not include the capacity to perform.¹⁸⁴ The translation of the CRPD may also add some complexity to this issue. In the Chinese version of the CRPD, for example, the term legal capacity is translated as 'falv quanli nengli', which, when compared with the text of China's Civil Law, may refer only to the legal capacity to be a right holder and not to be an actor under the law. Although China makes no reservation to the CRPD, such an arguably misleading translation may result in potential controversies and covert inconsistency.

More complexities have been added as it has been observed that previous International human rights conventions do not clearly address whether the term legal capacity includes both the capacity to have rights and the capacity to act.¹⁸⁵ The Office of the UN High Commissioner for Human Rights (OHCHR) has reviewed both Article 16 of the ICCPR¹⁸⁶ and Article 15(2) of the

¹⁸¹ *ibid* para 14.

¹⁸² *ibid* para 14.

¹⁸³ U.N. Enable, Working Group: Fourth Revised Text (Oct. 30, 2006), available at <http://www.un.org/esa/socdev/enable/documents/ahc8docs/AHC8DC-4th-rvsd-txt.doc> (last access: 8 Dec 2016); Dhanda (n 20).

¹⁸⁴ State party's declarations and reservations are available at: 'Declarations and Reservations to Convention on the Rights of Persons with Disabilities' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en> (last access: 8 Dec 2016).

¹⁸⁵ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (NP Engel 2005) 283.

¹⁸⁶ International Covenant on Civil and Political Rights (n 160) Article 16.

Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW)¹⁸⁷. Based on the rules of interpretation in the Vienna Convention on the Law of Treaties (VCLT),¹⁸⁸ the OHCHR has referred to *Webster's New Millennium Dictionary of English*, analysed the context in which the term 'legal capacity' is used, and reviewed the drafting history of the relevant provisions. According to the OHCHR, Article 16 of the ICCPR clearly endows individuals' right to be recognized as potential bearers of legal rights and obligations. However, it is not clear whether it encompasses the legal capacity to act under the law. Such indeterminacy is also evidenced by the fact that the widespread limitations on legal capacity to act, which exist in all legal systems, do not in themselves violate Article 16.¹⁸⁹ Article 15(2) of the CEDAW, in which the term legal capacity is used together with the wording 'exercise that capacity',¹⁹⁰ should be interpreted as elaborating both the legal capacity to be a right holder and the legal capacity to act under the law.¹⁹¹

One of the inquiries that is central to the debates around the components of legal capacity is whether Article 12 of the CRPD, by encompassing the right to legal capacity to act under the law, establishes a new right. It is argued in this thesis that Article 12 of the CRPD does not create a new right, but it does set out a clearer and stronger position towards the legal capacity to act than that in any other human rights treaties or domestic legal systems.

It should be pointed out that although previous human rights treaties do not clearly address the right to legal capacity to act, they do not deny the existence

¹⁸⁷ Convention on the Elimination of All Forms of Discrimination against Women (adopter 18 December 1979, entry into force 3 September 1981) UNTS 1249 Article 15.

¹⁸⁸ Vienna Convention on the Law of Treaties (adopted 23 May 1969) Article 31.

¹⁸⁹ Office of the United Nations High Commissioner for Human Rights, 'Background Conference Document Prepared by the Office of the United Nations High Commissioner for Human Rights - Legal Capacity' <<http://www.un.org/esa/socdev/enable/rights/ahc6documents.htm>> (last access: 8 Dec 2016).

¹⁹⁰ Convention on the Elimination of All Forms of Discrimination against Women. (n 187) Article 15.

¹⁹¹ Office of the United Nations High Commissioner for Human Rights (n 189).

of this right either. According to the background Conference document, there was general agreement that Article 16 'did not attempt to address the question of a person's capacity to act'¹⁹² and 'was not intended to deal with the question of a person's legal capacity to act, which might be restricted for such [various] reasons'.¹⁹³ Accordingly, it can be argued that the position of Article 16 should be understood as being that while there should be universal recognition of an individual's legal capacity to be a right holder, it leaves room for restrictions on legal capacity to act under the law at the national level. It is argued that there is no conflict between this position and that of Article 12. As explained in General Comment No.1, Article 12 of the CRPD does not rule out all possible restrictions on the legal capacity to act under the law.

'...when the State denies legal capacity, it must be on the same basis of all persons. Denial of legal capacity must not be based on personal trait such as...disability, or have the purpose or effect of treating the person differently.'¹⁹⁴

This clarifies the position of Article 12, that while legal capacity may be restricted for various reasons, disability or disability-related factors are not legitimate grounds for any form of restriction on one's legal capacity to act under the law.

3.2 Legal capacity and mental capacity

A stronger position is also held towards the relation between legal capacity and mental capacity. General Comment No.1 has called for de-linking legal capacity from mental capacity, and mental capacity in this context is equated with one's decision-making ability or skills.¹⁹⁵ It is not clear whether equating

¹⁹² *ibid.*

¹⁹³ *ibid.*

¹⁹⁴ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 32.

¹⁹⁵ *ibid* para 13.

mental capacity with decision-making ability or skills runs the risk of oversimplification.¹⁹⁶ However, this is beyond the scope of the discussion in this thesis. Without considering them as exactly the same, it follows that the term mental capacity, at its core, refers to individuals' ability to make decisions for themselves, which is then always specified as the ability to understand, retain and weigh information and express a decision.¹⁹⁷

At the international level, previous International human rights instruments have not clarified the distinction between mental and legal capacity.¹⁹⁸ Such an ambiguous conflation is no longer embedded in the CRPD, because Article 12 of the CRPD establishes a clearer and stronger position than that in previous International human rights instruments, on de-linking legal and mental capacity. As interpreted in General Comment No.1, legal capacity should be recognized as a universal attribute in all individuals by virtue of their humanity, and 'perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity'.¹⁹⁹

This stronger position has led some scholars to argue that it may be impractical or radical. Harper, for example, argues that 'persons without disabilities do not have such a right to have their mental capacity ignored by the law'.²⁰⁰ According to Harper, an individual's impaired mental capacity should not be a justification for denying his/her legal capacity as a rights

¹⁹⁶ For a discussion, see, for example, Melvyn Colin Freeman and others, 'Reversing Hard Won Victories in the Name of Human Rights: A Critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities' (2015) 2 *The Lancet Psychiatry*.

¹⁹⁷ Wayne Martin and others, 'Achieving CRPD Compliance-Is the Mental Capacity Act of England and Wales Compatible with the UN Convention on the Rights of Persons with Disabilities? If Not, What Next?' (2014).

¹⁹⁸ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 13.

¹⁹⁹ *ibid* para 13.

²⁰⁰ Colin M Harper, 'Submission in Response to Call for Comments on the Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law' (2014) <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>>.

holder.²⁰¹ However, de-linking the legal capacity to make a decision from mental capacity appears to suggest that disabled people have decision-making rights that persons without disabilities do not have.²⁰²

At the domestic level, according to General Comment No.1, through examining State Parties' reports, the CRPD Committee finds that mental and legal capacity have been conflated in most countries.²⁰³ Many researchers have also raised similar concerns.²⁰⁴ The consequence of the conflation between legal and mental capacity is that disabled people, especially people with a cognitive or psychosocial disability, will always be prejudicially considered as having diminished legal capacity. In most cases, they may be required to demonstrate a certain standard of cognitive ability before they can make a particular decision,²⁰⁵ or they may be deprived of legal capacity automatically.

It is illustrated in General Comment No.1, as well as observed by many researchers, that three main approaches to capacity-related tests embody the conflation between the concepts of mental and legal capacity.²⁰⁶ It is clearly stated in General Comment No.1 that all three approaches are prohibited by Article 12.

The first approach is the status test.²⁰⁷ This test presumes that a person with a specific physical or mental impairment, usually pivoting on a loss of cognitive capacity or mental illness, lacks legal capacity. Such a presumption, in fact,

²⁰¹ *ibid* para 11.

²⁰² *ibid* para 9 & 11.

²⁰³ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 15.

²⁰⁴ see, for example, *ibid*; Martin and others (n 197).

²⁰⁵ Michael Bach and Lana Kerzner, 'A New Paradigm for Protecting Autonomy and the Right to Legal Capacity' (2010).

²⁰⁶ see, for example Dhandu (n 28); Gerard Quinn and Anna Arstein-Kerslake, 'Restoring the "Human" in "Human Rights": Personhood and Doctrinal Innovation in the UN Disability Convention', *The Cambridge Companion to Human Rights Law* (Cambridge University Press 2012).

²⁰⁷ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 15.

equates individuals with an impairment with individuals lacking legal capacity. Quinn and Arstein-Kerslake have argued that denying one's legal capacity under this approach is comparable to 'how married women-qua married women-submerged their personhood into that of their husband in centuries past'.²⁰⁸

The second approach is the outcome test,²⁰⁹ which judges an individual's legal capacity based on an evaluation of their decision-making. If an individual makes a decision that is regarded as less 'wise' by a 'reasonable person', his or her capacity may be questioned.²¹⁰ Dhanda has provided an oft-quoted example that a mentally disabled person's capacity may be called into question if he or she voluntarily seeks psychiatric treatment and then decides to discontinue it. In this scenario, only the decision to discontinue treatment will be called into question but not the decision to seek treatment in the first instance. This approach, in fact, works backwards from a conclusion of 'unwise' decisions to a judgment of a lack of legal capacity.²¹¹ This approach is objectionable because a 'wise' decision *per se* is a constructed criterion, which people cannot always meet, but most 'non-disabled' people will not be denied legal capacity because of an 'unwise' decision. More objections against this approach can be raised from broader perspectives.²¹²

The third approach is the functional test.²¹³ The functional test assesses one's legal capacity by examining whether he/she can perform a specific function. This then leads to the examination of one's mental capacity, i.e. whether one

²⁰⁸ Quinn and Arstein-Kerslake (n 206).

²⁰⁹ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 15.

²¹⁰ *ibid* para 15.

²¹¹ Quinn and Arstein-Kerslake (n 206).

²¹² *see*, for example *ibid*.

²¹³ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 15.

can understand, retain, weigh information and express a decision.²¹⁴ The main difference between the functional test and the other two approaches is that it requires one's legal capacity to be assessed in terms of particular kinds of decisions at a specific time rather than across the board. Therefore, a decision on one's legal capacity made in terms of one matter at one time will not necessarily determine his/her legal capacity on other matters or at other time.²¹⁵ However, as pointed out by many scholars, this difference, as well as the differences between all three of these approaches, may not be significant from a practical perspective, because it may, after all, lead to the same discriminatory consequence as the status test does.²¹⁶

Although it has now been clarified in General Comment No.1 that Article 12 rules out all three of these approaches to legal capacity assessment, it is still worth noting that in the draft version of General Comment No.1, only the first approach -the status test- was completely prohibited. In the draft version of General Comment No.1, the other two approaches -the outcome test and the functional test- were found to violate Article 12 only 'if they are discriminatory or if they disproportionately affect the right of persons with disabilities to equality before the law.'²¹⁷ This position was questioned in many submissions from the State Parties and civil society. For example, WNUSP urged a clear stand against the use of the functional test for any purpose with regard to legal capacity.²¹⁸ Harper and Szmukler have discussed the difficulties of interpreting

²¹⁴ Michael Bach, 'The Right to Legal Capacity under the UN Convention on the Rights of People with Disabilities: Key Concepts and Directions from Law Reform' (Institute for Research and Development on Inclusion and Society 2009).

²¹⁵ Quinn and Arstein-Kerslake (n 206).

²¹⁶ see, for example Dhanda (n 28).

²¹⁷ Committee on the Rights of Persons with Disabilities, 'Draft General Comment on Article 12 of the Convention - Equal Recognition before the Law' (n 169).

²¹⁸ World Network of Users and Survivors of Psychiatry and Center for the Human Rights of Users and Survivors of Psychiatry (CHRUSP), 'Response to Draft General Comment on Article 12' (2014)

<<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>> (last access: 2 July 2015).

the standard of discriminatory.²¹⁹ Series has pointed out that the functional test, regardless of whether or not it requires a diagnostic threshold, is not only discriminatory but also has the potential to expand the scope of 'mental incapacity' to more people.²²⁰

The final version of General Comment No.1 clearly rules out all three of these approaches to legal capacity assessment, emphasizes that Article 12 does not permit discriminatory denial of legal capacity, and denies the legitimacy of linking legal capacity to disability, mental capacity or decision-making skills.²²¹ Specifically regarding the functional approach, it is pointed out in General Comment No.1 that the functional approach is flawed for two key reasons. One is that 'it is discriminatorily applied to people with disabilities', and the other is that 'it presumes to be able to accurately assess the inner-workings of the human mind' and 'denies him or her a core human rights' when the person fails to pass the assessment.²²² General Comment No.1 has thus adopted a clear position that functional tests of one's mental capacity should not be a basis for deprivations of legal capacity.

Some researchers and members of civil society have considered whether there is room under Article 12 to use a functional test to identify an individual's particular support needs. Their arguments can be summarized as involving two main points. Firstly, a functional test is necessary for determining what support should be provided to a person in the exercise of their legal capacity. As has been argued by, for example, Richardson, Bach and Kerzner and the

²¹⁹ Colin M Harper (n 201); George Szmukler, 'Submission to Committee on the Rights of Persons with Disabilities on the Draft General Comment on Article 12' (2014) <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>> (last access: 2 July 2015).

²²⁰ Lucy Series, 'Re: Comments on Draft General Comment on Article 12 - the Right to Equal Recognition before the Law' (2014) <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>> (last access: 2 July 2015).

²²¹ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 15.

²²² *ibid* para 15.

Canadian Association on Community Living, providing support with the exercise of legal capacity may require the creation of new boundaries to determine when and what kind of support should be offered. Functional tests of decision-making ability can help to identify individuals who exercise their legal capacity in 'substantially different' ways, and the different types of support measures that are required by those individuals. Thus, a functional assessment is necessary for the fair and sufficient allocation of support.²²³ Secondly, as further argued by the Canadian Association on Community Living, functional tests can be used to promote equality rather than to reinforce discrimination. The purpose of functional tests in this context is not to exclude disabled people by denying their legal capacity, but to ensure that different abilities are recognized and supported, and equal opportunities and outcomes are not dependent on those differences.²²⁴

As noted above, General Comment No.1 rules out the use of functional tests to deprive a person of his/her legal capacity. However, it does not condemn the use of the functional test to identify the need for support with the exercise of legal capacity. The discussion regarding whether and how the functional test should be a part of the process of identifying individuals' support needs will be revisited in Chapter 8 below.²²⁵ For current purposes, however, the focus of the analysis will return to the three main approaches to legal capacity assessment identified in General Comment No. 1.

It has been pointed out clearly in General Comment No.1 that the status, outcome and functional approach of legal capacity assessment are all rejected by Article 12 of the CRPD. It is argued here that Article 12 should be

²²³ see, for example Geneva Richardson, 'Mental Capacity in the Shadow of Suicide: What Can the Law Do?' (2013) 9 International Journal of Law in Context 87; Bach and Kerzner (n 206); Canadian Association of Community Living, 'Submission to the Draft General Comment on Article 12 of the Convention-Equal Recognition before the Law and Draft General Comment on Article 9 of the Convention- Accessibility'.

²²⁴ Canadian Association of Community Living (n 223).

²²⁵ see the discussion at 259, Chapter 8, 4.2 The negotiation of support needs

understood as also rejecting any other possible legal mechanisms in the future if they have similar discriminatory characteristics or lead to a similar result to any of these three approaches. Otherwise, the strong position, raised in Article 12 and General Comment No.1, towards disabled people's rights to equal recognition before the law may be undermined. Therefore, it is important to highlight the core characteristics of these three approaches of legal capacity assessment.

General Comment No.1 has pointed out one common feature of all of these three approaches, which is that a person's disability or decision-making skills are treated as legitimate grounds for the denial of his/her legal capacity.²²⁶ Considering the functional test in particular, a further characteristic is pointed out: that the functional approach is based on a flawed presumption of accurately assessing the inner-workings of the human mind.²²⁷

In addition, the academic debates have suggested another four characteristics that are shared by all three of these approaches. First, they all confer deference to psychiatric diagnosis or medical experts' evidence.²²⁸ Second, all three approaches take into account the particular point in time of making a decision, but ignore the decision-making in 'a broader or diachronic sense'.²²⁹ Third, all of them overlook the support provided in ordinary people's day-to-day decision-making and ignore the fact that co-decisions rather than purely independent decisions are the norm in practice.²³⁰ Fourth, none of the three

²²⁶ Committee on the Rights of Persons with Disabilities, 'Draft General Comment on Article 12 of the Convention - Equal Recognition before the Law' (n 169) para 15.

²²⁷ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 15.

²²⁸ see, for example, Quinn and Arstein-Kerslake (n 206); Dhanda (n 28).

²²⁹ Quinn and Arstein-Kerslake (n 206).

²³⁰ see, for example, *ibid*; RM Gordon, 'The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making' (2000) 23 *International Journal of Law and Psychiatry* 61; Piers Gooding, 'Supported Decision-Making: A Rights-Based Disability Concept and Its Implications for Mental Health Law' (2013) 20 *Psychiatry, Psychology and Law* 431.

approaches provides room for enhancing one's residual capacity by providing support.²³¹

Moreover, based on General Comment No.1 and the existing academic debates, it is pointed out in this thesis that the existing approaches to legal capacity assessment, especially the status approach, may have the effect of categorizing a disabled person into a fixed status of legal capacity, decision-making ability, or decision-making support. As argued in this thesis, categorizing disabled people into such fixed statuses may have a discriminatory effect on disabled people. Even if it does not remove the person's legal capacity completely, it may still undermine their right to equal recognition before the law.

As discussed before, given the strong position of Article 12 in terms of guaranteeing disabled people's right to legal capacity on an equal basis with others, Article 12 and General Comment No.1 should be understood as ruling out not only the three traditional approaches to denying disabled people's legal capacity, but also other possible mechanisms that have similar characteristics or lead to similar consequences to any of these three approaches.

3.3 The purpose underlying the term legal capacity in Article 12

As discussed above, Article 12 shows a clearer and stronger position towards legal capacity than any of the previous international human rights instruments. Because of this stronger position, Article 12 has been regarded as having powerful and radical potential to refresh human rights thinking in general, not just in the specific field of disability.²³² However, it is also predictable that Article 12 will bring controversies and challenges to existing legal instruments at both the international and domestic levels. To respond to these

²³¹ Quinn and Arstein-Kerslake (n 206).

²³² *ibid.*

controversies and challenges in line with the whole CRPD, it is important to look into the purposes underlying these stronger positions.

By referring to General Comment No.1, the existing Concluding Observation on States parties, as well as academic debates, two main points should be considered. First, as recognized in General Comment No.1, many groups of people including women, ethnic minorities and disabled people have been prejudicially deprived of their legal capacity throughout history, and disabled people remain the group 'whose legal capacity is most commonly denied in legal systems worldwide'.²³³ Accordingly, underlying Article 12 is the mission to combat the profound discrimination against disabled people's legal capacity. The mission of equality and non-discrimination is also illustrated in the preamble, Article 3, Article 5 and several other provisions in the CRPD. General Comment No.1 explains the significant relevance between these provisions and Article 12.²³⁴ Scholars have also pointed out the importance of Article 12 to the general principles and missions of the CRPD. According to Dhanda, for example, the establishment of an inclusive paradigm of legal capacity is necessary, because, without it, the foundational prejudices against disabled people cannot be disassembled.²³⁵ Second, it is emphasized in General Comment No.1 and most of the Concluding Observations on State Parties' reports that legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights.²³⁶ Having legal capacity is thus the key to accessing meaningful participation in society.²³⁷ A similar argument is raised by Quinn, who points out that legal capacity is a continuum connecting with everything that an individual needs to practise the right to

²³³ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 8.

²³⁴ *ibid* para 4, 32.

²³⁵ Dhanda (n 28).

²³⁶ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 8.

²³⁷ *ibid* para 13.

make decisions and have them respected.²³⁸ The denial of legal capacity may have certain influences on personhood in real life. ²³⁹ The existing practice also proves that people who are recognized as legally incompetent may be physically isolated or socially and economically excluded from mainstream society. Most of them may not have the opportunity to develop a vision for their own lives.²⁴⁰

It is recognized that discrimination against disabled people's legal capacity has already overtly or covertly pervaded law and practice for a long time, and the consequences of denying one's legal capacity are significant. Accordingly, a strong position is necessary to enable the scrutiny of the existing mechanisms that permit the discriminatory denial of disabled people's legal capacity, to ensure that no room is left for any possible discrimination, and to guarantee disabled people's equal enjoyment of all the rights and meaningful participation in society.

It is not deniable that there may be tension between the term 'legal capacity' in Article 12 of the CRPD and similar terms in other international or domestic legal instruments. Given the differences in legal systems and language, it is also foreseeable that the term 'legal capacity' as understood in Article 12 may be implemented in domestic law in different ways. However, no matter how the law is presented, it should bear no deviation from the ultimate purpose of Article 12 and the whole CRPD, which is to combat the profound discrimination against disabled people, respect disabled people's inherent dignity and

²³⁸ Gerard Quinn, 'Rethinking Personhood: New Directions in Legal Capacity Law and Policy' (2011).

²³⁹ Gerard Quinn, 'Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD.' (2010).

²⁴⁰ Ann P Turnbull and Rud Turnbull, 'Self-Determination' (2006) 31 *Research and Practice for Persons with Severe Disabilities* 83; Deborah Stienstra and Aileen Wight-Felske (eds), *Making Equality: History of Advocacy and Persons With Disabilities in Canada* (Captus Pr 2003).

autonomy, and ensure their equal enjoyment of all the rights and full participation in society.²⁴¹

4. Support in the Exercise of Legal Capacity and Safeguard

The strong position towards legal capacity in Article 12 is accompanied and facilitated by another conception, namely support in the exercise of legal capacity. Article 12 (3) obliges State Parties to guarantee the access by disabled people to support in the exercise of legal capacity. According to General Comment No.1, the provision of support should respect individuals' rights, will, and preference, and aim to maximize individuals' exercise of legal capacity.²⁴² The importance of providing support in the exercise of legal capacity is almost self-evident as the CRPD Committee has repeatedly stated in its Concluding Observations on States Parties' initial reports, as well as in General Comment No.1, that substitute decision-making should be replaced by supported decision-making, which respects the person's autonomy, will and preference.²⁴³ Article 12 (4) further requires States Parties to provide safeguards for the exercise of legal capacity and ensure that the provision of support is on an equal basis with others, and respects the person's rights, will and preferences.²⁴⁴

4.1 What is support in the exercise of legal capacity

The term support is not specifically defined in either Article 12 or General Comment No.1. It is instead illustrated in General Comment No.1 from three

²⁴¹ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 4, 6, 8; see, also, Arnardóttir (n 27).

²⁴² Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5); see, also, for example, Gooding (n 231).

²⁴³ see, for example, Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 3, 29; Committee on the Rights of Persons with Disabilities, 'Concluding Observations on Report of China' (n 6) para 21.

²⁴⁴ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 20.

aspects. First, General Comment No.1 emphasizes the essential principle that support in the exercise of legal capacity 'must respect rights, wills, and preferences' of disabled people. Second, it recognizes that owing to the diversity of disabled people, support in the exercise of legal capacity varies significantly in both type and intensity and encompasses both informal and formal support arrangements.²⁴⁵ It then gives an open-ended list of examples to illustrate what a support measure can entail.²⁴⁶ Third, General Comment No.1 also stipulates what does not amount to support in the exercise of legal capacity. It clarifies the conceptual distinction between first, support and reasonable accommodation in exercising legal capacity, and second, support in the exercise of legal capacity and substituted decision-making.

Regarding the relation between support and reasonable accommodation, General Comment No.1 provides that 'the right to reasonable accommodation in the exercise of legal capacity is separate from and complementary to the right to support in the exercise of legal capacity'.²⁴⁷ The main distinction between these two conceptions is that 'the right to support in the exercise of legal capacity shall not be limited by the claim of disproportionate or undue burden'.²⁴⁸

Regarding substitute decision-making, it has been debated whether Article 12 leaves room for any form of substitute decision-making, and the language of Article 12 is regarded as not sufficiently unequivocal on this issue.²⁴⁹ However, this is no longer subject to ambiguity, as General Comment No.1 takes the strong position that support in the exercise of legal capacity should never

²⁴⁵ *ibid* para 17 & 18.

²⁴⁶ *ibid* para 17.

²⁴⁷ *ibid*.

²⁴⁸ *ibid* para 34.

²⁴⁹ see, for example Oliver Lewis, 'Advancing Legal Capacity Jurisprudence' (2011) *European Human Rights Law Review*; Dhanda (n 20).

amount to substitute decision-making.²⁵⁰ Substitute decision-making should be abolished and any maintenance of substitute decision-making regimes, even as a last resort, can be regarded as not compatible with Article 12.²⁵¹ General Comment No.1 does not define substitute decision-making. It recognizes that substitute decision-making regimes can take many different forms,²⁵² and generalizes three common characteristics of substitute decision-making:

... (i) legal capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person's own will and preferences.²⁵³

These three characteristics, on the other hand, also suggest the features that support in the exercise of legal capacity cannot have.

It can be implied from the interpretation in General Comment No.1 that support in the exercise of legal capacity should be on a spectrum, in which there are a variety of legal mechanisms with different types and intensities, directed to a range of duty bearers.²⁵⁴ The widely used term 'supported decision-making' is

²⁵⁰ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 17.

²⁵¹ *ibid* para 28.

²⁵² *ibid* para 27.

²⁵³ *ibid* para 27.

²⁵⁴ *ibid* para 17; Piers Gooding, 'Navigating the “Flashing Amber Lights” of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns' (2015) 15 Human Rights Law Review 45.

one typical constitutive element of this spectrum,²⁵⁵ while the traditionally used term 'substitute decision-making' is completely excluded from this spectrum.

Considering the diversity of support in the exercise of legal capacity, it may be helpful to generalize its core characteristics. Reading Article 12 together with General Comment No.1, the following five points can be seen to be explicit. First, support in the exercise of legal capacity should be provided without discrimination. It should be in line with Article 5 and the general principle enshrined in Article 3 of the CRPD.²⁵⁶ According to General Comment No.1, one's level of support needs, one's mode of communication, whether or not one is isolated, and one's financial condition cannot be barriers to obtaining support.²⁵⁷ Second, as has been repeated, the support must respect the rights, will and preferences of disabled people.²⁵⁸ Even when their will and preference cannot be determined, the 'best interpretation of will and preference' must replace the 'best interests' determination.²⁵⁹ Third, the provision of support should not be based on any form of mental capacity assessments.²⁶⁰ Fourth, disabled people can freely choose, refuse, enter into or terminate the support relationship according to their own will and preference.²⁶¹ Fifth, the need for support should not result in the removal of one's legal capacity, not even in respect of a single decision.²⁶² Nor should it be a justification for limiting other fundamental rights of disabled people. ²⁶³

²⁵⁵ Michelle Browning, Christine Bigby and Jacinta Douglas, 'Supported Decision Making: Understanding How Its Conceptual Link to Legal Capacity Is Influencing the Development of Practice' (2014) 1 Research and Practice in Intellectual and Developmental Disabilities 34.

²⁵⁶ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 33.

²⁵⁷ *ibid* para 29.

²⁵⁸ *ibid* para 17.

²⁵⁹ *ibid* para 21 and 29.

²⁶⁰ *ibid* para 29.

²⁶¹ *ibid* para 19 & 29; Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, 'Supported Decision-Making: A Viable Alternative to Guardianship' (2012) 117 Penn State Law Review 1111.

²⁶² Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 27.

²⁶³ *ibid* para 29.

Three further characteristics can be derived from both Article 12 and General Comment No.1. First, the disabled people concerned should actively participate in, and be the principal and ultimate decision-maker in the decision-making process. A supported decision-making arrangement cannot include a substitute decision-maker appointed by someone other than the disabled person concerned.²⁶⁴ Second, support in the exercise of legal capacity should be consistent with the human rights-based model of disability. This requires that it should avoid the use of disabling labels, and focus on removing social barriers to disabled people's exercising legal capacity.²⁶⁵ Last but not least, the legal effect of the exercise of legal capacity with support should generally be recognized.²⁶⁶

4.2 The significance of support in the exercise of legal capacity

Quinn has helpfully pointed out that the concept of support in the exercise of legal capacity is the true revolution that lies in Article 12.²⁶⁷ It provides an alternative to the traditionally widespread mechanism of denying one's legal capacity and assigning a substitute decision-maker. For the purpose of developing a comprehensive insight into the implications and purpose of support in the exercise of legal capacity, it may be helpful to look into why it is regarded as revolutionary and its potential advantages.

From the perspective of law-making, it can be argued that the notion of 'support' suggests a new pattern of capacity-related law. The traditional capacity-related law is mostly framed in an exclusive pattern, in which legal

²⁶⁴ *ibid* para 27; see, also Leslie Salzman, 'Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandated of Title II of the Americans with Disabilities Act' (2010) 81 University of Colorado Law Review 157; Kohn, Blumenthal and Campbell (n 262).

²⁶⁵ see, Kohn, Blumenthal and Campbell (n 262); Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5).

²⁶⁶ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 16; Kohn, Blumenthal and Campbell (n 262).

²⁶⁷ Gerard Quinn (n 239); CRPD (n 2) Article 12 (3).

capacity is constructed by defining and managing the criteria of incompetency.²⁶⁸ As has been pointed out in General Comment No.1, the capacity-related law in such an exclusive pattern has the function of excluding certain people from mainstream society.²⁶⁹ Article 12, on the contrary, offers the potential to reconstruct legal capacity in an inclusive pattern. The notion of support shows that Article 12 requires not only the recognition of all people's legal capacity on an equal basis but also that measures are undertaken to maximize individuals' real exercise of legal capacity.²⁷⁰ General Comment No.1 analyses how support in the exercise of legal capacity is linked to other basic human rights.²⁷¹ This further suggests that the inclusive pattern of capacity-related law, as required by Article 12, can ultimately maximize individuals' inherent right to autonomy and their participation in the society.

From a philosophical perspective, the notion of 'support' challenges the traditional view that autonomous decision-making is isolated, rationalistic and purely independent.²⁷² Instead it emphasizes the relational aspect of self and advances a more realistic view that individuals may rely, to a greater or lesser extent, on others to help them make and give effect to decisions.²⁷³ It questions the traditional pattern of the enjoyment of autonomy and argues that autonomy is an interdependent rather than independent phenomenon.²⁷⁴ Support in the exercise of legal capacity, as proposed in Article 12, is significant and revolutionary because it proclaims that while the

²⁶⁸ Bach and Kerzner (n 205).

²⁶⁹ For example, disabled people, see Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 1 & 8.

²⁷⁰ *ibid* see, for example, para 29.

²⁷¹ *ibid* para 38-49.

²⁷² *ibid* para 4, see also; Gooding (n 230).

²⁷³ For a discussion of the relational aspect of self, see, for example, Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press 2000); Jennifer K Walter and Lainie Friedman Ross, 'Relational Autonomy: Moving beyond the Limits of Isolated Individualism' (2014) 133 *Suppl 1 Pediatrics* S16; Gooding (n 231); John Christman, 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves' (2004) 117 *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 143.

²⁷⁴ see, for example, Christman (n 273); Walter and Ross (n 273); Gooding (n 230).

interdependent nature of autonomous decision-making may be more evident for disabled people, such interdependency is in fact shared by all people, to a greater or lesser extent.²⁷⁵ It also leads the whole of society to consider that it may always be difficult for disabled people to access support in the exercise of legal capacity while formal or informal support is always available to people labelled as 'non-disabled.'

From the perspective of the social model of disability, it can be argued that substitute decision-making mechanisms may be regarded as a social barrier to disabled people developing and participating in social life.²⁷⁶ It has been pointed out that most substituted decision-making mechanisms do not facilitate the disabled person concerned to participate in the decision-making process, which may make the person concerned more isolated.²⁷⁷ Besides, since people under substituted decision-making mechanisms are always denied the chance to develop and practise decision-making skills, such abilities and skills may become weaker and weaker.²⁷⁸ This may then result in stronger substitute decision-making arrangements as well as stereotypical thinking about disabled people. In comparison with substitute decision-making, which creates such social barriers, support in the exercise of legal capacity may offer rich potential to remove these barriers. Based on the interpretation in General Comment No.1, the advantages of support in the exercise of legal capacity lies in three main aspects. First, it is not initiated, or linked to disability or other discriminatory labels.²⁷⁹ Nor does it result in discriminatory labels or prejudicial attitudes such as equating the need for support in decision-making with being

²⁷⁵ see, for example Tina Minkowitz, 'Submission to the Committee on the Rights of Persons with Disabilities Day of General Discussion on CRPD Article 12' (Center for the Human Rights of Users and Survivors of Psychiatry); Gooding (n 231); Walter and Ross (n 274).

²⁷⁶ Kohn, Blumenthal and Campbell (n 261).

²⁷⁷ Pamela B Teaster, 'The Wards of Public Guardians: Voices of the Unbefriended*' (2002) 51 Family Relations 344; Salzman (n 265).

²⁷⁸ Bruce J Winick, 'The Side Effects of Incompetency Labeling and the Implications for Mental Health Law' (1995) 1 Psychology, Public Policy, and Law 6; Kohn, Blumenthal and Campbell (n 262).

²⁷⁹ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 15.

incapable of reaching autonomous decisions. Second, support in the exercise of legal capacity is designed to enable and enhance, rather than restrict disabled people's participation in decision-making and social life as a whole. Third, as pointed out in General Comment No.1, support in the exercise of legal capacity, as well as the whole of Article 12, aims at developing, rather than undermining, the confidence, and skills of disabled people. Based on such development, disabled people may be encouraged to engage in more positive participation in social life and their need for support in the exercise of legal capacity may become less.²⁸⁰ This may further change the stereotypical thinking against disabled people and make the social environment better for disabled people's inclusion. Currently, there is not sufficient empirical literature on whether support in the exercise of legal capacity can achieve all of these goals,²⁸¹ though it does have the potential to bring about revolutionary change to the exercise of legal capacity by disabled people in practice.²⁸²

4.3 The safeguard for the exercise of legal capacity

Although there have been extensive discussions regarding the benefits of support in the exercise of legal capacity, its potential drawbacks should not be ignored. One of the primary concerns about support in the exercise of legal capacity is the possibility of misuse, coercion or other inappropriate influence by the supporter.²⁸³ The traditional practice of substitute decision-making has shown that abuse can pervade a formal legal arrangement such as guardianship.²⁸⁴ Considering that support in the exercise of legal capacity may take the form of informal arrangements, or occur in private and with less accountability, it can be argued that the possibility of abuse may increase.

²⁸⁰ *ibid* para 24.

²⁸¹ Kohn, Blumenthal and Campbell (n 261).

²⁸² *ibid*; Gooding (n 254).

²⁸³ Kohn, Blumenthal and Campbell (n 261).

²⁸⁴ see, for example Oliver Lewis, 'Mental Disability Law in Central and Eastern Europe: Paper, Practice, Promise' (2002) December 2002 *Journal of Mental Health Law* 293.

Article 12(4) requires states parties to provide appropriate and effective safeguards for the exercise of legal capacity:

...Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.²⁸⁵

It is worth noting that the safeguards prescribed in Article 12(4) in themselves have provoked some controversy. The records of the drafting process of Article 12 suggest that the safeguards prescribed in Article 12 might be misunderstood as leaving room for substitute decision-making.²⁸⁶

The CRPD Committee has clarified in General Comment No.1 that all regimes of substituted decision-making should be abolished.²⁸⁷ This clear stand is also manifested in the Concluding Observation to State Parties' reports as the CRPD Committee has repeatedly urged States to replace substitute decision-making systems with a regime of support in the exercise of legal capacity.²⁸⁸ General Comment No.1 has also clarified that the primary purpose of the safeguards stipulated in Article 12(4) is to ensure the respect of

²⁸⁵ CRPD (n 2) Article 12(4).

²⁸⁶ see, for example, International Disability Caucus, 'IDC Modification to Article 12, Draft EU Position Elaborated Together with Canada, Australia, Norway, Costa Rica, USA, Liechtenstein' <<http://www.un.org/esa/socdev/enable/rights/ahc7docs/ahc7idcmoart12e.doc>> (last access: 8 Dec 2016); Lewis, 'Advancing Legal Capacity Jurisprudence' (n 250).

²⁸⁷ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 26-30.

²⁸⁸ see, for example, Committee on the Rights of Persons with Disabilities, 'Concluding Observations on Report of China' (n 6).

the person's rights, will and preference.²⁸⁹ It further stipulates that to achieve this purpose, protection from abuse must be provided on an equal basis with others,²⁹⁰ the 'best interpretation of will and preferences' must replace the 'best interests' standard,²⁹¹ and 'undue influence' in the interaction between the supporter and the person being supported should be scrutinized and prevented.²⁹² Considering 'undue influence' in particular, General Comment No.1 notes that it means 'where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation'.²⁹³

In addition to the potential misunderstanding of Article 12(4), it should also be noted that safeguarding in the exercise of legal capacity may be a very complicated issue in practice. Whilst overt abuse may be prevented by some systemic measures or safeguards, some misuses are covert or even unconscious. It has been observed that undue influence on a disabled person's exercise of legal capacity can result from how the issue is framed, the way things are said, or an inaccurate assessment of the person's preference. This may in the end lead to decision-making that does not accurately reflect the person's will and preference.²⁹⁴ This may occur even when the supporter does not deliberately plan to influence the person being supported, or the person being supported deliberately shows deference to the supporter.²⁹⁵ Besides, there are always multiple ways of defining one's will and preference, so it is difficult, even for the person him/herself to determine the real or

²⁸⁹ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 20.

²⁹⁰ *ibid* para 20.

²⁹¹ *ibid* para 21.

²⁹² *ibid* para 22.

²⁹³ *ibid* para 22.

²⁹⁴ Terry Carney, 'Participation and Service Access Rights for People with Intellectual Disability: A Role for Law?' (2013) 38 *Journal of Intellectual and Developmental Disability* 59; Kohn, Blumenthal and Campbell (n 262).

²⁹⁵ Carney (n 294).

accurate understanding of his/her will and preference.²⁹⁶ The situation can be even more challenging when the person's will and preference are conflicting.²⁹⁷

The Mental Disability Advocacy Center (MDAC) raised such concerns in their submission to the CRPD Committee on Draft General Comment No.1.²⁹⁸ According to the MDAC, empirical evidence suggests that figuring out a disabled people's will and preference is always difficult for supporters and may involve a considerable amount of guesswork.²⁹⁹ It further points out that if the supporter finally ends up with an incorrect understanding or interpretation of the person's will and preference, the supporter, in effect, has made a substitute decision.³⁰⁰ From this perspective, it may be very hard to draw a definite line between substitute decision-making and undue influence in support.

Furthermore, even if the support is provided without abuse or undue influence, it may still be difficult to evaluate the quality of support and the decision reached with the support.³⁰¹ Respecting will and preference, and promoting autonomy, self-determination and dignity may be the ultimate standard to evaluate whether a person's right to exercise legal capacity has been guaranteed or whether appropriate support is provided for disabled people in the exercise of legal capacity. However, it can be argued that such a standard may be too general to be put into practice.

²⁹⁶ Kohn, Blumenthal and Campbell (n 261).

²⁹⁷ Gooding (n 254); Richardson (n 223).

²⁹⁸ Mental Disability Advocacy Center, 'Written Comments on Draft General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities, Submitted to the UN Committee on the Rights of Persons with Disabilities' (2014) <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>> (last access: 11 Nov 2015).

²⁹⁹ *ibid.*

³⁰⁰ *ibid.*

³⁰¹ Kohn, Blumenthal and Campbell (n 261).

The lack of empirical evidence may further strengthen concerns about the practical effect of support in the exercise of legal capacity and the relevant safeguards. General Comment No.1 gives some guidance to State Parties on how to develop a support regime at the domestic level. However, it is unclear whether the guidance is sufficiently helpful to those more practical circumstances.³⁰² Moreover, it has been observed that there is a growing amount of literature that seeks to address how support in the exercise of legal capacity should work, while there is little literature on how it actually works and the outcomes of decisions made with support in practice.³⁰³ In the absence of empirical data, further questions have been raised such as whether people are willing to utilize support in the exercise of legal capacity;³⁰⁴ whether such a support mechanism actually empowers disabled people and enhances their exercise of legal capacity;³⁰⁵ and whether the support mechanism is better than the traditional substitute decision-making.³⁰⁶ However, it should be noted that, as underlined in General Comment No.1, Article 12, the right to equality before the law has long been recognized as a civil and political right. The rights elaborated in Article 12, including the right to support in the exercise of legal capacity, are subject to immediate realization.³⁰⁷ Accordingly, State Parties cannot wait until all of the controversial issues related to support in the exercise of legal capacity are solved or empirically proved.

As discussed before, General Comment No.1 has underlined the diversity of support in the exercise of legal capacity. The legal regime of support should not be based on a 'one size fits all' model,³⁰⁸ but should embrace a wide range of support arrangements. Given the diversity of support arrangements, it is

³⁰² Anthony Mason, "Foreword" (2013) 36 UNSW Law Journal.

³⁰³ Browning, Bigby and Douglas (n 255); Kohn, Blumenthal and Campbell (n 261); Gooding (n 254); Mason (n 302).

³⁰⁴ Kohn, Blumenthal and Campbell (n 261).

³⁰⁵ *ibid*; Browning, Bigby and Douglas (n 255).

³⁰⁶ Kohn, Blumenthal and Campbell (n 261); Mason (n 302).

³⁰⁷ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 30.

³⁰⁸ Kohn, Blumenthal and Campbell (n 261); Salzman (n 264).

argued in this thesis that when a specific form of support is not compatible with the will and preference of a disabled person, or cannot enhance the person's exercise of legal capacity, he/she should be able to get another support arrangement that is suitable for him/her. From this perspective, it can be argued that ensuring the diversity of support arrangements *per se* may have the effect of safeguarding individuals' exercise of legal capacity. Accordingly, it is further argued in this thesis that Article 12 (3) and (4) should be understood, more specifically, as obliging States Parties to guarantee the availability and accessibility for disabled people to diverse support arrangements as long as the arrangement is in compliance with Article 12.

5. Conclusion

This chapter aimed to develop an in-depth and comprehensive understanding of Article 12. For this purpose, it started with an analysis of the normative content of Article 12. This preliminary analysis illustrated how Article 12 is interpreted by the CRPD Committee. It then conducted a more in-depth analysis of two specific conceptions in Article 12, namely legal capacity and support. The further analysis examined the various concerns underlying Article 12 and how these concerns have been considered, negotiated and balanced in the drafting process of Article 12 and General Comment No.1.

The analysis in this chapter led to the conclusion that Article 12 entails a stronger position than that in previous international human rights instruments, that disabled people have the right to equal recognition before the law on an equal basis with others. It affirms disabled people's right to legal capacity on an equal basis with others, both as a right holder and as an actor under the law, and the right to support in the exercise of legal capacity. Underlying such a strong position is the ultimate mission to combat the profound discrimination against disabled people. Article 12 is powerful in guiding the reform of the

domestic law on legal capacity from an exclusive pattern to an inclusive pattern. In a more metaphysical sense, it reflects a relational understanding of autonomy.

The understanding of the meaning, implications and purpose of Article 12 developed in this chapter is essential throughout the whole thesis. When Article 12 is implemented into Chinese law, given the differences in the legal system and legal culture, which will be discussed in later chapters, it may be presented in culturally sensitive language and form. However, the meaning and ultimate purpose of Article 12 cannot be undermined.

Chapter 4: An Analysis of Current Chinese Law Relevant to the Implementation of Article 12 of the CRPD

1. Introduction

The analysis of Article 12 in Chapter 3 has developed a comprehensive understanding of the individual rights and relevant State obligations elaborated in Article 12. China as a State Party to the CRPD is obliged to take measures for the full realization of the rights elaborated in Article 12. This chapter analyses the current Chinese law relevant to the implementation of Article 12 at the national level. It aims to examine two inquiries. The first is, what are the status and force of law accorded to international human rights law within the domestic legal system in China? The second inquiry is, which parts of current Chinese law are not in compliance with Article 12 of the CRPD? As explained in Chapter 1,³⁰⁹ this thesis is limited to the scope of adults' right to equal recognition before the law in the field of civil law in China. The analysis of current Chinese law in this chapter is thus within the civil law realm and does not engage with issues of criminal law.

The following analysis is divided into two main sections. Section 2 examines the status and hierarchy of Article 12, as a piece of international human rights law, in Chinese domestic legal system. The relevant law and legal principles that prescribe the effect of international law at the national level will be discussed together with the relation between international law and domestic legal systems. Section 3 examines the current Chinese law on legal capacity and adult guardianship, which is most relevant to the implementation of Article 12. It will look into the substantive and procedural perspectives of how an

³⁰⁹ see Chapter 1 at 2

individual's legal capacity is determined and how the adult guardianship is appointed. It will also examine the legal consequences of being denied full legal capacity.

2. Give Effect to Article 12 at national level in China

Depending on the legal system of different jurisdictions, the international law may be given effect at the national level in different approaches.³¹⁰ In states following the theory of dualism, the international law will be given effect at the national level by transforming the international law into domestic law. In states following the theory of monism, the international law will be given effect and become part of the national law once the requirements for signing and ratifying the international law have been satisfied.³¹¹ However, it has also been observed that the majority of domestic legal systems vary between pure monism and pure dualism.³¹² The following two sub-sections will start with examining how the international law is given effect in Chinese domestic legal system in general, and then turn to a more specific inquiry of how to give effect to Article 12 at the national level in China.

2.1 The approaches to give effect to international law in the Chinese legal system

It is not stipulated in the current Chinese law whether the Chinese legal system takes a monist or a dualist approach. The current Chinese Constitution and

³¹⁰ see, for example, Malcolm David Evans, *International Law* (Oxford University Press 2006) 428; Jeffrey L Dunoff, Steven R Ratner and David Wippman, *International Law: Norms, Actors, Process : A Problem-Oriented Approach* (Aspen Publishers 2006) 267.

³¹¹ For the discussion of monism and dualism, see, for example, Evans (n 310) 428; Dunoff, Ratner and Wippman (n 310) 267; Anthony Aust, *Handbook of International Law* (Cambridge University Press 2010) 75.

³¹² see, Evans (n 311) 428; Dunoff, Ratner and Wippman (n 311) 267; Ma Chengyuan (ed), *Textbook for postgraduate student: Studies in International Law* (CITIC PUBLISHING HOUSE 2003) 4.

basic law³¹³ do not contain any general rules on the legal effect, status, or hierarchy of international law in the domestic legal system either. Chinese scholars show different opinions and understandings of whether international law is, or can automatically be a part of Chinese law and applied in the domestic court.³¹⁴ Some scholars have raised the position that international law will be given effect and become a part of Chinese law once it has been signed and ratified. They always support their position by referring to the statement made by Chinese representative before the UN Committee against Torture in 1990 that once China has ratified the Convention, the crime provided in the Convention will also be regarded as the crime to be regulated by domestic law, and the Convention can be directly applied in China.³¹⁵ However, this understanding of the status of the Convention Against Torture (the CAT) in the Chinese legal system is objected by many other scholars.³¹⁶ Some other scholars do not show a clear position of whether the monist or dualist approach is adopted in China. Instead, they argue that the dichotomy between a monistic and a dualistic approach is, to a large degree, a theoretical distinction,³¹⁷ and the line between monism and dualism is often blurred depending on the subject matters.³¹⁸ Some foreign scholars have examined Chinese legal system from social, historical, or ideological perspectives and argued that Chinese legal system is closer to the theory of dualism.³¹⁹

³¹³ For the scope of basic law, refer to laws prescribed under Chapter 2 of The Law on Legislation of the People's Republic of China 2015.

³¹⁴ see, for example Jianwen Zhao, 'The Legal Statute of International Law in China's Domestic Legal System' [2010] Faxue Yanjiu (translated as Legal research); Haicong Zuo, 'The Research on Self-Excuting Treaties' [2008] Faxue Yanjiu (translated as Legal research).

³¹⁵ see for example, Guangmin Li and others (n 53); Jin Shao, *Text Book on International Law, 4th Edition* (Peking University Press 2011).

³¹⁶ see, for example, Xuewu Qu, 'Convention against Torture and China's Measures against Torture' (2002) (18)2 Chinese criminal science.

³¹⁷ Hanqin Xue and Qian Jin, 'International Treaties in the Chinese Domestic Legal System *' (2009) 8 Chinese Journal of International Law 299.

³¹⁸ Zuo (n 314), the author observed that some treaties on civil, commercial or copyright affairs can always be applied in domestic court; while human rights treaties cannot.

³¹⁹ see, for example, Dana Zartner, *Courts, Codes, and Custom: Legal Tradition and State Policy toward International Human Rights and Environmental Law* (Oxford University Press 2014) 220; Srinii Sitaraman, 'Explaining China's Continued Resistance Towards International Human Rights Norms: A Historical Legal Analysis' (ACDIS 2008).

It should be noted that despite the lack of general rule of the status and effect of international law in Chinese legal system, many specific domestic legislations prescribe the legislative process of 'transforming' (zhuanhuan)³²⁰ international law into relevant domestic law as a step to give effect to international law.³²¹ The legislative process of transformation, to some degree, evidences that Chinese legal system is closer to a dualist system, and the majority of the international law, even after ratification, accession or approval, do not automatically have legal effect in the domestic legal system.

Depending on the nature of the specific pieces of domestic law and the relevant international law, the approaches to transforming international law prescribed in each piece of domestic law are not the same. By examining and comparing across the domestic legal system, there are three main approaches to transforming international law.³²²

The first approach of transformation is that a specific piece of domestic law prescribes the situation, in which a specific piece of international law can be directly applied at the national level and exclude or supplement the application of related domestic law for a specific purpose. By stipulating the applicability of the specific international law, this specific piece of domestic law provides the authority for the domestic application of the international legal instruments being referred. A typical example of this approach is Article 23 of the *Measures on the Use of the Sign of Red Cross*, which provides:

³²⁰ The Chinese word 'zhuanhua' is a terminology to describes the legislative process of giving effect to international law at domestic level by writing the specific pieces of law into domestic law. The term 'zhuanhua' is translated into the English term 'transformation' or 'incorporation' in many text books on International Law in China to refer to the legislative process. see, for example, Ma (n 3); Philip R Bilancia, *Dictionary of Chinese Law and Government, Chinese-English* (Stanford University Press 1981) 108; Another term used to deliver the similar meaning is 'internalization', see, for example: Srinivasan (n 10).

³²¹ see, Xue and Jin (n 317); Ma (n 312) 17.

³²² The approaches of incorporating international law is examined by many scholars from different perspectives and discussed in many textbooks, see, for example, Guangmin LI and others (n 53); Shao (n 315); Ma (n 312).

If there is anything concerning the protective use of Red Cross signs not covered by these provisions, the relevant provisions of the Geneva Conventions and their Additional Protocols shall apply.³²³

The second approach of transformation is to apply the rule of conflict provided in domestic law, which manifests that when the domestic law is different from international law to which China is a party, the international law prevails. A typical example of this approach is Article 142 of the General Principles of the Civil Law:

The application of law in civil relations with foreign elements shall be determined by the provisions in this chapter. If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has declared reservations...³²⁴

The rule of conflict provides the authority for the application of international law at national level. However, in the majority cases, the rule of conflict can be applied only to the cases with a foreign element. According to Article 522 of the Supreme People's Court Interpretation on the Application of 'People's Republic of China Civil Procedure Law', a case with a foreign element means that

...one party or both parties to the dispute are foreign nationals, stateless persons, foreign enterprises or organizations; the residence of one party or both parties to the dispute is in foreign territories; the legal facts that establish,

³²³ Measures on the Use of the Sign of Red Cross 1996 (Decree No 194 of the State Council and the Central Military Commission) Article 23.

³²⁴ General Principles of the Civil Law of the People's Republic of China (2009 Amendment) 1986 (Order No 37 of the president of the People's Republic of China) Article 142.

modify or terminate the civil legal relations between parties arise in foreign territories; or the disputed object of the lawsuit is located in a foreign country...³²⁵

The third approach of transformation is through abolishing or modifying the existing domestic law, or creating new law. In cases where the subject matter addressed by the international law is not covered by any existing domestic law, the new law may be made to elaborate the rights and obligations created by the international law being concerned. A typical example is the Regulations of the People's Republic of China Concerning Consular Privileges and Immunities,³²⁶ which was made as a measure to transform the Vienna Convention on Consular Relations.³²⁷ In cases where the existing domestic law has a conflict with the international law, the relevant domestic law may be abolished or modified in line with the international law.³²⁸ This can be regarded as the most used approach to transforming international law in China, especially after China's entry into WTO.³²⁹ In either case, once the international law has been transformed, only the corresponding domestic law will be applied in domestic court and practice.

2.2 The approach to give effect to Article 12 in the Chinese legal system

Given the lack of an explicit rule that prescribes the relation between Article 12 and Chinese legal system, there may not be a definite answer to what is the status, hierarchy, or effect of Article 12 in Chinese legal system. Currently, this issue may be examined by drawing experiences from how other pieces of

³²⁵ Supreme People's Court interpretation on the application of 'People's Republic of China Civil Procedure Law' 2015 Article 522.

³²⁶ Regulations of the People's Republic of China Concerning Consular Privileges and Immunities 1990.

³²⁷ Ma (n 312).

³²⁸ *ibid* 19.

³²⁹ *ibid* 20.

international human rights law have been given effect at the national level in China.

Before the ratification of the CRPD, China has been a party to all the core human rights conventions except for the ICCPR, which has not been ratified. In most cases, these international human rights conventions are not regarded as automatically having effect in Chinese legal system.³³⁰ The main approach to give effect to these pieces of international human rights law is to transform the rights and obligations prescribed in the international human rights law into the domestic legal system by making changes to existing domestic law or creating new law.³³¹ A definite position made by the Chinese government in this regard can be found in the Response of Chinese Government to Questions Concerning the Combined 3rd and 4th Periodic Reports on the Implementation of the Convention on the Rights of the Child.

...Chinese courts try cases in accordance with domestic written laws (including laws and judicial interpretations), not directly invoking the Convention's clauses. Through domestic legislative procedures, China has turned the Convention's provisions (except those with reservations) into China's domestic laws...³³²

Similar positions can also be found or implied in the reports submitted by the Chinese government to other international treaty bodies.³³³ According to the

³³⁰ Xue and Jin (n 317).

³³¹ *ibid.*

³³² Committee on the Rights of the Child, 'List of Issues in Relation to the Combined Third and Fourth Periodic Reports of China, Replies of China to the List of Issues' (2013) CRC/C/CHN/3-4 para 1, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCHN%2fQ%2f3-4%2fAdd.1&Lang=zh, marked as unofficial translation.

³³³ see, for example, Committee on Economic, Social and Cultural Rights, 'List of Issues in Relation to the Second Periodic Report of China (E/C.12/CHN/2), Including Hong Kong, China (E/C.12/CHN-HKG/3) and Macao, China (E/C.12/CHN-MAC/2), Replies of China to the List of Issues' (2014) E/C.12/CHN/Q/2/Add.1 para 7-18; Committee on the Elimination of Discrimination against Women, 'Responses to the List of Issues and Questions for

reports submitted by the Chinese government, several domestic legislations have been made or modified to implement the relevant international human rights law. For example, the Compulsory Education Law of the People's Republic of China³³⁴ is regarded as a way to give effect to some rights and obligations prescribed in the Convention on the rights of Children. The Law of the People's Republic of China on the Protection of Women's Rights and Interests³³⁵ is regarded as a way to give effect to some rights and obligations prescribed in the CEDAW.³³⁶

As can be argued, Article 12, like other international human rights law, generally does not automatically have legal effect in current Chinese legal system, and the legislative process of transformation is needed in most cases. Since the current domestic law does not specify any situation in which Article 12 can be directly applied and exclude or supplement the application of the related domestic law, Article 12 cannot be transformed in the approach of direct application. There may be some room, in theory, to transform Article 12 in the approach of the rule of conflict, which enables Article 12 to override the application of conflicting domestic law. However, as has been pointed out, the rule of conflict can be applied only in cases where a foreign element is involved, which may be a very uncommon circumstance in the context of Article 12. In the majority of circumstances, Article 12 may be transformed in the approach of bringing changes to the existing law or creating new law. As discussed before, this is the approach in which most of other international human rights

Consideration of the Combined Fifth and Sixth Periodic Report of China* (2006)
CEDAW/C/CHN/Q/6/Add.1 3.

³³⁴ Compulsory Education Law of the People's Republic of China (2015 Amendment) 1986.

³³⁵ Law of the People's Republic of China on the Protection of Women's Rights and Interests 1992.

³³⁶ see, for example, Wang De-zhi, 'The Comparison between International Conventions on Human Rights and China's Human Rights Legislation' [2000] Journal of Shandong University (Social Science); Xue and Jin (n 335).

conventions, to which China is a State Party, are implemented at the national level in China.³³⁷

Since the subject matter of Article 12, the legal capacity, has already been addressed in domestic law, it is more likely that Article 12 will be transformed by bringing changes to the relevant domestic law than by creating new law. Accordingly, the main approach to give effect to Article 12 at the national level is to trigger the scrutiny of relevant domestic law in the context of Article 12, abolish or modify any domestic law that has conflicts with Article 12, and enforce the rights and obligations elaborated in Article 12 in domestic law and practice.

3. The Domestic Law on Legal Capacity and Guardianship

Given that Article 12 elaborates the right to equal recognition before the law, which further entails the right to legal capacity and the right to support in the exercise of legal capacity, the most relevant areas of domestic law to be scrutinized in the context of Article 12 is the law on legal capacity and adult guardianship.³³⁸ As explained at the beginning of this chapter, the analysis of current Chinese law in this chapter is limited to the scope of civil law realm and does not engage with issues in criminal law.

The legal framework of legal capacity and adult guardianship are mainly set up in The General Principle of Civil Law of the People's Republic of China³³⁹ (the Civil Law) and Civil Procedure Law of the People's Republic of China³⁴⁰ (the Civil Procedure Law). China is now in the process of drafting the Civil Code.

³³⁷ Xue and Jin (n 317).

³³⁸ see, Committee on the Rights of Persons with Disabilities, 'Concluding Observations on Report of China' (n 6) para 21.

³³⁹ General Principle of the Civil Law (n 324).

³⁴⁰ Civil Procedure Law of the People's Republic of China (2012 Amendment) 1991 (Order No59 of the President of the People's Republic of China).

However, none of the proposed drafts suggests any material change to the current legal framework of legal capacity and guardianship.³⁴¹ The following three sub-sections examine the legal standards of legal capacity and guardianship, and the legal consequences of being denied full legal capacity.

3.1 The law on legal capacity

Articles 9 to 14 of the Civil Law provide the substantive perspectives of how to determine one's legal capacity. According to Article 9 and 10, citizens have the legal capacity as a right holder from birth to death,³⁴² and all citizens are recognized as a right holder before the law on an equal basis.³⁴³ These two articles arguably reflect the legal capacity to be a right holder prescribed in Article 12. Article 11 provides that an individual aged 18 or over is an adult, and is recognized by law as a person with the full legal capacity to act under the law, which means he/she can independently participate in civil activities.³⁴⁴ This article generally reflects the legal capacity to act under the law prescribed in Article 12 of the CRPD. Article 13 of the Civil Law then sets out the exception to Article 11 that:

'A mentally ill person who is unable to account for his own conduct shall be a person having no capacity for civil conduct...'³⁴⁵;

A mentally ill person who is unable to fully account for his own conduct shall be a person with limited capacity for civil conduct...'³⁴⁶

³⁴¹ The first section of the Civil Code, 'General Principles' will come into force in October 1 2017, but it will not bring any material change to the current legal framework of legal capacity and guardianship. The official English version of this section has not yet been available. The official version (in Chinese) is available at:

http://www.npc.gov.cn/npc/xinwen/2017-03/15/content_2018907.htm(access: 2017/3/15)

³⁴² General Principle of the Civil Law (n 324) Article 9; in the 'General Principles' of the Civil Code will be Article 13.

³⁴³ *ibid* Article 10; In the 'General principles' of the Civil Code will be Article 14.

³⁴⁴ *ibid* Article 11; In the 'General principles' of the Civil Code will be Article 17&18.

³⁴⁵ *ibid* Article 13 (1). In the 'General principles' of the Civil Code will be Article 21

³⁴⁶ *ibid* Article 13(2). In the 'General principles' of the Civil Code will be Article 22.

Two further clarifications of Article 13 are provided in The Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (Interpretation of the Civil Law). Firstly, to determine whether an individual is mentally disabled, the court should refer to forensic psychiatry assessments and the medical diagnosis, or when there is no condition for diagnosis, it can refer to the opinion of people around the person concerned as long as the interested parties have no objections.³⁴⁷ Secondly, to determine to what extent a person can account for his/her own conduct, several factors need to be considered. This includes 'the degree of connection of the conduct with his/her own life',³⁴⁸ 'whether he/she can understand the conduct and foresee the consequence'³⁴⁹, whether he/she can understand 'the amount or objects of the conduct'³⁵⁰ and to what extent he/she has the ability of 'judgment' and 'self-protection'³⁵¹. It is pointed out in this thesis that Article 13 together with its interpretations provides the ground for denying an individual's legal capacity for disability-related reasons, and, to a great extent, conflates legal and mental capacity. The interpretation of Article 13, in particular, shows that whether a person has legal capacity is largely based on the person's cognitive abilities. Based on the comparison between Article 13 and the requirement of Article 12 of the CRPD, it is relatively clear that Article 13 together with its interpretations materially conflicts with Article 12.

Articles 177-180 and 187-190 of the Civil Procedure Law provide the procedural requirements of cases on determining an individual's legal capacity. It is stipulated in the current law that only the court can make the decision to deny an individual's full legal capacity. An individual's near relatives or other

³⁴⁷ Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation) 1988 para 7.

³⁴⁸ *ibid* para 4.

³⁴⁹ *ibid* para 4.

³⁵⁰ *ibid* para 4.

³⁵¹ *ibid* para 5.

interested parties can initiate the case by applying to the court for a declaration that the individual is with limited or no legal capacity. The application should be submitted with facts and evidence.³⁵² After accepting this application, the court shall require judicial assessment on the individual's legal capacity. If the judicial assessment has already been completed, the court should examine the result of the assessment.³⁵³ The case then goes to trial under the special procedure provided in Chapter 15 of the Civil Procedure Law.³⁵⁴ According to Article 178, the case will be heard by one judge and the judgment of the first instance shall be final, which means there is no opportunity to appeal. According to Article 189, a near relative of the person concerned, other than the individual who submits the application, should act as the agent *ad litem* of the person concerned in the trial. The court may assign one of his/her relatives to be the agent *ad litem* if necessary. The court should also hear the opinion of the person concerned if his/her health condition permits.³⁵⁵ If through the trial the court finds that the application is based on relevant facts, the court will declare that the person is with limited or no legal capacity. Otherwise, the court will reject the application.³⁵⁶

The procedural perspectives of the legal capacity case raise two main concerns. First, considering that the case on an individual's legal capacity is heard by only one judge and there is no opportunity to appeal, there may be the potential danger that the right to access to justice of the person whose legal capacity is being challenged is not guaranteed. Second, Article 189 stipulates it as a compulsory requirement that the person whose legal capacity is being challenged and examined in the case should have his/her near relative as his/her agents *ad litem*, whereas Article 58 of the Civil Procedure

³⁵² Civil Procedure Law of the People's Republic of China (2012 Amendment) (n 341) Article 187.

³⁵³ *ibid* Article 188.

³⁵⁴ *ibid* Article 177.

³⁵⁵ *ibid* Article 189.

³⁵⁶ *ibid* Article 189.

Law indicates that the appointment of agents *ad litem* is an individual's right rather than a compulsory requirement to be fulfilled in the court proceeding. Based on the comparison between Article 58 and Article 189, it can be further argued that in cases where a person's legal capacity is challenged and examined by the court, Article 189 may have the effect of denying the person's right and full legal capacity to participate in the court proceeding on his/her own behalf, even though the person's legal capacity is suspected rather than denied at the time of the court proceeding.

It should be noticed that the current Chinese law on legal capacity prescribes only the legal standards and procedures for the denial of one's full legal capacity. It does not specify whether the recognition of one's legal capacity, especially the legal capacity to act under the law, is an individual's right protected by the law. Neither does it manifest whether the arbitrary deprivation of one's legal capacity is an infringement of an individual's rights, or in which situation one would be liable for arbitrary interference in another's exercise of legal capacity. Article 12 of the CRPD and General Comment No.1, by contrast, make it much clearer that equal recognition before the law is an individual's right, and based on which disabled people have the right to exercise legal capacity on an equal basis with others.³⁵⁷ The failure to define the recognition of legal capacity as an individual's right is one of the fundamental gaps between the Chinese law on legal capacity and Article 12 of the CRPD.

3.2 The adult guardianship mechanism

According to Article 13 and 14 of the Civil Law, once the person is determined as having no or limited capacity to act under the law, he/she shall be

³⁵⁷ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 11-13.

represented by his agent *ad litem* in some, or all civil activities,³⁵⁸ and the guardian of the person is the agent *ad litem*.³⁵⁹ It is very clear in the current law that guardianship can be assigned after, and only after a person is determined as having limited or no legal capacity by the court through due process. Without such a judicial decision, guardianship should not be imposed on any adult regarded as with full legal capacity before the law.

Article 17 of the Civil Law lists the categories of people that can be appointed as the guardian of people with limited or no legal capacity:

'(1)spouse; (2)parent; (3) adult child; (4) any other near relative; (5) any other closely connected relative or friend willing to bear the responsibility of guardianship and having approval from the unit to which the mentally ill person belongs or from the neighborhood or village committee in the place of his residence.'³⁶⁰

According to Article 17, if there is a dispute over who should be the guardian, the dispute should firstly be handled by the neighborhood or village committee. A judicial process is required only when the dispute cannot be solved.³⁶¹ In this case, the court will select a guardian from the five categories in sequence, and if the person concerned has 'identification ability'³⁶², 'his/her opinions shall be solicited according to the circumstances'.³⁶³ However, the current law does not define the term 'identification ability' or clarify the issues regarding how it is decided whether or not a person has 'identification ability'.

³⁵⁸ General Principle of the Civil Law (n 324) Article 14. In the 'General principles' of the Civil Code will be Article 23

³⁵⁹ *ibid* Article 14.

³⁶⁰ *ibid* Article 17. In the 'General principles' of the Civil Code will be Article 28.

³⁶¹ *ibid* Article 17. In the 'General principles' of the Civil Code will be Article 31.

³⁶² Interpretation of the Civil Law (n 347) para 14.

³⁶³ *ibid* para 14.

In addition to the Civil Law, Article 26 of Law of the People's Republic of China on Protection of the Rights and Interests of the Elderly prescribes the guardianship arrangement for old people, which, according to the law, refers to people at or above the age of 60.³⁶⁴ According to Article 26, when an old person has full legal capacity, he/she can make guardianship arrangement for him/herself.³⁶⁵ The guardianship arrangement will take effect when the person concerned is determined as losing part or all of his/her legal capacity. Once the guardianship arrangement has taken effect, the guardian will be the agent *ad litem* for the old person, and represent the old person in some or all civil activities.³⁶⁶

Articles 18 and 133 of the Civil Law, together with the Interpretation of the Civil law list the obligations of the guardian. Regarding the person under guardianship, the guardian has obligations to protect his/her personal health and take care of his/her life, manage and protect his/her property, control and educate the person under guardianship, and act as his/her agent *ad litem* in civil activities and litigation.³⁶⁷ Besides, the guardian also bears obligations to others. According to Article 133, the guardian should be responsible for any damages caused by the person under guardianship.³⁶⁸ Some more specific obligations of guardians are provided in other pieces of law.³⁶⁹ These obligations may be categorized into three broad types: namely, caring for the person under guardianship, being the agent *ad litem* for the person in civil

³⁶⁴ Law of the People's Republic of China on Protection of the Rights and Interests of the Elderly (2015 Revision) 2015 (Order No 24 of the President of the People's Republic of China) Article 2.

³⁶⁵ *ibid* Article 26.

³⁶⁶ *ibid* Article 26. The similar provision will be provided in Article 33 of the 'General Principles' of the Civil Code

³⁶⁷ General Principle of the Civil Law (n 324) Article 18; Interpretation of the Civil Law (n 347) para 10. In the 'General principles' of the Civil Code will be Article 34.

³⁶⁸ General Principle of the Civil Law (n 324) Article 133.

³⁶⁹ Mental Health Law of the People's Republic of China 2012 (Order No 62 of the President of the People's Republic of China) Article 9, 36, 45, 49 and 59; Tort Law of the People's Republic of China 2009 (Decree No 21 of the President of the People's Republic of China) Article 32; Law of the People's Republic of China on the Protection of Disabled Persons (2008 Revision) (Order No 3 of the President of the People's Republic of China) Article 9.

activities, and bearing the responsibility for any damage caused by the person under guardianship.

It should be noted that although the current law prescribes the obligation of the guardian, it is not clear to what degree the guardianship is monitored. According to the Interpretation of the Civil Law, in cases where a guardian fails to fulfill her/his obligations or violates the rights of the person under guardianship, people, who belong to the five categories of subjects listed in Article 17 of the Civil Law, can file a complaint to the court.³⁷⁰ However, it is not clear whether the person under guardianship can file such a complaint on his/her own.

Given the substantive and procedure standard of guardianship, as well as the legal obligations of the guardian, it can be argued that the guardianship in most cases has the characteristics of the substitute decision-making regimes that are listed in General Comment No.1.³⁷¹ Accordingly, the legal mechanism of adult guardianship in current Chinese law constitutes a conflict with the requirement of Article 12. Besides, as has been pointed out by the CRPD Committee in the Concluding Observation on China's initial report, the system of support in the exercise of legal capacity is absent in the current Chinese law.³⁷²

³⁷⁰ Interpretation of the Civil Law (n 347) para 20.

³⁷¹ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 27.

³⁷² Committee on the Rights of Persons with Disabilities, 'Concluding Observations on Report of China' (n 6) para 21.

3.3 Restrictions on rights as the consequence of the denial of legal capacity and the appointment of guardianship

It has been pointed out in General Comment No.1 that the recognition of legal capacity is inextricably connected to the enjoyment of many other rights.³⁷³ Under the current Chinese law, once a person is denied full legal capacity, a large number of restrictions will be imposed on the rights of the person. The general restriction is provided in Articles 55 and 58 of the Civil Law. According to both Articles 55 and 58, to make civil conduct legally valid, the actor should have relevant legal capacity for the civil conduct.³⁷⁴ A civil conduct is not legally valid if it is performed by a person recognized as without legal capacity, or a person recognized as with limited legal capacity and cannot carry out this conduct independently.³⁷⁵ These two Articles generally deny the participation of individuals without full legal capacity in civil activities. The only exception is the conduct of accepting rewards, donations, or remunerations.³⁷⁶ However, even if a person without full legal capacity can receive rewards, donations or remunerations, he/she may not be able to dispose of such properties by conducting a legally valid act.

In addition to these general restrictions provided in the Civil Law, there are also other restrictions stipulated in various pieces of legislation at different levels. Some examples are given to illustrate how people recognized as without full legal capacity may be directly or indirectly excluded from civil activities and the enjoyment of other basic rights.

³⁷³ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 31.

³⁷⁴ General Principle of the Civil Law (n 324) Article 55. In the 'General principles' of the Civil Code will be Article 143.

³⁷⁵ *ibid* Article 58. In the 'General principles' of the Civil Code will be Article 144&145.

³⁷⁶ Interpretation of the Civil Law (n 347) para 6.

The first example is the direct exclusion from the right to access to justice. Article 57 of the Civil Procedure Law provides that for people without legal capacity to participate in a lawsuit, his/her guardian should participate in the lawsuit on behalf of him/her as agent *ad litem*.³⁷⁷ Individuals determined as with limited legal capacity may still have opportunities, although very limited, to present before the court on their own behalf. However, for individuals determined as with no legal capacity, their right to access to justice is to a large degree compromised by guardianship.³⁷⁸ Moreover, Article 16 of Regulation on Legal Aid provides that if the applicant of legal aid has been denied full legal capacity, his/her agent *ad litem*, i.e. the guardian, should apply for the legal aid on his/her behalf. If the person concerned needs legal aid in the dispute with his/her agent *ad litem*, his/her other agent *ad litem* should apply for the legal aid on his/her behalf.³⁷⁹ Accordingly, people without full legal capacity may not even have the opportunity to apply for legal aid on his/her own, and this can be regarded as another significant restriction on the right to access to justice.³⁸⁰

The second example is the direct exclusion from making contracts. According to Article 9 of the Contract Law of the People's Republic of China (Contract law), to enter into a contract, the parties shall have relevant legal capacity.³⁸¹ If a contract is concluded by a person with limited legal capacity, the contract will be valid only after being ratified afterward by the person's agent *ad litem*, i.e. the guardian.³⁸² The restriction on making contracts is one of the classic restrictions imposed on people determined as without full legal capacity. It has

³⁷⁷ Civil Procedure Law of the People's Republic of China (2012 Amendment) (n 341) Article 57.

³⁷⁸ see, CRPD (n 2) Article 13, access to justice, requires states parties to facilitate disabled people's effective role as direct and indirect participants in all legal proceedings.

³⁷⁹ Regulation on Legal Aid 2003 Article 16.

³⁸⁰ see, Committee on the Rights of Persons with Disabilities, 'Concluding Observations on Report of China' (n 6) para 23 & 24, in evaluating the performance under Article 13, access to justice, the Committee has showed its concerns on the establishment of legal aid service.

³⁸¹ Contract Law of the People's Republic of China (2012 Amendment) 1999 (Order [1999] No15 of the President of the People's Republic of China) Article 9.

³⁸² *ibid* Article 47.

far-reaching influence on several daily activities, for example, buying daily necessities, deciding where to live, and entering an employment contract.

In addition to these two typical examples, many other legislations, policies, and rules at lower hierarchy also set explicit restrictions on the rights of people determined as without full legal capacity. This contains a broad range of matters, for example, the right to select the beneficiary of the insurance,³⁸³ the right of association,³⁸⁴ and the right to get occupational qualifications.³⁸⁵

Moreover, restrictions can also be imposed in an indirect way by delegating power to the guardian. A typical example is Article 39 of the Mental Health Law of the People's Republic of China (Mental Health Law). It provides that when the treatment plans for patients with mental disability are formulated, the health care provider 'shall inform the patients or their guardians about the treatment plan...'.³⁸⁶ The term 'patients or their guardians', to some degree, makes the person under guardianship and his/her guardians as one subject to the relevant duty bearer. Under Article 39, the health care providers can fulfill their obligation by providing information to only the guardians. In this case, the patient's right to make informed consent, and therefore the right to health, may be significantly compromised.

Based on terms similar to 'patients or their guardians', the guardian is empowered to make substitute decision for the person under guardianship on a wide range of issues, such as using portrait,³⁸⁷ consenting to treatment including surgeries that result in loss of function of body organs, and

³⁸³ Insurance Law of the People's Republic of China (2015 Amendment) 1995 Article 39.

³⁸⁴ Regulation on Registration and Administration of Social Organizations 1998 (Order No 250 of the State Council of the People's Republic of China) Article 13.

³⁸⁵ Lawyers Law of the People's Republic of China (2012 Amendment) 2012 (Order No 64 of the President of the People's Republic of China) Article 7; Law of the People's Republic of China on Certified Public Accountants (2014 Amendment)p 1993 Article 10.

³⁸⁶ Mental Health Law of the People's Republic of China (n 369) Article 39.

³⁸⁷ Advertising Law of the People's Republic of China (2015 Amendment) 1994 Article 33.

experimental clinical treatments of mental disorders,³⁸⁸ consenting to disclose personal information of people with HIV positive,³⁸⁹ and consenting to the termination of gestation or performance of ligation operations.³⁹⁰ Although the law written in this way does not explicitly prevent the person under guardianship from doing something, the power delegated to the guardian, in fact, undermines the right of the person under guardianship.

4. Conclusion

This chapter examined the current Chinese law and legal system relevant to the implementation of Article 12 at the national level. It explored two main inquiries. The first is, what are the status and force of law accorded to international human rights law within the domestic legal system in China? The second inquiry is, which parts of current Chinese law are not in compliance with Article 12 of the CRPD?

Section 2 examined the status and force of law accorded to Article 12 of the CRPD, a piece of international human rights law, in domestic legal system in China. It outlined that the current Chinese law does not provide any explicit rule that defines the relation between Article 12, as well as international human rights law in general, and Chinese legal system. Therefore, there can hardly be a definite answer to what is the status, hierarchy, or effect of Article 12 in the Chinese legal system. By drawing on experiences from how other pieces of international human rights law have been given effect at the national level in China, Section 2 pointed out that the main approach to give effect to Article 12

³⁸⁸ Mental Health Law of the People's Republic of China (n 369) Article 43.

³⁸⁹ Regulation on the Prevention and Treatment of HIV/AIDS 2006 Article 39.

³⁹⁰ Law of the People's Republic of China on Maternal and Infant Health Care (2009 revision) (Order No 33 of the President of the People's Republic of China) Article 19; A cases happened in 2005 that with the consent and arrangements of the guardian, two women with mental illness had hysterectomy. The guardian did so because if the mentally ill women are pregnant, the burden of care for the guardian will be increased. The guardian was then prosecuted by the procuratorate.

at the national level is to transform it into domestic law. Under the legislative process of transformation, the relevant domestic law should be scrutinized in the context of Article 12, any domestic law that has conflicts with Article 12 should be abolished or modified, and the rights and obligations prescribed in Article 12 should be elaborated in domestic law.

Section 3 examined the current Chinese law on legal capacity and guardianship, which is the most relevant area of domestic law to be scrutinized in the context of Article 12. It pointed out that the current law provides the ground for denying one's legal capacity for disability-related reasons, and legal capacity is largely conflated with mental capacity. Besides, the current law on legal capacity fails to define the equal recognition before the law as an individual's right protected by the law. Such failure is regarded in this thesis as one of the fundamental gaps between the Chinese law on legal capacity and Article 12 of the CRPD. It also pointed out that the adult guardianship prescribed in the current law has the characteristics of substitute decision-making listed General Comment No.1, and is therefore not in compliance with the requirement of Article 12.

Considering China's obligation under the CRPD to achieve the full implementation of Article 12 at the national level,³⁹¹ a key step to fulfill the obligation is to reconsider and modify the current law on legal capacity and guardianship in line with Article 12.

³⁹¹ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 24-30, 50.

Chapter 5: Empirical Research Design

1. Introduction

As explained in Chapter 2,³⁹² as an important part of the exploration of the implementation of Article 12 in China, this thesis will conduct an empirical study of Chinese legal culture regarding issues of legal capacity and adult guardianship. This chapter explains the empirical research design.

The anthropological approach to legal culture developed by Merry, which has been discussed in detail in Chapter 2,³⁹³ is adopted as the preliminary methodological framework for the empirical study. Based on this methodological framework, the relevant legal culture will be empirically explored by looking into different people's knowledge, attitudes, experiences and expectation towards relevant law. Semi-structured interviews and focus groups will be used in the empirical study of legal culture. As explained in Chapter 2, both legal practitioners and people without legal expertise may have an influence on the legal culture. The empirical data will be generated from six categories of people containing both legal practitioners and people without professional legal knowledge. These six categories of participants are disabled people, disabled people's guardian, lawyers with experiences of providing legal services on disability issues, judges with experiences of legal capacity and guardianship cases, social workers with experiences of providing services for disabled people, and members of neighborhood committee with authority to assign guardianship. As will be explained in detail in this chapter, these six categories of participants are closely relevant to the law and practice of legal capacity and guardianship in various ways.

³⁹² see, Chapter 2 from 27

³⁹³ see, Chapter 2 from 31

The following discussion is divided into five main sections. Section 2 critically reviews the idea of social model research and analyses the degree to which this idea is reflected and applied in the empirical study in this thesis. Section 3 describes the research participants and explains why and how these participants are selected. Section 4 analyses the methods, semi-structured interview and focus group, used in the empirical study. It will explain why these two methods are selected and how they are used in the study. Three key ethical issues, namely informed consent, confidentiality, and avoiding risks, are looked into in Section 5. Section 6 explains how the data are processed and analysed.

2. Social Model Research

Oliver has observed that past research alienated disabled people, and the research may be regarded as a violation of their experience or irrelevant to their needs.³⁹⁴ He, as well as others, have suggested and reflected on the proposal that the research under the social model of disability should try to be emancipatory.³⁹⁵ This means that disabled people, rather than non-disabled researchers should control the research, and the researcher participates with those seeking to emancipate themselves on their own terms.³⁹⁶ As a part of the Ph.D. project, this research cannot be a fully emancipatory one as the author has to be in control of the whole research project. However, where possible elements of emancipatory research were incorporated into the

³⁹⁴ Mike Oliver, 'Changing the Social Relations of Research Production?' (1992) 7 *Disability, Handicap & Society* 101.

³⁹⁵ see, for example, Angie Carmichael, 'The Social Model, the Emancipatory Paradigm and User Involvement' in Colin Barnes and Geof Mercer (eds), *Implementing the Social Model of Disability: Theory and Research* (Leeds: The Disability Press 2004); M Oliver, 'Emancipatory Research: Realistic Goal or Impossible Dream' in Colin Barnes and Geof Mercer (eds), *Doing disability research* (The Disability Press 1997); Colin Barnes, 'What a Difference a Decade Makes: Reflections on Doing "emancipatory" Disability Research' (2003) 18 *Disability & Society* 3.

³⁹⁶ Oliver (n 395).

empirical research design, and enhance the participation of disabled people in each research stage as long as it does not impair the independence of this research. The idea of social model research is reflected in this empirical study in five aspects.

First, in this research, disabled people are viewed as 'expert knowers' on their own lives.³⁹⁷ Some previous research has drawn attention only to the opinion of 'carers', or asked people around disabled people to speak for disabled individuals on their behalf³⁹⁸ - thus revealing more about the experiences and subjectivity of the substitute persons while the disabled individual's own voice is not sufficiently represented or even absent.³⁹⁹ By contrast, the empirical study conducted in this thesis will explore disabled people's own experience and subjectivity. Disabled people participating in the research were encouraged to speak for themselves, when necessary, with support.

Second, to hear disabled people's own voices is not limited to letting them talk, but also to understand the social reality they described and experienced in their terms. This means to understand 'their' view and reality, rather than the view conceived by researchers.⁴⁰⁰ The participants were therefore encouraged to tell their experience and attitudes in their own words. I also tried to use their words to frame my questions.⁴⁰¹ Meanwhile, I am aware that a researcher cannot be an entirely neutral collector of information about the social world,⁴⁰² instead, researchers both influence and are influenced by the

³⁹⁷ Emma Stone and Mark Priestley, 'Parasites, Pawns and Partners: Disability Research and the Role of Non-Disabled Researchers' (1996) 47 *British Journal of Sociology* 699.

³⁹⁸ Andrea Hollomotz, *Learning Difficulties and Sexual Vulnerability: A Social Approach* (Jessica Kingsley Publishers 2011).

³⁹⁹ Vicki Lloyd, Amanda Gatherer and Sunny Kalsy, 'Conducting Qualitative Interview Research With People With Expressive Language Difficulties' (2006) 16 *Qualitative Health Research* 1386.

⁴⁰⁰ Norman Blaikie, 'Strategies for Answering Research Questions' in Norman Blaikie (ed), *Designing Social Research* (Polity Press Ltd 2010).

⁴⁰¹ Robert G Burgess, *In the Field: An Introduction to Field Research* (New Ed edition, Routledge 1984).

⁴⁰² Jennifer Mason, *Qualitative Researching* (2nd ed, Sage 2002) 52 chapter 3.

process of engaging in research.⁴⁰³ I did not try to regard myself as a neutral collector of 'truth'. Instead, I tended to regard the data collection and analysis as an interpretive portrayal of what has been studied, and reflecting the mutual constructions by the research participants and me.

Third, critical self-reflection has been regarded as a prerequisite for disability research under the social model of disability.⁴⁰⁴ I attempted to be reflexive during the empirical research, and to critically recognize and examine my own values, positions, bias and prejudice towards the research participants and the subject matter of the research.⁴⁰⁵ Since the position taken by a researcher may not be fixed,⁴⁰⁶ I kept an ongoing process of self-critique and self-appraisal through all stages of the research process.⁴⁰⁷ With reflexivity on my own values and positions, I thus attempted to reflect on whether my work was unintentionally colluding or reinforcing the existing oppression faced by disabled people and whether my research contributes to the empowerment of disabled people.⁴⁰⁸ By recognizing the importance of reflexivity, I did not overlook the relevant criticism and the need to guard against 'narcissistic preoccupation with the self'.⁴⁰⁹

Fourth, I appointed an advisory group consisted of 7 disabled people⁴¹⁰ from different gender and with different impairment labels to oversee and participate

⁴⁰³ Ruth Northway, 'Disability, Nursing Research and the Importance of Reflexivity' (2000) 32 *Journal of Advanced Nursing* 391; Dev Jootun, Gerry McGhee and Glenn R Marland, 'Reflexivity: Promoting Rigour in Qualitative Research' (2009) 23 *Nursing Standard* 42.

⁴⁰⁴ Oliver (n 395).

⁴⁰⁵ Heather Waterman, 'Embracing Ambiguities and Valuing Ourselves: Issues of Validity in Action Research*' (1998) 28 *Journal of Advanced Nursing* 101.

⁴⁰⁶ Hallam J and Marshall A, 'Layers of Difference: The Significance of a Self Reflexive Research Practice for a Feminist Epistemological Project.' in Mary Kennedy and Cathy Lubelska (eds), *Making Connections: Women's Studies, Women's Movements, Women's Lives* (Taylor & Francis 1993).

⁴⁰⁷ Mason (n 402).

⁴⁰⁸ Gerry Zarb, 'Modelling the Social Model of Disability' (1995) 6 *Critical Public Health* 21.

⁴⁰⁹ Dorothy Scott, 'The Researcher's Personal Responses as a Source of Insight in the Research Process' (1997) 4 *Nursing Inquiry* 130; Waterman (n 405).

⁴¹⁰Table1: Members of advisory group at 309

in the research from a very early stage.⁴¹¹ The members of the advisory group have close contact with various disabled people communities and at least a basic knowledge of the CRPD and social model of disability. The participation of the advisory group serves as an element of emancipatory research, an important way to enhance disabled people's participation, as well as a way to facilitate the reflexivity. The advisory group has been very helpful to me as they enhanced my knowledge of the real thinking and feeling of disabled people and provided suggestions such as whether the language used is sufficiently plain, how to communicate with disabled people, and what reasonable accommodations can be anticipated, etc.

Fifth, efforts have been made to ensure that information and communication are accessible and participants can get sufficient support as far as possible. With the help of the advisory group, I made different versions of empirical research information sheets, and thus ensured that the relevant information is accessible to potential participants with different preferences of information. To prepare the support measures, I told all the participants, at the time they were selected as participants, that they can discuss with me if they need any forms of support at any stage of the research. For participants who might need support but did not contact me, I contacted them to make the query. To facilitate the communication, I tried to make the language used in the research precise and plain as far as possible.⁴¹² Apart from the interviews conducted with professionals such as judges, legal terms and other professional terminologies were avoided. Complex grammatical structures or concepts or

⁴¹¹ For the incorporation of advisory group in disability research, see, for example, Hollomotz (n 398); Ann Lewis and others, 'Participation in Research: Reference, or Advisory, Groups Involving Disabled People: Reflections from Three Contrasting Research Projects' (2008) 35 *British Journal of Special Education* 78.

⁴¹² Hilary Arksey and Peter T Knight, *Interviewing for Social Scientists: An Introductory Resource with Examples* (SAGE 1999).

other ambiguous expressions were also avoided.⁴¹³ The advisory group helped me to check whether the language to be used is sufficiently plain. For those with learning or language difficulties, I also tried to know in advance about their preferred communication methods. Moreover, on the advice of advisory group, I prepared some reasonable accommodation and support measures in advance to make the research flexible, and therefore to facilitate the participation of people with different needs. This included, for example, longer time for response or more intervals, easy read version of information sheets, pictures, stenographer, peer supporters, and professional supporters such as social workers, interpreters, psychologist, etc. To apply which support measures to the research was decided by the participants themselves.

3. Participants

As explained in Chapter 2, the empirical study conducted in this thesis will explore the legal culture regarding the law and practice of legal capacity and guardianship. Merry's anthropological approach to legal culture provides the methodological framework to explore the legal culture by generating data from both people with and without legal expertise. Based on the purpose of the empirical study, the methodological framework, the effort to involve emancipatory elements, and my experience with the legal capacity and guardianship issue in China, six categories of people, containing both legal practitioners and people without professional legal knowledge, participated in the empirical study. These six categories of participants are disabled people, disabled people's guardian, lawyers with experiences of providing legal services on disability issues, judges with experiences of legal capacity and guardianship cases, social workers with experiences of providing services for disabled people, and members of neighborhood committee with authority to

⁴¹³ Similar measures are suggested by, for example, William ML Finlay and Evanthia Lyons, 'Methodological Issues in Interviewing and Using Self-Report Questionnaires with People with Mental Retardation' (2001) 13 *Psychological Assessment* 319; Hollomotz (n 398).

assign guardianship. As will be explained in the following sections, these six categories of people are relevant to the law and practice of legal capacity and guardianship in various ways. According to Merry's anthropological approach to legal culture, their knowledge, experience, attitudes towards the relevant law, and their legal consciousness and mobilization are important indicators to understanding the legal culture.

Given the available time and resources, I did not attempt to recruit a representative sample or provide data that can be applied to large populations, which would need much bigger numbers of participants than I could possibly have. Instead, the purpose of this empirical study is to produce a richer understanding of social life by generating in-depth and detailed qualitative data on, perhaps less representative participants.⁴¹⁴ Thus, the method of selecting participants may be judgmental,⁴¹⁵ although probability sampling is not overlooked in this research.

3.1 Disabled people

The analysis of the Chinese legislative framework in Chapter 4 has shown that disabled people are closely relevant to and influenced by the current law and practice of legal capacity and guardianship. I planned to have 20-30 disabled people participate in the research. The selection of participants went through three main stages.

The first stage is recruitment. The main purpose of this stage is to spread the information of empirical study and recruitment widely to cover as many potential participants as possible. The main strategy used at this stage is advertising. I have established connections with some disabled people's

⁴¹⁴ Norman Blaikie, *Designing Social Research* (2nd Edition, Polity Press 2009) 203 Chapter 6.

⁴¹⁵ *ibid* 204.

communities and organizations in my previous research and working, and the members of the advisory group contributed their resources and network. I made presentations of my empirical research plan in several disabled people communities, organizations, training centers and working places. I also made leaflets and posts of my research plan and recruit information, and put them in the office of relevant organizations. With the help of the advisory groups, these leaflets and posts were made into different formats to ensure the accessibility of information. Moreover, to enlarge the accessibility, electronic copy of these leaflets and posts were also put on the website of various disabled people organizations and the social media, and forwarded in several e-mail groups.

The second stage is approaching and relationship building. The main purpose of this stage is to provide opportunities for the potential participants to get more information about the empirical research and me as the researcher. By various kinds of formal and informal communication, people contacted me for participation, and I managed to get familiar and build trust with potential participants.

The third stage is selection. The main purpose of this stage is to identify the 'information-rich cases' that can best generate the data, thus, the strategy of purposive sampling was adopted.⁴¹⁶ To achieve a sound basis of purposive sampling, I listed three main elements to be considered: (1) types of impairment label; (2) gender; and (3) under guardianship or not and types of guardianship. These elements describe the different backgrounds or living situations of disabled people, and further reflect the different ways of how disabled people may be linked to the law and practice of legal capacity and guardianship. I balanced the number of participants that fit into these various elements to ensure the diversity of participants. Considering that, as the

⁴¹⁶ Michael Quinn Patton, *Qualitative Research & Evaluation Methods* (Third Edition, SAGE Publications, Inc 2002).

research continued, it may need to have participants of a particular type or with a particular element, I did not finalize the list of participants at this stage. Instead, I made a list of 10 disabled people who would participate first, and a list of 25 disabled people as the pool for further selection. Finally, 23 disabled people participated in this research.⁴¹⁷

I did not intend to exclude any disabled people with specific impairments from participation. However, the way of advertising and recruitment, to some degree, discouraged the participation of disabled people living in a relatively isolated situation in institutions or at home. This limitation had been considered at the early stage of research design, and the importance of the disabled people living in an isolated situation had been fully recognized in the empirical study as well as the whole research project. For the concerns of safety and risk control, however, I finally decided not to include disabled people living in an isolated situation. The way of selection is influenced by the available time, resources, expertise and my capability as a researcher. Such selection does not mean that disabled people living in a relatively isolated situation is devalued.

3.2 Guardians

As explained in Chapter 4, those who play the role of the guardian of disabled people are closely relevant to the law and practice of legal capacity and guardianship. I planned to have 10-15 guardians participate in the research. Based on my previous research and working experiences, the guardianship in practice may have various forms and some people may play the role of the guardian without being legally appointed as a guardian. For the purpose of the empirical study, whether the person defines him/herself as playing the role of the guardian is regarded as more important than whether the person has the

⁴¹⁷ Table2: Interviewees-Disabled people at 309

legal status of guardian. Accordingly, a list describing the role of the guardian of disabled people was provided in the recruiting information, and the recruitment was targeted at those who regard themselves as playing the role of guardian.

The process of recruiting guardians is similar to that of recruiting disabled people, which includes three main stages of advertising, approaching, and selection. Firstly, I advertised my research by making presentations and spreading both hard and electronic copies of leaflets and posts in disabled people's organizations, organizations for disabled people, disabled people's rehabilitation centers, day-care centers, training centers, and working places. I also entered into some social media or e-mail groups set up by disabled people's families and advertised my research project there. Following the advertising stages, I maintained both formal and informal contacts with potential participants to provide more detailed information about my research project for them and build a relationship with them.

The selection of participants was mainly based on purposive sampling. I considered three main elements in the selection: (1) the form of guardianship, either legal guardianship or other forms of informal guardianship; (2) the impairment label of the person under this guardianship; and (3) gender. It turned out to be very difficult to balance the gender of participants because, among all people expressing their willingness to participate, only 2 were male. I managed to make a list of 25 potential participants including those 2 male guardians, and finally, 14 of them participated in the research including 2 male participants. In addition, my initial plan was to select guardians of disabled adults. However, as the research went on, I found out that the guardian of old people may also contribute to investigating the research questions. It was a little difficult to recruit guardians of old people. Since neither old people nor their guardian has any close connection with disability communities, the initial

advertisement did not reach them. Considering the time and resources limitation, the advisory group and I resorted to our personal relationship with social workers.⁴¹⁸ With the help of social workers, I got contact with 9 guardians of old people and 2 of them participated in the research. Finally, 16 people who define themselves as playing the role of guardian participated in the empirical research.⁴¹⁹

3.3 Judges

The experience and opinions of judges with experience of legal capacity and guardianship cases may illustrate how the law on legal capacity and guardianship are understood by legal practitioners and applied in legal reasonings. I planned to have 5-8 judges participate in the research, and the strategy of purposive sampling was adopted for recruitment. The court case files on legal capacity and guardianship cases and the profile of judges in service helped me to identify the judges who have experience of making decisions on legal capacity and guardianship cases. I managed to get contact with 11 judges and explained my research to them. However, only 4 of them consented to participation. Although it is less than as planned, the difficulties had been anticipated, and the final number was judged to yield sufficient data for purposes of the current study.⁴²⁰

3.4 Lawyers

The experience and opinions of lawyers with experiences of providing legal services on disability issues may illustrate how the law on legal capacity and guardianship are understood by legal practitioners and influence the way they provide legal services. I planned to have 3-7 lawyers, including both

⁴¹⁸ For the use of such impersonal recruiting strategies, see, for example, Pranee Liamputtong, *Performing Qualitative Cross-Cultural Research* (1 edition, Cambridge University Press 2010); Pranee Liamputtong, *Focus Group Methodology: Principle and Practice* (SAGE 2011).

⁴¹⁹ Table5: Focus group participants-Guardians at age 311

⁴²⁰ Table3: Interviewees- Judges at 310

commercial lawyers with experiences on disability issues and public interest lawyer with particular interests in disability rights, participate in the research. To recruit commercial lawyers, I advertised my empirical research plan and information about participation in the major law firms, and some social media groups and e-mail groups established by lawyers. To recruit public interest lawyers, I advertised my empirical research plan and information about participation in the social media groups and e-mail groups set up by public interest lawyers. Besides, based on my previous working experience, I have a personal relation with people experienced in providing legal aid or advocacy for disabled people, and I resorted to them to recruit participants as well.

Finally, 4 lawyers participated in the empirical research. Two of them are commercial lawyers with experience of handling cases involving disability issues. The other two are public interest lawyers with particular focuses on disability rights.⁴²¹

3.5 Social Workers

I planned to have 7-10 social workers participate in the research. I included social workers as the participants mainly because they are currently the main supporter, other than the family members, available to disabled people under different sorts of guardianship.

The strategy of purposive sampling was adopted in recruitment and selection. I contacted the association of social workers in City H and managed to get the name list of social workers, among which, twenty-six social workers have experiences of providing service for disabled people. I contacted these twenty-six social workers and explained my research project. Most of them raised ethical concerns as to whether their participation in my research would

⁴²¹ Table 4: Interviewees- Lawyers at 310

have an influence on the people they serve. I then explained the principle of my research ethics. With communication and necessary clarification of my empirical research plan, 11 social workers participated in the empirical research. All these 11 participants have experiences of providing services for disabled people, whom they believe are under guardianship.⁴²²

3.6 Members of neighborhood committee

I planned to have 15-24 members of neighborhood committee of different communities participate in the empirical research. I include members of neighborhood committee as participants because, according to the current law, if a person is denied full legal capacity, the neighborhood committee of the person's residence is one of the bodies that have the authority to designate guardian with legal effect for the person.

To recruit participants, I contacted the leader of 47 neighborhood committees in different communities, and 38 of them expressed their willingness to participate. The strategy of purposive sampling was adopted for the selection, and the main factor considered in the selection was that the selected participants should represent neighborhoods with different socioeconomic and living condition. I finally selected 15 participants. 8 out of these 15 participants came from long-standing communities, in which most of the residents have lived in the community for relatively long time and residents are familiar with each other. These participants themselves also have lived in the community for a long time and have relatively close relationships with most of the residents. The other participants came from newly-built communities, in which the majority of the residents, including the participants themselves, are not very familiar with each other.⁴²³

⁴²² Table6: Focus group participants- Social workers at 312

⁴²³ Table 7: Focus group participants - Members of Neighborhood Committee at 313

4. Research Methods

Based on the methodological framework explained in Chapter 2, the empirical study explores the legal culture by looking into the research participants' expectations, feelings, knowledge, opinions, experiences and attitudes towards relevant law. It explores not only the observable phenomenon or practice but also, as called by Blaikie, the structures, mechanisms, power or tendency that produce the phenomenon or practice.⁴²⁴ Given the purpose of empirical study, the research participants, and the available time and resources, semi-structured interviews and focus groups are adopted in this empirical research.

Before starting the empirical research, I conducted a desk-based analysis of 274 court case files on legal capacity and guardianship issues made between 2013 and 2015. The desk-based analysis of these 274 court decisions generated some basic information of how the law on legal capacity and guardianship is applied in legal reasoning and practice. The desk-based analysis suggested many areas with important research potentials, and it contributed to developing the inquiries explored in the empirical study. However, I decided not to include the desk-based analysis into this thesis mainly for reasons of space as well as to make the empirical research analysis more focused on the central questions of the whole thesis.

4.1 Semi-structured interview

Among the six categories of participants, disabled people, judges, and lawyers participated in semi-structured interviews. Interview is understood as a kind of guided conversation with purposes, which provides opportunities for the researcher to listen carefully and 'hear the meaning' of what is being

⁴²⁴ Norman Blaikie (n 400).

conveyed.⁴²⁵ The method of semi-structured interview helped me to seek information and knowledge deeper than what is sought by, for example, survey or structured interview.⁴²⁶ For example, when interviewing judges, I sought not only what judgment is made by the judge, but also the judge's understanding of the law, and his/her personal experience and feeling in the process of making such a judgment. In addition, participants in the semi-structured interview played the role as a positive meaning maker, rather than simply retrieving information from a pre-existing list of answers.⁴²⁷ This enables me to probe into how people construct the meaning of legal capacity and guardianship with their own terms and experience. Furthermore, semi-structured interview as a form of conversation also enabled me to know and understand how people's narrative, understanding, and attitudes toward legal capacity and guardianship are shaped.

4.1.1 Before the interview

Before the interview, I developed the interview guide, which is a list of general topics to be explored in the interview conversation.⁴²⁸ The interview guide had the function of indicating what topics and questions might be covered in the interview and reminding me whether the conversation goes too far and therefore has no relevance to the research questions. Given the flexibility of semi-structured interview, the interview guide did not mean the topics listed have to be used in the interview and lead to an answer. Instead, there was ample room for discussing, rephrasing, re-ordering the topics, as well as raising new topic in each individual interview.

⁴²⁵ Steinar Kvale, *InterViews: An Introduction to Qualitative Research Interviewing* (SAGE Publications, Inc 1996); Burgess (n 401); Jaber F Gubrium and James A Holstein, *Handbook of Interview Research : Context & Method* (Sage Publications 2002).

⁴²⁶ Gubrium and Holstein (n 425).

⁴²⁷ *ibid.*

⁴²⁸ For the use of interview guide, see, for example, Robert G Burgess, *In the Field: An Introduction to Field Research* (Routledge 2002) 83–88.

In addition, as a part of the preparing work of interview, I worked on the various ways to phrase and present questions in the interview with different participants. Legal terms were used in the interviews with legal practitioners, while in the interviews with disabled people with relatively limited knowledge of law, I prepared the questions with more plain language and some examples and scenarios to explain the legal terms. With the help of the advisory group, I developed several strategies for raising questions to ensure that the interview is flexible and accessible to different participants. For example, in the interview with a participant with intellectual impairment, who had not heard the term 'guardian' before, I started the question by describing what kind of person is a guardian, and then asked the participant who, in his mind, can best fit into my description. After he had linked a specific person with the term 'guardian', I encouraged him to talk more about the person, and tried to phrase other topics or questions with the term he used.

Moreover, in two or three days in advance of each interview, I discussed with the participants about the site to conduct our interview. I managed to get permission from two disabled people's organizations and one social worker center to use their office for free. All these three offices are in a relatively convenient location and have at least one room that is quiet, accessible, and safe for privacy and confidentiality. The participants can choose from these three sites, or propose another place that they feel most comfortable, as long as the place is safe, not too noisy, and safe for privacy and confidentiality.

4.1.2 During the interview

Although all interviewees had given their consent in advance, I still went through the form of informed consent again with the participants before the interview began. In addition, I explained in more details the purpose and agenda of this interview, as well as the topics I wanted to cover. I made it clear

that we do not have to cover all the topics, neither to go through the topics in particular order. The participants were given time and opportunity to seek clarification of any points, and decide whether they wish to proceed.

I had learned that there are three main kinds of interview questions, namely, descriptive questions, structural questions, and contrast questions.⁴²⁹ It is suggested that an interview can start with simple questions that require description, and move on to more complex structural questions, then, to contrast questions.⁴³⁰ Based on topics I was interested in, I drafted some questions of different kinds on the interview guide as a reminder to myself. I always started by asking the participant to describe what they know about legal capacity and guardianship, and where and how do they get such knowledge. As said before, I developed different strategies to present the questions to various participants. Therefore, terms such as 'legal capacity' or 'guardianship' were not used directly in the question to some participants. During their talking, I noted down some special term they used, and sometimes I repeated the phrases they used or asked them to explain some points they made. Based on their talking, I then probed for further information step by step. I encouraged participants to tell things in their own words, and I always tried to use the term they used to phrase my queries. The conversations did not always follow the sequence of descriptive-structural-contrast. In such circumstances, I followed what was started by the participant first as long as it was not too distant to the research question. Then, I considered whether their talking had already covered other topics, or whether I needed to work my way back to some other questions, or topics.

⁴²⁹ Burgess (n 401).

⁴³⁰ *ibid.*

I recognized the importance of keeping self-reflexive during the interview. Many researchers have pointed out that participants' responses in the interviews may be influenced by how they perceive the interviewer or the situation requires.⁴³¹ In all interviews, I made clear at the very beginning that there is no 'right' or 'wrong' answer. I was constantly reflexive about the nature of my questions, the communication style, as well as my tone,⁴³² to ensure that I raised my queries without imposing the answers. In addition, in each interview, I intentionally raised questions with overlaps and asked for some detailed description or explanation of the specific points made by the participants. This, to some degree, improved the creditability of the data and helped to avoid my misunderstanding as well.⁴³³

4.1.3 After the interview

At the end of the each interview, I gave participants a small gift to present my gratitude for their participation. All the participants were informed that they can contact me at anytime for anything about the interviews. Besides, they were clearly informed that they could still withdraw their consent to the participation in the interview within two months after the interviews. I also guaranteed that in cases where they withdraw the consent, I would not use any of the information provided by them. However, this did not happen in the empirical study.

With the informed consent of the participants, all the interviews were recorded. Recordings were partially transcribed. The transcription had been sent to each interview participant. They can discuss with me about the accuracy or whether they wanted to withdraw some of the information. For participants that

⁴³¹ see, for example, Martyn Denscombe, *The Good Research Guide: For Small-Scale Social Research Projects: For Small-Scale Social Research Projects* (4 edition, Open University Press 2010) 184; Roger Gomm, *Social Research Methodology: A Critical Introduction* (2 edition, Palgrave Macmillan 2008).

⁴³² Gubrium and Holstein (n 425).

⁴³³ see, for example, Abu Sadik Maruf, *Forced Marriage: A Study on British Bangladeshi Community* (AuthorHouse 2012) 22.

preferred to go through the transcription with me face by face than to read the transcription, I arranged the time for such following -up meeting.

4.2 Focus group

The other three categories of participants, namely guardians, social workers and members of neighborhood committee participated in focus groups. Each focus group was composed of 3-5 participants from the same category. A focus group is understood as a group of people gathering together to discuss a focused issue of concern,⁴³⁴ and the core of focus group is the interaction among participants in the group as well as between the researcher and participants.⁴³⁵ The method of focus group provided an opportunity to examine the ways in which participants collectively understand an issue and then construct meanings around it.⁴³⁶ It enabled me to examine the shared experience, understanding, attitudes, and feelings of participants in the same group towards law and practice on legal capacity and guardianship. From my point of view, such shared views may reveal some deep-rooted and structural problems underlying the issue concerned. In addition, the interactions in the focus group allow participants to discuss, as well as challenge others' opinion on the issue. They can, therefore, take part in the process of explaining their own perspectives and uncovering from where these different viewpoints come.⁴³⁷ Such argumentative interaction enabled me to examine their shared views as well as to figure out the different understandings and meanings held by participants in the same group. Moreover, as participants are engaged in active interactions, it also offered me the opportunity to explore how the shared

⁴³⁴ Liamputtong, *Focus Group Methodology* (n 418).

⁴³⁵ see, for example David L Morgan, *Focus Groups as Qualitative Research* (SAGE Publications 1997); Wendy Duggleby, 'What About Focus Group Interaction Data?' (2005) 15 *Qualitative Health Research* 832; Herbert Blumer, *Symbolic Interactionism: Perspective and Method* (University of California Press 1986); Sue Wilkinson, 'Focus Groups: A Feminist Method' in Sharlene Nagy Hesse-Biber and Michelle L Yaiser (eds), *Feminist Perspectives on Social Research* (1 edition, Oxford University Press 2003).

⁴³⁶ see, for example, Richard A Krueger, *Moderating Focus Groups* (SAGE Publications 1998); Alan Bryman, *Social Research Methods* (4 edition, OUP Oxford 2012) 476.

⁴³⁷ Krueger (n 436).

or different views are formed, articulated or changed,⁴³⁸ and in which way their views are shaped by, and then may re-shape the law and practice on legal capacity and guardianship.

4.2.1 Before the focus group

The first issue I considered at the preparing stage of the focus group was how to group participants. Researchers have made a distinction mainly between a homogeneous group and a heterogeneous group⁴³⁹ and constructed groups and pre-existing groups.⁴⁴⁰ I planned to have 3-5 participants from the same category in each focus group, i.e. they are all guardians, or all social workers, or all members of neighborhood committees. Accordingly, the group was more like a homogeneous group in which participants have something in common. Participants shared some experience and backgrounds, though, they did not necessarily have similar views or attitudes.⁴⁴¹ Therefore, there was room for a diverse range of responses and possibilities of exploring the issue from different perspectives. All the focus groups in my research were constructed groups.⁴⁴² However, some participants in the same group might know each other before. I paid particular attention to whether participants in the same group had a relationship with hierarchies.⁴⁴³ For example, one social worker was once the supervisor of the other, and I put these two participants into

⁴³⁸ Wilkinson (n 435).

⁴³⁹ see, for example, Synneve Dahlin Ivanoff and John Hultberg, 'Understanding the Multiple Realities of Everyday Life: Basic Assumptions in Focus-Group Methodology' (2006) 13 *Scandinavian Journal of Occupational Therapy* 125; Morgan (n 435) 35; Lori Peek and Alice Fothergill, 'Using Focus Groups: Lessons from Studying Daycare Centers, 9/11, and Hurricane Katrina' (2009) 9 *Qualitative Research* 31; Lia Litosseliti, *Using Focus Groups in Research* (1 edition, Bloomsbury Academic 2003).

⁴⁴⁰ see, for example Julia Brannen and Rob Pattman, 'Work-Family Matters in the Workplace: The Use of Focus Groups in a Study of a UK Social Services Department' (2005) 5 *Qualitative Research* 523; J Leask, P Hawe and S Chapman, 'Focus Group Composition: A Comparison between Natural and Constructed Groups' (2001) 25 *Australian and New Zealand Journal of Public Health* 152; Jennie Munday, 'Identity in Focus The Use of Focus Groups to Study the Construction of Collective Identity' (2006) 40 *Sociology* 89.

⁴⁴¹ Peek and Fothergill (n 439); Morgan (n 435).

⁴⁴² Richard A Krueger and Mary Anne Casey, *Focus Groups: A Practical Guide for Applied Research* (Fourth Edition, SAGE Publications, Inc 2008).

⁴⁴³ *ibid.*

different groups to avoid the potential detriment, resulted from the established hierarchies, to data generated in the focus group.

To play a role as the monitor of the focus group, I made a focus group guide for myself, on which I wrote down the direction that each focus group should take,⁴⁴⁴ and some general topics leading to that direction. I have learned that the main task of the monitor in a focus group is to ensure that the group heads in the right direction, but also be flexible enough to investigate new paths if relevant to the main direction.⁴⁴⁵ Accordingly, the topics I listed were only a guide or a reminder, rather than topics that have to be covered in the focus group. I arranged ample room to shift some control to the participants and allow them to voice their own agendas and explore their own interpretations.⁴⁴⁶

In about one week in advance of the intended date of focus group, I started to discuss with participants about the time and place to conduct focus groups. Different researchers have discussed the pros and cons of both a neutral location and a venue that is familiar to participants.⁴⁴⁷ From my point of view, the most important is that the focus group should be conducted in a venue that provides comfortable and relaxed environment for discussion, and allows participants to express their true opinions.⁴⁴⁸ As said before, I was permitted to use the offices of three organizations. Participants could choose from these three sites, or propose another place. I asked each participant separately to advise 2-3 venues. When all participants in the same group advised the same venue, that focus group was conducted there; and if not, I chose one from their suggestions and asked them whether it was acceptable. Regarding the time frame, it has been argued as a rule of thumb that focus group should not last

⁴⁴⁴ Liamputtong, *Focus Group Methodology* (n 418).

⁴⁴⁵ *ibid.*

⁴⁴⁶ Wilkinson (n 435).

⁴⁴⁷ Liamputtong, *Focus Group Methodology* (n 418).

⁴⁴⁸ Monique M. Hennink, *International Focus Group Research: A Handbook for the Health and Social Sciences* (1 edition, Cambridge University Press 2007).

longer than two hours.⁴⁴⁹ I planned to conduct each focus group within one and a half hours, and it could be extended to two hours if necessary. I reserved three hours for each focus group, so that I could arrive at the site and did some preparing work before the focus group started, and if any participants would like to have a private talk with me after the focus group, we could use the site instead of finding another place. The tentative ideas of how long the focus group would last⁴⁵⁰ and which topics I was interested in were sent to each participant in advance of the focus group. The purpose of providing such information in advance was to clarify the aim, topic, and timeframe of the focus group, to help participants to have a clearer understanding of the relevance of the research topic and their experience and perspective, and to enable participants to think in advance about the issues relevant to the topic. Providing such information in advance can facilitate the discussions and interactions of the focus group.⁴⁵¹

4.2.2 During the focus group

All participants confirmed their informed consent before the focus group, but I still went through again the form of informed consent before each focus group started, and highlighted some key concerns. One point I emphasized in the focus group is confidentiality. I have noticed that confidentiality of participants or others may be compromised by the fact that people tend to know about each other, or know about the person being mentioned in the discussion.⁴⁵² I emphasized in each focus group that keeping the discussion confidential is one of the most important rules in the focus group. I also suggested to them that when they described a phenomenon or experience, just talked about what has happened and did not mention the name of anybody or organization. Another point I highlighted is to respect each other in the discussion. It has

⁴⁴⁹ Liamputtong, *Focus Group Methodology* (n 418).

⁴⁵⁰ see, *ibid.*

⁴⁵¹ see, *ibid* 47, the discussion of a successful focus group.

⁴⁵² Liamputtong, *Focus Group Methodology* (n 418).

been recognized by other researchers that some participants might become emotional in the focus group discussion, or some participants may fail to respond sensitively to personal disclosures of others. Either situation may bring a bad feeling to participants.⁴⁵³ As a monitor of the discussion, I took care of such circumstances, and suggested participants in advance that they should show respect to each other.

Before the discussion began, I explained in more detail about the purpose and agenda of the focus group. I also made clear that the agenda was not fixed, and it was flexible enough for them to voice their own agenda of the discussion. Then, I asked whether they have questions to me, and confirmed that they all wished to proceed the focus group.

To start the discussion, I prepared some warm-up questions, and they were used in two focus groups with guardians when no participants voluntarily started the discussion. To avoid over control, most of the time I, as a monitor, remained a relatively passive role, listened to the discussion, and noted down the points or phrases that frequently appeared in the discussion. When I felt that a specific point or term raised by the participant needed to be clarified, I did not interrupt the discussion for clarification immediately as some points might be clarified in the further interaction among participants. I paid close attention to participants' emotion and attitudes towards each other. I also paid attention to non-verbal interactions as it might reflect some of their feelings. To avoid losing control, I actively stepped in the discussion when it was too far away from the central research questions; it suggested the danger that the interaction might become too emotional; or, to remind them of the time. Sometimes the participants asked me to comment on what they were discussing or social events that we had all observed. In such circumstances, I

⁴⁵³ *ibid.*

always made a certain degree of self-disclosure. It has been argued that a certain degree of self-disclosure might encourage respondents to be more forthcoming,⁴⁵⁴ while completely avoiding such invitations might ruin the relationship between researcher and participants.⁴⁵⁵

I recognized the importance of keeping self-reflexive. It has been advised that the monitor of the focus group discussion should be a neutral person.⁴⁵⁶ However, it has also been recognized that to be able to stimulate the discussion and elicit the responses of the participants, the monitor can hardly be a neutral spectator. I was cautious about my behavior in each focus group discussions to avoid the potential negative impact on the discussion. I was also cautious about both over control and losing control of the focus group discussion and kept self-examining on, for example, whether I stepped into the discussion in a proper way and at a proper time, whether I made proportionate self-disclosure, etc.

4.2.3 After the focus group

At the end of each focus group, I gave participants a small gift to express my gratitude for their participation. I reserved time for participants who wanted to have some private talk with me. All the participants were informed that they could contact me at anytime for anything about the focus group. Besides, they were clearly informed that they could still withdraw their consent to the participation in the focus group within two months after the focus group. I also guaranteed that in cases where they withdrew the consent, I would not use any of the information provided by them. However, this did not happen in the empirical study.

⁴⁵⁴ *ibid.*

⁴⁵⁵ Burgess (n 401).

⁴⁵⁶ Janet Smithson, 'Focus Group' in Pertti Alasuutari, Leonard Bickman and Julia Brannen (eds), *The SAGE Handbook of Social Research Methods* (Reprint edition, SAGE Publications Ltd 2008).

With the informed consent of the participants, all the focus group discussions were recorded. Recordings were partially transcribed. The transcription had been sent to each focus group participant. They were invited to discuss with me about the accuracy or whether they wanted to withdraw some of the information.

5. Ethical Consideration

This research raises several ethical considerations. In accordance with university guidelines, I did not take any other empirical research steps at all until I obtained all the necessary ethical approvals from the Ethic Committee in the university. The main ethical concerns are now analysed as follows.

5.1 Informed consent

Based on the ethical requirement, I understood that I have to ensure that all the participants understand what and why they participate in, and the consequences of their participation. All research participants were provided with this information and the opportunity to consider and ask questions about participation. This research might involve asking participants about some private or sensitive issue, such as their family relationship, financial situation, and medical history. The participants were informed of this possibility at the very first stage of the research project. I also made clear that they did not have to answer these questions. With the help of the advisory group, I took several measures to ensure that all the information was presented in an accessible way. When necessary, and with the consent of the potential participant concerned, I also resorted to supporters trusted by the person to ensure that they understood all the needed information. I did not include anyone who did

not give informed consent, or, who, when all the available supports had been provided, could not understand what was involved.

A written form of informed consent with return receipt was included in the participant information booklet sent to each participant. For participants who had no difficulties in understanding the written material and writing, they could choose to give me their informed consent by signature and the return receipt. They could also choose to go through all the information with me before giving informed consent. For others who needed more time or information, I went through the form of informed consent with them and told them that they could wait until they were willing to make the consent. For those who preferred not to use a signature, they made consent with fingerprint or recorded consent as an alternative.

One issue considered in the informed consent process was that under the Chinese law, the legal guardian of the disabled people is their legal representative. According to the law, if the person is under legal guardianship, it should be the guardian who gave informed consent for the person. I was very cautious to the consent from a legal representative (guardian). I did not include anyone in the research without the informed consent of the person him or herself. If the guardian of the disabled person is assigned under due process, according to the law, the guardian, as a legal representative, shall be the person to decide whether the disabled person participates in the research project or not. Four participants fell into this case. I obtained informed consent from these four participants themselves first, and then, turned to their guardian (legal representative) for informed consent, to fulfill the requirement of current law.

I went through the consent process again before each interview or focus group to confirm whether the participants were willing to proceed. I also informed the

participants at the beginning, and reminded during the research, that they could withdraw from the study at any time before or during the interview or focus group, and within 2 months after the interview or focus group. No participant withdrew his/her consent. Two of the judges, after reviewing the transcription, asked me not to report some of their comments on cases, which might make others identify them. I agreed and deleted those contents.

5.2 Confidentiality

I understand clearly that it might result in serious ethical issue and put the participants at risk if the data were obtained by others or lost, or individuals or organizations could be identified from the research. The importance of confidentiality had been explained to all participants before each interview and focus group, and repeated at the end of interview conversation or focus group discussion. All data were properly anonymised, encoded and stored. I explained to participants the importance of confidentiality. For the purpose of anonymisation, all participants were represented by codes. All the supporters involved in the research were required to sign the agreement on confidentiality before their participation. When conducting focus groups, all the people in the focus group were required to sign the agreement on confidentiality before their participation.

5.3 Avoiding risks

I understand that it is the researcher's obligation to take measures to avoid any potential risks that might be caused by the research. Confidentiality and anonymisation are essential measures taken to avoid risks and are guaranteed all the time. In addition, I made it clear to each participant that the research project is not conducted to judge or make criticism of the life or work of any participants. The participants understood that they could contact me at any time if they feel uncomfortable during the participation or if they needed

more information to avoid misunderstanding. Moreover, considering disabled people who may need support in daily life, I ensured that all participants in this research project could obtain supports from different sources. Thus, even if there is a conflict between the disabled people and some people around him or her, he or she can still get supports, assistance, or protection from others. Further, as a last resort of risk control,⁴⁵⁷ I contacted professional supporters such as lawyers, counselors, and psychologists, from whom participants may seek support if needed. The last resort of risk control was not triggered in the empirical research.

6. Data Processing and Analysis

The empirical research of legal culture conducted in this thesis has a clear and specific purpose to serve the study of the implementation of Article 12 of the CRPD in China. As stated at the beginning of this chapter, the empirical research design is based on the anthropological approach of legal culture developed by Marry, which has been analysed in detail in Chapter 2.⁴⁵⁸ To make the analysis of empirical research data consistent with the whole empirical research design, and be more focused on the core research questions, the data processing and analysis is also based on the framework of the anthropological approach of legal culture. The approach of template analysis is adopted for the data processing and analysis.⁴⁵⁹ The four dimensions of legal culture developed by Marry, which has been discussed in detail in Chapter 2,⁴⁶⁰ serve as the priori template in the data processing and analysis.⁴⁶¹

⁴⁵⁷ the discussion of such strategies, see, for example, Liamputtong, *Focus Group Methodology* (n 418).

⁴⁵⁸ see Chapter 2 at 31

⁴⁵⁹ For the discussion of template analysis, see, for example, Gillian Symon and Catherine Cassell, *Qualitative Organizational Research: Core Methods and Current Challenges* (SAGE 2012) 427–295; Graham R Gibbs, *Analysing Qualitative Data* (SAGE 2008) 38–50.

⁴⁶⁰ see Chapter 2 at 31

⁴⁶¹ For the use of priori template, see, for example, Symon and Cassell (n 459).

The data processing was assisted by Microsoft EXCEL⁴⁶² and took four main steps. The first step is transcription. With the consent of participants, all the interviews and focus groups were recorded. Recordings were not transcribed in full. I decided whether to discharge or focus on data by examining and evaluating whether it is relevant to the priori templates and whether or not the data would contribute to the exploration of the research question.⁴⁶³ I paid careful attention and made detailed notes of which parts are not transcribed. In addition to the recording, I also took field notes, especially of those cannot be recorded, for example, non-verbal reaction, expression, and hesitation. These notes were also carefully marked alongside the relevant part of the transcription.

The second step is preliminary coding. The preliminary coding is based on a thorough read and familiarity of the transcripts. I marked the segments of the transcripts that may offer information relevant to the research questions, took notes of the key points of the segments, and noted down the preliminary code in the margin. The preliminary codes noted in this step cover a broad range of potential issues. I also made notes of whether a segment can be encompassed by one of the priori templates or might be relevant to more than one priori templates.⁴⁶⁴

The third step is to cluster the preliminary codes, categorize them into meaningful units, and then, develop the initial themes. The hierarchal and lateral relations between different themes are also identified in this step. This

⁴⁶² For the use of Excel in qualitative data analysis, see, for example, Wen an Lai, Wei-chu Chie and Chih-Yin Lew-Ting, 'Analyzing Qualitative Field Data with Microsoft EXCEL' (2005) 9 Formosan J Med; Daniel Z Meyer and Leanne M Avery, 'Excel as a Qualitative Data Analysis Tool' (2009) 21 Field methods; Patricia Bazeley, *Qualitative Data Analysis: Practical Strategies* (SAGE 2013).

⁴⁶³ the discussion of this strategy, see, for example, Matthew B Miles, *Qualitative Data Analysis: An Expanded Sourcebook* (2nd ed, Sage Publications 1994).

⁴⁶⁴ For the discussion of this strategy, see, for example, Symon and Cassell (n 459) 435.

step was an exploratory and repetitive process. Many different ways of organizing the preliminary codes and initial themes were mapped and evaluated.

The fourth step is to categorize the themes under the priori template. It is recognized that the priori templates are not necessarily to be at the top level of how the data is organized.⁴⁶⁵ However, given the empirical data generated and the design of the whole empirical research, putting the priori templates at the top level of the structure of data analysis will make them function best.

After the data processing, the analysis of the data contains two interrelated steps. The first step of analysis mainly drew on the accounts of participants. The data to be analysed is firstly organized under the priori templates. Under each template, to reflect group specific perspectives, the six categories of research participants serve as a 'placeholder codes', under which the themes relating to each category of participants are organized.⁴⁶⁶ Many quotations are used in this part of analysis with the attempt to present the research findings from the participants' subjective perspective as far as possible. The main difficulty encountered at this stage was the translation. All the interviews and focus groups were conducted in Mandarin or Cantonese, and participants' talking more or less included some slang that can hardly be translated into English. Given that the process of translation may inevitably cause the loss of the subjective emotion underlying the word, I considered whether it was still worth including the quotation as a part of the analysis. A decision was made to keep those quotations because, as discussed in the earlier part of this chapter, this research endeavors to understand, present and examine the social reality described and experienced by participants in their terms. I have tried to improve the translation and make it deliver the word said by the participants,

⁴⁶⁵ *ibid* 436.

⁴⁶⁶ For the discussion of placeholder codes, see, for example, *ibid* 431.

the meaning of the word, as well as the feeling and emotions underlying the word.

In comparison with the first step of analysis, the second step of analysis was not concerned much with capturing the accurate record of interview conversation or focus group discussions. Instead, it synthesizes the empirical research findings to develop some further and deeper discussion of the implications of the legal culture revealed in the empirical research findings. It also adds the context of Article 12 of the CRPD to the analysis of legal culture and explores how the implications of the empirical research findings of legal culture should be considered in the context of Article 12. It intends to identify issues to be taken into account in the law reform in light of Article 12, and to examine how these issues should be addressed for the purpose of full implementation of Article 12 at the national level.

7. Conclusion

This chapter outlined the research design of the empirical study of legal culture regarding the issues of legal capacity and guardianship in China. The empirical study was designed to explore the legal culture by looking into different people's knowledge, attitudes, experiences and expectation towards relevant law. It was designed also to explore the concerns and tendencies underlying the observable legal culture.

Six categories of people participated in the empirical research, namely disabled people, disabled people's guardians, judges, lawyers, social workers and members of neighborhood committee. Section 3 provided a detailed analysis of why these categories of people are included and how these participants are recruited, approached and selected. Semi-structured interviews and focus groups were adopted as the main methods. Section 4

provided a detailed analysis of why these research methods are selected and how they are used in the empirical study. The key ethical issues raised in the empirical research were recognized and examined in Section 5. Section 6 examined the approach of the data processing and analysis.

The whole empirical research values the idea of social model research and emancipatory research. The empirical research design and the strategy of data analysis reflected the endeavor to enhance disabled people's participation and subjectivity.

Chapter 6: Empirical Research Findings and Analysis

1. Introduction

This chapter aims to present and analyse the empirical research findings of the legal culture in China. A focal emphasis is put on the legal culture relevant to the law and practice of legal capacity and guardianship. Inspired by Merry's anthropological approach to legal culture,⁴⁶⁷ which has been analysed in Chapter 2,⁴⁶⁸ the empirical research findings of legal culture are presented and analysed in this chapter from four perspectives, namely the practice and ideologies within the legal system, the knowledge of law of those without legal expertise, legal mobilization, and legal consciousness. Merry has pointed out that legal mobilization and legal consciousness are closely connected.⁴⁶⁹ The preliminary data processing found out that such connection is very evident in the current empirical research findings. Therefore, the empirical research findings of legal mobilization and legal consciousness will be illustrated together in this chapter.

In this chapter, findings based on the subjective perspective of the research participants will be presented and analysed. Therefore, many quotations are used in this chapter to illuminate the context of participants' conversations and discussions. By doing so, however, I am mindful that my own perspectives may be influential - running through the whole process of selecting, presenting, evaluating and analysing the empirical research findings. Also, the process of translating the research data may inevitably cause some losses of the meaning and feeling underlying the word. Therefore, no attempt is made to claim that the analysis is entirely objective and neutral.

⁴⁶⁷ Merry (n 23).

⁴⁶⁸ see Chapter 2 at 31

⁴⁶⁹ Merry (n 23).

This chapter contains three main sections. Section 2 addresses the practice and ideologies within the legal system. For these purposes, data generated from the interviews with legal practitioners - judges and lawyers - will be analysed. Section 3 addresses knowledge of the law possessed by those without legal expertise, and Section 4 addresses legal mobilization and legal consciousness. The data generated from the interviews with disabled people, and focus groups with guardians, social workers, and members of the neighborhood committee will be analysed in Sections 3 and 4.

Previous chapters, especially Chapter 2, 4, and 5 serve as background to the empirical research findings. Besides, for the purpose of clarity, it may be helpful to clarify the use of some terms. In the analysis of this chapter, the term 'law' is used to refer to the current Chinese law at different levels, which contains national law, administrative regulation, local decree, and administrative rules promulgated by central or local governments. The term 'guardian' is used to refer to both formal and informal guardian, and the term 'legal guardian' is used to refer to those who are legally appointed as the guardian. When mental or intellectual impairments were concerned in the interviews or focus groups, some participants used relatively clear terms such as 'mental illness' and 'learning difficulties', while some other participants used relatively vague term such as 'some problem with brain (naozi you wenti)'. Considering the cases where the participants used the vague terms, the term 'mental disability' will be adopted in the analysis as a generic term.

2. The Practice and Ideologies within the Legal System

The first dimension of legal culture defined in Merry's anthropological approach to legal culture is the practice and ideology of legal practitioners. Occupational culture of law practitioners is regarded as having a crucial influence on legal

culture as a whole and legal change.⁴⁷⁰ The analysis in this section is focused on legal practitioners' opinions of legal rules and the kinds of people who use the law. Four judges and four lawyers were selected as the sample of legal practitioners. The data analysed in this section is generated from the individual, semi-structured interviews with each of them.

2.1 Semi-structured interviews with judges

Four general themes are developed to analyse the interview conversations with four judges. First, how these four judges understand the current law on legal capacity and guardianship. Second, how these four judges apply the current law to their decisions in legal capacity and guardianship cases. Third, how these four judges think about the people who use the law on legal capacity and guardianship. In the context of judges' practice, two kinds of people are specifically considered. One is the person, whose legal capacity is challenged and to be determined in the case (The Adult), and the other is the person, who applies to the court for the declaration that The Adult is with limited or no legal capacity (The Applicant). Fourth, what these four judges think are the problems of the current law on legal capacity and guardianship.

2.1.1 The understanding of the current law on legal capacity and guardianship

The four judges interviewed did not demonstrate many divergences in the understanding of the current law on legal capacity and guardianship. First of all, from their perspectives, the purpose of the law in the priority is to protect transaction security, the interest of the third party, and the social order and safety. In addition to this, the 'second purpose' of the law is to protect 'people who cannot protect themselves'. One interviewee's talking in this regard is quoted as an example.

⁴⁷⁰ *ibid*; Watson (n 141).

In001J: ...the main purpose of the law on legal capacity and guardianship is to protect what we always call transaction security and the interest of the third party, and it then, finally, protects the social order. Otherwise, you can imagine, what if a psychopath (jingshen bing) busts his credit again and again and cannot make credit card repayments...who is going to compensate that? We should be clear about this most important purpose of the law, and then as we can see, the second purpose of the law is to protect the people who have diminished ability and cannot protect themselves...⁴⁷¹

Based on such understanding of the purpose of law, these four interviewees further showed the similar understanding that the legal capacity prescribed in the current law is 'a kind of standard'⁴⁷² or 'a sort of qualification(zige)'⁴⁷³ to determine whether an individual can 'have civil juristic acts (shishi falv xingwei)'.⁴⁷⁴ According to their understandings, those who 'have abnormal (bu zhengchang) mental capacity',⁴⁷⁵ 'can not understand what they are doing',⁴⁷⁶ 'can not understand the possible consequences of his/her act',⁴⁷⁷ 'can not be responsible for his/her act',⁴⁷⁸ or 'do not know how to protect him/herself'⁴⁷⁹ are people who 'fail to meet the standard'⁴⁸⁰ or people 'who do not have the qualification'⁴⁸¹. These kinds of people should then be determined and declared as people with limited or no legal capacity, and restricted from 'having civil juristic acts'.⁴⁸²

⁴⁷¹ Interview with judge, Code In001J

⁴⁷² Interview with judge, Code In007J

⁴⁷³ Interview with judge, Code In001J

⁴⁷⁴ All these four interviewees use the term 'shishi falv xingwei', which is the term used in the current law on legal capacity, and the official English translation of this term is 'have juristic acts'.

⁴⁷⁵ Interview with judge, Code In001J; In007J; In022J;

⁴⁷⁶ Interview with judge, Code In010J; In022J; In001J; In007J

⁴⁷⁷ Interview with judge, Code In022J; In007J; In001J; In010J

⁴⁷⁸ Interview with judge, Code In010J; In022J; In001J; In007J

⁴⁷⁹ Interview with judge, Code In010J; In007J

⁴⁸⁰ Interview with judge, Code In007J; In022J

⁴⁸¹ Interview with judge, Code In001J

⁴⁸² Interview with judge, Code In001J, In007J, In010J, In022J

In addition, these four judges showed some similar understanding that the law on guardianship is 'a kind of authorization'⁴⁸³ or 'a kind of recognition'⁴⁸⁴. According to their understanding, the law on guardianship authorizes the guardian to 'control(kongzhi)',⁴⁸⁵ 'take care of(zhaogu)',⁴⁸⁶ or 'protect'⁴⁸⁷ people with limited or no legal capacity. Such authorization also includes the power to 'manage(guanli)'⁴⁸⁸ the money, house, bank account, or other financial or personal affairs of the person under guardianship. One interviewee used the term 'protective screen' (baohu wang) to describe how he thought the current law on legal capacity and guardianship functions.

In022J: ... the law believes that people with mental disabilities are dangerous to the world, or you can say the world is dangerous to them... It needs a protective screen to cushion the danger. The denial of legal capacity and the guardianship is the protective screen.⁴⁸⁹

These four interviewees did not use the specific term of segregation (geli/paichi) in their talking about their understanding of the current law. However, as can be argued, the term 'protective screen' as well as the terms such as 'standard', 'qualification', and 'control' used in their context suggest that, from their perspectives, a certain degree of segregation might be inevitable under the current law on legal capacity and guardianship, and such segregation might be justified by the purpose of the law.

2.1.2 The application of the law to cases on legal capacity and guardianship

All these four judges interviewed described how they apply the current law to cases on legal capacity and guardianship. They have some similar ways of

⁴⁸³ Interview with judge, Code In001J; In010J; In007J

⁴⁸⁴ Interview with judge, Code In022J

⁴⁸⁵ Interview with judge, Code In001J

⁴⁸⁶ Interview with judge, Code In022J; In010J

⁴⁸⁷ Interview with judge, Code In007J

⁴⁸⁸ Interview with judge, Code In001J; In010J; In007J; In022J

⁴⁸⁹ Interview with judge, Code In022J

practice, but the interview conversations show that such similar ways of practice may be based on different concerns and ways of balancing various factors. Their ways of practice also in some way further illustrate their understanding of the relevant law.

(1) The decisions on legal capacity

All these four judges interviewed demonstrated a clear knowledge of how legal capacity is prescribed in the current law. They demonstrated the knowledge of the substantive perspective of legal capacity that a person, who has mental disability and cannot fully 'account for his/her own conduct',⁴⁹⁰ may be declared as people without full legal capacity. They also demonstrated the knowledge that the declaration of one's legal capacity should be made by the court under due process. Except for in very exceptional circumstances, the medical diagnosis of the person's mental capacity and the judicial assessment on the person's abilities should be submitted to, and examined by, the court before the court reaches the decision on the person's legal capacity.

Based on such knowledge, however, only one of these four interviewees said that he 'requires both medical diagnosis and judicial assessment in every single legal capacity case, because the law requires this.'⁴⁹¹ The other three all admitted that they will always require the medical diagnosis, but are relatively more flexible to whether the judicial assessment is submitted. Two of them argued that a capacity assessment is neither practical nor necessary in some cases, for example, when the person is in a vegetative state,⁴⁹² or when there is clear and long-term medical record to prove that the person has already lost all or most cognitive ability.⁴⁹³ The other one showed some level

⁴⁹⁰ all these four interviewees use the legal term 'buneng bianren ziji de xingwei', the official English translation is 'account for his own conduct'

⁴⁹¹ Interview with judge, Code In022J

⁴⁹² Interview with judge, Code In001J

⁴⁹³ Interview with judge, Code In007J; In001J

of skepticism about the effectiveness and credibility of judicial assessment of capacity, and believed that 'the medical diagnosis and the description of people close to the person concerned can provide sufficiently detailed information.'⁴⁹⁴

Interviewees' attitudes towards medical diagnosis and judicial assessment raises further inquiry that if a decision on one's legal capacity can be reached without the judicial assessment, what do the interviewees think is the difference between the medical diagnosis and judicial assessment, and between the medical standard of mental capacity and the judicial conception of legal capacity. All these four interviewees acknowledged that there should be differences between the medical diagnosis and the judicial assessment, because 'otherwise, the law will not require both of them'.⁴⁹⁵ However, at the same time, all these four interviewees demonstrated similar understanding that both medical diagnosis of mental capacity and judicial assessment of one's abilities are made by 'medical experts'⁴⁹⁶ or 'psychologists'⁴⁹⁷ with 'professional medical standards',⁴⁹⁸ 'psychiatric indicator'⁴⁹⁹ or 'psychological test'.⁵⁰⁰ One interviewee, after a long hesitation, said that there 'might not be material differences' between the medical diagnosis and the judicial assessment, and he added that:

In022J: ...at least, in all the cases I had, the result of the judicial assessment is always consistent with the medical diagnosis.⁵⁰¹

In addition to the conflation of medical diagnosis and judicial assessment, all the interviewees confirmed that their decision to deny one's legal capacity

⁴⁹⁴ Interview with judge, Code In010J

⁴⁹⁵ Interview with judge, Code In022J

⁴⁹⁶ Interview with judge, Code In001J; In007J; In010J

⁴⁹⁷ Interview with judge, Code In022J

⁴⁹⁸ Interview with judge, Code In001J; In007J; In010J; In022J;

⁴⁹⁹ Interview with judge, Code In022J; In007J

⁵⁰⁰ Interview with judge, Code In022J; In010J

⁵⁰¹ Interview with judge, Code In022J

relies heavily on the medical diagnosis of the person's mental capacity; they will base their decisions on the result of the judicial assessment as long as there is one. One interviewee explained his concerns of 'relevant expertise'.

In007J: ... As a judge, you know, I know nothing about those medical things...and perhaps some psychiatric indicator... you know... people have different expertise... the diagnosis or assessment is made by professionals, so that there is no ground to doubt the result.⁵⁰²

Another interviewee, on the contrary, did not hide his doubt about the credibility of the medical diagnosis and judicial assessment. He explained, however, that he still defers to the diagnosis or assessment in most of his practice, and the main reason is to avoid the potential risk.

In010J: well...I don't really believe that... One's legal capacity or mental condition is always changing... even though I do not have medical knowledge, I can tell that you cannot have an accurate assessment of what is changing... The situation is that there are both medical diagnosis and judicial assessment in front of you, saying that the person has mental illness and cannot account for his/her conduct, and both of them are explicitly required by law. What can you do? Technically, I can ignore such advice. However, what if the person is just in his psychotic episode and causes some serious damages just after my decision? Who is going to be responsible? ⁵⁰³

The weight given by the interviewees to the medical diagnosis and judicial assessment raises further questions about the procedural perspective of legal capacity cases. As discussed before, all these four interviewees demonstrated clear knowledge that the declaration of one's legal capacity should be made by the court under due process. As required by due process, the court should base its decision on the examination of relevant facts, the medical diagnosis, and the judicial assessment. However, interviewees' deference to the medical diagnosis and judicial assessment in the legal capacity cases raises questions

⁵⁰² Interview with judge, Code In007J

⁵⁰³ Interview with judge, Code In010J

about the degree to which the procedural requirement of legal capacity cases is fulfilled in practice.

According to interviewees' description, the procedure of legal capacity cases is always simple in practice. In most cases, only The Applicant and the representative of The Adult present in the court. The Adult him/herself may present in the court in only very rare cases. Other relevant people, for example, those who make the medical diagnosis or judicial assessment, will ordinarily not be called by the court. All these four interviewees, explicitly or implicitly, showed the point of view that legal capacity cases are 'by nature a small thing'.⁵⁰⁴ They did not present much critical thinking about whether the procedure is so simple as to cause oversight to essential factors or the interested parties' rights.

One interviewee emphasized that although the procedure he applied in his practice is simple, it is in line with the current law.

In022J: (taking out the law book, and read)... you can see, I always follow the steps, listen to The Applicant, examine the diagnosis and assessment, and after all these steps, I make the decision. I admit that it is not a long procedure, but the law does not want to make a lengthy procedure for the legal capacity case...⁵⁰⁵

What raises concerns, in particular, is that this interviewee believes he 'examines the diagnosis and assessment' in line with the legal procedure. The current law does not specify what steps the judge should take to examine the medical diagnosis and judicial assessment. This interviewee suggested his understanding of the current law that the law does not necessarily require a very comprehensive and in-depth examination of the diagnosis or assessment,

⁵⁰⁴ Interview with judge, Code In022J

⁵⁰⁵ Interview with judge, Code In022J

and it does not oblige the judge to, for example, examine who, under which condition, by which standard, made the diagnosis or assessment.

Another interviewee acknowledged that the procedural requirements of legal capacity cases in the current law 'do not prevent the judge in the legal capacity case from conducting more detailed examination.'⁵⁰⁶ However, he at the same time pointed out a practical issue that more detailed examination may be unrealistic in the majority of cases because 'judges are very busy'.

In010J: ... it will be better if the decision on the person's legal capacity is based on more detailed examination and evaluation of the facts and the evidence... However, you have to understand that judges are very busy, and it is not possible for us to spend much time on cases in which the only issue is legal capacity.⁵⁰⁷

In addition to the court's function of examining the medical diagnosis and judicial assessment in legal capacity cases, the interviewees' description of the procedure adopted in the legal capacity cases brings up another important concern. It reveals that The Adult, whose legal capacity is to be determined in the case, is almost absent in the whole procedure. This is further probed in the interviews, and will be analysed later.

(2) Decisions on guardianship

The interview conversations with each of these four judges shed comparatively fewer lights on guardianship cases. All these four interviewees demonstrated a clear knowledge of how guardianship is prescribed in current law, and briefly talked about how they make a decision on guardianship arrangement. Their attitudes in the interviews suggested that as the judge in legal capacity and guardianship cases, they do not regard guardianship as an issue that might cause controversy.

⁵⁰⁶ Interview with judge, Code In010J

⁵⁰⁷ Interview with judge, Code In010J

All these four interviewees described a similar way of practice that in some cases, they as the judge may assign guardianship after The Adult's full legal capacity is denied, and The Applicant is always appointed as the guardian. It raises enquiries that whether this way of practice is in line with the procedural perspective of guardianship prescribed in the current law. All these four interviewees demonstrated clear knowledge that according to the current law, it is for the neighborhood committee of the person's residence to make the initial assignment of guardianship for the person. A court decision on guardianship may be required only when the neighborhood committee fails to make the assignment. However, the interview conversations did not shed many lights on the role that is supposed to be played by the neighborhood committee. All these four interviewees expressed a similar point of understanding that the court has the authority to assign guardianship immediately after the person's full legal capacity is denied.

Two interviewees explicitly pointed out that there are not many differences between 'whether the guardian is appointed by the court or by the neighborhood',⁵⁰⁸ because the guardian can be chosen from only a limited number of people, and 'sometimes there is only one candidate'.⁵⁰⁹ One interviewee further pointed out that the guardianship appointed directly by the court is better.

In010J: ...The Adult needs guardianship anyway... By court is even better...you know, more formal...if I do not assign the guardianship, the person concerned may have to start another court process for the guardianship assignment, and this takes time and money...⁵¹⁰

⁵⁰⁸ Interview with judge, Code In 010J, another interviewees In007J said 'who makes the guardianship assignment is not really important'

⁵⁰⁹ Interview with judge, Code In007J

⁵¹⁰ Interview with judge, Code In 010J

2.1.3 The interested parties in legal capacity and guardianship case

As has been discussed before, in the context of judges' practice, there are two main interested parties in legal capacity and guardianship cases. One is The Adult, whose legal capacity is challenged and to be determined in the case, and the other is The Applicant, who applies to the court for the declaration that The Adult is with limited or no legal capacity. The interviewees' attitudes towards The Adult and The Applicant were illustrated in different ways in the interview conversations. For example, two interviewees repeatedly used the term 'psychopath' (jingshen bing) during the interview,⁵¹¹ which arguably suggests a certain degree of prejudicial attitudes. The following analysis examines the interviewees' attitudes from one particular perspective. It explores that based on the interviewees' understanding of the law on legal capacity and guardianship, what are the rights or obligations of The Adult and The Applicant, and to which degree both parties' opinions should be heard in the case proceeding.

(1) The Adult

All these four interviewees explicitly recognized that even if a person is denied full legal capacity, his/her 'basic rights and interests (quanyi)⁵¹² should be guaranteed and protected by law. However, the interviewees' understanding of the scope of 'basic rights and interests' may raise concerns. The 'basic rights and interests' named by interviewees are similarly limited within a narrow scope, such as 'free from abuse',⁵¹³ 'health, safe and security',⁵¹⁴ 'protecting the person from others'.⁵¹⁵ Only one interviewee pointed out that 'other rights

⁵¹¹ Interview with judge, Code In 010J, In001J

⁵¹² All the interviewees use the term 'quanyi', which contains the meaning of both rights and interests.

⁵¹³ Interview with judge, Code In001J; In007J; In010J; In022J

⁵¹⁴ Interview with judge, Code In001J; In007J; In010J; In022J

⁵¹⁵ Interview with judge, Code In007J; In022J

are also important', but he at the same time pointed out the difficulties to guarantee those rights.

In007J: ...personally I think even the person without full legal capacity should have those rights. For example, they should have the right work, rather than staying at home...I believe some of them can do something if they are in a good environment. However, the good environment is not always existed...⁵¹⁶

Besides, some of the interviewees' opinions suggest that from their perspectives, the degree to which these very basic rights can be enjoyed by the person declared as without full legal capacity may be subject to various factors. This includes, for example, 'the capability of the guardian',⁵¹⁷ 'whether the family can afford',⁵¹⁸ and 'how serious the person's impairment is'⁵¹⁹. Also, the criteria of whether these basic rights are achieved might sometimes be relatively low. According to one interviewee, once The Adult is denied full legal capacity and put under guardianship, his/her rights may be regarded as well guaranteed by sending him/her to an institution.

In001J: ...as I understand the law from a judge's perspective, the very basic rights should be guaranteed, such as the right to life, food, water, a place to live...things other than these are optional... For those who are not that rich, they can put old people in the nursing home, or put psychopath(jingshen bing) in a mental hospital where also provides treatment to their mental illness...⁵²⁰

In addition to the interviewees' attitudes to The Adult's rights in general, the interviews also shed light on some specific rights. Considering the interviewees' role as the judge in the legal capacity and guardianship cases, it was presumed that The Adult's right to fair trial should be an issue of high

⁵¹⁶ Interview with judge, Code In007J

⁵¹⁷ Interview with judge, Code In 001J; In007J; In022J

⁵¹⁸ Interview with judge, Code In010J; In022J

⁵¹⁹ Interview with judge, Code In 001J; In010J

⁵²⁰ Interview with judge, Code In 001J

relevance. However, only one interviewee touched upon this issue indirectly. In the conversations with the other three interviewees, I brought up this issue first. All these four interviewees demonstrated clear knowledge that the right to fair trial should be guaranteed in each court proceeding. However, none of them showed a clear opinion of the degree to which, and the way in which, they think The Adult's right to fair trial should be ensured in a case considering his/her legal capacity.

According to interviewees' description of their experiences of hearing and making decisions on legal capacity and guardianship cases, only two interviewees had cases in which The Adult presented in the court. Both of them emphasized that these are very rare cases, and in most cases, only The Adult's representative present in the court on The Adult's behalf. One of them further pointed out that, from his perspective, there is no need for The Adult to present in the court.

In022J: ... it is not necessary. If there is sufficient evidence, I will deny his/her full legal capacity no matter what he/she said in the court... Otherwise, I will not deny his/her legal capacity even the person does not appear.⁵²¹

Moreover, according to the interviewees' description, in the majority cases in which The Adult does not present in the court, it is very likely that no other steps will be taken to obtain The Adult's own opinion. Interviewees provided several reasons for such practice that, for example, The Adult may have difficulties in communication⁵²² or The Adult has to live in a medical institution.⁵²³ Among all the reasons mentioned in the interview conversations, the most fundamental one, which is explicitly raised by all interviewees, is that according to interviewees' understanding of the law, the judge does not have

⁵²¹ Interview with judge, Code In022J

⁵²² Interview with judge, Code In022J; In007J

⁵²³ Interview with judge, Code In010J; In001J; In007J

the obligation to consider The Adult's opinion when making a decision on his/her legal capacity and guardianship. One interviewee explained this point of view by interpreting the current law.

In001J: it says that it is for The Applicant to present the reason of why The Adult should be denied full legal capacity, and it is for The Applicant to provide medical diagnosis, judicial assessment, or other evidence to support his/her application. We as the judge should examine what is submitted by The Applicant. It does not say that we have to consider whether The Adult has an objection or not...It is very clear, isn't it?⁵²⁴

(2) The Applicant

According to the interview conversations, in comparison with The Adults' absence, The Applicant may sometimes be given comparatively more weights in legal capacity and guardianship cases. All these four interviewees demonstrated clear knowledge that according to the current law, The Applicant should present the fact of why The Adult should be denied full legal capacity and provide information to support the application; the court should examine both the facts and the evidence submitted by The Applicant. However, the interview conversations did not show much about how the application and information submitted by The Applicant is examined. Rather, it revealed a relatively similar way of practice by the interviewees that, as the judge in the legal capacity and guardianship cases, they may lean to presume the credibility of what is submitted by The Applicant.

Some further inquiries on this way of practice show that such similar practices are based on two different concerns. Three of the interviewees, implicitly or explicitly, acknowledged that from their perspectives, since The Applicant in the majority cases is the family member of The Adult, 'there is no doubt that The Applicant is reliable' ⁵²⁵ and 'they will not intend to abuse the person by

⁵²⁴ Interview with judge, Code In001J

⁵²⁵ Interview with judge: Code In001J

resorting to guardianship'⁵²⁶. All these three interviewees recognized that their presumption of The Applicant's good faith is drawn from the 'real nature of human being and family relationship'⁵²⁷ more than from the context or the understanding of the current law. One interviewee further emphasized that such presumption does not contradict the current law.

In010J: ...they will not intend to abuse the person by resorting to guardianship... I believe no one will do that because otherwise, it is against our tradition and our value of family... The law is also built on such values. Otherwise the law will not let the family members to make such application, or it will not let family members to be the guardian...⁵²⁸

The other interviewee, by contrast, acknowledged that he sometimes doubts both the intention of The Applicant and the credibility of the information submitted by The Applicant, 'especially in cases where The Adult is an elder person with Alzheimer and The Applicant is the adult child of the elder people'. However, he also admitted that such doubts might not bring any material difference to the court decision because 'the doubts alone do not form the ground to reject the application, especially when The Applicant manages to obtain both the medical diagnosis and judicial assessment.'⁵²⁹

2.1.4 The problems of the current law

During the interview conversations, some of the interviewees' opinions also reflect what they think are the problems of the current law. Firstly, one interviewee clearly indicated the need to rethink the purpose of the law on legal capacity and how such purpose is achieved.

⁵²⁶ Interview with judge, Code In010J

⁵²⁷ Interview with judge, Code In001J

⁵²⁸ Interview with judge, Code In010J

⁵²⁹ Interview with judge, Code In022J

In022J:...for the purpose of protecting the so-called transaction security and public interests, once a person is declared as without full legal capacity, he/she will be put in a very passive position and many things are imposed on him/her... I say it is problematic because a person should not be arranged (bei anpai) in this way...⁵³⁰

Secondly, one interviewee showed comparatively more concerns than the other three on the current adult guardianship mechanism. With referring to some cases he observed, he pointed out that the current law on guardianship might fail to protect the rights of the person under guardianship, and the monitoring system of guardianship is not sufficiently addressed in the current law.

In007J: ...whether the guardian fulfills his/her obligation; whether, after a period, the person under guardianship still needs a guardian; or, what can the person do if the guardian abuses him/her... these are all about the effectiveness of the guardianship, and the monitoring things... But, as I can tell you, these issues are not sufficiently addressed in the current law...⁵³¹

Thirdly, all these four interviewees pointed out a similar issue, although from different perspectives, that the person under guardianship may have very limited social network in practice, and sometimes 'the guardian is the person's only social connection'.⁵³² One interviewee raised the concern that it may be difficult for person with such narrow social network to look for help if the guardian infringes his/her rights.⁵³³ Another concern raised by all these four interviewees is that if the only one guardian loses the capability to be the guardian, 'for example, died',⁵³⁴ the person under guardianship may be put in a more 'isolated',⁵³⁵ or 'unprotected'⁵³⁶ situation.

⁵³⁰ Interview with judge, Code In022J

⁵³¹ Interview with judge, Code In007J

⁵³² Interview with judge, Code In007J

⁵³³ Interview with judge, Code In007J

⁵³⁴ All these four interviewees mentioned the possibility that the guardian may be die before the person under guardianship

⁵³⁵ Interview with judge, Code In022J

⁵³⁶ Interview with judge, Code In001J; In010J

Although such reflections and critical thinking were raised in the interview conversations, all these interviewees were relatively reluctant to provide more detailed insights or engage in the talking about what they, as the judge, can do about these issues. Two interviewees explained that it might be beyond their authorities as the judge to address the problems of the current law because 'the judge cannot make or change the law'.⁵³⁷

2.2 Semi-structured interviews with lawyers

In comparison with the four judges interviewed, the lawyers interviewed, based on their various experiences and practices, raised more reflections and diverse perspectives to the current law on legal capacity and guardianship. The interview conversations with these four lawyers are analysed under two general themes. One is the interviewees' knowledge, understanding and attitudes towards the current law on legal capacity and guardianship; the other is how the current law and the understanding of the current law influence the interviewee's experiences and practices as a lawyer.

2.2.1 The knowledge, understanding, and attitudes to the current law

Lawyers' knowledge, understanding and attitudes towards the legal standards of legal capacity and guardianship might not directly influence the ultimate decision on one's legal capacity and guardianship. However, it may have an impact on how lawyers provide legal services, and this may further have influences on those who receive such legal services.

All these four interviewees demonstrated a rather similar understanding that the current law on legal capacity and guardianship has mainly two purposes.

⁵³⁷ Interview with judge, Code In022J

One is to protect 'the transaction security',⁵³⁸ 'the social order',⁵³⁹ and 'the interest of the bona fides third party'⁵⁴⁰; the other is to protect those who are regarded as 'lacking capability to protect themselves'⁵⁴¹ or 'cannot account for his/her own conducts'⁵⁴². Different from the judges interviewed, the lawyers interviewed did not show an overwhelming position of whether there is a definite hierarchy between these two purposes. According to the interviewees' understanding, these two purposes of the current law should be achieved by defining the standards of full legal capacity, declaring those who fail to meet the standards as a person without full legal capacity, and then, putting the person under the 'control and protection'⁵⁴³ of the guardian.

Based on such a relatively similar understanding of the purpose of law, though, interviewees showed different opinions to whether the current law actually achieves its purpose effectively and appropriately. Two participants shared some similar points of view that the current law does not achieve effective control over people under guardianship.⁵⁴⁴

In002LA: ... I can still receive many cases that mentally disabled people, who is supposed to be declared as without legal capacity and under the control of their guardian, cause damages to others, sign contract without proper supervision, get huge loans but cannot repay...⁵⁴⁵

Another interviewee, on the contrary, pointed out that the purpose of the current law on legal capacity and guardianship is achieved but by imposing disproportional restrictions on people being denied full legal capacity.

⁵³⁸ This term was used by all the lawyers interviewed

⁵³⁹ Interview with lawyer, Code In003LA, female, with 3 years experience in practicing civil law; Interview with lawyer, Code In002 LA, male, with 7 years experience in practicing civil law

⁵⁴⁰ The term 'shanyi disanren' was used by all the lawyers interviewed, and the official English translation is bona fides third party

⁵⁴¹ Interview with lawyer, Code In002 LA

⁵⁴² This term was used by all the lawyers interviewed.

⁵⁴³ Three interviewees used the term 'baohu he guanli', which contains the meaning of both protection and control.

⁵⁴⁴ Interview with lawyer, Code In002 LA; In003LA

⁵⁴⁵ Interview with lawyer, Code In002LA

In028LA: ...Let me put it in this way, they are not allowed to do anything so that they will not do anything wrong or cause any damage, this is basically the so-called protection...⁵⁴⁶

In addition to the understanding of the purpose of law, all these four participants demonstrated clear and definite knowledge of legal standards prescribed in the law on legal capacity. In particular, all these four interviewees raised a similar concern that the medical diagnosis of mental incapacity may not be a proper standard to determine whether a person has full legal capacity or need guardianship.

From their perspectives, people without mental disability may also lack the capability to account for his/her own conduct, and therefore need to be 'controlled',⁵⁴⁷ 'supervised',⁵⁴⁸ or 'protected'⁵⁴⁹ under the guardianship or similar mechanisms⁵⁵⁰. According to the interviewees, at least two kinds of people may fall into this category. One is individuals with some kinds of physical or sensory impairments, which make it difficult for them 'to have proper and effective communication with others'⁵⁵¹ and therefore 'cause misunderstanding, or even damage to themselves or others'.⁵⁵² The other is elder people 'with Alzheimer's'⁵⁵³ or 'with bad memory',⁵⁵⁴ who cannot 'manage their property',⁵⁵⁵ 'protect themselves',⁵⁵⁶ or 'manage their live'⁵⁵⁷.

⁵⁴⁶ Interview with lawyer, Code In028LA, female, with 3 years experience specialized in providing legal aid on mental health issues.

⁵⁴⁷ Interview with lawyer, Code In002LA; In003LA; Code In016LA, male, with 4 years experience in practicing civil law, and has been specialized in providing legal aid to disabled people for 19 months

⁵⁴⁸ Interview with lawyer, Code In016LA

⁵⁴⁹ Interview with lawyer, Code In003LA; In016LA; In002LA; In028LA

⁵⁵⁰ In the interview conversations, the Interviewee In028LA mentioned the 'personal assistant (fuzhuren)' mechanism in Taiwan

⁵⁵¹ Interview with lawyer, Code In016LA; Interviewee In003LA also talked about this issue.

⁵⁵² Interview with lawyer, Code In016LA

⁵⁵³ Interview with lawyer, Code In003LA; In002LA; In028LA

⁵⁵⁴ Interview with lawyer, Code In002LA;

⁵⁵⁵ Interview with lawyer, Code In003LA; In002LA; In028LA

⁵⁵⁶ Interview with lawyer, Code In002LA; In028LA;

⁵⁵⁷ Interview with lawyer, Code 003LA

According to the interviewees, since the medical diagnosis of mental incapacity is prescribed in the law as a precondition for the denial of legal capacity and the assignment of guardianship, people without such a diagnosis but need guardianship or similar mechanisms may, to some degree, be overlooked under the current law.

In comparison with their knowledge and understanding of how legal capacity is prescribed in the current law, interviewees demonstrated comparatively less comprehensive knowledge of the law on guardianship. According to the interviewees' description of their experience, the guardian and guardianship are of high relevance to their practices. The main inquiry raised in this regard is how the interviewee, as the lawyer, knows that the person is under guardianship and identifies the guardian of the person. While all these interviewees demonstrated relatively clear knowledge of who may be selected as the guardian of an adult, they showed comparatively less clear knowledge of how, by whom, or under which condition an adult will be put under guardianship. One interviewee explained that 'as lawyer's way of work', when a disabled person is at issue, he may identify whom he thinks is the guardian of the person to facilitate 'the lawyer's work'. From his perspective, such way of practice is different from the guardianship appointment prescribed in the law.

In002LA: ...we hear from whom we believe is the guardian of the disabled people...not only mentally disabled people, but also disabled people with difficulties in communications, such as deaf or mute people... because it is not practical for lawyers to spend time on a person when you cannot have effective communication with him/her... It does not mean we are making legal, formal, guardianship appointment for the disabled people. Thus we are not bound to consider the legal standards and procedures of arranging guardianship.⁵⁵⁸

⁵⁵⁸ Interview with lawyer, Code In002LA

2.2.2 The lawyers' experiences and practices

As has been discussed before, the lawyers' knowledge, understanding and attitudes to the current law on legal capacity and guardianship may influence their practice. On the other hand, the lawyers' experiences and practices of law may also illustrate their understanding of the law, and their attitudes to people who use the law. Besides, the lawyer's practice may reflect whether, from the lawyers' perspective, the current law on legal capacity and guardianship cause any practical difficulties or problems. All these four interviewees shared their diverse experiences in cases relevant to issues of legal capacity or guardianship. Some of their experiences and ways of practice are, to some degree, similar, or brings similar effects. The following analysis spotlights these experiences and ways of practice and looks into the different concerns and issues underlying these practices or experiences.

(1) The absence of the person in the legal proceeding in which his/her legal capacity is examined

All these four interviewees have experiences of legal proceedings in which an individual's legal capacity is examined and declared. According to their description of such experiences, the legal proceeding on one's legal capacity is always 'simple',⁵⁵⁹ 'speedy',⁵⁶⁰ and 'without many disputes to be discussed'⁵⁶¹. What raised more concerns is that their description of such experiences did not show much information about how the person performs in the case in which his/her legal capacity is examined or how the interviewees, as the lawyer, support the person concerned.

Two interviewees have the experiences in such legal proceeding, not as the lawyer or representative of the person whose legal capacity is examined but as

⁵⁵⁹ Interview with lawyer, Code In002 LA; In003LA;

⁵⁶⁰ Interview with lawyer, Code In028LA

⁵⁶¹ Interview with lawyer, Code In003LA; In016 LA

the lawyer of another interested party. Both of them said that they did not have the opportunity to see or talk to the person whose legal capacity is examined in the legal proceeding, and 'only the person's representative presented in the court.'⁵⁶²

One interviewee, who has experience of providing legal aid to the person whose legal capacity is examined in the case, pointed out that there may be some 'barriers created by the law' that have the effect of 'excluding the person concerned from the court proceeding on his/her own legal capacity'.⁵⁶³

In028LA: ... it is a compulsory requirement under the current law that the person should be represented by a representative in the court proceeding in which his/her legal capacity is to be determined... one of my clients tried to appoint me... but the court thought she did not have legal capacity to appoint me because she has mental disability... So, you can guess, the so-called representative is seldom selected by the person him/herself and will not speak for the person... Worse, as there is a representative, the court always feels that there is no need to hear from the person him/herself. ⁵⁶⁴

(2) The influences of the medical diagnosis of mental incapacity

As has been discussed before, all these interviewees raised the similar concern about whether the medical diagnosis of mental incapacity is a proper precondition for the denial of one's legal capacity and the appointment of guardianship. Although with such concerns, the interview conversations with each interviewee show that the medical diagnosis of mental incapacity or the fact that the person has mental disability may sometimes be given a lot of weight in their practices as the lawyer, and influence their decisions of how to provide legal services.

⁵⁶² Interview with lawyer, Code In002 LA

⁵⁶³ Interview with lawyer, Code In028LA

⁵⁶⁴ Interview with lawyer, Code In028LA

Three interviewees' description of their practices suggests a similar presumption that mentally disabled people are without full legal capacity, under guardianship, or, at least, in need of guardianship. Based on such presumption, once a mentally disabled person requires legal services or is involved in a case for some reasons, they, as the lawyer, may not check whether or not the mentally disabled adult at issue has been denied full legal capacity and put under the guardianship through due process. Instead, they may 'contact the person's parents, adult children, spouse...one of them must be the guardian'⁵⁶⁵.

In003LA: ...for mentally disabled people...if they need legal aid, it should be their guardians that come to us because the person him/herself does not have the capacity to apply for legal aid⁵⁶⁶

The other interviewee, on the contrary, stated that she provides legal services to those who seek help from her, no matter whether this individual is legally capable or not, and she does not require the medical diagnosis nor the judicial assessment. However, she, at the same time, pointed out that the medical diagnosis of mental incapacity or the person's mental disability may still influence the legal services provided for mentally disabled people in many ways.

In028LA: ... a medical diagnosis is sufficient, at least to challenge the individual's legal capacity, especially in the formal legal proceeding... Once the individual's legal capacity is challenged, the person's decision to appoint me as the lawyer may not be recognized and my position of his/her lawyer or representative may be invalidated... If I want to provide legal service to a mentally disabled people in a formal legal proceeding, I have to ask the person's family member to appoint me as the lawyer... ⁵⁶⁷

⁵⁶⁵ Interview with lawyer, Code In016 LA

⁵⁶⁶ Interview with lawyer, Code In003LA

⁵⁶⁷ Interview with lawyer, Code In028LA

Besides, the same interviewee admitted that she does not encourage mentally disabled people to resort to the formal legal procedure for a settlement even in some cases the person concerned is willing to. She emphasized that she does not intend to devalue her client's will and preferences, but she has to consider the potential social and legal barriers and risks.

In028LA: ...when you go to court, you need to provide convincing evidence first... The current law does not say what steps should be taken by the court to decide whether a mentally disabled people tells the truth... to which degree do you think our judge will believe a mentally disabled people? They have nearly no chance to win... Also, there is the potential danger that once my client goes to the court, everyone knows that he/she has mental illness... ⁵⁶⁸

(3) The role played by the guardian or the person believed to be the guardian

The guardian and guardianship were mentioned repeatedly in the interview conversations with each interviewee. The interviewees demonstrated relatively complicated attitudes to the guardian or the person believed as the guardian, which, in most cases is the family member of the disabled person.

Firstly, all these interviewees' descriptions of their practices similarly show that they may give a lot of weight to the opinion of the guardian or the person believed to be the guardian. Also, they may sometimes recognize the substitute decision made for the person perceived as under guardianship. According to the interviewees, the main reasons for such a practice are that 'the guardian is the one who pay for the legal services',⁵⁶⁹ 'the guardian knows more about what is the best for the person',⁵⁷⁰ 'the guardian can provide more

⁵⁶⁸ Interview with lawyer, Code In016 LA

⁵⁶⁹ Interview with lawyer, Code In002 LA

⁵⁷⁰ Interview with lawyer, Code In002 LA; In003LA; In016 LA

information',⁵⁷¹ and, as was mentioned by all interviewees, the guardian takes the responsibility for the person and his/her conduct.

One interviewee emphasized that she, as the lawyer, is aware of the importance to hear from the person him/herself instead of some substituted person. However, by sharing some of her cases, she pointed out that it may sometimes be very difficult to have effective communication with the person concerned, especially in cases where the person has mental disability or lacks communication skills.

In028LA: ...I tried very hard to talk with him, but we just did not understand each other, and I had no idea about what he preferred and how he wants me to help him...⁵⁷²

According to this interviewee, in cases where she cannot have effective communication with the disabled person and therefore tries to talk to people around the person for information, she finds out that some disabled people 'do not have many people around them'. From her perspective, when a disabled person has only a limited number of people around him/her, these people may, in many ways, play the role as the guardian of the disabled person, no matter whether they have been legally appointed as the guardian. It may also be 'inevitable' that these people's opinions about the disabled person concerned are given a lot of weights.

Secondly, although the interviewees may give much weight to the opinion of the guardian or the person believed as the guardian of the disabled person, their attitudes to the guardian's legal status and rights are not very clear. Instead, all these four interviewees put more emphases on the obligations and responsibilities of the person perceived as the guardian. In particular, all these interviewees highlighted the guardian's obligation to be responsible for the

⁵⁷¹ Interview with lawyer, Code In028LA

⁵⁷² Interview with lawyer, Code In028LA

damage caused by the disabled person believed as under guardianship. One interviewee explicitly pointed out that one of the ways to identify the guardian of the disabled person is to identify 'who takes the responsibilities'.

In003LA: ...the guardian him/herself will come to you... especially in cases where the disabled person causes damages or is harmed by others, it is always the guardian bring the case to us... Yes, it must be the guardian, because only the guardian has such responsibilities. Otherwise, who else is willing to be involved in such trouble? ⁵⁷³

Besides, the interview conversations with each interviewees suggest that all of them, more or less, shared a similar point of view that since the guardian takes the responsibility for the disabled person and his/her conduct, the guardian's opinion should be given proper weight. Interviewee's attitudes, to some degree, further suggests that in their practice, whether a person is recognized as the guardian may depend on the extent to which the person actually takes the responsibility for the disabled person concerned more than on whether the person has the legal status of the guardian.

2.3 Summary

This section presented and analysed the data generated from the individual, semi-structured interviews with four judges and four lawyers. By illustrating how the interviewees know and understand about the current law on legal capacity and guardianship, how they experience and practice the relevant law, and what are their attitudes to the people who use the law, this section tried to illuminate some occupational culture of law practitioners on issues of legal capacity and guardianship.

⁵⁷³ Interview with lawyer, Code In003LA

The following findings and analysis are summarized and highlighted. First, legal capacity is understood by all these interviewees as a standard, and the denial of one's full legal capacity, in most cases, is not understood as a deprivation of an individual's rights. Second, the medical diagnosis of mental capacity is a major factor that in many ways influences the interviewee's practice in cases relevant to legal capacity and guardianship issues. Third, the procedural perspective of legal capacity and guardianship prescribed in the current law may sometimes be overlooked in the interviewee's practices as the legal practitioner. Fourth, although most of the interviewees demonstrated the awareness that the rights of person without full legal capacity should be guaranteed, the person perceived as without full legal capacity may not be able to enjoy some of their basic rights on an equal basis with others in practice. Such failure may be attributed to various factors including some social and legal barriers. Fifth, the guardian, or the person believed as the guardian of the disabled person may have influence, in many ways, on the interviewees' practices as the legal practitioner. Last, most of the interviewees spotlighted a phenomenon, from different perspectives, that some disabled people may live in a relatively isolated situation with a narrow social network. This also causes difficulties in interviewees' practice as legal practitioner.

3. The Public's Knowledge and Attitudes towards the

Current Law on Legal Capacity and Guardianship

The second dimension of legal culture defined by Merry is the public's knowledge and attitudes towards the law. The public in this context refers to people without legal expertise. Instead of looking into the whole public's knowledge and attitudes, the data analysed in this section is generated from disabled people, guardians, social workers, and members of neighborhood

committee. As discussed in Chapter 5,⁵⁷⁴ among the public as a whole, these four categories of people are highly relevant to the legal capacity and guardianship issues. The analysis in this section focuses on how these groups of people know, understand, and feel about the current law, especially the law on legal capacity and guardianship, and how they obtain such knowledge and understanding.

3.1 Semi-structured interviews with disabled people

The data generated from the individual, semi-structured interview with disabled people is presented and analysed under four general themes in this section. First, to which degree the interviewees know about the law in general. Second, what are the interviewees' knowledge and understanding of the law on legal capacity. Third, what are the interviewees' knowledge and understanding of the law on guardianship. Fourth, in which way the interviewees obtain the knowledge about the law.

3.1.1 The knowledge of the law in general

Considering that most of the interviewees are without legal background, the majority of the individual interviews started with encouraging the interviewees to talk about the law, which they believe is relevant to them as disabled people.

Four interviewees showed some basic consciousness that 'the law keeps orders',⁵⁷⁵ 'the law punishes bad people' and 'protect good one',⁵⁷⁶ and 'the law protects me'.⁵⁷⁷ However, they could not name any specific pieces of law or give an example of how to resort to the law. Nine interviewees, on the contrary, demonstrated relatively clear knowledge and understanding of some specific pieces of domestic law or international human rights law, such as the

⁵⁷⁴ see Chapter 5 at 96

⁵⁷⁵ Interview with disabled people, Code In024DP, Female, with autism

⁵⁷⁶ Interview with disabled people, Code In017DP, male, with autism

⁵⁷⁷ Interview with disabled people, Code In026DP, male, with intellectual disability

CRPD and the domestic law on disabled people's employment, or some specific clauses or terminologies in the law, such as the term reasonable accommodation and accessibility. Some of them also have the experiences of participating in strategic litigation and rights advocacy. However, they demonstrated little knowledge about how the legal system works, such as the hierarchy of different pieces of law. The rest of interviewees demonstrated some basic knowledge of the current law. They know, for example, the name of certain pieces of legislations or regulations, such as the Mental Health Law, the Regulation on the Employment of the Disabled and the Law on the Protection of Disabled People, and understand that these legislations and regulations are in some way relevant to them. However, most of them did not show a clear understanding of the specific content of these legislations or regulations, or how these legislations or regulations may have an impact on them. Among all the interviewees, only three of them mentioned the law on legal capacity and guardianship.

3.1.2 The knowledge and understanding of the law on legal capacity

The interview conversations show that the term legal capacity (Falv Xingwei Nengli) is unfamiliar to most of the interviewees. All but three interviewees required or preferred some further explanation of legal capacity in the interviews, among which, seven interviewees said that they had not known the term before.

Three interviewees did not require any explanation of the term legal capacity. They demonstrated basic knowledge of which clauses, in which pieces of legislation, prescribe the legal capacity, and what is the consequence of being denied full legal capacity. However, they did not demonstrate a very clear understanding of the meaning of the relevant law. All these three interviewees conflated the mental disability with the lack of legal capacity. According to their

understanding of the law, 'people diagnosed as with mental illness are without full legal capacity'.⁵⁷⁸ One interviewee also believed that 'the doctor in mental hospital can deny your legal capacity'.⁵⁷⁹ Besides, all of them believed that 'the denial of legal capacity is permanent'⁵⁸⁰ and 'the law does not allow you to change it even when your mental illness has disappeared'⁵⁸¹.

The rest of the interviewees were provided with the explanation of the term legal capacity, and then, they were encouraged to talk about the law, which they think are relevant to legal capacity. The implication of having legal capacity is generally explained as one can make the decision for him/herself by one's own will and preference. Such decision has legal binding force, so that one should be responsible for the decision and others have to respect the decision. Being denied full legal capacity is generally explained as one cannot always make the decision for oneself by one's own will and preference. Someone else will sometimes make the decision for one, and control one's behavior.

Provided with the explanation of the term legal capacity, several interviewees associated legal capacity with some specific pieces of law, for example, the contract law.

In009DP: ... in the contract law, there are restrictions on people like me to sign the contract... and, as I know, even if we sign the contract, the contract can be invalid... I once signed an employment contract, but then invalidated by my father... ⁵⁸²

⁵⁷⁸ Interview with disabled people Code In011DP, female, diagnosed as bipolar disorder, but the participant herself does not agree with the diagnosis

⁵⁷⁹ Interview with disabled people, Code In012DP, male, diagnosed as depression, but the participant himself does not agree with the diagnosis

⁵⁸⁰ Interview with disabled people Code In025DP, female, diagnosed as bipolar disorder, but the participant herself does not agree with the diagnosis.

⁵⁸¹ Interview with disabled people, Code In011DP

⁵⁸² Interview with disabled people Code In009DP female, with bipolar disorder

More than half of the interviewees associated the term legal capacity with the law, or what they think is the law in a rather vague and imprecise way.

In006DP: ... my mother and our tutor said that the law does not allow me to marry KAKA ...is this law relevant to what you called legal capacity?⁵⁸³

In027DP: ...the law of the bank does not allow deaf people to buy the fund on our own, I think this is relevant to denying...the word you use... my legal capacity⁵⁸⁴

In029DP: ...the principal of the mental hospital said that the law does not allow me to sign the guarantees and even if I signed, it has no legal effect, and is only waste paper...⁵⁸⁵

As shown in the interview conversations, the majority of the interviewees associated the term legal capacity with something that is more relevant to the consequences of being denied full legal capacity. None of these interviewees brought up any pieces of law that prescribe how and by which standard one's legal capacity is determined. Instead, the interview conversations suggest that most of these interviewees, to a large extent, conflated disability or impairment with the lack of legal capacity.

Moreover, the word used by interviewees in the conversations, to some degree, suggests their attitudes towards what they think is the law relevant to legal capacity. The terms such as 'restrictions', 'limitations', 'not allow' and 'prevent' were of high frequency in interviewees' talking about legal capacity. One interviewee, who did not require the explanation of the term legal capacity, use the term 'victim' in her talking about the law on legal capacity.

⁵⁸³ Interview with disabled people Code In006DP, female, 26 years old, with Down's syndrome.

⁵⁸⁴ Interview with disabled people Code In027DP, female, 26 years old, deaf

⁵⁸⁵ Interview with disabled people Code In029DP female, 31 years old, with obsessive-compulsive disorder

In012DP: ...the law makes it so easy for the doctor to deny one's legal capacity...this is a bad law, it encourages bad family member, bad doctors...and I am the victim...⁵⁸⁶

Comparatively, the term such as 'individual rights and interests', 'protection' and 'caring', which are of high frequency in the interview conversations with legal practitioners, were seldom used by the disabled people interviewed in their talking about legal capacity.

3.1.3 The knowledge and understanding of the law on guardianship

Compared with the term legal capacity, the term guardianship (jianhu) or guardian (jianhu ren) is less unfamiliar to the interviewees. However, some interviewees still required further explanations of the term guardianship or guardian. Guardianship is generally explained as a mechanism prescribed and regulated by the law. Once a person is put under guardianship, some other person, the guardian, will take care of, make decision for, and sometimes control the behavior of the person under guardianship. The person under guardianship may still have the opportunity to present his/her will and preference, or objection, but this may not necessarily influence the arrangement and decision made by the guardian.

Two interviewees, to some degree, equated the guardian with their family members. From their perspectives, most of their families 'are like the person called guardian'.⁵⁸⁷ Both of them were provided with the detailed explanation of guardian and guardianship with examples and scenarios, however, they did not demonstrate the understanding that the guardian is a status different from the status of family member.

⁵⁸⁶ Interview with disabled people Code In012DP

⁵⁸⁷ Interview with disabled people, Code In017DP, with autism

Most of the other interviewees associated guardianship to the disability card issued by the Chinese Disabled Person Federation (the CDPF) and the name of the guardian registered on the disability card. Although the guardianship registration in the CDPF is not a part of the current law, the majority of the interviewees showed the similar opinion that the guardianship registration in the CDPF is 'required by the law'⁵⁸⁸ or 'a legal procedure',⁵⁸⁹ and the disability card issued by the CDPF is a kind of legal document. Only one interviewee mentioned that 'the guardian can also be appointed by the court'.⁵⁹⁰ However, according to his understanding, the legal appointment of the guardian and the guardian registration in the CDPF are 'just two procedures without many differences in effect', and 'the guardianship registration in the CDPF is more convenient'.⁵⁹¹ It is noted that four interviewees had been assigned legal guardianship by the court. However, all of them associated guardianship with only the guardian registered on the disability card and did not refer to the guardianship prescribed in the law.

In addition, none of the interviewees demonstrated clear knowledge that according to the current law, only adult being denied full legal capacity will be put under the guardianship. Instead, most of the interviewees shared the similar opinion that disabled people, no matter his/her impairment label is mental, physical, sensory or others, are under the guardianship of the person whose name is registered on their disability card.

Further, although all but two interviewees demonstrated the understanding that the guardian is a kind of status different from the status such as family member or friends, most of the interviewees did not demonstrate a clear understanding

⁵⁸⁸ Interview with disabled people Code In027DP; similar opinion is also presented by other interviewees in some different word.

⁵⁸⁹ Interview with disabled people Code In005DP, female, blind; similar opinion is also presented by other interviewees in some different word.

⁵⁹⁰ Interview with disabled people Code In008DP, male, with physical impairment

⁵⁹¹ Interview with disabled people Code In008DP

of the implication of guardianship, or the consequences of being put under guardianship. Some interviewees explicitly pointed out that, for example, 'the guardianship does not bring any change to my life'⁵⁹² or 'my mother will do all the things for me even if she is not my guardian'.⁵⁹³ Some other interviewees said or indicated that they have thought about 'the function of guardianship'⁵⁹⁴. They raised a similar point of view that based on their understanding, the guardianship is not about re-defining the relation between the guardian and the person under guardianship, but 'to tell others that this is my guardian'.⁵⁹⁵

In031DP: ...my mother told me that since her name is shown on my disability card, we can prove that she is on my side. It is difficult to prove your mother is your mother to a stranger, but the disability card can tell others that this is my guardian, and she is recognized by the law. So that others will trust her and know that she will be good to me...⁵⁹⁶

The interview conversations show that the guardianship, as a legal relation, sometimes overlaps with the family relationship in practice. Such overlaps may further influence the interviewee's knowledge and understanding of the law on guardianship. It also suggests that based on the interviewees' knowledge and understanding of the law on guardianship, the role played by the guardian is closer to that of a carer or a protector. The majority of the interviewees did not demonstrate the awareness that the guardian is also a person with the power authorized by the law to control the life, or override the will and preference of the person under guardianship.

⁵⁹² Interview with disabled people, In015DP, with hearing, visual and physical impairments

⁵⁹³ Interview with disabled people, In023DP, with intellectual disability

⁵⁹⁴ Interview with disabled people, In026DP, with intellectual disability;

⁵⁹⁵ Interview with disabled people, In026DP; similar opinion was also raised by several other interviewees with different word

⁵⁹⁶ Interview with disabled people Code In031DP, male, 29 years old, with Down's syndrome

3.1.4 The knowledge and understanding of the law obtained from experiences

As has been analysed, the interview conversations show that the majority of the interviewees have only very limited knowledge of what is exactly prescribed in the law on legal capacity and guardianship. It also suggests that most of the interviewees did not obtain the knowledge of what they think is the law from reading legal documents or professional legal advice. Instead, they manufactured most of their knowledge of law mainly from their own experiences. The interview conversations show that the interviewees tend to be convinced that what they experienced is in accordance with the law especially when such practices widely exist without being challenged.

In005DP: ...I have not found any law saying that people like me cannot do something, but restrictions are everywhere, the bank, the post office, the housing agency... and these are not some private business, you know... these are all state-owned(guoyou de). So, I think, if all of them can have such restrictions on me, the restrictions must be legal, because the state-owned bank, the state-owned post office will not violate the law...⁵⁹⁷

In addition, the interview conversations illustrate how the interviewees developed inconsistent or even wrong knowledge of the law from their experiences. A typical example is that one interviewee, who is diagnosed as mentally disabled and has been declared as with no legal capacity by the court, developed the knowledge from her experiences that 'the only thing the law does not allow me to do is to stop the medicine.'

In030DP: ... the only thing the law does not allow me to do is to stop the medicine. My mother said if I stopped the medicine, the police would

⁵⁹⁷ Interview with disabled people Code In005DP, female, blind

take me away... you say bank account ? I have bank accounts. This is permitted by the law... in fact, I have two...⁵⁹⁸

What can serve as a comparison is that some interviewees with physical or sensory impairments, who should not be, and in fact is not denied full legal capacity under the current law, have experienced many restrictions on their exercise of legal capacity, such as opening bank account or renting a house. They may, therefore, develop the knowledge from such experiences that 'such restrictions must be legal'.⁵⁹⁹

These interview conversations spotlight a further issue that such inconsistent or even wrong knowledge of law may not be corrected in time, especially when the professional legal information, advice, or services are not always available or accessible to disabled people.

3.2 Focus groups with guardians

The data generated from the focus groups with guardians is presented and analysed under two general themes in this section. One is the participants' knowledge and understanding of the current law on legal capacity, and the other is the participants' knowledge and understanding of the current law on guardianship.

3.2.1 The knowledge and understanding of the law on legal capacity

Three participants, in two different groups, required the explanation of the term legal capacity, and the other participants in the groups provided an explanation for them. The majority of the participants demonstrated at least a basic understanding that full legal capacity is a kind of 'qualification

⁵⁹⁸ Interview with disabled people Code In030DP, female, with mental disability

⁵⁹⁹ Interview with disabled people Code In005DP

(zige/renzheng)⁶⁰⁰, which is closely related to whether a person can make decision with legal effect, or whether he/she is 'permitted' to do something in his/her own names.⁶⁰¹ Six participants, in four different groups, said that they have the experiences of applying to the court to declare another person as without full legal capacity.

(1) The procedural perspective of legal capacity

The focus group discussions did not shed many lights on the procedural perspective of legal capacity. Only four participants demonstrated clear knowledge that an adult's legal capacity can be denied only by the court through a legal procedure. The majority of the participants, including two with the experiences of legal proceedings on legal capacity, did not demonstrate clear knowledge of which pieces of law prescribe the procedural perspective of legal capacity or what are the legal procedure in which one's full legal capacity is denied.

Although each group had, at least, one participant with the experiences of legal proceedings in which one's legal capacity is denied by the court, none of these participants talked about their such experiences in detail. The other participants in the same groups with them did not ask them about how the law is exactly applied in practice either.

FG022GL: ...according to the law, you have to take all these steps, and then, the court can reach a decision on the person's legal capacity... However, I have to say, the procedure in the practice is much more

⁶⁰⁰ Most of the participants used the term 'zige', 'renzheng', or 'renke ni keyi' in their talking about the implication of full legal capacity. In the context of their discussions, the most matched translation of these terms is qualification.

⁶⁰¹ Field notes 20150827FGC01, the word 'permit'/permission' (yunxu) is widely used by guardians, as well as social workers in their talking. The use of this word is compared with the use of 'cannot'. It can be implied from a lot of participants' talking that when they say 'he/she cannot ...', they in most cases are indicating that the disabled people lacks the ability to do something; and when they say 'he/she is not permitted...', they in most cases are indicating that the disabled people are prevented, by others, from doing something.

simple... I submitted the diagnosis and assessment, and the court reached the decision...

FG021GF: ... (to 022) does the court decision really matter?

FG022GL: No, not really, it is... just a procedure...

FG021GF: So, if you all agree, I think we can pass this issue...⁶⁰²

(2) The substantive perspective of legal capacity

In comparison with their discussions of the procedural perspective of legal capacity, participants in each group had more active discussions about the substantive perspective of legal capacity. In each focus group, the majority of the participants demonstrated a relatively clear knowledge that the standards of full legal capacity are prescribed in the current law. However, only five participants named the specific piece of law that prescribes the standard of legal capacity. The other participants referred to the law in a more vague way such as 'according to the law (falv)' or 'the law says'.

In the discussions of each group, all the participants demonstrated the understanding that the diagnosis of mental capacity is one of the standards used to examine or deny one's full legal capacity. However, participants in each focus group raised some divergent opinions about whether one's mental disability is the only standard used to examine or deny one's legal capacity or whether the legal capacity is associated with other factors. Depending on participants' various perspectives and knowledge of law, three different points of view were raised in the discussions of different focus groups.

First, three participants, in three different groups, raised a similar point of view that not only mentally disabled people but also people with other impairments may be denied full legal capacity under the current law. None of them referred

⁶⁰² Focus group discussion with guardians, Code FGG301, participant FG022GL, male, having a mother with Alzheimer's, his mother is denied legal capacity in the court and he is appointed by the court as her mother's guardian; participant FG021GF, having a brother with mental illness, he has registered in the CDPF as the guardian of his brother;

to any specific piece of law, and two participants gave examples of their experiences. One participant had applied to the court to deny his daughter's legal capacity. The court had denied his daughter's full legal capacity accordingly even though his daughter has only physical impairments. From his perspective, this can be a convincing example to show that people with physical impairments may also be denied full legal capacity under the current law.

FG034GL: ...I think people with physical impairment may also be denied full legal capacity ...

FG037GL: (to 034) No, I don't think so. The law says clearly that only mentally disabled can be denied full legal capacity. Also, when we applied to the court to deny my father's legal capacity... he had suffered from Alzheimer's for a long time...the court said that a factual description of my father's condition is not sufficient and we must submit a diagnosis of his mental illness...

FG034GL: (to 037) but the court denied my daughter's legal capacity several years ago. My daughter has cerebral palsy...

FG035GN: is it not a mental illness?

FG034GL: No, it is a kind of physical impairment, it influences my daughter's ability to speak and walk, but her brain is definitely normal....we applied to the court to deny her legal capacity several years ago...we explained why we need to do so and submitted the assessment of her physical impairments... The court did not require other information... and declared that my daughter is with limited legal capacity. It is a court decision, so that it must be in accordance with the law. This is why I say the law on legal capacity can be applied to people with physical impairments.

FG036GF: I don't know much about the law, but if the court did what you(034) said, it must be the law... maybe, you two (to 034 and 037) are talking about different pieces of law...⁶⁰³

⁶⁰³ Focus group discussion with guardians, Code FGG401, participant FG034GL, male, having a daughter with cerebral palsy, he is legally appointed as her daughter's guardian; participant FG037GL, male, having a father with Alzheimer's, he is legally appointed as the guardian of his father; participant FG036GF, female, having a sister with mental illness, she has registered in the CDPF as her sister's guardian.; participant FG035GN, having a daughter with mental disability, she regards herself as the guardian of her daughter

The other participant talked about her daughter's experience. She believed that at least part of her daughter's legal capacity was denied by the Civil Service Bureau because of her daughter's visual impairment.

FG024GF: ... my daughter is blind, and when she got married, the Civil Service Bureau required us to be presented and to affirm that we agree to her marriage. Otherwise she is not permitted to make the marriage registration. I think this is an example that at least part of her legal capacity is denied...

FG022GL: ...but the law mentions only people with mental illness...

FG023GN: (to 024)... there may be some other law that denies blind people's some legal capacity... she said that it is the Civil Service Bureau, and the Civil Service Bureau must do so in according to some law that we do not know.⁶⁰⁴

Second, two participants, in two different focus groups demonstrated a comparatively narrower understanding of legal capacity. Based on their understanding of law, only people with mental illness, and at the same time be dangerous to other, will be denied full legal capacity. In the discussions of one group, the participant explained why, from her perspective, dangerousness should be understood as a legal standard of legal capacity in detail. Another participant in the same group raised a relatively strong objection to 'correct' her.

FG019GF: ...the purpose of the law on legal capacity is to control people with mental illness, and a person needs control only when he/she is dangerous. So, I think the law on legal capacity should be understood as relevant to only mentally disabled people who are at the same time dangerous...

FG017GL: (to 019)... I have to correct you that people who need to be controlled are not necessarily dangerous. Yes, my daughter's mental condition is sometimes terrible. She needs to be controlled and has been denied legal capacity by the court. But she is never dangerous

⁶⁰⁴ Focus group discussion with guardians, Code FGG301, participant FG022GL, male, having a mother with Alzheimer's, his mother is denied legal capacity in the court and he is appointed by the court as her mother's guardian; participant FG023GN, female, having a son with Down's syndrome, she is not a guardian appointed by the court or registered in the CDPF, but she regards herself as the guardian of her son; participant FG024GF, female, having a blind daughter, she has registered in the CDPF as the guardian of her daughter.

to anyone, in fact, she is kind, and she is sometimes in dangerous...⁶⁰⁵

Third, it was brought up in the discussions of all groups that one's capability to be responsible for his/her conduct should also be a factor to be considered when determining whether the person has full legal capacity. Not all the participants demonstrated a clear position of whether they agree with this point of view. Instead, based on their various experiences and understanding of the current law, participants in different groups raised this point of view, responded to it, and illustrated their opinions from various perspectives. One point of view was discussed by most of the participants from different perspectives that whether people have the rights to make only the decisions to which they can be responsible.

FG020GF: ...if we agreed that having legal capacity means that the person have the right to do what he/she wants... of course cannot against the law... then, as I understand, whether the person has such rights depends on whether he/she can be responsible to what he/she does...

FG017GL: But, how can you know that a person cannot be responsible to what he/she wants to do if you do not let him/her do that?

FG018GF: ...you can learn from experience... also, it is sometimes obvious. My husband, for example, does not have a decent job and therefore has no income. I can foresee that he is, at least, financially incapable to be responsible for some of his decision, and I will not let him to make those kinds of decision. I agree with you (to 020). I think the purpose of the law on legal capacity is not to forbid mentally disabled people to do anything, but to ensure that people who have the right to do whatever he/she wants to have the capability to be responsible to what he/she has done... If a person is given the rights to do whatever he/she wants but cannot be responsible, it may do harm to both him/herself and others...⁶⁰⁶

⁶⁰⁵Focus group discussion with guardians, Code FGG201, Participant FG019GF, female, having a son with autism, she is registered as the guardian of her son in the CDPF; and Participant FG017GL

⁶⁰⁶ Focus group with guardians, Code FGG2, participant FG020GF, having a son with intellectual disability and she is the guardian of her son registered in the CDPF; FG017GL, female, having a daughter with mental impairments and she is appointed by the court as her daughter's guardian; FG018GF, having a husband with mental disability, she is the guardian of her husband registered in the CDPF

Participants in one group also had discussions on how to understand the relation between legal capacity and the capability to be responsible under current law. Two different understanding were raised in their discussions. One is that the capability to be responsible should be understood as a legal standard of legal capacity. The other is that the denial of one's legal capacity should be understood as a legal regime responding to the reality that some people cannot be responsible to their conducts.

FG001GL: ... the essence of legal capacity is the capacity to take legal responsibilities. The main purpose of legal capacity is to select those who are capable of being responsible for their conducts and decisions, and to give them the rights to make decisions. I believe this is how the law on legal capacity should be, and is actually understood.

FG004GF: ...(to 001) I have to say your logic is wrong. The capability to be responsible should not be understood as a legal standard of legal capacity. Instead, it is the reality that some people cannot be responsible for their conduct...(interrupted)

FG002GL: (to 004)...no, it is not a reality. At least, you cannot say that they cannot be responsible for each of their conduct...

FG004GF: (to 002)...even not each of their conduct...I think we should admit that it is the reality that in comparison with normal people(zhengchang ren), the majority of disabled people do not have good education, good job, good social skills... It is not their fault, but it is the reality and it makes disabled people less capable of being responsible for what they want to do or have done... it will cause many problems if they are permitted to do everything while they cannot be responsible for the consequence... To avoid these problems, the law provides that these people can be denied full legal capacity and thus their conducts will be controlled. ⁶⁰⁷

The focus group discussions show that the majority of the participants developed their knowledge and understanding of the law on legal capacity

⁶⁰⁷ Focus group discussions with guardian, Code FGG101, participant FG001GL, female, having a daughter with mental illness, she is legally appointed as the guardian of her daughter; participant FG004GF, female, having a son with intellectual impairments, she is registered in the CDPF as the guardian of her son; participant FG002GL, female, having a son with autism and she is legally appointed as the guardian of her son

from their experiences. Some of their knowledge of the law on legal capacity is not very consistent with how legal capacity is prescribed in the current law. This further suggests the possibilities that people may be denied full legal capacity in practice for some reasons that are not prescribed by the law. It also suggests that the concern of the person's capability to be responsible for his/her conducts influences participants' understanding of the law on legal capacity in many ways.

3.2.2 The knowledge and understanding of the law on guardianship

None of the participants required further explanation of the term guardian or guardianship. All of them demonstrated at least a basic knowledge that a guardian is the one who takes care of, and makes decisions or arrangements for, the person under his/her guardianship.

(1) The procedural perspective of guardianship

Six participants, in four different groups, said that they are the legal guardian appointed by the court, and therefore demonstrated some knowledge about the legal procedure of guardianship. However, none of them demonstrated the knowledge about the authority of the neighborhood committee to make guardianship appointments. The other participants demonstrated very limited knowledge about the legal procedure of guardianship. The majority of them did not know clearly that the guardianship with legal effect can be assigned to only mentally disabled people, whose legal capacity has already been denied by the court. Instead, they shared the similar understanding that 'disabled people are all under guardianship',⁶⁰⁸ or 'if one is disabled, he/she will have a guardian.'⁶⁰⁹

⁶⁰⁸ Focus group discussion with guardians, Code FGG101, Participant FG003GF, female, having a deaf she is registered in the CDPF as the guardian of her son; the other participants did not raise different points of view.

⁶⁰⁹ Focus group discussion with guardians, Code FGG301, participant FG023GN, female, having a son with Down's syndrome, she is not a guardian appointed by the court or registered

When encouraged to talk about in which procedure they become the guardian, three participants in one group, nearly at the same time, said that 'I do not become, but I am my son's guardian',⁶¹⁰ and 'why should there be a procedure'.⁶¹¹ One participant in another group raised a similar point of view that he is not 'appointed' as the guardian.

FG021GF: ...I don't think we have to be appointed by someone to be the guardian. I am the guardian of my brother because he is my brother... I made some kinds of guardianship registration... it is registration, not appointment... I made the registration because others should know that I am the guardian of my brother. They can have a record of my information so that they can contact me if there is something about my brother.⁶¹²

Apart from the six participants that have been appointed as the guardian by the court, the majority of the other participants regarded the guardianship registration in the CDPF as the formal procedure of guardianship and did not demonstrate a clear awareness that the guardianship registration in the CDPF does not have legal effect.

(2) The legal rights and obligations of the guardian

The focus group discussions did not shed many lights on the legal rights of the guardian. Even after I brought up this issue in each group, the participants did

in the CDPF, but she regards herself as the guardian of her son; the other participants agreed with her

⁶¹⁰ Focus group discussion with guardians, Code FG202, participant FG020GF, female, having a son with intellectual disability, she is registered in the CDPF as the guardian of her son.

⁶¹¹ Focus group discussion with guardians, Code FG202 participant FG019GF, female, having a daughter with autism; and participant FG018GF, female, having a husband with mental illness

⁶¹² Focus group discussion, Code FG302, participant FG021GF, having a brother with mental illness, he has registered in the CDPF as the guardian of his brother

not follow on to have a discussion in detail. One participant explicitly pointed out that 'I as the guardian will not take time to think about my legal rights'.⁶¹³

FG023GN: ...I only know that I am the guardian of my son, and I have to do whatever I can for him... so, I as the guardian will not take time to think about my legal rights. If one thing is good for my son, I will do it even I do not have the right. If one thing is not good for my son, I will not do it even I have the right.⁶¹⁴

Comparatively, participants in all these focus groups had more active discussions of their knowledge and understandings of the guardians' obligation. All participants in each focus group generally agreed on that they as the guardian have a broad range of obligations, for example, 'helping them to develop skills'⁶¹⁵ or 'helping her to manage her own life'⁶¹⁶. Three sorts of obligations were mentioned by all the participants, namely, to protect the person under guardianship, to ensure that the person under guardianship does not hurt others, and to take the responsibilities of the damage caused by the person under guardianship.⁶¹⁷ While the majority of the participants in each group showed relatively similar understanding of what are the obligations of the guardian of disabled people, they raised divergent opinions of whether the guardians' obligations are legal or moral obligations.

The majority of the participants tended to regard the guardian's obligations as moral rather than legal obligations because they regarded themselves as 'first

⁶¹³ Focus group discussion, Code FG302, participant FG023GN, female, having a son with Down's syndrome and she regards herself as the guardian of her son

⁶¹⁴ Focus group discussion, Code FG302, participant FG023GN, female, having a son with Down's syndrome and she regards herself as the guardian of her son

⁶¹⁵ Focus group discussion with guardians, Code FGG202, participant FG019GF; this point was also agreed on by the other participants in the same group.

⁶¹⁶ Focus group discussion with guardians, Code FGG102, participant FG001GL, this point was also agreed on by the other participants in the same group.

⁶¹⁷ This is mentioned by all the participants. Some participants did not use the term guardianship. Instead, they say, for example, 'protecting my son', or 'protecting my brother'.

of all, the family member, and then, the guardian'.⁶¹⁸ Some participants further pointed out that although the current law prescribes the guardian's legal obligations, they, as the guardian, in fact, have broader scope of obligations with higher standards, which are not written in the law but based on the moral and family relationship.

FG017GL: ...I know that the law provides a list of guardian's legal obligation, but we, as the guardian, in fact, have much much more obligations... the law provides that the guardian should take care of the person under guardianship. What does it mean by taking care? The law does not say clearly. I am the guardian of my daughter, and more importantly, I am her mother. For me, taking care means to take care of everything in her everyday life. It also means to take care of every stage of her life, such as saving enough money for her so that she can maintain her standard of living even after I die... Most of these are moral obligations...

FG020GF: ...yes, I totally agree with you. The legal obligation of the guardian touches only the tip of the iceberg... the law says that the guardians should protect the best interest of the person under guardianship... for me, the standard of best interest is very complicated. When my son said he wants to marry his girlfriend, I knew that getting married may be his best interest for now because it will make him happy. However, I have to think about whether it is his best interest in the future. What if they have a baby? They will not be able to raise the child, so, am I able to raise the child for them? I can foresee that the marriage will add burden to his life and our family. The law does not give me the power to require others to share such burden with my family. So, I have to prevent such burden at the beginning for my son's good. It makes him sad now, but is good for him in the future... the law does not oblige me to consider these issues, but since I am both a mother and a guardian, I have to...⁶¹⁹

Five participants, in three different groups, explicitly raised a different point of view that all the guardians' obligations mentioned in their group discussions

⁶¹⁸ Focus group discussion, Code FG302, participant FG024GF, female, having a blind daughter, she has registered in the CDPF as the guardian of her daughter; similar opinions were also expressed by other participants in different words.

⁶¹⁹ Focus group discussion with guardians, Code FGG202, Participant FG017GL, female, having a daughter with mental impairments and she is appointed by the court as her daughter's guardian, FG020GF, female, having a son with intellectual disability, she is registered in the CDPF as the guardian of her son.

should be legal obligations. One of them explained what he think is the difference between legal and moral obligations.

FG023GN:...I agreed that all we discussed before are the guardian's obligations, but I don't think they are legal obligation. I think all of us will do all these things for our daughter, or son, or brother, or mother... even we are not the guardian... because all these are our moral obligation as a part of the family...⁶²⁰

FG022GL: ...when I say it should be legal obligation, it is not about whether you have the obligations or not. As you said, as family members, we all have the obligations. It is about whether you fulfill the obligation. When it is a legal obligation, you will be liable under the law if you do not fulfill the obligation...

FG021GF: (to 022) if we do not fulfill the moral obligation, we will be morally liable. I think the moral liability is sufficient, and it is sometimes stronger than the legal liability...⁶²¹

Participants in one group, after discussing their different opinions, generally agreed on that the obligations of the guardian are both moral and legal obligation. From their perspective, the 'correct understanding of the law'⁶²² should be that the moral obligation applies when the guardian is the family member of the person under guardianship, and the legal obligation applies when the guardian is not the family member.

FG037GL: ...the fact is the guardians' obligation is prescribed in several pieces of the law. Therefore, it is legal obligation.

FG035GN: (to 37) I know it is prescribed in the law, but I don't think the law is relevant to us. I take care of my daughter, not because the law says that if you do not do it, you would be punished... Also, I know better than the legislator that what is the best for my daughter, I do

⁶²⁰ Focus group discussion, Code FG302, participant FG021GF, having a brother with mental illness, he has registered in the CDPF as the guardian of his brother; participant FG023GN, female, having a son with Down's syndrome, she is not a guardian appointed by the court or registered in the CDPF, but she regards herself as the guardian of her son; participant FG022GL, male, having a mother with Alzheimer's, his mother is denied legal capacity in the court and he is appointed by the court as her mother's guardian

⁶²¹ Focus group discussion with guardians, Code FGG302, participant FG022GL, FG023GN, FG021GF

⁶²² Focus group discussion with guardians, Code FGG402, participant FG035GN, female, having a daughter with mental illness, she regards herself as playing the role of the guardian

not need any law, rule, or guidance to tell me how to take care of my daughter

FG036GF: ...well, I think all of us presume that the guardian is someone from the family, right? I agree that if the guardian is from the family, it should be moral obligation. But, the guardian can also be someone outside the family. For example, if someone do not have a family member... If the guardian is not a family member, there is no moral obligation, and the legal obligation should be applied...

FG035GN: ... (to 36) I think this makes sense... this should be the correct understanding of the law you (to 37) mentioned ⁶²³

The focus group discussions of the law on guardianship illustrate the overlaps between guardianship and the family relationship. It also suggests how such overlaps may influence the participants' knowledge and understanding of the law on guardianship, especially the legal rights and obligations of the guardian. Besides, the focus group discussions suggest that most of the participants, who play the role of guardian in practice, understand the role of guardian as a carer, a protector, and a duty bearer. They did not demonstrate much awareness that by playing the role of guardian, they may also control the life or infringe the rights and autonomy of the person under guardianship.

3.3 Focus groups with social workers

The social workers are not directly relevant to the law on legal capacity and guardianship in most cases. However, their knowledge and understanding of the law on legal capacity and guardianship may have a direct or indirect impact on their attitudes to disabled people and people perceived as without full legal capacity and under guardianship. It may further influence how they provide social worker services to these people. The data generated from the focus groups with social workers is presented and analysed under two themes. One is the participants' knowledge and understanding of the law on legal capacity,

⁶²³ Focus group discussion with guardians, Code FGG401, participant FG036GF, female, having a sister with mental illness, she has registered in the CDPF as the guardian of her sister; participant FG035GN, participant FG037GL

and the other is participants' knowledge and understanding of the law on guardianship.

3.3.1 The knowledge and understanding of law on legal capacity

The majority of the participants demonstrated at least a basic knowledge that mentally disabled people may be denied full legal capacity under the law. If a person is denied full legal capacity, 'he/she may be restricted from doing many things',⁶²⁴ or 'his/her legal status is like a child',⁶²⁵ or 'he/she should get permission before he/she want to do something'⁶²⁶. Four participants, in different groups, also demonstrated some clearer knowledge about which pieces of law, in which way, prescribes the legal standards of legal capacity or the consequences of being denied full legal capacity.

Participants in each group raised some different understanding of the law on legal capacity. The focus group discussions show that participants' divergences are centred on two main issues.

The first issue is the relation between one's mental disability and one's legal capacity, and 'whether legal capacity is a legal or medical standard'.⁶²⁷ Four participants, in different groups, pointed out that legal capacity should be understood as a legal standard, and distinguished from medical standards. However, the majority of the participants, more or less, conflated mental disability with the lack of legal capacity. Some of them further pointed out that even though the denial of one's legal capacity requires both medical diagnosis

⁶²⁴ Focus group discussion with social worker, code FGSW301, participant FG031SW, female, with four years experience; the term 'restrict' was also used by many other participants in the discussion to describe the consequences of being denied full legal capacity

⁶²⁵ Focus group discussion with social worker, code FGSW101, participant FG010SW, female, with five years experiences

⁶²⁶ Focus group discussions with social worker, code FGSW201, participant FG016SW, female, with two years experience

⁶²⁷ Focus group discussions with social worker, code FGSW201, participant FG015SW, male, with 2 years experiences; the similar questions was also raised in the discussion of group code FGSW301

and judicial assessment, based on their understanding, the judicial assessment is also based on medical standards.

FG015SW: ... It sounds like whether a person has legal capacity depends entirely on the medical standard of mental or intellectual impairments...

FG013SW: I don't think so. Legal capacity should be understood as a legal standard, and it is different from medical standard. Based on my understanding, you can only suspect but not determine that the mentally or intellectually disabled person has no legal capacity. The denial of one's legal capacity requires not only the medical diagnosis but also a judicial assessment of the person...

FG016SW: (to 013) But, as I understand, the judicial assessment is also based on medical standard.

FG013SW: I don't know the exact differences... but I think it is based on different standard.⁶²⁸

The second issue, which has some overlaps with the first one, is the relation between one's mental disability, one's capability to be responsible, and one's legal capacity. This issue was raised and debated in two groups. The debates suggested that based on participants' understanding of the law, one's capability to be responsible may also be an important factor related to one's legal capacity.

FG010SW: ...according to the law, you should also prove that the person cannot be accountable for his/her own conduct.

FG011SW: (to 10) cannot be accountable for his/her own conduct is exactly how most people describe people with mental or intellectual impairments...

FG010SW: (to 11) ...I cannot agree with you. The capability to be responsible is relevant to not only one's mental capability but also many other factors, such as whether you have money, whether you have friends to help you... The intention of the law is to restrict those who cannot be responsible...

FG012SW: (to 10)...I agree with you that the capability to be responsible is influenced by more factors. Also, I feel that disabled people in

⁶²⁸ Focus group discussion with social workers, Code FGSW201, participant FG013SW; FG016SW; FG015SW

general may have a very prejudicial reputation of being less capable of being responsible. I think this is because most of the disabled people in our society still live at the bottom of the society... anyway, I think no matter what is intended by the law, the effect of the law is that disabled people may be regarded as with no capability to be responsible in the first place. Then, they are denied legal capacity, and people can set restrictions or controls on them.⁶²⁹

In comparison with the discussions on the substantive standards of legal capacity, participants in each group had fewer discussions on the legal procedure in which one's full legal capacity is denied. Only three participants, in two different groups, demonstrated some knowledge of how the procedural perspective of legal capacity is prescribed in the current law. The majority of the participants did not demonstrate much awareness that a person's legal capacity can be denied only by a court through a judicial procedure. One participant explicitly pointed out that 'social workers like us deny people's legal capacity in our practices.'

FG011SW: ...some of my clients ask me thousands of times per day to stop the medicine, but I will not let them make the decision... one of my clients is a medically diagnosed as shopaholic, and his parents and I together lock his card and decide how much money he can have per day... What I want to say is that when we prevent them from making all these decisions for themselves, what we exactly do is denying, at least, a part of their legal capacity. Social workers like us deny people's legal capacity in our practices, and we do not need to apply for a court judgment before we do so...⁶³⁰

The focus group discussions suggest that participants have more knowledge and thinking about who will be denied full legal capacity under the current law, and what are the consequences of being denied full legal capacity. Comparatively, they have less knowledge about how a person can be denied

⁶²⁹ Focus group discussion with social worker, code FGSW101, participant FG010SW; participant FG011SW, female, with 3.5 years experiences; participant FG012SW, female, with four years experience

⁶³⁰ Focus group discussion with social workers, Code FGSW101, participant FG011SW

full legal capacity. It also suggests that based on participants' understanding of law, one's capability to be responsible is closely relevant to whether one should be recognized as with full legal capacity.

3.3.2 The knowledge and understanding of the law on guardianship

All the participants demonstrated a basic knowledge that once a person is under guardianship, the guardian will take care and protect the person, and make decisions or arrangements for the person. The focus group discussions also show that the guardian, in different ways, influences the participants' social worker practices. However, most of them did not demonstrate very comprehensive knowledge of how the guardianship is prescribed in current law.

Only two participants referred to the specific pieces of law on guardianship and demonstrated the knowledge that only the people, whose full legal capacity has been denied by the court, may be put under guardianship. The majority of the participants showed the understanding that disabled people are all under guardianship, and 'some of the family members are his/her guardian'⁶³¹ or 'the name of their guardian is showed on their disability card.'⁶³² Most of the participants did not demonstrate the understanding that the guardian is a legal status.

FG033SW... I think guardian is just a more formal way to call the carer of disabled people... ⁶³³

⁶³¹ Focus group discussion with social workers, code FGSW101, participant FG011SW; the guardian in the other participants' discussions was also referred to the family member of disabled people.

⁶³² Focus group discussion with social workers, Code FGSW302, participant FG033SW, with 2 years experience; the majority of the participants referred to the guardian registered on the disability card.

⁶³³ Focus group discussion with social workers, Code FGSW302, participant FG033SW

In addition, the majority of the participants demonstrated the similar understanding that the guardian of the disabled person has the responsibilities to protect the person under guardianship, and take the responsibility of the person's conduct especially those caused damages. The participants also demonstrated the similar understanding that 'since the guardian has such responsibilities',⁶³⁴ the guardian should have the rights and power to, for example, 'control the person's improper behavior',⁶³⁵ 'make the decision for the person',⁶³⁶ 'prevent the person from doing dangerous or unwise thing'⁶³⁷. However, none of the participants referred to any specific law that prescribes the guardians' legal obligations, responsibilities, rights or authorities. One participant explained that although he did not know much about the law, he believed that his understanding of the guardians' responsibilities and powers is not in conflict with the law.

FG032SW: ...since the guardian takes so many responsibilities, especially the responsibility of the damage caused by the person, it will be unfair if the guardian does not have the power to control the person under guardianship... I do not know much about the law, but I think the law will not permit what is unfair... ⁶³⁸

The focus group discussions suggest that the overlaps between the guardianship, as a legal relationship, and the family relationship, in many ways, influence participants' knowledge and understanding of the law on guardianship. It also shows that most of the participants were aware that the guardian plays the role not only as a carer or a protector but also as one with the power to control the person under guardianship. Based on participants'

⁶³⁴ Focus group discussion with social workers, code FGSW201, participant FG015SW; the relation between guardians' responsibilities and guardians' rights and powers are mentioned or indicated by most of the participants in different words.

⁶³⁵ Focus group discussion with social workers, Code FGSW101, participant FG012SW

⁶³⁶ Focus group discussion with social worker, code FGSW301, participant FG031SW

⁶³⁷ Focus group discussion with social workers, Code FGSW302, participant FG033SW

⁶³⁸ Focus group discussion with social workers, Code FGSW302, participant FG032SW, with three years experience

understanding of law, such power can be justified mainly by the responsibilities taken by the guardian.

3.4 Focus groups with members of neighborhood committee

The neighborhood committee of a person's residence has the power, authorized by the current law, to make guardianship appointment for the person whose full legal capacity has been denied by the court. Therefore, how the members of neighborhood committee know and understand the current law on legal capacity and guardianship may have influences on how the neighborhood committee make the guardianship appointment. The data generated from the focus groups with members of neighborhood committee is presented and analysed under two themes. One is the participants' knowledge and understanding of the law on legal capacity and the other is participants' knowledge and understanding of the law on guardianship.

3.4.1 The knowledge and understanding of the law on legal capacity

Participants in each group did not have many discussions about the law on legal capacity. Seven of the participants, in three different groups, required further explanation of the term legal capacity. The majority of the other participants demonstrated only vague knowledge, such as 'mentally disabled people do not have legal capacity'⁶³⁹ or 'people without legal capacity do not have to take legal responsibilities'⁶⁴⁰. Only two participants, in different groups, referred to the law that prescribes the legal standard of legal capacity.

⁶³⁹ Focus group with members of neighborhood committee, code FGNC1, participant FG009NC, female, living in the community for three year, and serving in the committee for 1 year; most of the other participants also demonstrated this knowledge

⁶⁴⁰ Focus group with members of neighborhood committee, Code FGNC1, participant FG005NC, male, living in the community and serving in the committee for 2 years; most of the other participants also demonstrated this knowledge

For the purpose of discussion, an explanation of the term legal capacity was given in all focus groups.⁶⁴¹ The majority of the participants in each group expressed the similar point of view that 'the law on legal capacity does not have much relevance to the neighborhood committee'⁶⁴² or 'I cannot see the needs to get knowledge of the law on legal capacity'.⁶⁴³ Only two participants, in different groups, associated the legal capacity with the neighborhood committee's authority to make guardianship appointment.

3.4.2 The knowledge and understanding of the law on guardianship

Participants in each group did not require further explanation of the term guardian or guardianship. Most of the participants demonstrated the understanding that disabled people may be put under guardianship, the guardian is selected from the family members, and the guardian has the obligation to take care of the person under guardianship. Since the neighborhood committee has the power authorized by the law to make the guardianship appointment in accordance with the law, it was presumed that the members of neighborhood committee have a relatively comprehensive knowledge of the law on guardianship. However, only two participants referred to legal standards and procedure of guardianship prescribed in the current law. Most of the other participants demonstrated only very limited knowledge of the law on guardianship.

Five participants, in three different groups, did not know that neighborhood committee has the authority to make guardianship appointment.

⁶⁴¹ For the explanation of the term legal capacity, see the first sub-section

⁶⁴² Focus group with members of neighborhood committee, Code FGNC2, participant FG026NC, female, living in the community for 19 months and serving in the committee for 6 months; most of the other participants also demonstrated this knowledge

⁶⁴³ Focus group with members of neighborhood committee, code FGNC2, participant FG029NC, female, living in the community for 13 years, and serving in the committee for 1 year; most of the other participants also demonstrated this knowledge

FG027NC: I know, but not very clearly, that if someone in the community has mental illness, the neighborhood committee can appoint... perhaps his/her parents or other family members... to be his/her guardian...

FG025NC: I don't think it is for the neighborhood committee to make the appointment, it should be the court. One of our neighbors has been appointed by the court to be the guardian of her mother recently...⁶⁴⁴

The other ten participants demonstrated the knowledge about the neighborhood committee's authority to make guardianship appointment. Six of them, in three different groups, had the experience of making guardianship appointment. They showed some different knowledge and understanding of the law on guardianship on two main issues.

First, they showed different knowledge and understanding of the implication of guardianship and the role played by the guardian. Only one participant demonstrated clear knowledge that the guardian is not only the carer but also the legal representative of the person under guardianship.

FG005NC: ... there are some old people with dementia living in our community, and their adult children ask us to appoint them as the guardian... Honestly, my colleagues and I are not very willing to do this... it sounds like huge responsibilities because once you appoint someone as the guardian, the appointment seems to have legal effect and the guardian can represent the person under guardianship on almost everything. The guardian can also make a lot of decision for the person under guardianship...

FG008NC: (to 005) ... you are thinking too much about the guardianship! The guardian is just a contact on the record. You select someone reliable from the family members as the contact of the old people or the disabled people... so that, when necessary, for example, if the old people fall, you know whom you can contact with...⁶⁴⁵

⁶⁴⁴ Focus group with members of neighborhood committee, Code FGNC201, participant FG027NC, female, living in the community for 2 years and serving in the committee for 9 months; participant FG025NC, male, living in the community for 3 years and serving in the committee for 2 years

⁶⁴⁵ Focus group with members of neighborhood committee, Code FGNC1, participant FG005NC; participant FG008NC, female, living in the community for 17 years, and serving in the neighborhood committee for 2 years

Second, they showed different knowledge and understanding about the legal procedure of guardianship. Only two participants demonstrated clear knowledge that only mentally disabled people, who have been denied full legal capacity by the court, will be put under guardianship. The other participants showed the similar knowledge that the neighborhood committee can appoint a guardian for the disabled person 'when it is required by the disabled person's family member'⁶⁴⁶ or 'when it is required by the disabled person'⁶⁴⁷. In the group discussions, one of the participants talked about how she obtained the knowledge of the legal procedure of guardianship. Her experiences show that she did not obtain the knowledge from any systematic training of the law or professional legal information, but from her failure to make guardianship appointment in line with the law.

FG007NC: ...an old lady in our community, at least 80. Her husband died years ago, and she is now living with her younger son and daughter in law. All people in our community know that her younger son and daughter in law are very good to her. Her brain went wrong last year. Her son then applied disability card for her... they have to write the name of the guardian on the disability card. The son showed us the law providing that the neighborhood committee should assign the guardianship. So, our committee appointed the son as the guardian and the old lady was happy with this. Two or three months later, the old lady's elder son came and said that our guardianship appointment is invalid and illegal. He showed us another law providing that the assignment should be based on some sort of court decision...He even said that he could sue our committee because of our guardianship appointment! ...How can we know that this two law should read together? We are not the judge! ⁶⁴⁸

⁶⁴⁶ Focus group with members of neighborhood committee, Code FGNC3, participant FG040NC, living in the community for 8 years and serving in the committee for 3 years; similar knowledge was demonstrated by the other three participants

⁶⁴⁷ Focus group with members of neighborhood committee, Code FGNC2, participant FG028NC, living in the community for 27 years and serving in the committee for 4 years

⁶⁴⁸ Focus group discussion with members of neighborhood committee, Code FGNC1, participant FG007NC, female, living in the community for 21 years, and serving in the neighborhood committee for w years.

The focus group discussions show that although the neighborhood committee is clearly authorized by the law on guardianship to make guardianship appointment, participants, as the members of neighborhood committee may not know about the law or make guardianship appointment in accordance with the law. It also suggests that the members of neighborhood committee might not have the opportunity to get systematic training of the law on guardianship before they are required to make guardianship appointment.

3.5 Summary

This section presented and analysed the data generated from the individual, semi-structured interviews with disabled people, and the focus group discussions with guardians, social workers, and members of neighborhood committee. By illustrating how the interviewees and focus group participants know and understand about the current law on legal capacity and guardianship, and how they obtained and developed such knowledge and understanding, this section has tried to illuminate the legal culture from the perspective of how the relevant law is known and understood by people without legal background. Considering the diversities of interviewees and focus group participants, the empirical research found out many different opinions and attitudes as well as different perspectives towards similar issues, which have been analysed in detail in this section. The following findings and analysis are summarized and highlighted.

First, the majority of the interviewees and focus group participants demonstrated only limited knowledge of the relevant law. Even though some of the participants demonstrated relatively clear knowledge of the content of the law, they may not have a comprehensive understanding of the implication of the law or how the law works and has an impact on them.

Second, the term legal capacity and the current law on legal capacity are relatively unfamiliar to most of the interviewees and focus group participants. As shown in the analysis, the majority of the interviewees and focus group participants conflated the lack of legal capacity with mental disability or even disability in general. The procedural perspective of legal capacity is, to a great extent, overlooked. Besides, the analysis of focus group discussions, especially with guardians and social workers, suggest that whether a person is recognized as with full legal capacity may sometimes be highly dependent on whether the person is perceived as with the capability to be responsible.

Third, the majority of the interviewees and focus group participants were familiar with the term guardianship. However, most of them did not demonstrate comprehensive knowledge or understanding of the law on guardianship. Besides, the analysis shows that the overlaps between guardianship and family relationship may, in many ways, influence how the interviewees and focus group participants know and understand the law on guardianship.

Last, the analysis also shed lights on how interviewees and focus group participants obtained the knowledge and understanding of the law. It reveals that the majority of the interviewees and focus group participants may not have many accessible sources to legal information or professional legal services. Most of them manufactured their knowledge of law on legal capacity and guardianship from their experiences more than from learning and understanding the law itself. The analysis also shows that participants' some knowledge and understanding of the relevant law are influenced or sometimes shaped by how the law is practised by other social actors, especially those regarded as with authorities, such as the lawyer and the governmental department.

4. Legal Mobilization and Legal Consciousness

The third and fourth dimensions of legal culture defined by Merry are legal mobilization and legal consciousness. The main inquiries made in these two dimensions are the degree to which people see themselves as entitled to legal protections, and are willing to define the problem they faced with as a legal issue and resort to law for settlement.⁶⁴⁹ The data analysed in this section is generated from the individual, semi-structured interview with disabled people, and focus groups with guardians, social workers, and members of neighborhood committee. As discussed in Chapter 5,⁶⁵⁰ among the public as a whole, these four categories of people are highly relevant to the legal capacity and guardianship issues.

Since interviewees and focus group participants of different categories are involved in legal capacity and guardianship issues in various ways, the legal mobilization and legal consciousness were explored from different perspectives and with different emphases in the interviews and focus group discussions. The law in the context of this section refers to not only the law on legal capacity and guardianship but also other law that may be relevant to or have an impact on the relevant interviewees or focus group participants.

It does not ignore that the majority of the interviewees and focus group participants do not have many experiences of using the law. As can be argued, this gives a sketchy impression about a relatively low degree of legal mobilization and consciousness. However, the analysis in this section focuses on not only the interviewees' and focus group participants' action of using the law but also their willingness to use the law. It is also noted that, as suggested by the analysis in last section, the majority of the interviewees and focus group

⁶⁴⁹ Merry (n 23).

⁶⁵⁰ see Chapter 5 at 96

participants do not have very comprehensive knowledge or understanding of the law, especially the law on legal capacity and guardianship. This may, to some degree, further influence their willingness and action to use the relevant law. However, the analysis in this section attempts to go further and explore how other factors, especially the factors of disability, legal capacity, and guardianship, may influence people's legal mobilization and consciousness.

4.1 Interviews with disabled people

The data generated from the semi-structured, individual interview with disabled people is presented and analysed under three themes. First, to which degree the interviewees have the legal consciousness that they are entitled to legal rights and protections. Second, to which degree the interviewees are willing to resort to the law for settlement. In the analysis under these two themes, a focal emphasis is put on how the identity of disabled people, the impairment, and the factors of legal capacity and guardianship influence interviewees' legal consciousness and willingness to use the law. Third, what are the barriers or difficulties that may undermine interviewee's willingness to use the law. This may have some overlaps with the analysis under the second theme. However, it will put more focuses on the barriers and difficulties faced by interviewees who have taken the action to resort to the law, rather than the interviewee's subjective willingness or concerns. The law in the context of this part is not specified to the law on legal capacity and guardianship, but refers to the law in a more general sense. As will be analysed in detail, it is also noted that the current law on legal capacity and guardianship may in itself be a factor that prevents disabled people from using the law.

4.1.1 Legal consciousness

The majority of the participants demonstrated, at least, a basic legal consciousness that they are entitled to legal rights and the protections by the

law. Some of them said in the interviews that, for example, 'according to the law, it is my right to be treated fairly (gong ping) in the company',⁶⁵¹ 'this is my boss's obligation not to discriminate against me, otherwise, he should be punished by the law',⁶⁵² or 'if the doctors or nurses abuse me, I can sue them'⁶⁵³. However, the interview conversations show that depending on the context in which the legal rights are considered, the interviewees' awareness of their entitlement to legal rights may sometimes be compromised, or they may re-define their legal rights in some other way.

Based on the interview conversations, such change of legal consciousness is especially evident in the circumstances in which the interviewee's legal right is infringed by a family member who plays the role as the guardian.

In023DP:...all my salaries go to my mom's account every month because she is my guardian (showing her disability card)... I hope that I can have some, but my mom did not agree... my tutor said that my mom infringes my legal right by holding my salary... I understand that the money belongs to me and if someone takes the money from me, it can be stealing or robbery, and I can call the police... But I think if my mom takes the money, it should be different... I don't want to say that my mom infringes my legal right, it makes my mom like a bad person... I feel that when we are talking about mom, I should not say that I have legal rights to my salary...⁶⁵⁴

In030DP: ... I was disappointed when I knew that my mom refused my job offer without asking me. I also know that I have the legal right to work and to earn money... If it is someone else, let's say, my neighbor refused that offer for me, I will definitely feel angry because he has no right to deprive me of my legal rights to work... But I cannot blame my mom... Because of my illness, my mom sacrificed a lot for me. Maybe I can also make some sacrifice, for example, not go to work...⁶⁵⁵

⁶⁵¹ Interview with disabled people, Code In020DP, male, with physical impairment

⁶⁵² Interview with disabled people, Code In023DP, female, with intellectual disability

⁶⁵³ Interview with disabled people, Code In018DP, male, with mental disability

⁶⁵⁴ Interview with disabled people, Code In023DP, female, with intellectual disability

⁶⁵⁵ Interview with disabled people, Code In030DP, female, with mental disability

The interview conversations do not provide evidence suggesting that the identity of disabled people, people without full legal capacity or people under guardianship alone could undermine the interviewee's legal consciousness. However, when the factors of disability or impairment interact with the guardianship, in which the guardian is a family member, it may influence the interviewees' awareness of their legal rights or their willingness to define their rights in legal terms and defend the rights.

4.1.2 Willingness to use the law

Although the majority of the interviewees demonstrated, at least, a basic awareness of their entitlement to legal rights, they did not show many willingnesses to defend their rights by using the law. Some interviewees expressed their attitude that, for example, 'legal settlement is not my first choice'⁶⁵⁶ or 'I will not resort to the law (shang fayuan) if there is an alternative'⁶⁵⁷. The interview conversations illustrate three major concerns underlying interviewees' similar reluctance to use the law.

First, more than half of the interviewees raised a similar point of view that resorting to the law may cost a lot of time, money and energy.

In011DP: ...many people said that it is very expensive to hire a lawyer.⁶⁵⁸

In025DP: ...I have tried to read some law books, it is extremely difficult to understand them... if I want to use the law, I have to spend a lot of time on reading and understanding what the law says.⁶⁵⁹

In021DP: ...some of my friends told me that the court proceeding takes very long time, and will make people feel very tired and unhappy.⁶⁶⁰

⁶⁵⁶ Interview with disabled people, code In011DP, with mental disability

⁶⁵⁷ Interview with disabled people, code In029DP, with mental disability

⁶⁵⁸ Interview with disabled people, code In011DP, with mental disability

⁶⁵⁹ Interview with disabled people, code In025DP, with mental disability

⁶⁶⁰ Interview with disabled people, code In021DP, with visual impairment

One interviewee explicitly pointed out that comparing with resorting to the law, 'some problems can be solved in some easier way'.

In005DP: ...some of my friends in the blind people community are now trying to sue the railway company because the company's website is not accessible to blind people and blind people cannot buy tickets online... well, they told me that it is our legal rights to have accessible facilities, and I really appreciate their courage to use the law as a weapon. However, it costs them a lot of time and money. For me, I think some problems can be solved in some easier way, for example, I always ask someone else to buy tickets for me...⁶⁶¹

Second, five interviewees, with mental disability, expressed the similar worrying about people's attitudes, their reputation and privacy, and further stigma.

In029DP: ...they violate my freedom and therefore violate the law. I knew that I should stand out to defend my rights. However, I was worried and scared. Supposing I sue the mental hospital, what if my case is reported by someone on the internet? My life will be ruined if everyone knows that I have mental illness... my families will also be embarrassed. So far, my neighbors do not know that I have mental illness...I do not want more people to know it...⁶⁶²

Third, the interview conversations show that the interviewees may be more reluctant to use the law to defend their rights if the law is to be used against their family members. This is especially evident in circumstances in which the interviewee's rights are infringed by a family member who plays the role as the guardian. The interview conversations show that interviewees' reluctance to use the law against their families is based on different concerns. One interviewee, for example, pointed out that she does not want to use the law against her mother because 'it is not her fault'.

⁶⁶¹ Interview with disabled people, code In005DP, blind

⁶⁶² Interview with disabled people Code In029DP, female, diagnosed with mental impairment

In030DP: ...although my mother is the one who ruins my chance to have a job, I understand that it is not her fault... and she is nearly the only one that stands by my side... the problem lies in the policies. According to the policy, we will have more money if I do not work, because the allowance for disabled people without a job is more than what I can earn from that job. I want to use the law against who makes such stupid policies, but I don't think there is such law for me to use...⁶⁶³

More interviewees, explicitly or implicitly, raised a similar point of view that using the law against family members may be emotionally unacceptable. From their perspective, the maintenance of family relationship may prevail over their rights.

In012DP: ... my mother put me under her guardianship... I know clearly that she intended to take my money and house. However, I don't want to bring the thing to the court (duibu gongtang). Our relation is never good, and I don't want to make it worse ...after all, she is my mother, no matter how I am angry with her, she is my only mother in the world...⁶⁶⁴

The interview conversations also suggest that the degree to which the family relationship is regarded as important may sometimes be influenced by how the interviewee is dependent on his/her family.

In009DP: ...my families treat me as a troublemaker... especially my father, his is also my guardian on the disability card... he has thrown me to the mental hospital for many times... Someone I know told me that my father was wrong and I should defend my rights... so what? I have no money, no job... and if they throw me out of the family, I will have no place to live...⁶⁶⁵

The interview conversations do not provide evidence suggesting that the identity of disabled people, people without full legal capacity, or people under

⁶⁶³ Interview with disabled people, Code In030DP, with mental disability

⁶⁶⁴ Interview with disabled people, Code In012DP female, diagnosed with mental impairment but she does not agree with it.

⁶⁶⁵ Interview with disabled people, code In009DP, with mental disability

guardianship alone could be a major factor that influences interviewees' willingness to use the law. However, the worrying about the discriminatory attitudes and the social stigma on disabled people may prevent interviewees from resorting to law for help. Besides, in cases where the interviewee's right is infringed by the guardian, who is also a family member, the overlaps between guardianship and family relationship may, in various ways, refrain the person from using the law to defend his/her rights.

4.1.3 The barriers to using the law

The interview conversations reveal that not all interviewees are reluctant to use the law in the first place. Two interviewees talked about their experiences of turning to the law for help and the kinds of barriers and difficulties that prevent them from taking further steps to use the law. These two interviewees' experiences spotlight two main barriers for them to use the law.

First, the law on legal capacity and guardianship may in itself be a factor that, at least indirectly, makes it difficult for people perceived as without full legal capacity to use the law.

In011DP: ...I called the legal aid center and a law firm. When they knew that I had been diagnosed as with mental illness, they both refused to help me. The lawyers in the legal aid center explained to me that according to the law, people with mental illness do not have legal capacity, and thus cannot apply for legal aid on their own. They also told me that even if they provide legal aid for me, I could not bring a lawsuit on my own. They said that if I still want to have legal aid, I have to ask my guardian to make the application for me.⁶⁶⁶

Second, the lack of professional legal services or the support to obtain legal services may make it difficult for disabled people to use the law.

⁶⁶⁶ Interview with disabled people, code In011DP, diagnosed as depression, but the interviewee himself does not agree with the diagnosis

In014DP: ...we all felt that this is unfair, however, we are not sure whether such practice is authorized by some other pieces of law that we do not know... one of my friends tried to find some lawyers for help, but it seems that lawyers are not very helpful to deaf people especially when you want to have face to face communication with the help of sign language interpreter...⁶⁶⁷

This interviewee further pointed out that such unsatisfactory experiences of turning to the law for help or the anticipation of such unsatisfactory experiences may refrain people from using the law.

In014DP: ...you might know that deaf people, just like other disabled people, have our own communities... So, when some of us find out that turning to the law cannot solve our problems, the rest of us may not be willing to take the same approach...⁶⁶⁸

These two interviewees' experiences and opinions illustrate how the social and legal barriers make it difficult for disabled people to access to professional legal information and services. It also suggests that disabled people's experiences of such social and legal barriers may further undermine their willingness to use the law. It may be helpful to recall that similar social and legal barriers have also been illuminated in the interviews with legal practitioners.⁶⁶⁹

4.2 Focus groups with guardians

Considering the role of guardian and the legal issues relevant to guardianship, the inquiries about legal mobilization and consciousness made in the focus group discussions with guardians were specific to the law on legal capacity and guardianship instead of the law in a general sense. The data generated from the focus groups with guardians is presented and analysed to illustrate

⁶⁶⁷ Interview with disabled people, Code In014DP, female, deaf

⁶⁶⁸ Interview with disabled people, Code In014DP, female, deaf

⁶⁶⁹ see, above from 144 to149

participants' willingness or reluctance to use the law on legal capacity and guardianship, and the concerns underlying their willingness or reluctance.

4.2.1 The willingness to use the law on legal capacity and guardianship

Although all the participants regard themselves as the guardian or playing the role of guardian, only six of them are the legal guardian appointed by the court. None of these six participants demonstrated clear willingness to use the law on legal capacity and guardianship. Instead, they all said that they had to resort to the law and be appointed as the legal guardian for some reasons. As each of them said in the discussions, these reasons include 'to manage my mother's property',⁶⁷⁰ 'to help my father to sell his house',⁶⁷¹ 'to represent my daughter in the court hearing of the car accident case in which my daughter is a victim',⁶⁷² 'to claim the compensation for my daughter',⁶⁷³ 'to apply for the passport for my son',⁶⁷⁴ and 'to apply for the social security for my daughter'⁶⁷⁵.

FG003GF: (to 002) ...you mean you were forced to make application to the court for denying your son's legal capacity and appointing you as his guardian?

FG002GL: I cannot say I was forced to... I took my son to the Bureau of Exit and Entry Control first because I thought he could apply for the passport himself. However, the official staff saw his medical record and said that he could not apply for the passport himself and it should

⁶⁷⁰ Focus group discussion, Code FG301, participant FG022GL, male, having a mother with Alzheimer's, and he is legally appointed as the guardian

⁶⁷¹ Focus group discussion with guardians, Code FGG402, Participant FG037GL, male, having a father with Alzheimer's, and he is appointed by the court as his father's guardian.

⁶⁷² Focus group discussion with guardians, Code FGG402, participant FG034GL, male, having a daughter with cerebral palsy, he is appointed by the court as his daughter's guardian

⁶⁷³ Focus group discussion with guardians, Code FGG202, Participant FG017GL, female, having a daughter with mental impairments and she is appointed by the court as her daughter's guardian.

⁶⁷⁴ Focus group discussions with guardian, Code FGG101, participant FG002GL, female, having a son with autism, and she is legally appointed as the guardian of her son.

⁶⁷⁵ Focus group with guardians, Code FGG102, participant FG001GL, having a daughter with mental disability and she is appointed by the court as her daughter's guardian

be me to make the application for him. Then, they also told me that I should be appointed by the court as the guardian of my son first, and then, I can make the application for him. When I went to the court, the staff there told me that I should make the application to the court for denying my son's legal capacity first, and then, I can be appointed as the guardian... anyway, I did what they said accordingly because my son need to get his passport...

FG001GL: ...yes, I went through all these procedures too... No one force you to do so, but, for me, I did not have many choices as it seems that only in this way can I apply for the social security for my daughter.⁶⁷⁶

Two of these six participants showed relatively clear reluctance to use the law on legal capacity and guardianship. One of them explicitly pointed out in the group discussion that from her perspective, the law on legal capacity and guardianship 'cannot solve the problem'.⁶⁷⁷

FG017GL: ...in fact, I went through all the legal procedures to deny my daughter's legal capacity and become her guardian only because otherwise my daughter cannot get her compensation. I don't like the law at all. Although I was told that the denial of one's legal capacity is to give disabled people better protection, I have found out that by protection, it does not mean that the law can make the society more friendly and safe for my daughter. Instead, it will make my daughter more dependent on me. She will never be in danger if she never goes into the society alone. However, this cannot solve the problem. I may be able to protect her now, but I cannot protect her forever... Although she has been denied full legal capacity, I am now still trying to improve her ability to live independently...⁶⁷⁸

The other participant did not show such strong reluctance to use the law but still pointed out clearly the law 'made me feel uncomfortable'. From his

⁶⁷⁶ Focus group with guardians, Code FGG102, participant FG001GL, having a daughter with mental disability and she is appointed by the court as her daughter's guardian, participant FG002GL, female, having a son with autism, and she is legally appointed as the guardian of her son, participant FG003GF, female, having a deaf son, she has registered in the CDPF as the guardian of her son

⁶⁷⁷ Focus group with guardians, Code FGG202, participant FG017GL, female, having a daughter with mental impairments and she is appointed by the court as her daughter's guardian.

⁶⁷⁸ Focus group with guardian, Code FGG202, participant FG017GL, female, having a daughter with mental impairments and she is appointed by the court as her daughter's guardian;

perspective, the law on legal capacity and guardianship put a discriminatory label on people who 'needs help and assistance' .

FG022GL: ...the law sounds like you do not deserve a guardian unless you admit you are abnormal, or have fewer abilities than others... My mother is with Alzheimer's and she needs help and assistance especially to manage her property. That's why we applied to the court for denying her legal capacity and appointing me as her guardian... it made me feel uncomfortable when I heard the judge saying that my mother is assessed as mentally disabled people without the ability to account for her conduct... my mom is just old... but it feels like I put a discriminatory label on her forehead...I will not use such law if there are any other alternatives...⁶⁷⁹

Apart from these six participants, all but two of the other participants are the guardian registered in the CDPF. Most of them regarded the guardianship registration in the CDPF as a legal procedure and demonstrated relatively clearer willingness to resort to it. The focus group discussions suggest that one major reason for participants' willingness to resort to the guardianship registration in the CDPF is that the CDPF will provide information and services for those who make the registration.

FG018GF: when you register as the guardian in the CDPF, you can get a lot of information from it, such as how to apply for social welfare and whether there are any job opportunities for mentally disabled people... They also organize regular activities such as lectures on mental illness, or taking mentally disabled people to museums... most of these are free. If you register as the guardian in the CDPF, they will inform you these activities...⁶⁸⁰

Some participants did not know clearly about the law on legal capacity and guardianship until they got some knowledge of the law in the focus group

⁶⁷⁹ Focus group with guardians, Code FGG302, participant FG022GL, male, having a mother with Alzheimer's, and he is appointed by the court as her mother's guardian

⁶⁸⁰ Focus group with guardians, Code FGG201, participant FG018GF, female, having a husband with mental disability and she is the registered in the CDPF as the guardian of her husband

discussions. One of their common inquiries about the law was whether using the law on guardianship could bring any benefit, or whether the court will provide services to those who appointed as the guardian by the court. This, as suggested in their discussions, may be one of the factors that influence their willingness to use the law.

4.2.2 The issues fail to be addressed in the current law on legal capacity and guardianship

It is noticed that although the majority of the participants did not resort to the law when legal capacity or guardianship is at issue or even demonstrated clear unwillingness to use the relevant law, most of them are not entirely reluctant to put legal capacity and guardianship issues in the legal context. The focus groups discussions suggest that one reason for participants' relatively low legal mobilization of the law on legal capacity and guardianship is that the legal settlement provided in the current law does not meet their needs.

FG020GF: ...I think the lawmaker put emphasis on wrong things. They should not put emphasis on what the guardian or disabled people's families should do, because we as the guardians and families are doing much more than the law requires, and we know better about what is good for our disabled families than the lawmaker does... The lawmaker does not know what disabled people and their families really need.

FG017GL: Or, the lawmaker does not care. The effect of the current law on legal capacity and guardianship is putting all the obligations and responsibilities on disabled people's families... the law may be helpful to other people in the society, but it is not helpful at all to disabled people and their families.⁶⁸¹

The focus group discussions also suggest two interrelated issues, which the participants thought should be, but are not addressed in the current law on

⁶⁸¹ Focus group with guardians, Code FG202, participant FG017GL, female, having a daughter with mental impairments and she is appointed by the court as her daughter's guardian; FG020GF, having a son with intellectual disability and she is the guardian of her son registered in the CDPF

legal capacity and guardianship. Although the focus group discussions in this regard may go a little beyond the inquiry of legal mobilization of the current law, it is still regarded as relevant and meaningful.

The first issue, which was raised in the discussions of all groups, is that the current law on legal capacity and guardianship is not clear about the settlements or arrangements available to disabled people who have no families to be the carer or guardian, or whose guardian is dead.

FG035GN: ... the most important thing in my mind is who will take care of my daughter after I die...

FG037L: (to 035) According to the current law, it will be your other children, or other family members, or if none of them is available, it will be the neighborhood committee of your community

FG035GN: Yes, I know that. But I have only one child... other family members live in different cities, and my daughter will not want to move... the law does not say clearly how the neighborhood committee should take care of the disabled people... I hope that the law can establish some guardianship mechanism to provide guardians for disabled people who do not have a family member to be the guardian.

FG036GF: Me too. We are not one child family, so that when my parents become too old to take care of my sister, I can take over the responsibilities and be her guardian. However, I have my own families, and there is the possibility that I may die before my sister... I am not going to escape from what I have to do as a sister, but I think it will be very helpful if the law can provide some mechanisms to support the families of disabled people.

FG035GN: I think the problem is that the lawmaker has never thought about this situation... If there is the law in this regard, I will be the first one to use that law...⁶⁸²

The second issue is interrelated to the first one. Participants in two different groups raised the issue that the current law on legal capacity and guardianship

⁶⁸² Focus group discussion with guardians, Code FGG401, participant FG036GF, female, having a sister with mental illness, she has registered in the CDPF as the guardian of her sister; participant FG035GN, having a daughter with mental disability, she regards herself as the guardian of her daughter; participant FG037GL, having a father with Alzheimer's, he is legally appointed as the guardian of his father

is not clear about the standards of social services supplementary to the guardianship and the legal obligations of those who provide services to people under guardianship.

FG021GF: ... there have already been some professional assistant or services that are supplementary to guardianship... but the problem is that such services are not regulated by the current law... so that there is no legal standard for these services... I think since there are legal standards for guardianship, there should also be legal standards for these supplementary services... Apart from the problem of lacking legal standard, I think these services are more useful than what is provided in the social welfare policy... in comparison with what a disabled person and his/her family need, the current social welfare policy is only a drop in the bucket (beishui chexin)...

FG023GN: Yes, most importantly, the law should provide clear standards of the legal obligations and responsibilities of those who provide the services. One social worker center in our city provides social worker services for disabled people. The social workers will take disabled people to, for example, picnic, camping, or excursion. They also provide assistance for disabled people to get jobs... All these services are good. However, I have not yet let my son get these services. My concern is that who will be responsible if, for example, my son gets hurt in the activities, or he hurts others. Should I as the guardian take all the potential responsibilities? To what degree will the social workers be responsible for the consequences of their services? I think the social workers should have some legal obligations and responsibilities, otherwise, I cannot fully trust them.⁶⁸³

The focus group discussions show participants' need for the legal framework for social services, professional assistance, or similar mechanisms that are supportive to the disabled people and supplementary to the guardianship. Such legal framework is not available in the current law. It also suggests that the participants may be more willing to use the law on legal capacity and guardianship if the law meets their needs in a more supportive way.

⁶⁸³ Focus group with guardians Code FGG302, participant FG021GF, female, having a brother with mental illness, he has registered in the CDPF as the guardian of his brother; participant FG023GN, female, having a son with Down's syndrome, she is not a guardian appointed by the court or registered in the CDPF, but she regards herself as the guardian of her son

4.3 Focus groups with members of neighborhood committee

Considering the neighborhood committee's role and authority to make guardianship appointment, the inquiries about legal mobilization and consciousness made in the focus groups with members of neighborhood committee were specific to the law on guardianship instead of the law in a general sense. The data generated from the focus groups with members of neighborhood committee will be presented and analysed from two relatively specific perspectives. One is participants' willingness to define guardianship issues in legal terms, and the other is participants' willingness to submit the guardianship appointment to the court.

4.3.1 Willingness to define guardianship issues in legal terms

Participants in each group did not show obvious reluctance to define guardianship issues in legal terms. However, the language they used in the group discussions suggests that their willingness to put guardianship issues in legal context might be slightly different depending on who is the guardian being concerned or by whom is the guardian appointed.

First, when the guardian being concerned in the group discussions was someone outside the family, the participants used the legal terms such as guardian or guardianship throughout their talking. For example, one participant gave an instance in which the neighborhood committee appointed itself as the guardian of a homeless person who always stays in the garden in front of their community. This participant used the term 'our committee as his guardian', instead of 'we' or 'our committee'.⁶⁸⁴ By contrast, when the guardian being concerned in the group discussion was the family member of the person under guardianship, most of the participants in each group seldom used legal terms such as guardian or ward. Instead, they used, for example, 'the person's

⁶⁸⁴ Field notes 20150903FGNC302

mother', 'his family', in their discussion. However, the majority of the participants did not resist defining guardianship issues in legal terms when the guardian being concerned is the family member. I tried in all groups to bring the legal terms into the discussion by saying, for example, 'what will his/her guardian do...'. Participants in each group did not avoid using the term 'guardian', and some of them tried to use the legal term as I did.⁶⁸⁵

Second, when the guardian being concerned in the discussion was the guardian appointed by the court, the majority of the participants used relatively formal terms, such as 'appoint (zhiding)' or 'assign (guiding)'. When the guardian being concerned in the discussion was the guardian appointed by the neighborhood committee, the majority of the participants used less formal terms, such as, 'select (tiao)' or 'choose(zhao)'; or some of them said that, for example, 'we talked with his mother to see whether she want to be the guardian'⁶⁸⁶. Besides, one participant explicitly pointed out that although the guardian appointed by the neighborhood committee has the same legal effect with that of the appointment made by the court, the appointment made by the neighborhood committee should not be understood as a 'pure legal settlement'.

FG025NC: (to 028)...you mean that the guardian appointed by the neighborhood committee is with legal effect?

FG028NC: Yes, the same legal effect with that of the guardian appointed by the court.

FG025NC: So, it does not matter who makes the appointment?

FG028NC: I think there are still differences... the legal effect may be the same, but the guardianship appointment made by us is not only about the law... When the judge makes guardianship appointment, he/she does not know the guardian or the person under guardianship... we as the neighbors are different. We know their stories, their difficulties

⁶⁸⁵ Field notes 20150721FGNC102; Field notes, 20150724FGNC201, Field notes, 20150801FGNC302

⁶⁸⁶ Focus group discussion with members of neighborhood committee, Code FGNC302, participant FG041NC, male, living in the community for 14 years and serving in the neighborhood committee for 5 years

in daily life, and we really care about them. From my perspective, the guardianship appointment made by the court is a pure legal settlement and it has only the legal effect. The guardianship appointment made by us has both the legal effect and our emotional bonds...⁶⁸⁷

The focus group discussions show that although participants do not have an obvious reluctance to define guardianship issues in legal terms, they may not treat guardianship as a pure legal issue. Also, the overlaps between the guardianship and family relationship or neighborhood relationship may influence participants' willingness to put guardianship issues in legal context.

4.3.2 Willingness to submit the guardianship appointment to the court

Although the guardian appointed by the neighborhood committee has the same legal effect to that of the guardian appointed by the court, the focus group discussions suggest that, as discussed before, the majority of the participants regarded the guardianship appointment by the court as a 'pure legal settlement' or a 'more formal legal procedure'⁶⁸⁸. Based on participants' such understanding, participants' willingness to submit guardianship appointment to the court was further probed in the focus group discussions.

Participants in each group had divergences in the degree to which they are willing to submit the guardianship appointment to the 'more formal legal procedure'. The discussions in each group show that one of the major factors that influence participants' willingness is the situation of their communities. For participants from newly-built communities, almost all of them showed their

⁶⁸⁷ Focus group with members of neighborhood committee, Code FGNC202, participant FG025NC, male, living in the community for 3 years and serving in the committee for 2 years; participant FG028NC, living in the community for 27 years and serving in the committee for 4 years

⁶⁸⁸ Focus group with members of neighborhood committee, Code FGNC1, participant FG005NC, male, living in the community and serving in the committee for 2 years; many other participants expressed the same opinion with different words.

position in the focus group discussions that they prefer to submit the guardianship appointment to the court. Most of them expressed the similar opinions that the appointment made by the court is 'more neutral and professional',⁶⁸⁹ and 'the court has stronger authority to define the guardians' legal obligation'⁶⁹⁰. For participants from long-standing communities, on the contrary, the majority of them showed the position that they will not make the guardianship appointment unless it is 'really necessary(bu zhiding buxing)', and they will submit the guardianship appointment to the court only when they cannot reach an agreement on who should be the guardian.

FG029NC: ...at least, submitting the guardianship appointment to the court cannot be our first choice. First of all, our committee will not make guardianship appointment unless it is really necessary. In our community, there are now two old people, living alone, with dementia; one person with mental illness, and two people with other disabilities... None of them are under guardianship, but all of them are under very good caring by all the neighbors. You can say that all the neighbors, more or less, play the role as their guardian. The mentally disabled people, for example, has lived here for 17 years and his neighbors treat him as their own son...There is no need for us to select a specific guardian for any of them...

FG026NC: ... we really have very different situations... the fact is we are not a community with history and people have not yet developed such familiarity... our committee will prefer to submit guardianship issues or disputes to the court... The court is more professional than our committee...

FG028NC: ...I understand that some people may need a specific person to be the guardian, and our committee has made such appointment. However, we will not submit the guardianship appointment to the court unless the committee members cannot reach an agreement on who should be the guardian. The main reason is that, as I have said, we as the neighbors know better about the people than the court does, and we have stronger emotional connection with the people... You (to 026) said that the court is more professional, but I will say our

⁶⁸⁹ Focus group with members of neighborhood committee, Code FGNC101, participant FG005NC, male, living in the community and serving in the committee for 2 years; similar opinion was also expressed by some other participants with different word.

⁶⁹⁰ Focus group discussion with members of neighborhood committee, Code FGNC301, participant FG038NC, female, living the community for 4 years and serving in the committee for 1 year

committee is more professional on this issue because we have more knowledge and understanding of the person concerned.⁶⁹¹

The focus group discussions show that participants' willingness to submit guardianship appointment to the more formal legal procedure is influenced significantly by their connection with the person concerned. It may also, to some degree, be influenced by participants' attitude to the court. The focus group discussions suggest the possible differences, from participants' perspective, between the guardian appointed by the court and the guardian appointed by the neighborhood committee.

4.4 Focus groups with social workers

The social workers and social worker services provided for disabled people are not mentioned in the current law. Therefore, in comparison with the research participants of other categories, social workers' willingness to use the law is of less significance. However, the discussions of each group show that the social workers participating in the focus groups have strong willingness to put social worker services provided for disabled people, especially for disabled people under guardianship, in the legal context. Participants in the focus group discussions raised their opinions about what issues should be addressed in the law, what legal rights they as the social workers should be entitled to, and why they as social workers want to use the law to solve the issues in their social worker services. The focus group discussions in this regard may go a little beyond the inquiries of legal mobilization and consciousness of the current law. However, it is still recognized as of high relevance and importance and therefore is presented and analysed.

⁶⁹¹ Focus group discussion with members of neighborhood committee, Code FGNC202, participant FG028NC, female, living in the community for 27 years, and serving in the neighborhood committee for 4 years; participant FG029NC, female, living in the community for 13 years and serving in the neighborhood committee for 1 year; participant FG026NC, female, living in the community for 19 months and serving in the committee for 6 months

The discussions in all groups reveal a similar issue that the current law on legal capacity and guardianship is, to some degree, 'out of date'⁶⁹². As pointed out by the participants, the current law on legal capacity and guardianship was made 'in the time, when there was nearly no social worker service, and disabled people are cared completely by their families'⁶⁹³. It, therefore, fails to address the situation, in which disabled people are 'cared and supported by multiple carers and supporters with different backgrounds and expertise'⁶⁹⁴. Participants raised two main issues, which they thought should be, but are not addressed in the current law.

4.4.1 The legal position of an independent and professional supporter

The first issue, which was raised in the discussions of all groups, is that the law should recognize social worker's legal position as an independent and professional supporter, rather than a 'service provider subordinate to the disabled people's guardian or carer'⁶⁹⁵.

FG033SW: ... I am now providing support for disabled people to get a job. I will help my clients (anzhu) to get information about the job and a more important task is to assist my clients to understand, and then to sign the employment contract. The problem is that, in several cases, the guardian or the families of my clients prevented them from signing the employment contract. Even when my clients repeatedly confirmed their willingness to sign the contract, the employer said they need the permission from the guardians.

FG030SW: This is normal... because the guardian is not only their carer but also their representative recognized by law.

FG033SW: But, I think I as the social worker have more expertise than the guardian does...if our expertise is not recognized by the law, it will

⁶⁹² Focus group with social workers, code FGSW102, participant FG010SW, with 5 years experience.

⁶⁹³ Focus group with social workers, code FGSW201, participant FG016SW, with 2 years experience.

⁶⁹⁴ Focus group with social workers, code FGSW301, participant FG030SW, with 6 years experience.

⁶⁹⁵ Focus group with social workers, code FGSW301, participant FG033SW, with two years experiences

make us as service provider subordinate to the disabled people's guardian or carer.

FG030SW: In most cases, we are. I think the key issue is that the law should recognize qualified social workers as a professional supporter. Especially in cases where the client is under guardianship, the law should also recognize that our position as a professional supporter is independent of the guardian of the client. Otherwise, as you said, we are only the service provider without any authority to assist our clients to reach any decisions with legal effect.⁶⁹⁶

Participants in another group also pointed out that not only social workers, but also other professional supporters such as lawyers, and 'perhaps some non-professional helper'⁶⁹⁷ should be recognized by the law as a supporter independent of the guardian of the disabled people.

4.4.2 The distribution of obligations

The second issue, which was raised by participants in two groups, is that the law should specify how the obligations and responsibilities should be shared and distributed between disabled people's guardians and other supporters such as social worker.

FG014SW: ... when I helped one of my clients to open an online shop, her guardian asked me: will you be responsible if she is cheated? ...when one of our clients with Down syndrome wanted to get married, his mother came to us and said, don't encourage him, will you be responsible if they have baby? It feels like they threaten you... I will take my part of responsibilities, but I do not like the feeling of being threatened...

FG013SW: I think the guardians' concerns are understandable... The current law does not say whether social workers have any obligations or responsibilities, but it does say the guardians have many obligations and responsibilities... The guardians want to ensure that your services will not impose more burdens on them...

FG016SW: I can understand the feeling of being threatened (to 014), but I think a more practical problem is that people will say who takes the

⁶⁹⁶ Focus group with social workers, code FGSW301, participant FG030SW, with 6 years experience; participant FG033SW, with two years experiences

⁶⁹⁷ Focus group with social workers, code FGSW101, participant FG012SW, with 4 years experiences

responsibilities can make the decision... when I help my client to reach a decision that is different from that made by her guardian, other people recognizes only the guardians' decision...

FG013SW: ...I will say, we need some kinds of new law that can completely change the guardianship mechanism and re-distribute the relevant authorities and responsibilities between the guardian and other supporters of disabled people.⁶⁹⁸

One participant in another group further pointed out that the law should specify the mutual obligations between the guardians and other supporters or helpers of the disabled people.

FG012SW: ...one of my experiences is that when my colleague and I wanted to discuss with the guardian of our client about the service plan, she simply refused us because she wanted to send our client to mental hospital while we recommended that our client should live in the community. This makes me think that the law should specify the mutual obligations between the guardian and other supporters or helpers. For example, we should have a mutual obligation to communicate with each other. Otherwise, the guardian may still be in a dominant or even monopoly position... yes such mutual obligations should be written in the law, otherwise, we can hardly require it.⁶⁹⁹

The focus group discussions show that there may be tensions between the social workers and the guardian of disabled people. Such tensions may undermine the effectiveness of social worker services provided for disabled people. The focus group discussions also illustrate participants' willingness and needs to be legally recognized as an independent and professional supporter for disabled people and to put the social worker services provided for disabled people in the legal context. The focus group discussions further suggest that, while the supportive mechanisms are currently available to disabled people in practice, the legal framework for the supportive

⁶⁹⁸ Focus group with social workers, code FGSW201, participant FG013SW, with 2 years experiences; FG014SW, with 1 year experiences; FG015SW, with 2.5 years experience; participant FG016SW, female, with two years experience

⁶⁹⁹ Focus group with social workers, code FGSW102, participant FG012SW, with 4 years experiences

mechanisms is, to a great extent, absent. The absence of law may be one of the factors that undermine the effectiveness of participants' social worker services provided for disabled people.

4.5 Summary

This section presented and analysed the data generated from individual semi-structured interviews with disabled people, and the focus groups discussions with guardians, social workers, and members of neighborhood committee. By illustrating the degree to which the interviewees and focus group participants are aware of their entitlements to legal rights and willing to resort to the law for settlement, this section tried to illuminate the legal culture from the perspective of legal consciousness and mobilization. The empirical research found out various factors that may influences interviewees' and focus group participants' willingness to resort to the law in different ways, which have been presented and analysed in detail in this section. The following findings and analysis are summarized and highlighted.

First, the current law on legal capacity and guardianship is in itself a barrier, especially for disabled people perceived as without full legal capacity, to use the law. The denial of full legal capacity provided in the current law makes it difficult for disabled people perceived as without full legal capacity to enjoy their rights to access to justice. Other disabled people may also have difficulties in getting legal services or accessing to legal procedures.

Second, the current law on legal capacity and guardianship fail to address the situation in which the disabled people are not only under guardianship, but also supported by other supporters such as social workers. Therefore, the legal settlement provided in the current law may not be able to meet the needs of disabled people, guardians and supporters such as social workers. The

absence of effective law may, in many ways, undermine people's willingness to use the law.

Third, the legal capacity and guardianship issues overlap with some natural relationship, such as family relationship and neighborhood relationship, in many ways. Such overlaps and the interaction between such overlaps and the current law may, in many ways, influence people's willingness to define issues in legal terms and use the law

5. Conclusion

This chapter presented and analysed the empirical data generated from individual interviews with judges, lawyers, and disabled people, and focus groups with guardians, social workers and members of neighborhood committee. By presenting and analysing the empirical research findings, it illuminated the legal culture in China, especially the legal culture relevant to the law and practice of legal capacity and guardianship. Based on Merry's anthropological approach, the legal culture was examined from four perspectives, namely the practice and ideologies within the legal system, the knowledge of the law of those without legal expertise, legal mobilization, and legal consciousness.

The empirical research found out many different, but interrelated factors that may influence, shape, or even be re-shaped by some aspects of legal culture, which have been analysed in detail in each section. The analysis of empirical data generated from different sources highlighted several points, which are commonly and repeatedly raised, discussed, or reflected by different participants from various perspectives. The following summary of these points is made.

First, the analysis suggests that there may not be a solid ground of legal culture to respect disabled people's rights, especially those whose full legal capacity is not recognized. According to the analysis, in general, most of the participants have the awareness that disabled people, including those with mental disability, are entitled to legal rights on an equal basis with others. The majority of disabled people interviewed, in particular, demonstrated the legal consciousness that they are entitled to legal protections. However, the analysis also reveals that such awareness and consciousness may not necessarily lead to the effort to respect, protect, or fulfill disabled people's rights. According to the analysis, disabled people's various rights are sometimes overlooked by legal practitioners especially when the full legal capacity of the disabled people concerned is denied or challenged. The analysis also reveals various legal and social barriers that may make it difficult for disabled people to enjoy or defend their rights. Such difficulties may further undermine disabled people's willingness to use the law.

Second, the analysis of data generated from disabled people, guardians, social workers and members of neighborhood committee shows a kind of legal culture that some of the public may be distanced from legal information. Although these four categories of participants are closely relevant to, or significantly influenced by, the law on legal capacity and guardianship, the analysis shows that the available sources of legal information regarding legal capacity and guardianship are not sufficiently available to most of them. Most of their knowledge of the relevant law are not very comprehensive or clear. Besides, the analysis reveals that professional legal services are not always available or accessible to disabled people. Such unavailability or inaccessibility may also prevent disabled people from resorting to the law for help even when they are willing to.

Third, the analysis reveals the overlaps between legal capacity and guardianship issues and some sorts of natural relationships, such as family relationship and neighborhood relationship. It also reveals that such overlaps, and interactions between such overlaps and the relevant law may have far-reaching influences on how people understand the law on legal capacity and guardianship, the degree to which people are willing to put legal capacity and guardianship issues in legal context, and how they use the law to settle issues relevant to legal capacity and guardianship.

Fourth, specific to the law on legal capacity and guardianship, the analysis reveals that the legal standard of legal capacity is sometimes overlooked or simplified as medical standards of mental capacity, or disability in general. The analysis of the interview conversations with legal practitioners shows that the majority of their ways of practice, to a large degree, blurs the line between the legal standard of legal capacity and medical diagnosis of mental capacity. The analysis of data generated from many other participants, especially the experiences shared by disabled people interviewed, suggests that it may be a relatively common way of practice to presume that disabled people are without full legal capacity. With such presumption, disabled people, no matter whether being denied full legal capacity or not, may be prevented from exercising legal capacity in an even more arbitrary way in daily practice. Moreover, the analysis shows that there may not be a solid ground of legal culture to recognize the importance of due process. The analysis shows that most of the legal practitioners interviewed, more or less, overlook the procedural perspective of legal capacity and guardianship in their practices. The analysis also suggests that in practice, more attention may be given to the consequences of being denied full legal capacity, whether a person is under guardianship, and who is the guardian. Comparatively, less attention may be given to under which standards and procedures the person is denied legal capacity or assigned guardianship.

Last, the analysis suggests that the current law on legal capacity and guardianship may, to some degree, be out of date or lack of clarity. In particular, it fails to address the situation in which disabled people is not only under guardianship but also supported by other supporters such as social workers. The legal settlement provided in the current law on legal capacity and guardianship may not always meet people's need. The analysis shows that the absence of effective law is also an important factor that influences people's willingness to use the law and how they resort to law for settlement.

Chapter 7: Reflections on Key Cultural Issues Relevant to the Implementation of Article 12

1. Introduction

This chapter conducts further analysis of the implications of the empirical research findings and reflects on the key cultural-related issues that may have an influence on the implementation of Article 12 in China. The analysis of the empirical research findings in last chapter used many quotations to illustrate the research participants' contexts and subjective perspectives. Different from the analysis in the last chapter, this chapter synthesizes the empirical research findings and examines them in the context of Article 12. This chapter explores structures, mechanisms or tendencies that underlie or produce the observable legal culture and identifies key cultural-related issues to be taken into account in the implementation of Article 12 in China. Some factors raised in the empirical research findings may be comparable to the issues raised in existing research conducted in other social contexts or doctrinal frameworks. The analysis in this chapter may also shed light on some previously neglected aspects of legal capacity and support in the exercise of legal capacity.

The analysis in this chapter will be divided into two sections. Section 2 examines cultural-related issues relevant to developing the inclusive paradigm of legal capacity proposed in Article 12. Section 3 examines cultural-related issues that are relevant to developing the legal regime of support in the exercise of legal capacity.

2. Developing the Inclusive Paradigm of Legal Capacity

It was discussed in Chapter 3⁷⁰⁰ that Article 12 of the CRPD entails an inclusive paradigm of legal capacity, which contends that all people have legal capacity on an equal basis with others.⁷⁰¹ It thus refuses the approach of linking legal capacity to standards of cognitive capability or decision-making skills, which has the effect of excluding those who fail to meet the standards by declaring them legally incapable.⁷⁰² The analysis of Chinese law in Chapter 4 shows that the Chinese law on legal capacity still fails to recognize people's legal capacity on an equal basis, and the legal standard of legal capacity is, to a great extent, conflated with one's cognitive capabilities.⁷⁰³ The analysis of the empirical research further reveals that discriminatory interference in disabled people's exercise of legal capacity widely exists in practice. According to General Comment No.1, State parties are obliged under Article 12 to abolish discriminatory denials of disabled people's legal capacity in both law and practice.⁷⁰⁴ China, as a State Party to the CRPD, has to fulfil this obligation. Based on the synthesis of the empirical research findings, two key issues emerge that should be considered in the implementation of Article 12 in China.

2.1 The failure to define the recognition of full legal capacity as a legal right

It was pointed out in Chapter 4 that the current Chinese law leaves ambiguities regarding whether the recognition of one's full legal capacity is a legal right. It

⁷⁰⁰ see Chapter 3 from 42 to 56

⁷⁰¹ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 8, 25; see, for example, Dhanda (n 28); Eilionoir Flynn and Anna Arstein-Kerslake, 'Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity' (2014) 10 *International Journal of Law in Context* 81.

⁷⁰² Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 15; see, for example, Dhanda (n 28).

⁷⁰³ see Chapter 4 from 79 to 82

⁷⁰⁴ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 25.

does not describe the situation in which deprivation of one's legal capacity or interference in one's exercise of legal capacity may constitute violations of one's rights. Nor does it provide any remedy for those whose exercise of legal capacity is infringed arbitrarily.⁷⁰⁵ The empirical research finds that such ambiguities in law, in many ways, lead to or reinforce the practice of relatively arbitrary and discriminatory interference in disabled people's exercise of legal capacity or the denial of disabled people's legal capacity. Such practice further becomes one of the factors that result in the legal culture of inconsistent knowledge to the law on legal capacity and the relatively low legal consciousness of disabled people's right to legal capacity.

Firstly, although the current law makes it clear that the denial of full legal capacity may be applied only by the court and only to mentally disabled people,⁷⁰⁶ the analysis of the empirical research reveals that people with non-cognitive related impairments may also be regarded as not having full legal capacity and be prevented from exercising legal capacity in practice.⁷⁰⁷ The analysis of the empirical research also shows that apart from the legal practitioners interviewed, the majority of the other research participants do not have consistent knowledge of the law on legal capacity especially the procedural standard of denying one's full legal capacity. Some of the research participants, including disabled people interviewed, showed only a sweeping idea, which is inconsistent with the law, that all disabled people can be legitimately prevented from exercising legal capacity.⁷⁰⁸ The analysis of the empirical research suggests that based on the current law on legal capacity, recognition as persons before the law is seldom understood as a legal right in practice. Instead, more often it may be understood as a 'qualification',⁷⁰⁹ and

⁷⁰⁵ see Chapter 4 from 79 to 82

⁷⁰⁶ see Chapter 4 from 79 to 82

⁷⁰⁷ see Chapter 6 from 151 to 171

⁷⁰⁸ see Chapter 6 from 152 to 155; 159 to 166; 171 to 175

⁷⁰⁹ see, for example, Chapter 6 from 125 to 132, 140 to 144

only those who are recognized as having this qualification can make decisions with legal effect.

Secondly, as analysed in Chapter 4, the current law does not specify the situation in which deprivation of one's legal capacity or interference in one's exercise of legal capacity constitutes a violation of one's rights.⁷¹⁰ The analysis of the empirical research reveals that arbitrary intervention in disabled people's exercise of legal capacity may not bring any legal liabilities in practice. It further suggests that the lack of legal liability may, somehow, reinforce or even encourage the practice of preventing disabled people from exercising legal capacity. Besides, as analysed in Chapter 4, the current law does not stipulate any effective remedy for arbitrary intervention in disabled people's exercise of legal capacity. The analysis of the empirical research shows that the lack of legal remedy creates both legal and practical obstacles for disabled people to defend their exercise of legal capacity.⁷¹¹ Even when a disabled person is aware of an infringement to his/her right to equal recognition before the law, it may be very difficult for them to challenge such an infringement by using the law. The analysis of the empirical research further indicates that such difficulties have been experienced by not only mentally disabled people but also disabled people with non-cognitive related impairments.⁷¹²

Thirdly, the analysis of the empirical research shows that the legal and practical obstacles for disabled people to defend their exercise of legal capacity may further influence their knowledge of the law on legal capacity and willingness to use the law. This empirical research finding may, to some degree, be linked to Merry's theory of how experiences of law may influence people's knowledge of law, and their legal mobilization and consciousness.⁷¹³

⁷¹⁰ see Chapter 4 from 79 to 82

⁷¹¹ see Chapter 6 from 189 to 190

⁷¹² see Chapter 6 from 189 to 190

⁷¹³ This has been discussed in Chapter 2 from 31 to 34

In the discussion of the anthropological perspective of legal culture, Merry points out that people's legal mobilization and consciousness may change with their experiences. If people cannot get support from the legal system, their awareness of, and willingness to use, the law to defend their rights may be undermined.⁷¹⁴ The analysis of the empirical research shows that once a disabled person has experienced, or is aware of others' experience of, difficulties in obtaining legal remedies for arbitrary intervention in their exercise of legal capacity, he/she may not be willing to use the law to defend his/her exercise of legal capacity.⁷¹⁵ Merry also points out that people's knowledge of and attitudes towards the law may be shaped by their personal experience with the legal system.⁷¹⁶ The analysis of the empirical research indicates that when arbitrary intervention in disabled people's exercise of legal capacity or the discriminatory denial of a disabled people's legal capacity become common practice without being challenged under the law, disabled people and other social actors may manufacture the knowledge from such observations or experiences that disabled people can be legitimately prevented from exercising legal capacity. The prejudicial presumption that disabled people are all without legal capacity might also be reinforced in practice.

Based on the analysis of the empirical research and the further discussions in light of Merry's theory of legal culture, it is argued here that the failure to define the recognition of one's full legal capacity as a legal right may be a barrier to the achievement of the inclusive paradigm of legal capacity. To remove this barrier, the implementation of Article 12 should entail a definite affirmation that individuals have the legal right to be recognized as persons before the law with full legal capacity on an equal basis. Moreover, underlying the ambiguities in the current law on legal capacity are more structural issues, as revealed in the

⁷¹⁴ Merry (n 23).

⁷¹⁵ see Chapter 6 from 186 to 190

⁷¹⁶ Merry (n 23).

empirical research, regarding the inconsistent knowledge of the law on legal capacity, relatively low consciousness of disabled people's right to equal recognition before the law, and relatively low legal mobilization by disabled people to defend their right to exercise legal capacity on an equal basis with others. As pointed out in Chapter 6, a solid ground in terms of the legal culture to recognize, respect and protect disabled people's right to equal recognition before the law has not been formed in China.⁷¹⁷ These structural issues should be taken into account and addressed in the implementation of Article 12 in China.

2.2 The driving force for the interferences in disabled people's exercise of legal capacity

According to General Comment No.1, the conflation between legal and mental or cognitive capacities is highlighted as one of the important factors that drive the denial of disabled people's legal capacity.⁷¹⁸ The analysis of Chinese law on legal capacity also shows that the legal standard of legal capacity is, to a large degree, conflated with mental capacities.⁷¹⁹ However, the analysis of the empirical research indicates that in practice, concern about disabled people's mental or cognitive capacities may not necessarily be the only or direct driving force behind interferences in disabled people's exercise of legal capacity. This is particularly evident in cases where disabled people with non-cognitive related impairments are discriminatorily prevented from exercising legal capacity.⁷²⁰ This practice is inconsistent with the relevant law on legal capacity. Given such practice, it is argued that delinking legal and mental capacity in law, as required by Article 12, may not be sufficient to completely abolish the denial of legal capacity on the grounds of disability in practice. It is necessary to

⁷¹⁷ see, Chapter 6 at 206

⁷¹⁸ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 15.

⁷¹⁹ see Chapter 4 from 79 to 82

⁷²⁰ see Chapter 6 from 152 to 155, 159 to 166

identify the other factors that drive the practice of preventing disabled people from exercising legal capacity on an equal basis with others. It is also necessary to explore how these factors can be addressed in the implementation of Article 12.

The analysis of the empirical research indicates that apart from the disabled people interviewed, the majority of the other research participants were concerned, from different perspectives, that disabled people may not be able to be responsible for their actions or decisions.⁷²¹ This led to the concern that disabled people's exercise of legal capacity may consequently expose the rights and interests of themselves, or others, to disproportionate and unnecessary risks. The analysis of the empirical research further suggests that in comparison with the conflation between legal and cognitive capacities, concern about the possible negative consequences of disabled people's exercise of legal capacity may be a more visible and direct factor that drives the practice of preventing disabled people from exercising legal capacity.

Concern about the negative consequences of disabled people's exercise of legal capacity is, to some degree, rooted in the prejudice against disabled people, especially disabled people with cognitive impairments. However, as revealed in the analysis of the empirical research findings, the issues underlying such concerns are arguably more complicated, and they should not be oversimplified or completely attributed to the prejudice against disabled people or the conflation of legal and cognitive capacities.

According to the analysis of the empirical research, only a few of the research participants explicitly associated the possible negative consequences of disabled people's exercise of legal capacity with concerns that disabled people

⁷²¹ see Chapter 6 from 159 to 177

may lack the cognitive ability to, for example, understand and balance information, or communicate a decision.⁷²² The majority of the other participants associated their concerns about disabled people's exercise of legal capacity with a variety of other factors. These factors include, for example, the experience of negative consequences of disabled people's exercise of legal capacity; disabled people's impairments, which include both cognitive and non-cognitive related impairments; disabled people's financial capacities; and disabled people's social class.⁷²³ Based on the empirical research findings, it can be argued that these factors or some more complicated interactions between these various factors may, directly or indirectly, constitute the driving forces for discriminatory interferences in disabled people's exercise of legal capacity. It can also be argued that some of these factors are grounded in the structural disadvantages or oppression suffered by disabled people.

The analysis of the empirical research further suggests that the current law, to a large degree, fails to provide legal mechanism that can effectively remove people's concerns about the possible negative consequences of disabled people's exercise of legal capacity. The denial of disabled people's legal capacity prescribed in the current law may reinforce the attitudes and practice that preventing disabled people from exercising legal capacity is a justifiable way to protect themselves, transaction security, or the rights of a third party.⁷²⁴ Moreover, as has been analysed in Chapter 4,⁷²⁵ according to the current Chinese law, if a disabled person's conduct causes damage and the disabled person is perceived as having no legal capacity to perform the conduct, he/she may not be held legally liable and the corresponding legal responsibility will

⁷²² see Chapter 6 from 128 to 137

⁷²³ see Chapter 6, for example, from 159 to 177

⁷²⁴ see Chapter 6, for example, from 125 to 128, 140 to 144

⁷²⁵ see Chapter 4 at 82

shift to someone else, such as the person's guardian.⁷²⁶ The analysis of the empirical research suggests that the waiver of legal responsibilities prescribed in the current Chinese law may reinforce the pre-existing prejudiced view that disabled people are not always capable of being responsible for their own conduct.⁷²⁷

Based on the analysis of the empirical research, it is argued in this thesis that the implementation of Article 12 should recognize the complexity of the factors that drive the discriminatory denial of disabled people's full legal capacity in practice. These factors and the interaction between them may be barriers to the achievement of the inclusive paradigm of legal capacity in practice. Thus, this should be carefully considered and addressed in the implementation of Article 12.

Support in the exercise of legal capacity, as proposed in Article 12, may have the effect of removing some of the driving forces for the denial of disabled people's legal capacity. This will be analysed in detail in the next section. In addition, it is argued in this thesis that the implementation of Article 12 may need to entail some legal mechanisms to ensure that by recognizing disabled people's right to exercise legal capacity, the rights and interests of the disabled person him/herself and of other people will not be exposed to unnecessary or disproportionate risk without remedy. Otherwise, even if the inclusive paradigm of legal capacity is established in the law, concerns about the possible negative consequences of disabled people's exercise of legal capacity may remain as a driving force for discriminatory interference in disabled people's exercise of legal capacity in practice. It should also guarantee that the

⁷²⁶ see, for example General Principle of the Civil Law (n 325) Article 58; Contract Law of the People's Republic of China (2012 Amendment) (n 381) Article 9, Article 47.

⁷²⁷ see Chapter 6, for example, from 159 to 177

safeguard of people's rights and interests should not be discriminatory against disabled people or result in the removal of disabled people's legal capacity.

Moreover, the analysis of the empirical research has shed light on how disabled people's exercise of legal capacity may be influenced by the structural disadvantages and oppression that are already faced by disabled people. It is argued in this thesis that such influences should also be recognized in the implementation of Article 12. Even though the complete removal of the existing disadvantages and oppression may be beyond the scope of the implementation of Article 12, the relevant domestic law and policy reform in the light of Article 12 should refrain from underpinning the existing disadvantages and oppression or imposing new disadvantages on disabled people.

3. From Substitute Decision-making to Support in the Exercise of Legal Capacity

As discussed in Chapter 3,⁷²⁸ in addition to the requirement to abolish the discriminatory denial of legal capacity on the grounds of disability, Article 12 also obliges State Parties to ensure disabled people's right to have support in the exercise of legal capacity. It is emphasized in General Comment No.1 that substitute decision-making regimes should be replaced by support in the exercise of legal capacity. The support should be based on the disabled person's will and preferences rather than on what are believed to be the objective best interests of the person concerned.⁷²⁹ The analysis of Chinese law in Chapter 4 shows that under the current Chinese law, once a person is denied full legal capacity, a guardian will be appointed and authorized to make

⁷²⁸ This has been discussed in Chapter 3 at 56

⁷²⁹ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) see, for example, para 21, 29.

substitute decisions for the disabled person under guardianship.⁷³⁰ The analysis of the empirical research reveals that the practice of substitute decision-making is widely experienced by disabled people, and that support to exercise legal capacity is almost absent.⁷³¹ Given how Article 12 is interpreted in General Comment No.1, China as a State Party of the CRPD is obliged under Article 12 to repeal the law and practice of guardianship and replace substituted decision-making with support to exercise legal capacity.⁷³² Based on the synthesis of the empirical research findings, the following sub-sections highlight and examine four key issues to be considered in developing the legal regime of support in the implementation of Article 12.

3.1 Adult guardianship practice based on the moral context

As discussed in Chapter 4, the adult guardianship mechanism and the rights and obligations of the guardian are prescribed in the current Chinese law.⁷³³ However, the analysis of the empirical research shows that apart from the legal practitioners interviewed, the majority of the other research participants did not have very comprehensive knowledge of the law on guardianship, especially the procedural standard of guardianship.

In addition to the adult guardianship prescribed in the law, the empirical research points to another parallel guardianship system operated by the Chinese Disabled Person Federation (CDPF). While the adult guardianship provided in the law is applied only to mentally disabled people who have been denied full legal capacity by the court, the guardianship system operated by the CDPF has a wider scope of application. It is applied to not only disabled people with cognitive impairments but also disabled people with non-cognitive

⁷³⁰ This has been analyzed in Chapter 3 at 82

⁷³¹ see Chapter 6, for example, from 155 to 159, 166 to 171

⁷³² Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 28.

⁷³³ This has been discussed in Chapter 3 at 82

related impairments, and it can be applied regardless of whether or not the disabled person concerned has been denied full legal capacity. The family members of a disabled person can apply to the CDPF to register as the guardian of the disabled person. Although guardianship registration in the CDPF does not have legal effect, the analysis of the empirical research shows that it may be mistakenly recognized as with legal effect in practice.⁷³⁴ Therefore, a guardian registered in the CDPF may, in fact, play a similar role, as a substitute decision-maker, as a legal guardian does. Moreover, the analysis of the empirical research reveals that the family members of the disabled person might play the role of guardian and be recognized as the guardian by others in practice, even if they are neither appointed as the legal guardian under the law nor registered as the guardian in the CDPF.⁷³⁵

The analysis of the empirical research findings illustrates that the legal status of guardian and the moral status of family members may, to a great extent, be conflated in practice. The issues relevant to guardianship may sometimes be defined and understood in the context of moral and family relationships rather than in the legal context. It is argued in this thesis that the recognition and understanding of the moral context of guardianship are essential to a more comprehensive understanding of the concerns and issues underlying guardianship in practice. Based on the analysis of the empirical research, three aspects of the moral context of guardianship can be illustrated.

First, based on the moral context, the family members of disabled people may oblige themselves to play the role of guardian even if they are not bound by any guardianship with legal effect. The analysis of the focus group discussions with the guardians, in particular, reveals that the majority of the participants were of the opinion that they as the families know what is best for the disabled

⁷³⁴ see Chapter 6, for example, from 155 to 159, 166 to 171

⁷³⁵ see Chapter 6, for example, from 144 to 149, 175 to 177

person concerned. Thus, even if someone outside the family is appointed as the legal guardian of the disabled person, they as the families will still play the role of guardian and do what is best for the disabled person concerned.⁷³⁶ Second, based on the moral context, there may sometimes be the presumption that disabled people's families have the obligation, either moral or legal, to take care of the disabled person and be responsible for the disabled person's behaviour. The analysis of the empirical research indicates that family members who take on such responsibilities may then be recognized by other social actors as being authorized to make decisions for the disabled person concerned. Other social actors may also presume that a disabled person's family know better than others what is best for the disabled person concerned and that the family will always do what is best for the disabled person concerned.⁷³⁷ Third, the majority of the disabled people interviewed did not use legal terms, such as guardianship, rights, obligation, or autonomy, to define their relationship with those they thought were their guardians. The analysis of the interview conversations with the disabled people suggests that the role of guardian played by family members may sometimes be understood by the disabled people as a way in which family members manage their life together.⁷³⁸

The empirical research findings regarding the moral context of the guardianship practice raise several further concerns. First, the analysis of the empirical research illustrates that the family members of disabled people, by playing the role of guardian, may be regarded as being authorized and having the power to control the disabled person and, at the same time, as having responsibility to take care of the disabled person and account for their behaviour. Since, as revealed in the analysis of the empirical research, the

⁷³⁶ see Chapter 6 from 167 to 171

⁷³⁷ see Chapter 6, from 137 to 138, 147 to 149, 175 to 177

⁷³⁸ see Chapter 6 from 155 to 158

family members who are recognized as the guardian may not be legally appointed as the guardian under the law, their powers and responsibilities are not necessarily derived from the law and may not be effectively monitored in the legal context. It may be even harder to monitor the guardianship practice or to scrutinize guardianship abuse when other social actors presume that the family members of disabled people, who play the role of guardian, are always acting in the best interests of the disabled person concerned.

Second, the analysis of the empirical research suggests that when the practice of guardianship is considered in the moral context, the majority of the emphasis is placed on the best interests of the disabled person concerned, and less effort may be made to understand the will and preference of the person under guardianship. Accordingly, it can be argued that the moral context of the guardianship practice may have the effect of underpinning the attitude and practice that what are regarded as the best interests of the disabled people should be given more weight than the disabled person's will and preference. Besides, the analysis of the empirical research suggests that the disabled person's family may always be recognized as the ones who decide the best interests of the disabled person concerned. It can be argued that this may further result in paternalism and undue influences on the disabled person concerned.

Third, the analysis of the empirical research suggests that the moral context of the guardianship practice may undermine the legal context of disabled people's rights and autonomy. The decisions made by, or conduct of, the disabled people's guardian or family members, which, as in the legal context, may amount to a violation of the legal rights of the disabled person concerned, might be justified in the moral context of the family relationship. Also, disabled people's legal rights and autonomy may be compromised by some sort of deliberate deference by the disabled people. The analysis of the empirical

research shows that the moral and emotional bond between disabled people and their family members, who play the role of guardian, may be a factor that, in different ways, drives disabled people to defer to the undue influence or the substitute decisions made by their guardians or family members. The analysis of the interview conversations with the disabled people shows typical examples in which the disabled people are aware of a violation of their legal rights by their guardian or family members and have the opportunity to defend their rights. However, they may still give more weight to the family relationship and be reluctant to defend their legal rights against their families.⁷³⁹

Based on the analysis of the empirical research findings, it is argued in this thesis that the analysis of the current practice of guardianship suggests a possible dilemma that should be considered in developing the legal regime of support in line with Article 12 at the national level. On the one hand, in view of the current practice of guardianship, when disabled people's families play the role of the guardian, it may be very difficult to monitor the guardianship practice. The engagement of disabled people's families in the guardianship practice may also result in different degrees of paternalism and undue influences. It can be argued that these issues are, to a certain extent, rooted in the cultural and moral understanding of the family relationship. Therefore, it is very likely that such matters may remain when the guardianship mechanism is replaced by support in the exercise of legal capacity as long as disabled people's families are engaged in the support arrangements. This may be a further barrier to ensuring that all of the support provided for disabled people is based on their will and preferences, as required by Article 12. On the other hand, considering the cultural and moral understanding of the family relationship, as shown in the analysis of the empirical research, it may be culturally and emotionally unacceptable to disabled people, and perhaps against their will and preference,

⁷³⁹ see Chapter 6, from 186 to 190

for their family members to be completely excluded from the legal regime of support in the exercise of legal capacity. Therefore, some degree of conflation between the moral context of the family relationship and the legal regime of support may be inevitable.

Central to this possible dilemma are concerns about manipulation, pressure, undue influence, or coercion by the supporter. Possible manipulation by, and undue influences of, the supporter in disabled people's exercise of legal capacity have already been noted and examined in both General Comment No.1⁷⁴⁰ and the existing literature.⁷⁴¹ The existing literature has also shed light on the possibility of disabled people's deliberate deference to the supporter.⁷⁴² As one of the responses to the concerns about the supporter's influences on the disabled person being supported, Gooding has pointed out that all people are subject to different degrees of influence, pressure, manipulation or coercion by those around them and are likely to give some deference to those they trust.⁷⁴³

Based on both Gooding's argument and the empirical research findings discussed before, it is pointed out here that a key issue to be considered in developing the legal regime of support in the light of Article 12 at the national level is to balance the interaction between the moral context of the family relationship and the legal regime of support. It should ensure that, on the one hand, disabled people's autonomous decision-making can benefit from the trust, faith and intimacy rooted in the moral context of the family relationship; and on the other, the engagement of disabled people's families in the support

⁷⁴⁰ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 22.

⁷⁴¹ see, for example, Gooding (n 255); Adrian Ward, 'Adults with Incapacity: Freedom and Liberty, Rights and Status: Part 1' 5 Scots Law Times; Lucy Series, 'Relationships, Autonomy and Legal Capacity: Mental Capacity and Support Paradigms' (2015) 40 International Journal of Law and Psychiatry 80.

⁷⁴² Kohn, Blumenthal and Campbell (n 261).

⁷⁴³ Gooding (n 254); see, also, Series (n 741).

regime does not undermine disabled people's rights, will, preferences and autonomy. How this issue should be addressed in the implementation of Article 12 in China is further examined from two aspects.

First, it may be helpful to recall from Chapter 2, Merry's argument raised in her empirical study of human rights and gender violence, that when human rights law is implemented at the national level, human rights values should be firmly insisted upon rather than bent to fit the local culture.⁷⁴⁴ If human rights values conflict with the local conditions, they should challenge the existing social or cultural elements by providing local people with a different framework for thinking. Based on Merry's argument, it was pointed out in Chapter 2 that the value of Article 12 should be sufficiently rendered at the national level.⁷⁴⁵

It is further argued here that the trust and emotional bond rooted in the moral and cultural understanding of the family relationship, as revealed in the empirical research, should be respected and carefully considered in the implementation of Article 12. However, the paternalistic practice of substitute decision-making for disabled people and the ignorance of disabled people's will and preference are what should be challenged and changed by the implementation of Article 12. The legal regime of support developed in the light of Article 12 should entail a framework of thinking for people to recognize the problems of the existing paternalism and ignorance of disabled people's rights and autonomy.

Second, as discussed in Chapter 3,⁷⁴⁶ the legal regime of support as proposed in Article 12 illuminates the relational aspect of self and autonomy. The theory of relational autonomy, originated in feminism, may provide a way

⁷⁴⁴ see Chapter 2 at 29

⁷⁴⁵ see Chapter 2 at 29

⁷⁴⁶ see Chapter 3 at 60

of thinking for the development of a legal regime of support at the national level. According to Mackenzie and Stoljar, relational autonomy refers to a model of understanding autonomy, which is based on the assumption that persons are 'socially embedded', and a self-governing agent may form his/her identities, values or commitments in the context of social or interpersonal relationships.⁷⁴⁷ The theory of relational autonomy challenges the traditional legal conception of self and autonomy, which are conceptualized as isolated, rationalistic and purely independent.⁷⁴⁸ It underlines that autonomy should be seen as a relational and interdependent, rather than independent, phenomenon.⁷⁴⁹ The relevant critiques of the theory of relational autonomy are not ignored here, in particular how it might fail to identify individuals who should be protected from paternalistic intervention.⁷⁵⁰ However, a detailed examination of various views of relational autonomy may be beyond the scope of this thesis.

The existing literature has shed light on how the theory of relational autonomy can be applied to families' engagement in individuals' decision-making.⁷⁵¹ This is what links the theory of relational autonomy to the current discussion of the possible conflation between the moral context of the family relationship and the legal regime of support. Walter and Ross, for example, have applied the theory of relational autonomy to their discussion of the patient-parent relationship in medical decision-making.⁷⁵² They pointed out that based on the theory of relational autonomy, being autonomous should not be equated to rejecting

⁷⁴⁷ Mackenzie and Stoljar (n 274) 4; see, also, Marina AL Oshana, 'Personal Autonomy and Society' (1998) 29 *Journal of Social Philosophy* 81; Jannifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7.

⁷⁴⁸ Gooding (n 230).

⁷⁴⁹ Gordon (n 230); Gooding (n 230).

⁷⁵⁰ Jules Holroyd, 'Relational Autonomy and Paternalistic Interventions' (2009) 15 *Res Publica* 321; Mackenzie and Stoljar (n 274) 3–31.

⁷⁵¹ Jennifer K Walter and Lainie Friedman Ross, 'Relational Autonomy: Moving Beyond the Limits of Isolated Individualism' (2014) 133 *Pediatrics* S16; The theory of relational autonomy and families' engagement in decision-making are also discussed by, for example, Anita Ho, 'Relational Autonomy or Undue Pressure? Family's Role in Medical Decision-Making' (2008) 22 *Scandinavian Journal of Caring Sciences* 128.

⁷⁵² Walter and Ross (n 273).

others' support in the making of important decisions. Turning to trusted family members for support or opinions in decision-making does not necessarily mean abdicating one's autonomy.⁷⁵³

How the theory of relational autonomy has been applied to family members' engagement in an individual's decision-making process in the existing literature may provide a framework to consider the engagement of disabled people's families in the legal regime of support. The theory of relational autonomy and its possible application further suggests the potential for the moral context of the family relationship and the trust and intimacy between disabled people and their families to be transformed into useful resources to support disabled people's autonomous decision-making. It is worth exploring whether the implementation of Article 12 can entail a conceptual framework of person and autonomy, which better reflects and enables the relational and interdependent aspects of autonomy. This may further form the ground on which the legal regime of support in the light of Article 12 can be developed at the national level and a careful balance can be made between family members' engagement in the support regime and precautions against potential paternalism.

3.2 The driving force for substitute decision-making

It was stated in Chapter 4 that under the current Chinese law, only when a mentally disabled person has been denied full legal capacity by the court will a legal guardian be appointed to the disabled person and authorized to make substitute decisions for him/her.⁷⁵⁴ However, the analysis of the empirical research reveals that in practice, substitute decision-making may be imposed not only on mentally disabled people who have been denied full legal capacity under the law, but also disabled people with non-cognitive related impairments.

⁷⁵³ *ibid.*

⁷⁵⁴ see Chapter 4 at 82

Disabled people's families, who are not legally appointed as their guardian and therefore do not have legal authorization to make substitute decisions, may also play the role of substitute decision-maker in practice. The empirical research arguably indicates that the practice of substitute decision-making may not necessarily be driven by concerns about disabled people's cognitive ability or based on the legal authorization given to the legal guardian. To abolish substitute decision-making in both law and practice, as required by Article 12, it is necessary to explore the driving forces behind substitute decision-making in practice.

First of all, it is important to point out that, as revealed in the analysis of the empirical research, in practice, disabled people's guardians, or families who play the role of guardian, are not only the substitute decision-makers but also the ones that take most of the responsibility for the disabled person and his/her behaviour.⁷⁵⁵ Such responsibilities include, for example, protecting and taking care of the disabled person, supporting the disabled person's development, and deciding whether the disabled person's decisions or actions should be recognized as having legal effect. In cases where the disabled person causes damage and cannot compensate for it, his/her family may have to compensate for it on his/her behalf even if the disabled person concerned has not been denied full legal capacity under the law. The analysis of the empirical research shows that even though disabled people's families may not necessarily have a legal obligation to take such responsibility, the moral and cultural understanding of the family relationship, as analysed in the last subsection, may make them feel morally obliged to take on this responsibility.

To have a more comprehensive understanding of the practice of substitute decision-making, it is important to recognize and understand that disabled

⁷⁵⁵ see Chapter 6, for example, from 167 to 171, 175 to 177

people's guardians or families play the role of both substitute decision-maker and responsibility bearer in practice. These two roles should be considered together, as they are arguably two sides of the same coin.

Given the dual roles played by disabled people's guardians or families in practice, the responsibility placed on disabled people's guardians or families may, to some degree, influence their attitudes towards disabled people's exercise of legal capacity. According to the analysis of the focus group discussions with guardians, based on either their legal or moral responsibilities, disabled people's families may have concerns about not only the immediate consequences of the disabled person's exercise of legal capacity, for example, whether it will cause damage, but also the consequences or influences in a long-term sense. As a typical example, when discussing disabled people's exercise of legal capacity to get married, the main concern of most of the guardians in the group discussion was the possible influence of the marriage on the disabled person's future life. More specific concerns included, for example, whether the marriage would add a financial burden to the disabled person and whether the disabled person could get help in raising children.⁷⁵⁶ The analysis of the empirical research also suggests that such worries about disabled people's exercise of legal capacity are not rooted in disabled people's impairments alone. Rather, they are rooted in the complicated interaction between disabled people's impairments and different social barriers, disadvantages and inequalities.

Moreover, the analysis of the empirical research suggests that concerns about disabled people's exercise of legal capacity may drive disabled people's guardians or families to make substitute decisions to guarantee what they think are the best interests of the disabled people. The analysis of the focus group

⁷⁵⁶ see Chapter 6, from 166 to 171

discussion with guardians shows that most of the guardians in the group discussion were aware that what they think is the best interests of the disabled person may conflict with the person's own will and preference. However, such awareness may not necessarily lead disabled people's guardians or families to be more supportive of disabled people's autonomous decision-making. The analysis of the empirical research suggests that the barriers, disadvantages, and inequalities that are already faced by disabled people may be one of the main factors driving disabled people's families to make substitute decisions to avoid further disadvantages. Disabled people's guardians or families may regard substitute decision-making, for the purpose of guaranteeing disabled people's best interests, as the major approach to fulfilling their legal or moral responsibilities for the disabled person and his/her behaviour.⁷⁵⁷

The analysis of the empirical research illustrated that substitute decision-making in practice could be driven by the complex interaction between the concerns of impairments, the culturally-based understanding and practice regarding the responsibility of disabled people's families and the social barriers and disadvantages faced by disabled people. Accordingly, abolishing the legal status and authorization of substitute decision-maker in law may not be sufficient to abolish substitute decision-making in practice. The complexity of the driving forces behind substitute decision-making in practice should be recognized and carefully taken into account in the implementation of Article 12.

3.3 The lack of a legal framework for support

The current Chinese law prescribes some very general obligations of governments and other social actors such as schools, hospitals, social

⁷⁵⁷ see Chapter 6, from 167 to 171

organizations, enterprises, to improve the life quality of disabled people.⁷⁵⁸ It is almost absent from the current Chinese law whether any social actors, other than disabled people's families, have a legal status or obligation to provide any form of help, assistance or support to disabled people to make decisions or take action with legal effect.

The analysis of the empirical research reveals that in practice, both disabled people and their families may have the need or be willing to have support in disabled people's exercise of legal capacity or other daily activities. There are also people, such as lawyers and social workers, that are willing to provide support for disabled people; and there are already disability-related social services that may be utilized as support in disabled people's exercise of legal capacity. However, the analysis of the empirical research shows that in practice, although disabled people can get informal help in some daily activities, they can hardly get support, especially from people other than their family members, in their exercise of legal capacity. Difficulties in getting support in the exercise of legal capacity are experienced not only by mentally disabled people but also by disabled people with non-cognitive related impairments.⁷⁵⁹

The current law does not explicitly forbid anyone from providing support for disabled people in their exercise of legal capacity. However, it does not provide a legal framework for any forms of support in the exercise of legal capacity, and thus the legal status, rights, obligations and responsibilities of the supporters are unclear. The analysis of the empirical research suggests that in practice, such indeterminacies in the law have created barriers to disabled

⁷⁵⁸ see, for example, Law of the People's Republic of China on the Protection of Disabled Persons (2008 Revision) (n 369) Article 6-8.

⁷⁵⁹ see Chapter 6, from 186 to 190

people obtaining support, especially in their exercise of legal capacity. This can be illustrated from three aspects.

Firstly, the analysis of the empirical research shows that without a status recognized by law, people who are willing to provide support for disabled people may only be able to provide informal help or assistance for disabled people in their daily activities that do not directly bring legal effect.⁷⁶⁰ Support that they provide in disabled people's exercise of legal capacity can hardly be recognized under the law. Besides, the analysis of the empirical research suggests that since the current law does not specify the obligations or responsibilities of those who provide support for disabled people, potential supporters may worry about whether their support to disabled people will burden them with responsibilities in terms of the disabled people's conduct or misconduct. Such worries may further restrain potential supporters from providing support for disabled people, especially in their decision-making or actions that may have legal effect.⁷⁶¹

Second, it has been discussed before that disabled people's families are always recognized as having the power to make decisions for the disabled person. The analysis of the empirical research suggests that in practice, disabled people's families may decide whether, and to what degree, the disabled person can utilize the support available to him/her, or interfere in how the supporter provides support for the disabled person.⁷⁶² Besides, the analysis of the empirical research shows that since the current law does not prescribe the legal standards or legal monitoring mechanisms for the support provided for disabled people, disabled people's families may worry about the quality of the support and possible abuse. Such worries may further restrain

⁷⁶⁰ see Chapter 6, from 144 to 149, 201 to 203

⁷⁶¹ see Chapter 6, from 201 to 205

⁷⁶² see Chapter 6, from 147 to 149, 201 to 205

disabled people's families from facilitating support to be provided to disabled people.⁷⁶³

Third, it has been discussed previously that based on the moral context of the family relationship, disabled people's families may be recognized by other social actors as having the power to make decisions for the disabled person, even if they do not have legal authorization for substitute decision-making. In contrast, as suggested by the analysis of the empirical research, other social actors may hardly recognize the position of the potential supporter, who has neither a legal status under the current law nor a moral status such as a family member. The decisions made by disabled people with support may not be recognized by other social actors, especially when the disabled person's own decision is different from the substitute decision made by his/her guardians or family members.⁷⁶⁴

The analysis of empirical research shows that the lack of clear legal and regulatory framework for support in the exercise of legal capacity could underpin the culturally-based understanding and practice that disabled people's families have the power to make decision for the disabled people. It could further underpin the paternalism and the legal culture of ignoring disabled people's rights and autonomy. Moreover, such an absence in law contradicts not only the requirement of Article 12 but also disabled people's need and willingness in the exercise of legal capacity and the current trend of development in social services provided for disabled people. The barriers, as a result of the law or the absence of appropriate law, to disabled people having support in the exercise of legal capacity should be completely removed by the implementation of Article 12.

⁷⁶³ see Chapter 6, from 191 to 196

⁷⁶⁴ see Chapter 6, from 202 to 205

3.4 Disabled people's narrow social network

The analysis of the empirical research reveals that under the current law and practice, disabled people may live with a relatively narrow social network. It further suggests that on the one hand, disabled people's narrow social network, to some degree, results from the current practice of guardianship and the lack of other social support. On the other hand, disabled people's narrow social network may be a factor that strengthens the practice of substitute decision-making and restricts the development of support in the exercise of legal capacity. This can be illustrated from three aspects.

First, the analysis of the empirical research suggests that it may be difficult for others, including potential supporters, to approach disabled people with narrow social networks. In cases where the disabled person concerned has a very narrow social network, for example, a limited number of family members, whether or not others can approach the disabled person relies heavily on these family members' willingness because they may restrict contact between the disabled person concerned and others.⁷⁶⁵ It may also be very difficult for others to know the real will and preferences of disabled people with narrow social networks because others can get information about the disabled people only from very limited sources. As shown in the analysis of the empirical research, such difficulties are particularly evident in cases where the person concerned uses an unusual way of communication, and thus others need assistance with interpretation by someone that is familiar with the person concerned.⁷⁶⁶ If only a very limited number of people can assist the communication between the disabled person concerned and others, for example, the social worker or the lawyer, what others know about the disabled person concerned might be only what the assisting person wants them to know.

⁷⁶⁵ see Chapter 6, from 203 to 205

⁷⁶⁶ see Chapter 6, from 147 to 149

Thus, it will be very difficult to know whether the information obtained represents the real needs, will and preferences of the disabled person, or whether it has been manipulated by someone else.

Second, the analysis of the empirical research suggests that disabled people's narrow social networks may be one of the major sources of undue influences imposed on disabled people, and it may be very difficult to scrutinize such undue influences. Compared with individuals with broad social networks, disabled people with narrow social networks may have less opportunity to get support or help from different people. Therefore, they might be at higher risk of experiencing fear and deception caused by people within their narrow social networks. The analysis of the empirical research suggests that losing their social network *per se* can be a kind of threat to disabled people with a narrow social network. It may, to some degree, force disabled people to defer to the influences of the people within the narrow social network.⁷⁶⁷ Moreover, it may be difficult for people outside a disabled person's narrow social network to investigate whether the disabled person concerned is under undue influence because the information that can be obtained might be manipulated by the limited number of people within the disabled person's narrow social network.

Third, the analysis of the empirical research also reveals that disabled people with a narrow social network may suffer an even worse possibility, that their narrow social network may disappear. The research highlights a specific category of cases, in which people with mental or intellectual disabilities are cared for by their parents, and their parents represent their only social relationship.⁷⁶⁸ The main concern raised in the analysis of the empirical research is that if the disabled people's parents die before them, which is possible considering age, the person concerned may be put into a very

⁷⁶⁷ see Chapter 6, from 186 to 189

⁷⁶⁸ see Chapter 6, from 138 to 140; 194 to 196

isolated situation and have no-one else familiar around him/her. In this case, it may be very difficult to develop support in either disabled people's exercise of legal capacity or other more informal daily activities. It will also be very likely that the disabled person concerned may be put under more restrictive substitute decision-making mechanisms or even be isolated in the institution.

Based on the analysis of the empirical research, it is argued in this thesis that the degree to which a disabled person has a broad, flexible and sustainable social network may be an important factor that influences the effectiveness of the support provided for the disabled person in his/her exercise of legal capacity. It might further influence the degree to which the disabled person's autonomy can be respected and promoted.⁷⁶⁹ Given such influences, it is argued in this thesis that the implementation of Article 12 should take into account two issues.

One is that, as suggested in the analysis of the empirical research, disabled people's narrow social network is, to some degree, a current social reality, and it may cause difficulties in providing support for disabled people in their exercise of legal capacity. Accordingly, in the implementation of Article 12, how to address such pre-existing difficulties and remedy the pre-existing disadvantages faced by disabled people should be considered. The other issue to be considered is that to ensure the effectiveness of support in the exercise of legal capacity, the implementation of Article 12 should entail a legal regime of support that is built on diverse, flexible and sustainable social networks. Besides, depending on the individual's will and preference, the legal regime of support should offer the possibility to broaden disabled people's social networks, which can then provide disabled people with more options

⁷⁶⁹ For a discussion of the relation between social relation and autonomy, see, for example, Oshana (n 744); Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 372–377; John Christman, 'Autonomy, Independence, and Poverty-Related Welfare Policies' (1998) 12 *Public Affairs Quarterly* 383; Christman (n 274).

and further advance their autonomy. Otherwise, as argued in this thesis, the legal regime of support in the exercise of legal capacity might not be able to respect and promote disabled people's will, preferences and autonomy effectively.

4. Conclusion

This chapter analysed the implications of empirical research findings regarding legal culture in the context of Article 12. The analysis in this chapter reflected on key cultural-related issues that may have an influence on the implementation of Article 12 in China.

Section 2 highlighted two issues to be taken into account in the implementation of the inclusive paradigm of legal capacity in the light of Article 12 at the national level. One is that the current law fails to affirm disabled people's right to equal recognition before the law. Because of such an absence in the law, discriminatory interference in the exercise of legal capacity is experienced not only by mentally disabled people but also by disabled people with non-cognitive impairments. It was pointed out in the analysis that such an absence in law and the discriminatory practice experienced by disabled people further result in the legal culture regarding the inconsistent knowledge of the current law on legal capacity, the relatively low legal consciousness of disabled people's right to equal recognition before the law and the relatively low legal mobilization by disabled people. The other issue highlighted in the discussion is that while the conflation between legal and mental capacity has drawn much attention in the existing literature, the analysis of the empirical research showed that the driving forces for the denial of disabled people's legal capacity in practice may be more complicated. The factors and concerns underlying the discriminatory denial of disabled people's legal capacity may interact with

some of the structural barriers and disadvantages that are already faced by disabled people.

Section 3 examined four key issues regarding the development of the legal regime of support in the exercise of legal capacity in line with Article 12. Firstly, the analysis of empirical research indicated the potential conflation between the moral context of the family relationship and the legal regime of support in the exercise of legal capacity. It pointed out that the culturally-based understanding of family relationship and the paternalism resulting from it underlie the legal culture of ignoring disabled people's rights and autonomy. This could have an influence on the effectiveness of the legal regime of support in the exercise of legal capacity and should thus be considered in the implementation of Article 12 in China. Second, the analysis of empirical research found out that guardianship, as a form of substitute decision-making, is imposed not only on mentally disabled people but also on disabled people with non-cognitive impairments. It further examined the driving forces behind substitute decision-making in practice and pointed out that substitute decision-making in practice could be driven by the complex interaction between impairments, culturally-based understanding and practices, and social barriers faced by disabled people. The complexity regarding the driving forces behind substitute decision-making should be recognized and carefully considered in the implementation of Article 12. Third, it was pointed out in the analysis that the current law fails to provide a legal framework for people, other than disabled people's families, to provide support for disabled people. The absence of such a legal framework has already created barriers for disabled people in terms of obtaining support in the exercise of legal capacity, and it has restrained potential supporters from providing more effective support as well. The analysis of empirical research also indicated that such an absence in law could underpin the culturally-based understanding and practice that disabled people's families have the power to make decision for the disabled people.

Last, the analysis of empirical research revealed that due to the interaction of various factors and social barriers, disabled people may currently have very narrow social networks. Such narrow social networks may further result in various difficulties in terms of support for disabled people's exercise of legal capacity. It has been argued that such existing difficulties should be sufficiently considered and addressed in the implementation of Article 12. It has also been argued that to ensure the effectiveness of support in the exercise of legal capacity, the implementation of Article 12 should entail a legal regime of support built on diverse, flexible and sustainable social networks.

Chapter 8: Reflections on Reforming Domestic Law in Light of Chinese Legal Culture

1. Introduction

Based on the analysis of Article 12 in Chapter 3, relevant Chinese law in Chapter 4, and empirical research findings of legal culture in Chapter 6 and 7, this chapter will reflect on reforming the domestic law to achieve consistency with Article 12 of the CRPD and explore the degree to which the changes in law has the potential to bring about changes in relevant legal culture.

As analyzed in Chapter 2⁷⁷⁰, the relationship between law and social and cultural context is an intricate interrelationship. The full implementation of international human rights law requires the meaning, implication and value of the law to be presented in a culturally sensitive way to suit the particular social and cultural context, and at the same time, the implementation of international human rights law has the potential to change the social and cultural context. By analysing the implication of empirical research findings of legal culture, Chapter 7 identified the key legal culture-related issues to be considered in the implementation of Article 12, a piece of international human rights law, in China and examined the degree to which the implementation of Article 12 may be influenced by the prevailing legal culture. Based on the insights developed in Chapter 7, this chapter will focus on two major issues. First, it will reflect on reforming the domestic law to transpose Article 12 into domestic law in a culturally sensitive way while maintaining its fundamental meaning, implication and value. Second, it will explore the degree to which the implementation of

⁷⁷⁰ see, Chapter 2 from 16

Article 12, through the domestic law reform, has the potential to change the relevant social and cultural context.

The reflections on domestic law reform and the degree to which the changes in the law have the potential to change the relevant legal culture will be considered from four interrelated perspectives in the following sections. Section 2 focuses on how the affirmation of disabled people's right to equal recognition could be elaborated in domestic law. Section 3 examines how the domestic law on legal capacity could be reformed to ensure disabled people's right to legal capacity on an equal basis with others. Section 4 explores how the legal regime of support could be developed in domestic law to ensure disabled people's right to get support in the exercise of legal capacity. Section 5 illustrates the kind of legal mechanisms of safeguarding and monitoring that should be established in domestic law to protect and fulfil disabled people's right to equal recognition before the law.

The analysis of the proposed domestic law reform in this chapter is carried out in the light of the social and cultural context, especially the legal culture in China as examined in Chapters 6 and 7. It focuses on how the proposed domestic law reform shows cultural sensitivity and how the implementation of Article 12, through the domestic law reform, has the potential to change the relevant legal culture in China. As examined in Chapter 2,⁷⁷¹ given the domestic legal system and social context in each jurisdiction, there might not be a one-size fits all approach for the full implementation of international human rights law at the national level. However, given the universality of human rights law, the implementation of international human rights law in different jurisdictions may still share a certain degree of similar approaches and commonalities. Accordingly, the analysis of the domestic law reform in the

⁷⁷¹ see, Chapter 2 from 16

light of Article 12 in this chapter might share certain commonalities or provide relevant insights regarding the implementation of Article 12 in other jurisdictions.⁷⁷²

2. Affirmation of Disabled People's Right to Equal

Recognition before the Law

As discussed in Chapter 3, Article 12 of the CRPD provides a clear affirmation of disabled people's right to equal recognition before the law.⁷⁷³ The analysis of the current Chinese law in Chapter 4⁷⁷⁴ shows that, in contrast to Article 12, the current Chinese law contains many ambiguities in terms of affirming disabled people's right to equal recognition before the law. Such ambiguities in the law mean that there is a fundamental gap between the current law and the requirements of Article 12. The analysis of legal culture in Chapter 7⁷⁷⁵ further shows that such ambiguities in the law arguably result in relatively low legal consciousness of disabled people's right to equal recognition before the law. They may also drive, or even encourage, discriminatory interference in disabled people's exercise of legal capacity. To implement Article 12 at the national level in China, one of the fundamental issues to be addressed in the domestic law reform is that a definite and clear affirmation of disabled people's right to equal recognition before the law should be provided in domestic law.

To ensure that the non-discriminatory position and human rights values elaborated in Article 12 are fully rendered at the national level, the relevant domestic law should be instituted to affirm that all individuals have the right to

⁷⁷² For the legislative and policy-making effort in other jurisdictions, see, for example, BD Kelly, 'The Assisted Decision-Making (Capacity) Bill 2013: Content, Commentary, Controversy' (2014) 184 *Irish Journal of Medical Science* 31; Bach and Kerzner (n 206).

⁷⁷³ CRPD (n 2) Article 12; Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 11-13.

⁷⁷⁴ see, Chapter 4 from 78

⁷⁷⁵ see, Chapter 7 from 211

be recognized as persons before the law on an equal basis. The recognition of persons before the law should not be conditional on the demonstration of an individual's capability in any form. Individuals' impairments and capabilities should not be relevant to the recognition of persons before the law. In addition, the relevant domestic law should manifest that the State and other social actors have the obligation not to deny individuals' legal status as persons before the law on the basis of disability-related reasons or in other discriminatory way. The discriminatory denial of an individual's right to equal recognition before the law may constitute the violation of that individual's legal rights.

The analysis of the empirical research in Chapter 7⁷⁷⁶ revealed that the ambiguities in terms of the statutory obligation to refrain from discriminatory denial of disabled people's legal status as persons before the law are one of the factors that have caused the low level of legal consciousness of disabled people's right to equal recognition before the law. Such ambiguities in the law also create practical obstacles for disabled people in terms of defending their right to equal recognition before the law. Accordingly, the statutory obligation on the State and other social actors to refrain from the discriminatory denial of disabled people's equal recognition before the law and the possible legal liabilities for this discriminatory denial should be prescribed in the relevant domestic law without ambiguities. The prescription of the statutory obligations and legal liabilities is an essential factor to ensure that the affirmation in law of disabled people's right to equal recognition before the law can function effectively in practice.

The affirmation in law of disabled people's right to be recognized as persons before the law on an equal basis is essential to the domestic law reform in the

⁷⁷⁶ see Chapter 7 from 211 to 219

light of Article 12 as it renders the non-discriminatory position at a holistic level. In addition to the changes in the law, this affirmation has the potential to change the current legal culture, as discussed in Chapter 7,⁷⁷⁷ regarding a relatively low level of consciousness of disabled people's right to equal recognition before the law and little legal mobilization. Moreover, given the close connectivity between the right to equal recognition before the law and other human rights, as discussed in Chapter 3,⁷⁷⁸ this affirmation and the non-discriminatory position rendered by it may be able to go beyond its basic purpose of ensuring disabled people's rights to equal recognition before the law. It may also serve as an innovator of change to raise people's awareness of disabled people's equal rights and to develop the legal culture of respecting, protecting and fulfilling disabled people's rights in a broader sense. Such potential to bring about changes to the legal culture reflects Lewis's argument that the CRPD embodies the expressive role of human rights by promoting a shift of attitudes and the reconsideration of prevailing practice and assumptions regarding disabled people.⁷⁷⁹

3. Developing an Inclusive Paradigm of Legal Capacity in

Domestic Law

As analysed in Chapter 3, Article 12 affirms that disabled people have the right to enjoy legal capacity, to be both a holder of rights and an actor under the law, on an equal basis with others in all areas of life.⁷⁸⁰ The analysis of the current Chinese law in Chapter 4⁷⁸¹ revealed that mentally disabled people remain the

⁷⁷⁷ see Chapter 7 from 211

⁷⁷⁸ see, Chapter 3 from 53

⁷⁷⁹ Oliver Lewis, 'The Expressive, Educational and Proactive Roles of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities' in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-Based Mental Health Laws* (Hart Publishing 2010); For a discussion, see also, Alex Geisinger and Michael Ashley Stein, 'A Theory of Expressive International Law' (2007) 60 *Vanderbilt Law Review* 75.

⁷⁸⁰ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 12.

⁷⁸¹ see, Chapter 4 from 78

group whose legal capacity is commonly denied in the current Chinese legal system and the denial of legal capacity further results in the deprivation of many other basic rights. The analysis of the empirical research in Chapters 6⁷⁸² and 7 further shows that the denial of an individual's legal capacity in practice is not always consistent with the legal standards and procedures in the current law. Arbitrary and discriminatory interference in the exercise of legal capacity is experienced not only by mentally disabled people but also by disabled people with other impairment labels. To achieve the full implementation of Article 12 at the national level, an essential issue to be addressed is to repeal the discriminatory denial of disabled people's legal capacity in both law and practice. The following sections examine two issues. One is the new implications of the right to legal capacity to be elaborated in the domestic law in the light of Article 12, and the other is the justifiable limitations on the exercise of legal capacity.

3.1 The new implications of the right to legal capacity

To ensure that the non-discriminatory position and human rights values elaborated in Article 12 are fully rendered in domestic law, the relevant domestic law should be instituted to affirm that individuals have the right to be recognized as having full legal capacity on an equal basis. The right to legal capacity should not be conditional on the demonstration of an individual's capabilities. The conception of legal capacity in domestic law should encompass two indivisible components in line with Article 12, which are the legal capacity to be a right holder and the legal capacity to act under the law. In addition, it should be elaborated in domestic law without ambiguities that to achieve substantive equality in terms of the right to legal capacity, disabled people are entitled to get support, based on their will and preference, in the exercise of legal capacity.

⁷⁸² see, Chapter 6 from 151 to 181, and Chapter 7 from 211 to 219

Corresponding to the individual's right to legal capacity, the domestic law should manifest the statutory obligations on the State and other potential social actors. Although Article 12 prescribes only the State's obligation to recognize disabled people's right to legal capacity on an equal basis with others, the individual's right to exercise legal capacity in domestic law may necessitate a broad range of potential duty bearers. To fulfil its obligation under Article 12(2) the State may have to turn the general obligation of recognizing disabled people's right to legal capacity into more specific duties in domestic law and policies, and assign such duties to a wide range of social actors at the domestic level. Two aspects of these obligations, in particular, should be elaborated in domestic law. One is that the State and other potential social actors are obliged not to discriminatorily deny or interfere in individuals' exercise of legal capacity. The other is that the State and other potential social actors have the obligation to guarantee that support in the exercise of legal capacity is available and accessible to disabled people, and disabled people can get support according to their will and preferences. The domestic law should manifest that discriminatory denial of, or interference in, disabled people's exercise of legal capacity or failure to guarantee the availability and accessibility of support may constitute violations of individuals' rights.

Elaborating these new implications of the right to legal capacity in domestic law is essential to the implementation of Article 12 at the national level. The proposed changes in the domestic law on legal capacity in the light of Article 12 will be powerful in terms of repealing the legal ground for the discriminatory denial of disabled people's legal capacity. Since the proposed law reform will prescribe both the negative and positive obligations of the State and other social actors to respect, protect and fulfil individuals' right to legal capacity on an equal basis, it will provide the legal framework to achieve substantive equality in terms of individuals' right to legal capacity. In addition, elaborating

these new implications of the right to legal capacity in domestic law has the potential to change the social understanding of the discriminatory denial of, or interference in, disabled people's exercise of legal capacity from a common and justifiable practice to one that violates individuals' equal rights.⁷⁸³ Moreover, the proposed changes in the domestic law on legal capacity will provide a framework to reflect the relational aspect of an individual's exercise of legal capacity and shift the focus from individuals' capabilities to the potential social barriers to disabled people's exercise of legal capacity. This framework has the potential to enable disabled people to redefine the obstacles and disadvantages they have experienced in their exercise of legal capacity. It also has the potential to challenge the public's understanding of the nature of autonomous decision-making and to lead the whole of society to consider that it may always be difficult for disabled people to access support in the exercise of legal capacity while formal or informal support is always available to people labelled as 'non-disabled.'

3.2 The justifiable limits on an individual's exercise of legal capacity

A key question regarding the inclusive paradigm of legal capacity is whether there is room for limitations on the exercise of legal capacity. Article 12 and General Comment No.1 are not concerned with limits on legal capacity which are not based on disability.⁷⁸⁴ The analysis of empirical research in Chapter 6 and 7⁷⁸⁵ revealed that in practice, the limits on the exercise of legal capacity may be imposed on disabled people discriminatorily by superficially disability-neutral reasons. Accordingly, for the purpose of effective

⁷⁸³ For a discussion of law's ability to change the social meaning of particular behaviors, see Geisinger and Stein (n 776); see, also Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144 *University of Pennsylvania Law Review* 2021.

⁷⁸⁴ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 32.

⁷⁸⁵ see, Chapter 6 from 150 to 182 and Chapter 7 from 211 to 219

implementation of Article 12 at the national level, it is necessary to examine the justifiable limits on the exercise of legal capacity in more detail in the context of domestic law. The question is specified as, can an individual exercise legal capacity and effectively cause legal consequences, such as creating, modifying or terminating a legal relationship whenever he/she intends to, and if not, what are the justifiable limits on the exercise of legal capacity?

Removing all of the possible limitations on one's exercise of legal capacity is not required by Article 12 and, from the perspective of domestic law and practice, it may be impractical. This is analysed from three aspects. First, many disability-neutral factors may prevent an individual's exercise of legal capacity from bringing actual legal effect. For example, an individual's exercise of legal capacity with the intention to create a contract may be blocked because of failure to reach a consensus with the other party in the contract being negotiated. Also, an individual's exercise of legal capacity with the intention to open a credit card account may be rejected because of his/her bad credit record. It can hardly be justified to remove such limitations only because the individual involved is a disabled person. More importantly, this is not required by Article 12, and doing so would not be consistent with the purpose of Article 12 or the requirement of recognizing disabled people's legal capacity on an equal basis with others.

Second, as Bach has pointed out, the right to challenge one's exercise of legal capacity in a specific case, mostly applied in contract or tort law, is one of the bases on which a person enjoys legal capacity. Challenging another's exercise of legal capacity can be regarded as a specific act undertaken by an individual to exercise his or her legal capacity to protect him or herself by using the law.⁷⁸⁶ It should also be clarified that the opportunity to challenge one's

⁷⁸⁶ Bach (n 214).

exercise of legal capacity is in itself disability neutral and extends legal protection to all people.

Third, the analysis of the empirical research in Chapter 7⁷⁸⁷ reveals that the interaction between disabled people's impairments and some existing social barriers may lead to concerns, and sometimes the reality, that disabled people's exercise of legal capacity might expose the rights and interests of their own or others to unnecessary or disproportionate risk. Such worries may then be one of the direct driving forces behind discriminatory interference in disabled people's exercise of legal capacity in practice. It has been argued in Chapter 7 that as one of the steps to be taken to protect disabled people's equal rights to legal capacity, effective legal mechanisms should be provided in domestic law to relieve such worries. Proper limitations on the exercise of legal capacity, given that they are not discriminatory in purpose or effect, could be one of the legal mechanisms to convince people that the legal effect of a decision, action or inaction is not recognized arbitrarily without conditions.

While arguing for the retention of the limitations on one's exercise of legal capacity, it is not ignored here that, as shown in both the literature and the analysis of the empirical research findings, limitations on an individual's exercise of legal capacity may cause an overwhelming discriminatory effect against disabled people in practice. To make the limitations on the exercise of legal capacity in line with Article 12, it should be ensured that the limitations are not discriminatorily applied to disabled people in purpose or effect. Besides, the analysis of the empirical research in Chapter 7⁷⁸⁸ has revealed that disabled people's exercise of legal capacity may be influenced by some of the existing social barriers or disadvantages faced by disabled people. It is further argued here that the limitation on one's exercise of legal capacity cannot be

⁷⁸⁷ see Chapter 7 from 215

⁷⁸⁸ see Chapter 7 from 215

justified under Article 12 if it has the effect of reinforcing the social barriers and disadvantages that are already suffered by disabled people or impose new disadvantages on disabled people. Premised on this understanding, it will now be discussed how the proposed changes in the domestic law on legal capacity are capable of ensuring that the limitation on the exercise of legal capacity is compatible with Article 12. This is illustrated from four aspects.

First, as discussed before, based on the proposed changes in domestic law in the light of Article 12, an explicit affirmation should be provided in the law that individuals have the right to be equally recognized as persons before the law with full legal capacity. The domestic law should also specify the statutory obligations of the State and social actors to respect and fulfil individuals' rights. Formed in this way, the proposed law reform can provide a clearer position that disability-related reasons cannot be the trigger of the limitations on the exercise of legal capacity. It does not provide any room or legal ground for the prejudicial presumption that disabled people may lack legal capacity, or disabled people's exercise of legal capacity can be limited for disability-related reasons.

Second, as discussed before, based on the proposed changes in the domestic law on legal capacity, an individual's right to legal capacity is not conflated with any form of that individual's capabilities. Therefore, the limitation on the exercise of legal capacity has no implications in evaluating an individual's capabilities. Instead, the limitation on the exercise of legal capacity should be elaborated in domestic law as having the function of triggering scrutiny regarding whether relevant duty bearers fulfil their duties to guarantee the availability and accessibility of support in the exercise of legal capacity. Alternatively, depending on the will and preference of the individual concerned, it may trigger a re-negotiation of the individual's support needs. As noted before, the proposed changes in the domestic law on legal capacity would

enable the focus to be shifted from individuals' capabilities to social actors' obligations to ensure the availability and accessibility of support in the exercise of legal capacity.

Third, as interpreted in General Comment No.1, Article 12 requires that legal capacity should not be removed from a person, 'even if this is in respect of a single decision'.⁷⁸⁹ Under the proposed changes to the domestic law on legal capacity, the limitations on the exercise of legal capacity do not have the implication, and should not amount to the effect, of removing legal capacity from a person. In cases where the disabled person's exercise of legal capacity does not lead to the intended consequences because of disability neutral reasons, for example, the failure to reach a consensus in a contractual relationship, such a limitation should be understood as a possible consequence of exercising legal capacity rather than the removal of legal capacity. In cases where support in the exercise of legal capacity is not sufficiently available or accessible to the disabled person, depending on the reason for the lack of support, the disabled person concerned may be entitled to claim the duty bearer's liability for violating the individual's right to exercise legal capacity. Alternatively, the disabled person may be entitled to require the renegotiation of the support arrangements. In either case, the lack of support should not be understood as warranting the removal of legal capacity from the individual. If the disabled person concerned recognizes the need to re-negotiate the support arrangement, such a renegotiation should be regarded as a part of the process of exercising legal capacity, rather than a result of the limitation on legal capacity. There may also be the cases where the disabled person concerned did not realize the need of support until his/her decision causes loss or damages, or where the appropriate support is available and accessible but the disabled person concerned insisted at the

⁷⁸⁹ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 27.

time that he/she does not want to have the support. These situations will be examined in later section regarding the legal mechanism of safeguarding disabled people's exercise of legal capacity.

Last, the analysis of the empirical research in Chapter 7⁷⁹⁰ shows that discriminatory denial of, or interference in, disabled people's exercise of legal capacity in practice may not necessarily be driven by law, and may, in a covert way, be driven by superficially disability-neutral reasons. The proposed changes in the domestic law may not be able to guarantee that discriminatory denial of disabled people's right to legal capacity never happens, just as contract law cannot ensure the performance of every contract. However, since the proposed law reform provides a clear affirmation of individuals' rights to equal recognition before the law and a specified scope of the corresponding obligation of the State and potential social actors, it may arguably provide a more powerful framework for disabled people to defend their exercise of legal capacity. Besides, the anticipation of legal liability for failure to respect or fulfil disabled people's right to legal capacity may also have the effect of preventing social actors from discriminatorily denying or interfering in disabled people's exercise of legal capacity. Furthermore, the proposed change in the law on legal capacity does not stand on its own. The development of the legal regime of support in the exercise of legal capacity and the safeguards of disabled people's exercise of legal capacity, which are discussed in the following two sections, are also indivisible parts of the proposed domestic law reform in the light of Article 12.

Given that, as revealed in the analysis of empirical research in Chapter 7,⁷⁹¹ the discriminatory interference in disabled people's exercise of legal capacity may be driven by some structural disadvantage and inequality suffered by

⁷⁹⁰ see, Chapter 7 from 215 to 238

⁷⁹¹ see, Chapter 7 from 215 to 238

disabled people and preventing disabled people from exercising legal capacity has long been understood as a justifiable way to protect disabled people themselves or the rights of a third party, repealing the discriminatory limitations on disabled people's right to legal capacity in practice may be a long and complicated process. Although the proposed law reform in light of Article 12 shows its potential in addressing the discriminatory limitations on disabled people's exercise of legal capacity, it is recognized that the implementation of Article 12 alone may not be sufficient to defend disabled people's equal right to legal capacity in practice. A wider process of social change including addressing issues falling under other CRPD provisions will be necessary.

4. Developing the Legal Regime of Support in the Exercise of Legal Capacity in Domestic Law

As analysed in Chapter 3, Article 12 requires that access to support should be provided for disabled people in the exercise of legal capacity.⁷⁹² Support in the exercise of legal capacity should replace the regime of substitute decision-making, which enables others to make decisions for disabled people against their will and preference.⁷⁹³ The term support is not specifically defined in either the CRPD or General Comment No.1. Instead, General Comment No.1 illustrates the term support by providing a wide range of examples of support measures and stipulating that support in the exercise of legal capacity should never amount to any form of substitute decision-making.⁷⁹⁴ It is also emphasized in General Comment No.1 that the support should be based on trust and provided with respect to the individual's will and preferences.⁷⁹⁵

⁷⁹² Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 15.

⁷⁹³ *ibid* para 26-28.

⁷⁹⁴ *ibid* para 17.

⁷⁹⁵ *ibid* para 17.

The analysis of Chinese law in Chapter 4⁷⁹⁶ and the analysis of the empirical research in Chapters 6 and 7⁷⁹⁷ shows that adult guardianship in current Chinese law and practice can be regarded as a typical form of substitute decision-making. Besides, support in the exercise of legal capacity in line with Article 12 is not available either in the law or in practice. Accordingly, to achieve the full implementation of Article 12 in China, one essential issue to be addressed is to develop the legal regime of support in domestic law.

The analysis of the empirical research in Chapter 7⁷⁹⁸ raised a specific issue to be taken into account in developing the legal regime of support in domestic law. As pointed out in Chapter 7, based on the cultural and moral understanding of the family relationship, the legal regime of support may have some inevitable interaction with the moral context of the family relationship. In current practice, the strong family relationship and the paternalism resulting from it underlie the legal culture of ignoring disabled people's rights and autonomy. It was argued in Chapter 7 that such negative influences of the family relationship should be avoided in the legal regime of support. To develop the legal regime of support in domestic law in line with Article 12, efforts should be made to transform the trust, faith and intimacy rooted in the moral context of the family relationship into useful resources to support disabled people's rights, will, preferences and autonomy.

Based on how the support is illustrated in Article 12 and General Comment No.1 and the issues raised in the empirical research findings, this section discusses support in the exercise of legal capacity in more detail in the context of domestic law reform in the light of Article 12.

⁷⁹⁶ see, Chapter 4 from 82 to 89

⁷⁹⁷ see, Chapter 6 from 132 to 137; 155 to 158, 166 to 171, 178 to 181; Chapter 7 from 219 to 238

⁷⁹⁸ see Chapter 7 from 219 to 231

4.1 The proposed legal regime of support

The legal regime of support proposed in this thesis for the domestic law reform in the light of Article 12 can be analysed from four aspects. First, the proposed legal regime of support is based on an awareness that the need for support is sometimes mutual. Although the support in the exercise of legal capacity prescribed in Article 12 and interpreted in General Comment No.1 is mainly from the perspective of the disabled people's needs, it should not lead to the understanding that the disabled person is the only one that needs or benefits from support in the exercise of legal capacity. Such an understanding is counterfactual and discriminatory against disabled people. As a simple example, when a deaf person tries to exercise his/her legal capacity to create a contract, both parties to the contract under negotiation can benefit from the support of a sign language interpreter. The mutual need for support may not be codified into a specific legal rule, but awareness of it should be embedded in how the legal regime of support is elaborated in domestic law.

Second, General Comment No.1 has pointed out the high degree of diversity regarding the forms and intensity of support measures.⁷⁹⁹ Accordingly, the proposed legal regime of support is built on the understanding that disabled people's needs in terms of support are diverse and dynamic. The relevant domestic law should thus enable a legal regime of support that encompasses a spectrum of support measures rather than limited forms of support with less flexibility. In addition, given the varying forms and intensity of support in the exercise of legal capacity, different support measures may lead to a diversity of duty bearers. Accordingly, although Article 12 prescribes only the State's obligation to guarantee access by disabled people to support, the legal regime of support in domestic law may necessitate a broad range of potential duty

⁷⁹⁹ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 17.

bearers. As a way to fulfil its obligation under Article 12(3), the State may have to turn the general obligation of providing support into more specific duties in domestic law and policies, and assign such duties to a wide range of social actors at the domestic level. Besides, the State may also perform its obligation under Article 12 (3) by providing some support, in a general sense, to the potential duty bearers, and thus achieve the ultimate effect of guaranteeing the availability and accessibility of support for disabled people. For example, the State may provide financial support to hospitals in rural areas to equip them with more support measures, such as a universal design and communication assistants, and therefore guarantee that support can be accessed in cases where a disabled person needs to make informed medical decisions in that hospital.

Third, support in the exercise of legal capacity should be based on a network of multiple supporters rather than the capabilities of one supporter. In making this argument, the possibility is not ignored that some people may prefer to be in a relatively isolated situation with all of their support provided by as few supporters as possible. In this case the person's preference should be respected. However, the proposed legal regime of support is not based on the presumption that the support is always provided by only one supporter. The analysis of the empirical research in Chapter 7⁸⁰⁰ reveals the various barriers faced by disabled people with narrow social networks. It also suggests that support based on narrow social networks may be more likely to cause undue influence on disabled people's exercise of legal capacity. Accordingly, support based on a wide, flexible and sustainable social network should be prescribed in the law and available in practice. Besides, to ensure the effectiveness of support based on a network, the proposed legal regime of support should define the legal positions of the different supporters, and specify the scope and

⁸⁰⁰ see Chapter 7 from 231 to 238

standards of the rights and obligations of the various supporters in providing support. It should also entail legal mechanisms to facilitate the cooperation of the multiple supporters. The analysis of the empirical research in Chapter 7 shows that the ambiguities in the legal status, rights and obligations of supporters may be a barrier for disabled people in terms of getting support in the exercise of legal capacity.⁸⁰¹ This barrier should be removed by the proposed legal regime of support and relevant law reform in the light of Article 12.

The legal regime of support based on a wide, flexible and sustainable social network will enable disabled people's families to engage in the support in disabled people's exercise of legal capacity and, at the same time, will safeguard disabled people's exercise of legal capacity against the paternalism resulting from strong family relationships. This further shows the potential to transform the trust, faith and intimacy rooted in the strong family relationship into useful resources to support disabled people's exercise of legal capacity. The degree to which a wide, flexible and sustainable social network can safeguard disabled people's autonomous exercise of legal capacity will be examined in more detail in the next section.

It is recognized and examined in Chapter 7⁸⁰² that since the legal regime of support may have a relatively high degree of interactions with the social and cultural elements, especially the moral context of family relationship, the prevailing social and legal culture may have influence on the effectiveness of the legal regime of support. However, the analysis of empirical research in Chapters 6 and 7⁸⁰³ also reveals that in current practice, the appropriate support from social actors and the effective legal and regulatory framework for

⁸⁰¹ see Chapter 7 from 231 to 235

⁸⁰² see Chapter 7 from 220 to 231

⁸⁰³ see Chapter 6 from 190 to 196, 201 to 205; Chapter 7 from 231 to 235

support in the exercise of legal capacity are desired by disabled people and their families. The legal framework for support is also desired by social actors who are willing to provide support for disabled people. Accordingly, the development of a legal regime of support, as long as is in a culturally sensitive way, is compatible with the need and desire of the people and the development of the social context. Such compatibility offers rich potential that the legal regime of support developed in law can be enacted effectively in practice. Moreover, while the development of a legal regime of support may be influenced by the social and cultural context, it also has the potential to bring about changes to some traditional social attitudes and culturally based practices. The analysis of the empirical research in Chapter 7⁸⁰⁴ reveals that in most cases, caring for and supporting disabled people is regarded as the moral obligation of disabled people's families. The development of a legal regime of support in domestic law may increase the consciousness that supporting disabled people is not only a family issue or moral obligation but also a social issue and legal obligation. Such potential change in the social and cultural context may further facilitate the practice of the legal regime of support.

4.2 The negotiation of support needs

A key question in terms of support in the exercise of legal capacity is whether it can be accompanied by some form of assessment. As discussed before in Chapter 3,⁸⁰⁵ Article 12 clearly rules out the three main forms of legal capacity assessment applied in many jurisdictions, namely the status approach, the outcome approach, and the functional test.⁸⁰⁶ The review of the academic debate in this regard shows that while an assessment of one's cognitive

⁸⁰⁴ see Chapter 7 from 220 to 228

⁸⁰⁵ see Chapter 3 at 45

⁸⁰⁶ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 15.

abilities is rejected by the majority of scholars, there may be some room for assessment with the purpose of providing support.⁸⁰⁷

It is argued here that there is room for assessment centred on one's support needs. However, based on the proposed legal regime of support analysed above, the term assessment is replaced with the term negotiation in the current discussion. The term assessment may arguably imply some kind of unequal power relationship between the one initiating the assessment and the one being assessed, while the term negotiation is more consistent with the view, as discussed before, that having support is a disabled person's right rather than obligation, and the need for support is sometimes mutual. As a part of the proposed legal regime of support, it is argued here that to guarantee that the support provided for disabled people is adequate, appropriate and in line with their will and preference, negotiation of the support needs is necessary. General Comment No.1 provides that there should be 'new, non-discriminatory indicators of support needs'.⁸⁰⁸ The negotiation of support needs serves as a non-discriminatory indicator of support needs in the proposed legal regime of support to be set up in the light of Article 12.

To ensure that the negotiation of support needs to be elaborated in domestic law is in line with Article 12, it may be helpful to identify why the status, outcome and functional approach to legal capacity assessment fail to be compatible with Article 12. By referring to General Comment No.1 and the relevant academic debate, how the negotiation of support needs should be elaborated in domestic law is analysed from four aspects.

⁸⁰⁷ Gooding (n 255); People with Disabilities Australia and Australian Center for Disability Law, 'Submission to the Australian Law Reform Commission (ALRC), Equality, Capacity and Disability in Commonwealth Laws, Discussion Paper' <<https://www.alrc.gov.au/publications>>.

⁸⁰⁸ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 29 (i).

First, the proposed negotiation of support needs should not be triggered by disability related reasons. As has been observed, the status approach of legal capacity assessment is explicitly triggered by the diagnosis or suspicion of disability related attribution. The outcome and functional approach may not take disability as an explicit trigger, but always have the effect of triggering by disability-related attributions in practice.⁸⁰⁹ A disability-related trigger in any form can be discriminatory. Therefore, the proposed negotiation of support needs should not be triggered by any disability-related attributions. Instead, it should be triggered when the disabled person concerned requires support in the exercise of legal capacity. Alternatively, it may be triggered when some other people feel that some support measures are needed for the individual's exercise of legal capacity and the individual concerned is willing to engage in the negotiation.

Second, the right to require and refuse the negotiation of support needs should be elaborated in the law as an inseparable part of disabled people's right to have support in the exercise of legal capacity. Underlying the status, outcome, and functional approach is arguably a common presumption that an assessment is required by the non-disabled party in the decision-making process, and that disabled people have no right to refuse the assessment. Such a presumption, as well as the practice, are discriminatory, and therefore should not be repeated in the proposed legal regime of support. The domestic law should manifest that it is disabled people's right, rather than obligation, to engage in the negotiation of support needs as a part of their exercise of legal capacity. Given a specific case in which a disabled person exercises his/her legal capacity, when it is the disabled person concerned that requires the negotiation of support needs, the non-disabled party may not always have the right to refuse because, as discussed before, the non-disabled party may be

⁸⁰⁹ *ibid* para 15; Dhanda (n 28).

obliged by domestic law to guarantee access to support for the disabled person concerned. The non-disabled party may also be able to suggest a negotiation of support needs. However, the disabled person concerned has the right to refuse, because as discussed before, having support is a right rather than an obligation of disabled people.

Third, the proposed negotiation of support needs should not aim to identify the perceived best interests of the disabled person being supported. As analysed in General Comment No.1 and many academic debates, the traditional approaches to legal capacity assessment have the main purpose of ensuring that the decision made by the individual concerned is wise, rational and in his/her best interests.⁸¹⁰ According to General Comment No.1, the best interest paradigm is no longer compatible with Article 12.⁸¹¹ Therefore, the proposed negotiation of support needs should not be based on the same purposes. Under the proposed legal regime of support, the purpose of the negotiation of support needs is to uncover and understand the needs, will and preferences of the disabled person concerned.

Fourth, the proposed negotiation of support needs should not lead to any forms of discriminatory denial of, interference in, or limitations to, disabled people's exercise of legal capacity. Nor should it result in any fixed label or categorization of disabled people's support needs. As pointed out in General Comment No.1, as well as by many scholars, the traditional approach to legal capacity assessment may result in the removal of full legal capacity from the disabled person concerned.⁸¹² General Comment No.1 has made it explicit that such discriminatory denial of disabled people's legal capacity is not

⁸¹⁰ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 15, 22.

⁸¹¹ *ibid* para 21.

⁸¹² *ibid* para 15; see, also, for example, Dhanda (n 28).

compatible with Article 12.⁸¹³ Accordingly, the proposed negotiation of support needs should not result in any label of legal incapacity being placed on the disabled people concerned or any forms of exclusion being imposed on them in terms of exercising legal capacity on an equal basis with others. Otherwise, it is not compatible with Article 12. In addition, General Comment No.1 recognizes that disabled people's needs of support in the exercise of legal capacity may change with time.⁸¹⁴ It has also been discussed before that the proposed legal regime of support should be based on the understanding that disabled people's needs of support are diverse and dynamic. Accordingly, the proposed negotiation of support needs should not have the effect of categorizing disabled people into a fixed status of support needs. A fixed status of support needs does not necessarily constitute discrimination against disabled people. However, it may not be capable of responding to possible changes in the disabled person's needs, will and preferences in terms of support, and, may therefore not be completely in line with Article 12.

5. Legal Mechanisms of Safeguarding and Monitoring

The analysis of current Chinese law in Chapter 4⁸¹⁵ has revealed that a legal mechanism to safeguard disabled people's exercise of legal capacity is almost absent from the current Chinese law. The analysis of the empirical research in Chapter 6⁸¹⁶ has further shown that such ambiguity in the law is a barrier for disabled people in terms of defending their exercise of legal capacity in practice. To achieve the full implementation of Article 12 at the national level, definite legal mechanisms should be established in domestic law to safeguard disabled people's right to equal recognition before the law and to monitor whether other relevant duty bearers are fulfilling their obligation to respect and

⁸¹³ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 15.

⁸¹⁴ *ibid* para 17 and 24.

⁸¹⁵ see Chapter 4 from 78

⁸¹⁶ see Chapter 6 from 189 to 190

fulfill disabled people's right to equal recognition before the law. Based on the analysis of Article 12, the relevant academic debate, and the empirical research findings, it is argued here that the proposed legal mechanism of safeguarding and monitoring should be capable of responding to three main issues. The following sub-sections look into these issues.

5.1 The safeguard of disabled people's exercise of legal capacity

The first issue to be considered is that, as required by Article 12 (4), sufficient safeguarding should be guaranteed for disabled people's exercise of legal capacity including the right to support in the exercise of legal capacity.⁸¹⁷ According to General Comment No.1, the key functions of the safeguarding prescribed in Article 12(4) are to ensure respect of individuals' rights, will and preferences, and protect individuals from undue influences.⁸¹⁸

It is recognized and examined in Chapter 3⁸¹⁹ the potential complexity in terms of safeguarding in the exercise of legal capacity. The analysis of the empirical research in Chapters 6 and 7⁸²⁰ also indicates difficulties in safeguarding disabled people's exercise of legal capacity in practice. Such difficulties should be recognized and addressed in the domestic law in the light of Article 12. Three aspects of the potential difficulties have been identified, and how such difficulties can be addressed in the proposed legal mechanism of safeguarding and monitoring in the light of Article 12 will be discussed below.

First, it may sometimes be difficult to know the disabled people's will and preference regarding the exercise of legal capacity. The analysis of the

⁸¹⁷ CRPD (n 2) Article 12(4).

⁸¹⁸ Committee on the Rights of Persons with Disabilities, 'General Comment No.1' (n 5) para 20-22.

⁸¹⁹ see Chapter 3 from 63 to 68

⁸²⁰ see Chapter 6 from 144 to 149, 201 to 205; Chapter 7 from 231 to 238

empirical research in Chapter 7⁸²¹ shows that such difficulties may be evident especially in cases where the disabled person concerned has only a very narrow social network.

Second, whether an individual's rights, will and preferences are fully respected and whether an individual suffers, for example, fear, aggression, threat, deception or manipulation in the exercise of legal capacity are not purely objective standards, but also subjective feelings. The analysis of the empirical research in Chapters 6 and 7⁸²² suggests that such subjective feelings may be influenced by the interaction of many factors. Accordingly, it may be difficult to have specific standards or indicators to determine whether the person's will and preferences are being respected or whether the disabled person's exercise of legal capacity is under undue influence.

Third, the analysis of the empirical research on the current adult guardianship practice in Chapter 7⁸²³ has revealed that when the role of guardian is played by disabled people's families, the moral context of the family relationship may, in different ways, influence the disabled person's exercise of legal capacity. The analysis of the empirical research also suggests that such influence may not be removed by abolishing the adult guardianship mechanism and setting up a legal regime of support in line with Article 12, because disabled people's families, in most cases, will engage in the support arrangements. Considering that support in the exercise of legal capacity may have some degree of conflation with the moral context of the family relationship, the potential tension between safeguarding for the exercise of legal capacity and the individual's right to family and private life should not be ignored. Much care should be taken that the examination of whether the disabled person's rights, will and

⁸²¹ see Chapter 7 from 235 to 238

⁸²² see Chapter 6 from 184 to 190, Chapter 7 from 220 to 238

⁸²³ see, Chapter 7 from 220 to 238

preferences are being fully respected in the exercise of legal capacity does not amount to an intervention in the individual's private life. However, the border between the two may not always be clear, especially when the disabled person's family members play a major role as supporters. This may add further difficulties in ensuring effective safeguarding for disabled people's exercise of legal capacity.

Based on the awareness of these potential difficulties, it is argued here that exploring proper and effective safeguards for disabled people's exercise of legal capacity may be a continuous process. At the current stage, the proposed law reform in the light of Article 12 may enable legal mechanisms to safeguard disabled people's exercise of legal capacity in two ways.

Firstly, as discussed in the previous sections, the proposed legal regime of support should entail support arrangements based on a broad, flexible and sustainable social network. The effort to encourage and guarantee a wider social network for disabled people *per se* may be regarded as a way to safeguard disabled people's exercise of legal capacity. With a broad support network, disabled people may have more opportunities to select supporters and support measures according to their will and preferences. When disabled people can get support from different sources, they may be able to weigh and balance the opinions of various supporters rather than being overwhelmingly influenced by a specific person. In addition, when support in the exercise of legal capacity is based on a broad social network, the power may be balanced between different supporters, and this may help to decrease the potential dominance imposed on the individual by a specific person. Furthermore, a broad support network offers the possibility of more indicators, from different perspectives, to identify the individual's real will and preference, or the best interpretation of the individual's real will and preference. It may also facilitate

the examination of whether the individual's rights, will and preferences are being fully respected.

Secondly, considering that examining whether the support provided for disabled people is appropriate may cause some degree of intervention in disabled people's private lives, it may be better to encourage disabled people to choose the mechanism of safeguarding and to report potential abuse of support voluntarily. Diverse options in terms of safeguarding and monitoring, such as regular visits or periodic reviews of the individual's situation, should be stipulated in the domestic law and available in practice. The relevant domestic law should also manifest that disabled people should be informed of the option of safeguarding and monitoring, and as a part of the right to have support in the exercise of legal capacity, disabled people should have the right to choose safeguarding measures in accordance with their will and preferences. In addition, as part of the proposed law reform in the light of Article 12, the relevant domestic law should provide various forms of complaints mechanism. The purpose of the complaints mechanism is not to identify or determine legal liabilities, but to encourage disabled people to disclose anything that influences their exercise of legal capacity. Accordingly, it does not have to be a formal judicial procedure, and some more informal and flexible forms may be preferred as long as they can be sufficiently accessible, both physically and emotionally, to disabled people to raise complaints or suggestions about the support provided to them. In addition to accessibility, it should also be guaranteed that the complaint mechanism will protect the individual's privacy, and cause no harm to the individual.

5.2 Damage resulting from disabled people's exercise of legal capacity

The second issue to be responded to by the proposed legal mechanism of safeguarding and monitoring is the concern that disabled people's exercise of legal capacity may cause damage to their own rights and interests or those of others. The exercise of legal capacity by people without impairments may also cause damage. However, concerns about possible damage are still considered specifically in the context of disabled people's exercise of legal capacity. The main reason is that, as revealed in the analysis of the empirical research in Chapter 6,⁸²⁴ because of the interaction between impairments and different social barriers faced by disabled people, it is sometimes the current social reality that disabled people may be more likely than people without impairments to lack the capability to be responsible for their exercise of legal capacity. The analysis of the empirical research further shows that concerns about the negative consequences of disabled people's exercise of legal capacity are one of the main driving forces for the discriminatory denial of disabled people's exercise of legal capacity in practice. Accordingly, effective legal mechanisms to address such worries are essential for the protection of disabled people's right to legal capacity.

The analysis of the empirical research in Chapter 7⁸²⁵ has shown two areas of concern in terms of potential damage resulting from disabled people's exercise of legal capacity. One aspect of concern is that disabled people's exercise of legal capacity may cause damage to themselves. It is recognized here that the possibility of such damage may not be entirely avoided even when the legal regime of support in line with Article 12 is guaranteed in both law and practice. Like everyone else, disabled people may not be able to foresee the

⁸²⁴ see Chapter 6 from 140 to 149, 159 to 166; 190 to 196

⁸²⁵ see Chapter 7 from 215 to 219, 228 to 231

consequences of every decision or action, or they may be aware of their support needs until the exercise of legal capacity causes some damage. However, the possibility of such damage can be addressed by some legal mechanisms already provided in the current Chinese law. For example, Article 58 (3) of the Civil Law provides that an individual can require the voiding of a decision or action when he/she makes the decision or action under 'cheating, coercion or exploitation of his unfavorable position by the other party'.⁸²⁶ Article 59 of the Civil Law provides that an individual can require the altering or rescinding of a decision or action when he/she has a serious misunderstanding of the content of the decision or action, or the decision or action is obviously unfair.⁸²⁷

Currently such legal mechanisms are not effectively used to protect disabled people's rights and interests, and one of the main reasons for this is that disabled people may be prevented from making decisions or taking actions in the first place. Since disabled people's right to exercise legal capacity is to be affirmed and guaranteed in the proposed law reform in the light of Article 12, the legal right to void, alter or rescind a decision or action, as prescribed in the current law, should also be enjoyed by disabled people on an equal basis with others. This could be utilized as the legal mechanism to safeguard disabled people's rights and interests against possible damage caused by their exercise of legal capacity. What should be added in the law reform in the light of Article 12 is that such safeguarding mechanisms should be enjoyed by disabled people on a substantively equal basis. The relevant domestic law should stipulate that information about such safeguarding mechanisms should be available to disabled people in an accessible form, and disabled people should have the right to get support in resorting to such safeguarding mechanisms.

⁸²⁶ General Principle of the Civil Law (n 324) Article 58. In the 'General principles' of the Civil Code will be Article 148-151.

⁸²⁷ *ibid* Article 59. In the 'General principles' of the Civil Code will be Article 151.

The other aspect of the concerns about negative consequences of disabled people's exercise of legal capacity is that it may cause damage to the rights and interests of others. The analysis of Chinese law in Chapter 4⁸²⁸ and the analysis of the empirical research in Chapter 6⁸²⁹ shows that under the current law and practice, when a disabled person cannot be responsible for damage resulting from his/her exercise of legal capacity, the responsibility is imposed solely on the guardian or family members of the disabled person. As argued in Chapter 7,⁸³⁰ this may not be a proper solution because it may further drive the guardian or family members to impose substitute decision-making or undue influence on the disabled person, rather than supporting the disabled person's exercise of legal capacity. Besides, since, as discussed before, disabled people's lack of capability to be responsible may be rooted in some social barriers or disadvantages, it might not be equitable to put all of the responsibility on disabled people and their families.

It is proposed here that in cases where a disabled person's exercise of legal capacity causes damage to others, and the disabled person him/herself cannot be fully accountable for it, the corresponding responsibility for, for example, compensation, should not be imposed solely on one duty bearer. Instead, scrutiny should be conducted first to examine whether the disabled person concerned has been guaranteed access to support in accordance with his/her will and preference at each stage of his/her decision-making. If the damage was caused because the disabled person was not guaranteed access to appropriate support, the liability for such damage may be distributed among those who failed in their duty to ensure access to support. It should be noted that the person suffering the damage may also bear part of the duty to

⁸²⁸ see Chapter 4 from 82 to 86

⁸²⁹ see Chapter 6 from 166 to 171, 175 to 177

⁸³⁰ see Chapter 7 from 220 to 231

guarantee access to support. In cases where all of the duty bearers fulfil their duty to guarantee access to support, it is proposed here that the liability for damage caused by the disabled person's exercise of legal capacity should still not be imposed solely on the disabled person or his/her family. Instead, the feasibility of, for example, whether some remedial or compensatory mechanism can be established by the State to handle the damage in such cases should be explored. This proposal will not be discussed in detail in this thesis, but it may be worth exploring in the future.

There may be the situations in which a disabled person takes a course of action that poses a risk of serious and immediate harm to either him/herself or others, and after all efforts, he/she still refuses any form of support in the exercise of legal capacity. It is argued here that a necessary and proportionate intervention should be permitted in such relatively extreme cases.⁸³¹ It is further underlined that such interventions can be justified only when they are carried out to prevent serious and immediate harm and are done so on an equal basis for people with or without an impairment. To ensure that such interventions are not misused in practice, the proposed law reform in the light of Article 12 should provide detailed guidelines on when, how and according to which standards and procedures such interventions can be made. The relevant domestic law should manifest that only the least restrictive measures can be used, and in particular, the intervention should not cause any irreversible results. Moreover, it should also be provided in the relevant domestic law that the person concerned or any other relevant people can challenge the intervention, and the misuse of such an intervention may constitute the violation of an individual's rights and cause legal liabilities.

⁸³¹ For a discussion of such intervention, see, for example, Piers Gooding and Eilíonóir Flynn, 'Querying the Call to Introduce Mental Capacity Testing to Mental Health Law: Does the Doctrine of Necessity Provide an Alternative?' (2015) 4 *Laws* 245.

5.3 The availability and accessibility of legal mechanisms of safeguarding and monitoring

The third issue is to ensure that the legal mechanism of safeguarding and monitoring is available and accessible to disabled people on an equal basis with others. The analysis of the empirical research in Chapter 6⁸³² has revealed that under current Chinese law, disabled people who want to defend their rights by resorting to the law may be impeded by different legal, social and emotional factors. The following discussions highlight three aspects of such barriers and discuss how the barriers can be addressed in the proposed law reform in the light of Article 12.

First, the analysis of Chinese law in Chapter 4⁸³³ shows that under the current law, disabled people may be required to have a representative when they try to defend their rights in legal proceedings. The analysis of the empirical research in Chapter 6⁸³⁴ further shows that this constitutes a legal barrier that prevents disabled people from accessing to justice or legal remedy on an equal basis with others. Such a legal barrier should be removed in the proposed law reform in the light of Article 12. The proposed law reform in the light of Article 12 should entail the affirmation that disabled people have the right to represent themselves in formal legal proceedings on an equal basis with others. Besides, it should also be stipulated in the law that professional legal aid and other support in legal proceedings should be available and accessible to disabled people on an equal basis with others.

Second, the analysis of the empirical research in Chapter 6⁸³⁵ shows that resorting to legal settlement under the current law can be very time, money

⁸³² see Chapter 6 from 144 to 149, 189 to 190

⁸³³ see Chapter 4 from 79 to 89

⁸³⁴ see Chapter 6 from 144 to 149

⁸³⁵ see Chapter 6 from 189 to 190

and energy consuming for disabled people. This factor may drive disabled people away from resorting to legal settlement in practice. Accordingly, it is argued in this thesis that the legal mechanisms of safeguarding and monitoring provided in the proposed law reform should be economically affordable to all people, and the process of such mechanisms should not be disproportionately difficult.

Third, the analysis of the empirical research in Chapters 6 and 7⁸³⁶ shows that disabled people may have the concern that resorting to legal settlement, especially regarding guardianship issues, may break down their relationships with their family members or other people close to them. Such concerns may further make disabled people reluctant to resort to legal settlement even when they want to defend their rights, will and preferences against violation. To address this issue, the proposed law reform should entail legal mechanisms of safeguarding and monitoring with different forms and intensities. In addition to formal court proceedings, they should also include some relatively informal and flexible approaches, for example conciliation and mediation. Disabled people should be given the opportunity to choose from these different forms of legal mechanism according to their own will and preferences. Depending on which form they choose, they may also be given the opportunity to choose who will be involved in the proceedings. Different forms of legal mechanisms may lead to consequences with different legal effects. However, they should all be recognized by law. Besides, disabled people should be given the opportunity to challenge, modify or update the decisions, solutions or remedies reached under each form of legal mechanism.

⁸³⁶ see Chapter 6, from 182 to 190; Chapter 7 from 220 to 231

6. Conclusion

Based on the previous analysis of Article 12 and relevant Chinese law and legal culture, this chapter reflected on reforming the domestic law to transpose Article 12 of the CRPD into domestic law in a culturally sensitive way and explored the degree to which the changes in law has the potential to bring about changes in relevant legal culture. The reflections on domestic law reform and the potential change to the relevant legal culture were illustrated from four interrelated aspects

Section 2 examined how the affirmation of disabled people's right to equal recognition before the law could be elaborated in domestic law. It pointed out that a definite and clear affirmation in law of disabled people's right to equal recognition before the law is essential to the implementation of Article 12 at the national level as it renders the non-discriminatory position at a holistic level. Such an affirmation has the potential to change the current legal culture regarding a relatively low level of consciousness of disabled people's right to equal recognition before the law. It may also serve as an innovator of change to raise people's awareness of disabled people's equal rights and to develop the legal culture of respecting, protecting and fulfilling disabled people's rights in a broader sense.

Section 3 provided a detailed analysis of the new implications of the right to legal capacity that could be elaborated in domestic law in line with Article 12 and the negative and positive obligations on the State and other social actors to respect, protect and fulfil disabled people's right to legal capacity on an equal basis. It also examined the justifiable limitation on the exercise of legal capacity. It was pointed out in Section 3 that the proposed changes in the domestic law on legal capacity have the potential to enable the reconsideration

of disabled people's exercise of legal capacity and the nature of autonomous decision-making. It also has the potential to change the social meaning of the discriminatory denial of, or interference in, disabled people's exercise of legal capacity from a common and justifiable practice to one that violates individuals' equal rights.

Section 4 provided an analysis of how the legal regime of support in the exercise of legal capacity could be set up in domestic law. It underlined that in the proposed legal regime of support, support in the exercise of legal capacity should be based on a broad, flexible and sustainable social network. It also proposed that to ensure that the support provided for disabled people is appropriate and in line with disabled people's will and preference, the negotiation of support needs should serve as a non-discriminatory indicator of the support needs. It was underlined in Section 4 that the proposed legal regime of support has the potential to transform the culturally rooted strong family relationship, which is a source of paternalism in the current practice, into useful resources to support disabled people's rights, will and preferences. The proposed legal regime of support also has the potential to raise awareness that supporting disabled people is not only a moral obligation or a family issue but also a social issue and a legal obligation.

Section 5 analysed the legal mechanisms of safeguarding and monitoring that should be contained in the proposed law reform in the light of Article 12. It identified three issues that should be addressed by the legal mechanism of safeguarding and monitoring, namely the safeguarding of disabled people's exercise of legal capacity, concerns about damage resulting from disabled people's exercise of legal capacity, and the availability and accessibility of safeguarding and legal remedies. It then provided a detailed analysis of the importance of these three issues, the potential difficulties associated with them,

and how they can be addressed in the proposed law reform in the light of Article 12.

It was recognized in this chapter that the discriminatory denial of, or interference in, disabled people's exercise of legal capacity interacts with the prevailing legal culture regarding a relatively low level of consciousness of disabled people's equal rights and the structural inequality and disadvantages that have long been suffered by disabled people. The implementation of Article 12 alone may not be sufficient to guarantee disabled people's right to equal recognition before the law in practice. The proposed domestic law reform should be a part of a wider process of social change including addressing issues falling under other CRPD provisions. Otherwise, the proposed changes in law might not bring appropriate and effective changes in practice. On the other hand, however, the analysis in this chapter indicated that the proposed domestic law reform has the potential to bring about changes to the relevant social and cultural context. It also has the potential to serve as an innovator of social change to develop the legal culture of respecting, protecting and fulfilling disabled people's rights in a broader sense. Such potential changes in social and cultural context may further facilitate the proposed domestic law reform and the achievement of Article 12 at the national level.

Chapter 9: Conclusion

1. Introduction

This thesis has attempted to closely examine the challenges concerning the implementation of Article 12 of the CRPD - equal recognition before the law - at the national level in China, and the degree to which the implementation of Article 12 could be influenced by, and have an influence on, the relevant legal, social and cultural context in China.

This thesis proceeded by adopting the normative framework that disability is created not solely by impairments, but also by the various societal barriers; disabled people are entitled to all human rights on an equal basis with others - formal and substantive equality. The research question was explored under the theoretical framework of the symbiotic relationship between the implementation of international human rights law and the cultural context of a jurisdiction. The implementation of Article 12, a piece of international human rights law that is closely tied to the claim of universality, should recognize the fundamental meaning, implication and value of Article 12 at the national level. The meaning, implication and value of Article 12 should be presented in a culturally sensitive way at the national level, and at the same time, the implementation of Article 12 has the potential to bring about changes to relevant cultural context.

Based on an in-depth analysis of both Article 12 of the CRPD and relevant Chinese law, this thesis demonstrated that the discriminatory denial of disabled people's legal capacity and the adult guardianship mechanism - a form of substitute decision-making- prescribed in the current Chinese law materially conflict with Article 12 of the CRPD. By conducting and analyzing

the empirical research of relevant legal culture in China, this thesis illustrated that disabled people's right to equal recognition before the law is influenced not only by the law but also by the structural and social barriers that have long been suffered by disabled people. Some of these barriers are linked to certain cultural understandings, such as the understanding of family relationship. The analysis identified key cultural-related issues to be taken into account in the implementation of Article 12. Some other of these barriers result from the existing law, the absence of appropriate law, especially the lack of a legal regime of support in the exercise of legal capacity, or the inconsistent knowledge or practice of the law. The analysis pointed out the barriers that should be removed by the implementation of Article 12 in China and examined how they could be removed. This thesis further reflected on reforming the domestic law to transpose Article 12 at the national level in a culturally sensitive way and examined the degree to which the implementation of Article 12 in China, through domestic law reform, has the potential to bring about changes to the relevant legal, social and cultural context.

In the following part of this chapter, Section 2 explains what each stage of the analysis contributed to answering the overall research question. Section 3 highlights the key findings and arguments made in this thesis and analyses how these findings and arguments are linked to broader theoretical inquiries. Section 4 will shed light on the directions for future research.

2. Answering the Research Questions

This thesis has attempted to explore the challenges regarding the implementation of Article 12 at the national level in China and the interrelationship between the implementation of Article 12 and the relevant legal culture.

Chapter 2 began by developing the theoretical framework for the exploration of the research question. To do this, Chapter 2 inquired into two main theoretical issues by referring to the comparative law scholarship. One is the degree to which the meaning, implication and value of the law can be moved from one jurisdiction to another. The other is how the debate around the universality and cultural relativity of international human rights law raises concrete implications for the implementation of international human rights law at the national level. Chapter 2 concluded that the full and effective implementation of Article 12 at the national level necessitates a comprehensive understanding of both Article 12 and the relevant social and cultural context in the given jurisdiction. The meaning, implications, and values of Article 12 should be fully rendered at the national level, and they should be 'transposed'⁸³⁷ in a culturally sensitive way to ensure that they can be fully understood and effectively utilized by local people. Based on this theoretical framework, Chapter 2 further examined Merry's anthropological approach to studying legal culture, and this formed the preliminary methodological framework for the empirical research into the relevant Chinese legal culture conducted in this thesis.

Chapter 3 conducted an in-depth analysis of the text, meaning, implications and values of Article 12. By critically reviewing General Comment No.1, Concluding Observations on State parties' reports, and the ongoing academic debates on Article 12, Chapter 3 developed insights of how the conceptions of legal capacity and support in the exercise of legal capacity should be understood as well as the obligations of State Parties under Article 12. It underlined that underlying Article 12 is the ultimate aim to combat the profound discrimination against disabled people's right to equal recognition before the law and to respect, protect and fulfil disabled people's inherent dignity and autonomy. While the right to equal recognition before the law may be

⁸³⁷ Esin Örücü, 'Law as Transposition' (n 11) detailed discussion, see, Chapter 2.

elaborated at the national level in different styles depending on differences in legal systems and languages, the ultimate purpose and values of Article 12 should not be undermined. Chapter 3 contributed to the overall research question by providing a detailed picture of the right to equal recognition before the law and clarifying the meanings, implications and values of Article 12 that should be implemented at the national level.

Chapter 4 provided a detailed analysis of the current Chinese law and legal system relevant to the implementation of Article 12. It concluded that the main approach to give effect to Article 12 in China should be to scrutinize the relevant domestic law and carry out legislative reform in the light of Article 12. The most relevant area of domestic law to be reformed is the law on legal capacity and adult guardianship. The discriminatory denial of disabled people's legal capacity and the adult guardianship - a form of substitute decision-making - prescribed in the current law, and the lack of a legal regime of support in the exercise of legal capacity, materially conflict with Article 12. Chapter 4 contributed to the overall research question by identifying some of the fundamental gaps between current Chinese law and Article 12. A detailed examination of the current Chinese law on legal capacity and adult guardianship from a human rights law perspective, as the one provided in Chapter 4, is almost absent from the existing literature.

Chapter 5 outlined the empirical research design to study the legal culture in terms of the issue of disabled people's right to equal recognition before the law in China. It provided a detailed analysis of the research methods used, the recruitment and selection of the research participants, the steps in the data processing and analysis, the key ethical concerns and the elements of emancipatory research involved in the research design.

Chapter 6 presented and analysed the empirical research data from the subjective perspective of the research participants. Many quotations were used in Chapter 6 to illuminate the context of the participants' conversations and discussions in the empirical research. Chapter 7 conducted further analysis of the implications of the empirical research findings in the context of Article 12. The analysis of the empirical research findings in Chapters 6 and 7 identified legal culture-related issues that should be taken into account in the implementation of Article 12 in China. It also examined how the relevant legal culture, and the culture-related issues and social barriers underlying it, may have influences on disabled people's right to equal recognition before the law or create challenges to the implementation of Article 12 in China. The analysis of the empirical data in Chapters 6 and 7 provided an in-depth understanding of the relevant cultural context in China, which, based on the theoretical framework developed in Chapter 2, is essential to answering the overall research question.

Drawing on the previous discussions of Article 12 and the relevant Chinese law and legal culture, Chapter 8 reflected on reforming the domestic law to achieve consistency with Article 12 and examined the degree to which the proposed changes in law has the potential to bring about changes in relevant legal culture. Chapter 8 provided a detailed analysis of how the meaning, implications and values of Article 12 could be transposed from the context of international human rights law to the domestic legal system and presented in domestic law in a culturally sensitive way. It indicated that the proposed changes in law have the potential to bring about changes to legal culture regarding disabled people's right to equal recognition before the law. Chapter 8 contributed to the overall research question by illuminating the potential interrelationship between the implementation of Article 12 in China and the relevant Chinese legal culture. It synthesized the previous discussions of Article 12 and the relevant Chinese law and legal culture and reflected on the

theoretical framework of the symbiotic relationship between the implementation of international human rights law at the national level and the cultural context of the given jurisdiction.

3. The Implications of the Key Findings

The findings of the doctrinal and empirical analysis have been articulated and evaluated in detail in the previous chapters. The implications of the key findings may be divided into four main categories: the importance of implementing Article 12 in China, the universality of Article 12, the cultural relativity of Article 12 in China's context, and the potential social changes that could be fostered by the implementation of Article 12 in China.

3.1 The importance of the implementation of Article 12 in China

The analysis of current Chinese law in Chapter 4 revealed that mentally disabled people remain the group whose right to equal recognition before the law is discriminatorily denied or restricted in the current legal system in China. The analysis of the empirical research findings in Chapter 6 further revealed that in practice, discriminatory denial of, or restrictions on, the right to equal recognition before the law is experienced not only by mentally disabled people but also by disabled people with other kinds of impairments. Such denial or restrictions are imposed in various ways, some of which are not consistent with the relevant law, and in a rather arbitrary manner. The discriminatory and arbitrary denial of, or restriction on, disabled people's equal recognition before the law is often imposed by disabled people's families or carers, who have limited knowledge of the law, and also by legal practitioners. The current law does not provide any effective remedies for disabled people to protest against the discriminatory and arbitrary denial of the right to equal recognition before the law. The analysis in Chapter 4 and Chapter 6 further revealed that the

denial or restriction of the right to equal recognition before the law results in restrictions on disabled people's exercise of other human rights.

The research findings provide empirical evidence that the discriminatory denial of, or restriction on, the right to equal recognition before the law pervades the lives of many disabled people in China – particularly (but not exclusively) the lives of people with mental disabilities. It also empirically proved how the right to equal recognition before the law is indispensable for the exercise of other human rights. The research findings thus further reinforce the importance of the implementation of Article 12 in China. Besides, as argued in Chapters 7 and 8, the implementation of Article 12 in China should go beyond bringing about changes to the domestic law. It has the potential to challenge the existing legal culture of ignoring disabled people's equal recognition before the law and increase the awareness of disabled people's right, autonomy and equality.

3.2 The universality of Article 12 as a piece of international human rights law

The doctrinal analysis in Chapter 2 concluded that international human rights law is closely tied to the claim of universality and such universality still retains its solid ground when diverse cultures are concerned. The universality of international human rights law in the multicultural and globalized world mainly comes from the common consciousness of human rights values and similar needs in terms of human rights protection.

The analysis of the empirical research in Chapters 6 and 7 provided empirical evidence that the universality of Article 12, as a piece of international human rights law, retains its solid ground when the specific social and cultural context in China is concerned. This was demonstrated by two sorts of empirical

research findings, both of which illustrate that the human rights values underlying Article 12 and the need for human rights protection are, to a large degree, recognized by research participants especially disabled people and their families and carers.

First, although the majority of the disabled people interviewed had very limited knowledge of the concepts of recognition before the law, legal capacity, or the right to autonomy, they demonstrated a clear willingness to be recognized as persons who have the right to make autonomous decision. The majority of them, even those who had the experience of deliberately deferring to the substitute decision imposed on them, demonstrated a clear need to have their right to autonomous decision-making be protected. Second, the analysis of the focus groups with guardians and social workers showed that although some of them had violated disabled people's right to equal recognition before the law through, for example, substitute decision-making, they do not necessarily deny disabled people's entitlement to rights and equality or reject human rights values. Although research participants understood rights and equality, and how they can be guaranteed, in various ways, the majority of them, at least, demonstrated the consciousness that disabled people should have been included in the society and provided with the opportunity to develop. The analysis of the focus group discussions revealed the various social and legal barriers faced by disabled people's families or carers, which, to some degree, drive them to interfere in disabled people's autonomous exercise of legal capacity. The analysis of the focus group discussions also indicated that disabled people's families and carers have the need for social, legal and policy support to enable them to be more supportive of disabled people's rights, equality and autonomy.

These empirical findings indicated that the human rights protection advanced by Article 12 and the human rights values underlying it are compatible with

what people in China need and desire. This further underpins that the universality of Article 12 has its solid ground in China. Such universality forms the grounds on which the meaning, implications and values of Article 12, through proper implementation, could be adopted by, rather than imposed on, people in China.

In addition, the analysis of the empirical research in Chapter 6 revealed various factors that have influences on disabled people's legal consciousness of their right to equal recognition before the law or their legal mobilization to defend their exercise of legal capacity. While some of these factors link to culturally based concerns, more of them result from the ambiguities in the relevant law and the legal and social barriers that have long been suffered by disabled people. These research findings reinforce the importance of insisting on the universality of Article 12 at the national level. This means that the meaning, implications and values of Article 12 should not bend to the social and cultural context in China. Instead, it should be fully rendered at the national level and form the mechanism to remove the existing social and legal barriers for disabled people to defend their right to equal recognition before the law.

3.3 The importance of cultural sensitivity in the implementation of Article 12

The doctrinal analysis in Chapter 2 reviewed Örucü's argument that when the law is moved from one context to another, it should go through a process of transposition to suit the social-legal culture of the specific jurisdiction while maintaining its fundamental meaning, implication and value.⁸³⁸ The analysis in Chapter 2 also reviewed similar arguments raised in Merry's empirical research that international human rights law should be vernacularized at the

⁸³⁸ *ibid.*

national level by repackaging the fundamental human rights ideas and values in culturally resonant wrappings.⁸³⁹

The analysis of the empirical research in Chapters 6 and 7 provided empirical evidence regarding the importance of implementing Article 12, a piece of international human rights law, at the national level in a culturally sensitive way. The importance has been illustrated in three aspects.

Firstly, the analysis of the empirical research revealed that conceptions extracted from the relevant law or Article 12, such as recognition before the law, legal capacity, rights, equality, and autonomy, are sometimes intangible to people with limited knowledge of law. It is thus important to present these conceptions and human rights ideas by using culturally secular language and narratives that resonate with the local people. Such cultural adaptations of Article 12 will help local people to see how the human rights elaborated in Article 12 are relevant to their lives and how the human rights protections advanced by Article 12 could help to address the inequality and disadvantages experienced by them. Only when Article 12 is implemented at the national level in a way that is fully accessible and understandable to local people will it be utilized effectively by the subjects of rights.

Secondly, some culturally based concerns may influence people's legal consciousness and mobilization. The analysis of the empirical research in Chapters 6 and 7 provided the typical example that in cases where legal protection of autonomy and equality may create tensions with the values of family relationships, disabled people may give more weight to the maintenance of family relationships and defer to the violation of their rights and autonomy. Such culturally based concerns should be taken into account in the

⁸³⁹ Merry (n 13) 221.

implementation of Article 12 at the national level. The analysis of Chapter 8 underlined the importance of ensuring that the domestic law reform in the light of Article 12 enables disabled people to choose from diverse mechanisms of legal protection and defend their rights in a way that is culturally accessible and acceptable to them.

Thirdly, cultural elements, which may be a barrier to the implementation of international human rights law, may also be transformed into resources for the achievement of human rights. The analysis of the empirical research in Chapter 7 indicated that the strong family relationship rooted in Chinese culture is arguably a source of legal culture of ignoring disabled people's rights and autonomy. The paternalism resulting from such family relationships may be a barrier to the implementation of Article 12. However, the analysis in Chapters 7 and 8 also pointed out that based on an in-depth understanding of such cultural elements, the implementation of Article 12, with proper cultural adaptation, has the potential to transform strong family relationships into useful resources to support disabled people's exercise of legal capacity.

3.4 The potential of the implementation of international human rights law to bring about structural changes at the national level

The doctrinal analysis in Chapter 2 reviewed Teubner's argument regarding the law's binding arrangements with other social systems, which states that the cross-border spread of law may change the social and cultural conditions in the specific jurisdiction.⁸⁴⁰ The analysis in Chapter 2 also reviewed Merry's argument that as the international human rights law is vernacularized at the national level, it should retain its fundamental meanings and values, provide a

⁸⁴⁰ Teubner (n 11).

radically different frame of thinking, and challenge the existing social inequalities.⁸⁴¹

As explained in Chapters 1 and 4, China has not yet taken effective measures to implement Article 12 at the national level. The research findings in this thesis thus cannot show how the implementation of Article 12 in China can actually bring about structural changes at the national level. However, the analysis in the previous chapters, especially Chapter 8, explores how the implementation of Article 12 has the potential to bring about structural changes to the social, legal and cultural conditions. The analysis in Chapter 8 synthesized the previous discussions of Article 12 and the relevant Chinese law and legal culture and developed reflections on domestic law reform in the light of both Article 12 and relevant legal culture in China. The analysis of the proposed direction for domestic law reform indicated that the implementation of Article 12 has the potential to bring about changes to the social and cultural context in China in the following three aspects.

First, the implementation of Article 12 could provide disabled people with a context of human rights law that enables them to rethink their rights and redefine the discriminatory interferences or abuses they have suffered. This may further raise disabled people's legal consciousness not only with regard to the right to equal recognition before the law, but also other rights. Second, the implementation of Article 12 may provide a different framework of thinking, which enables the public to reflect on the barriers, inequalities, and disadvantages experienced by disabled people and how such barriers, inequalities and disadvantages further result in the prejudicial assumption that disabled people are less capable than others. Third, the implementation of Article 12 may challenge the traditional and cultural-based understanding that

⁸⁴¹ Merry (n 13) 221.

disability is an individual's own problem and supporting disabled people is the moral obligation of the disabled people's families. The implementation of Article 12 has the potential to raise awareness that supporting disabled people is not only a family issue or moral obligation, but also a social issue and legal obligation. It also has the potential to shift the focus from disabled people's capabilities to the barriers and disadvantages suffered by disabled people and how social support should be provided to ensure that disabled people can enjoy their rights on a substantively equal basis with others.

4. The Directions for Future Research

Many issues remain to be explored in studying the full implementation of Article 12 at the national level. The recommendations for the future studies are made from two perspectives.

First, the research conducted in this thesis has its limitations, which may indicate the need for future studies. Two of the most relevant directions for future studies are recommended below.

Firstly, it is recognized in this thesis that the right to equal recognition before the law has a deep connection with the moral and political philosophy of personhood. However, since this thesis focuses on the implementation of Article 12 at the national level, the deeper philosophical dimensions of Article 12 and personhood were not fully explored. The existing literature on Article 12 has provided many insights into the connection between Article 12 and the moral and political philosophy of personhood. However, the majority of such analyses are based on Western liberal political theory. It may be an interesting topic for future studies to look into the philosophical dimension of the right to equal recognition before the law from the Asian perspective of philosophy.

Secondly, the empirical research conducted for this thesis was with the aim to enlarge the participation of disabled people and to reflect the diversity of disabled people. However, due to the limitations of time and resources, and ethical and safety concerns, the participants in the empirical research did not include disabled people living in institutions. Disabled people living in institutions are entitled to equal recognition before the law. Besides, in comparison with disabled people living in the community, it may be harder to guarantee the enjoyment of the right for those living in institutions. Accordingly, there is a need to conduct empirical research on this more specific group of disabled people. The empirical data on how disabled people living in institutions may be denied the right to equal recognition before the law and how to provide support for disabled people living in institutions to exercise legal capacity are essential to exploring the full implementation of Article 12 in China. Besides, the majority of the participants in this research are currently residing in cities. Considering the current differences between the urban and rural areas in China, disabled people in rural areas may have relatively different experiences of, and opinions or attitudes towards, the right to equal recognition before the law and different expectations regarding the legal regime of support in the exercise of legal capacity. Such differences cannot be sufficiently reflected in the empirical research conducted for this thesis, and should be explored in future studies.

In addition to the above two aspects, the methodologies and methods used in this research, and the findings of this thesis, also signal the importance of further research. Four relevant directions for future studies are recommended.

First, this thesis adopted empirical research methods to investigate disabled people's right to equal recognition before the law and adult guardianship in practice. The empirical evidence on these two issues is still very limited in the existing research and is not otherwise available in the academic research in

China. The empirical research findings provided in this thesis illustrate the unique subjective perspectives of the different participants regarding the right to equal recognition before the law and the practice of adult guardianship. The analysis of the empirical research suggests how such empirical research findings might contribute to research on the full implementation of Article 12 at the national level. Accordingly, it may be worthwhile in future studies to collect more empirical data on disabled people's right to equal recognition before the law and the practice of adult guardianship. Besides, this thesis included elements of emancipatory research in the empirical research design to enhance the participation of disabled people. Empirical research with emancipatory elements is relatively rare in disability rights study in China. The empirical research findings and the following analysis in this thesis suggest the significance of disabled people's participation in academic research on disability rights. In particular, this showed how disabled people's subjective perspectives are necessary to ensure that the disability rights elaborated in international human rights law are implemented at the national level in a way that can be effectively utilized. Accordingly, it would be worthwhile exploring ways to empower disabled people to lead, co-produce, or positively participate in research on the implementation of the CRPD in China and other disability rights studies.

Second, as explained in Chapter 1, the analysis in this thesis is within the scope of adults' right to equal recognition before the law in the field of civil law. The implementation of Article 12 in China will also have influences on the relevant law on minors' right to equal recognition before the law and issues in the field of criminal law. However, further discussion of these two areas of law is beyond the scope of this thesis. For future studies, it would be worthwhile exploring how other parts of Chinese law should be reformed in line with Article 12. This issue will have important influences on the full implementation of

Article 12 at the national level and the consistency of the domestic legal system.

Third, the analysis in this thesis pointed out the interaction between disabled people's right to equal recognition before the law and the deeper and structural disadvantages that have already been experienced by disabled people. It was also pointed out that the removal of such disadvantages might be beyond the scope of the implementation of Article 12. For future studies, it may be necessary to examine and evaluate the law and policy in a broader scope and explore ways to remove the structural disadvantages suffered by disabled people. Such further studies may also benefit from exploring in detail the connectivity between Article 12 and other rights elaborated in the CRPD.

Fourth, the analysis in this thesis proposed a framework for the legal regime of support in the exercise of legal capacity. It also underlined that the legal regime of support should be designed to encompass a variety of support arrangements based on broad, flexible and sustainable social networks. However, knowledge of disabled people's needs, will, and preferences in terms of support in the exercise of legal capacity is very limited in the existing literature. Accordingly, there is a need to conduct further studies, especially empirical studies engaging disabled people, to explore disabled people's need for support in the exercise of legal capacity, the type of support that is desired by disabled people, and ways to provide support that is accessible and acceptable to disabled people. There may also be a need to conduct pilot study or case study of good and bad practices of support in the exercise of legal capacity. The importance of disabled people's participation in such further studies should be sufficiently recognized..

5. Conclusion

Article 12 of the CRPD, like other international human rights laws, is powerful in providing guidelines regarding what the State should and should not do to respect, protect and fulfil individuals' rights. In particular, it provides the framework for what is needed to ensure disabled people's right to equal recognition before the law. However, Article 12 of the CRPD, like other international human rights laws, has its own limitations and weaknesses. There may be controversies regarding the precise meaning and implications of Article 12, and the enforcement mechanism of Article 12 may be weak.

While recognizing its strengths and weaknesses, this thesis regards Article 12 as a meaningful and powerful driving force for positive legal and social change with the purpose of promoting equal rights for disabled people. This thesis developed a theoretical framework for the implementation of international human rights law at the national level by referring to the theoretical inquiries in comparative law and the debates around the universalism and cultural relativism of human rights law. By applying this theoretical framework to exploring the full and effective implementation of Article 12 in China, this thesis examined and analysed how the meaning and implications of Article 12, and the human rights values underlying it, can be rendered at the national level in a way that can be understood and utilized by local people. The analysis in this thesis also indicated that the implementation of Article 12 in China has the potential to stimulate legal and social changes and promote equality and inclusion in the society.

At a more holistic level, the study of the implementation of Article 12 in China in this thesis contributed reflections on the debate around the universalism and cultural relativism of international human rights law and the theoretical

inquiries regarding the symbiotic relationship between law and social and cultural context. The analysis in this thesis underpinned the argument that the international human rights law is tied to a claim of universality even when it is considered in a specific social and cultural context. It also illustrated the importance of basing the implementation of international human rights law on an in-depth understanding of the given social and cultural context. By providing doctrinal and empirical analysis, this thesis strengthened the point of view that the fundamental meaning, implication and value of international human rights law should be rendered at the national level in a culturally sensitive way to enable those who need rights protection to recognize their entitlement and assert their rights by using the law, and at the same time, the implementation of international human rights law has the potential to bring about changes to the social and cultural context at the national level.

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Appendix 1: Participation of the empirical research

Table1: Members of advisory group

| Code | Gender | Age | Impairment label |
|------|--------|-----|---------------------------------|
| AG1 | Female | 33 | User of psychiatric treatment |
| AG2 | Female | 26 | Blind |
| AG3 | Male | 31 | Down's syndrome |
| AG4 | Female | 24 | Learning difficulties |
| AG5 | Male | 42 | Deaf and visual impairment |
| AG6 | Female | 35 | Obsessive - Compulsive disorder |
| AG7 | Male | 40 | Physical and hearing impairment |

Table2: Interviewees-Disabled people

| Code | Gender | Age | Impairment label | Guardianship state/type |
|---------|--------|-----|-------------------------|-------------------------|
| In004DP | Male | 30 | Deaf | CDPF guardianship |
| In005DP | Female | 27 | Blind | CDPF guardianship |
| In006DP | Female | 23 | Down's syndrome | CDPF guardianship |
| In008DP | Male | 36 | Physical impairment | CDPF guardianship |
| In009DP | Female | 24 | Bipolar disorder | CDPF guardianship |
| In011DP | Male | 44 | Depression | Legal guardianship |
| In012DP | Female | 40 | Bipolar disorder | CDPF guardianship |
| In013DP | Female | 31 | Physical impairment | Informal guardianship |
| In014DP | Female | 25 | Deaf | CDPF guardianship |
| In015DP | Male | 28 | Multiple impairments | Legal guardianship |
| In017DP | Male | 22 | Autism | CDPF guardianship |
| In018DP | Male | 44 | Mania | CDPF guardianship |
| In019DP | Female | 27 | Intellectual disability | Legal guardianship |
| In020DP | Male | 32 | Physical impairment | Informal guardianship |

| | | | | |
|---------|--------|----|-------------------------|-----------------------|
| In021DP | Female | 37 | Visual impairment | Informal guardianship |
| In023DP | Female | 25 | Intellectual disability | CDPF guardianship |
| In024DP | Female | 27 | Autism | CDPF guardianship |
| In025DP | Female | 42 | Bipolar disorder | CDPF guardianship |
| In026DP | Male | 32 | Intellectual disability | CDPF guardianship |
| In027DP | Female | 26 | Deaf | Informal guardianship |
| In029DP | Female | 31 | Obsessive-Compulsive | CDPF guardianship |
| In030FP | Female | 33 | Bipolar disorder | Legal guardianship |
| In031DP | Male | 29 | Down's syndrome | CDPF guardianship |

Table3: Interviewees- Judges

| Code | Gender |
|--------|--------|
| In001J | Male |
| In007J | Male |
| In010J | Male |
| In022J | Male |

Table 4: Interviewees- Lawyers

| Code | Gender | Working experience | Scope of service |
|---------|--------|--|--|
| In002LA | Male | 7 years | Commercial Lawyer Civil Law |
| In003LA | Female | 3 years | Commercial Lawyer Civil Law |
| In016LA | Male | 4 years (in civil law) 1.5 years (in disability rights) | Public interest lawyer |
| In028LA | Female | 3 years | Public interest lawyer Mental health rights |

Table5: Focus group participants-Guardians

| Group | Code | Guardianship type | Gender | Impairment label of the person under guardianship | Relation with the person under guardianship |
|-------|---------|-------------------------|--------|---|---|
| G1 | FG001GL | Legal&CDPF guardianship | Female | Mental impairment | Mother |
| | FG002GL | Legal&CDPF guardianship | Female | Autism | Mother |
| | FG003GF | CDPF guardianship | Female | Deaf | Mother |
| | FG004GF | CDPF guardianship | Female | Intellectual impairment | Mother |
| G2 | FG017GL | Legal&CDPF guardianship | Female | Mental impairment | Mother |
| | FG018GF | CDPF guardianship | Female | Mental impairment | Wife |
| | FG019GF | CDPF guardianship | Female | Autism | Mother |
| | FG020GF | CDPF guardianship | Female | Intellectual impairment | Mother |
| G3 | FG021GF | CDPF guardianship | Male | Mental impairment | Brother |
| | FG022GL | Legal guardianship | Male | Alzheimer's | Son |
| | FG023GN | Informal guardianship | Female | Intellectual impairment | Mother |
| | FG024GF | CDPF | Female | Blind | Mother |

| | | | | | |
|----|---------|----------------------------|--------|------------------------|--------|
| | | guardianship | | | |
| G4 | FG034GL | Legal&CDPF guardianship | Male | Physical impairment | Father |
| | FG035GN | Informal guardianship | Female | Mental impairment | Mother |
| | FG036GF | CDPF guardianship | Female | Mental impairment | Sister |
| | FG037GL | Legal guardianship | Male | Alzheimer's | Son |

Table6: Focus group participants- Social workers

| Group | Code | Gender | Working experience |
|-------|---------|--------|--------------------|
| SW1 | FG010SW | Female | 5 years |
| | FG011SW | Female | 3.5 years |
| | FG012SW | Male | 2 years |
| SW2 | FG013SW | Female | 2 years |
| | FG014SW | Female | 1 year |
| | FG015SW | Male | 2.5 years |
| | FG016SW | Female | 2 years |
| SW3 | FG030SW | Female | 6 years |
| | FG031SW | Female | 4 years |
| | FG032SW | Male | 3 years |
| | FG033SW | Male | 2 years |

Table 7: Focus group participants - Members of Neighborhood Committee

| Group | Code | Gender | Length of service in the Committee/ living in the community | Types of the community |
|-------|---------|--------|---|------------------------|
| NC1 | FG005NC | Male | 2 years/ 2 years | Newly-built |
| | FG006NC | Female | 7 months/ 1 year | Newly-built |
| | FG007NC | Female | 2 years/ 21 years | Long standing |
| | FG008NC | Female | 2 years/ 17 years | Long standing |
| | FG009NC | Male | 3 years/ 9 years | Long standing |
| NC2 | FG025NC | Male | 2 years/ 3 years | Newly-built |
| | FG026NC | Female | 6 months/ 1.5 years | Newly-built |
| | FG027NC | Female | 9 months/ 2 years | Newly-built |
| | FG028NC | Female | 4 years/ 27 years | Long standing |
| | FG029NC | Female | 1 year/ 13 years | Long standing |
| NC3 | FG038NC | Female | 5 months/ 2 years | Newly-built |
| | FG039NC | Male | 1 year/ 14 years | Long standing |
| | FG040NC | Female | 1 year/ 2 years | Newly-built |
| | FG041NC | Male | 5 years/ 14 years | Long standing |
| | FG042NC | Male | 2 years/ 7 years | Long standing |

Appendix 2: Sample of Declaration of Informed Consent

This is the sample of Declaration of Informed Consent. The empirical research was conducted in Chinese and all the relevant information were provided for the participants in Chinese. Depending on the needs of the participant, the information was adapted into easy to read version or provided with the help of pictures.

Declaration of Informed Consent

1. I confirm that I have read and understand the information sheet provided by Huang Yi, explaining the research project and I have had the opportunity to ask questions about the project.

2. I understand that my participation is voluntary and that I am free to withdraw at any time before and during the research, or within 2 months after the research, without giving any reason and without there being any negative consequences. In addition, should I not wish to answer any particular question or questions, I am free to decline.

3. I understand that my responses will be kept strictly confidential (only if true). I give permission for Huang Yi and members of the research team to have access to my anonymised responses. I understand that my name will not be linked with the research materials, and I will not be identified or identifiable in the report or reports that result from the research.

4. I understand the potential risk of my participation, and I understand how the Huang Yi and I can avoid or minimize the risks.

5. I understand that in certain situation, Huang Yi may break the rule of confidentiality. We have made other arrangements for these specific situations and I agree on the arrangements.

6. I agree to audio recording my response or the interview/focus groups I will participate. I understand that only Huang Yi can access to the original recording, and the recording will only be stored for three years.

7. I understand that if I have any questions about the research project, I can contact Huang Yi, and her contacting number is : (86)13621928174 (when she is in China); (44)7547997052(when she is in UK).

8. I agree for the data collected from me to be used in future research

9. I agree to take part in the above research project

Signature of Participant (or legal representative)

Date

I have carefully explained the participant information in the way that is accessible to the participant.

Signature of the researcher

Date