

Thoughts on the Transformation of Visitation Rights Legal System in China

Li Jiayi, Xu Wenjie

Southwest Medical University, Luzhou, Sichuan, China

Keywords: Visitation Rights Dispute; Subject of Rights; Protection of the Interests of Minors

Abstract: Parent-child relationship is a major bond that maintains family ties. Along with the continuous rise of the divorce rate. The continuous rise in the divorce rate is often accompanied by problems such as property disputes, disputes over child custody, and visitation rights disputes. As parents divide their family property and live separately after divorce, it is inevitable that one of them has relatively reduced the emotional connection with their children. The Civil Code follows the provisions of the previous Marriage Law regarding the visitation rights system, but its provisions are rather general and vague, and are not very applicable to various social life situations, resulting in continuous disputes in judicial practice. When we simply regard visitation rights as the rights of parents, the visitation rights system merely tends to protect the interests of parents. At the legislative and judicial levels, an in-depth analysis of the visitation rights system in China is conducted to explore the theoretical basis and existing problems of visitation rights, and legal suggestions for improving the visitation rights system are put forward, with the aim of establishing a visitation rights system centered on the interests of minors, giving full play to the functions of mediation and consultation, improving the efficiency of civil litigation, and further standardizing the current situation of inconsistent judicial practice operations in China.

1. Introduction

1.1. The Concept and Nature of Visitation rights

Visitation rights have the attribute of unity of rights and obligations. Professor Wang Liming mentioned: "Although the rights enjoyed based on identity are essentially rights, they are centered around obligations. The right holder, driven by morality and ethics, voluntarily or involuntarily is subject to the interests of the counterparty.^[1] Therefore, obligations are included within rights." Whether from the perspective of parents or children, visitation rights have been set as a right to better protect the rights and interests of both parties. Meanwhile, visitation rights also have the attribute of obligation. Parents have a natural responsibility and obligation to protect and educate their children. Parents need to fulfill their responsibilities and obligations before their children grow up. However, if visitation rights are merely set as an obligation of either the father or the mother, it not only fails to comply with the provisions of legal significance but also leads to a predicament in

the execution process as an obligation. As a result, this right cannot fully realize its true value and is detrimental to the order and justice values of the law.^[2] The party who has not obtained custody rights can only avoid a cold relationship or even hatred through the reasonable exercise of visitation rights, satisfy the emotional needs of themselves and their children, and allow the children to grow up in a sound family care environment.

1.2. Legislative Status and Purpose

The visitation rights system made its debut in China's Marriage Law in 2001, and the regulations were simple and abstract. Article 1086 of the Civil Code, which attracted worldwide attention in 2020, clearly stipulates the right of visitation and establishes its position in the marriage and family chapter. This is a significant progress in China's marriage and family legislation regarding parent-child relationships.^[3] We have to admit that the visitation rights system in our country is still in its infancy and its content still needs to be improved urgently. The root cause lies in the fact that the visitation rights system is not a native legal system of our country and the theoretical research on visitation rights in our country has not been deepened for a long time. All these have led to deviations in our determination of the nature of visitation rights. Visitation rights originated from blood ties, and the development of visitation rights is based on the fact that children's rights have begun to be valued worldwide. The 1989 United Nations Convention on the Rights of the Child clearly stipulates in Article 10 the right of children to maintain contact with their parents and the principle of the best interests of the child.

1.3. Improve the practical value of visitation rights

1.3.1. Protect the interests of minor children

The legislative purpose of the visitation rights system is to provide a good growth environment for minor children from divorced families and minimize the psychological trauma caused by parents' divorce to the children to the greatest extent. The establishment of visitation rights enables the party not directly raising the children to have the responsibility of caring for, protecting, raising and educating them. Teenagers are a crucial period for the personality construction of every natural person. The education they receive should not only focus on the cultivation and learning of scientific theories and survival skills,^[4] but also on emotional education. The primary goal of visitation rights is to ensure that parents and children maintain their affection through meeting and communicating, relieve the low emotions encountered by minor children during their growth, and satisfy the abundant emotions of a healthy natural person during their growth.

1.3.2. Meet the maintenance requirements of guardianship relationships

The promulgation of the Civil Code has provided relatively complete legal norms for all stages of marriage and family. Even with an efficient and complete legal system in place, the role of public order and good customs in the formulation and filling of laws cannot be ignored.^[5]

The General Secretary has profoundly pointed out that no matter how much The Times change or how much the living pattern changes, we must attach importance to family building, pay attention to family, family education and family style, and place family style building in an important position. The exercise of visitation rights is a form of relief when guardianship cannot be exercised, making up for the children's longing for fatherly or motherly love and fulfilling the expectations of divorced parents who want to know more about and accompany their children. The legal guarantee for the exercise of visitation rights by rights holders also provides practical and effective implementation channels and legal support for the guardianship system. Therefore, improving the

visitation rights system is also a guarantee for promoting the effective functioning of the guardianship system.

1.3.3. Maintain the stability of social order

On the one hand, through the nature of the visitation rights system, it is emphasized that parents still need to be responsible for the development and growth of their children after divorce. The right holder may not use conditions such as "bearing more child support" as a reason to give up visitation rights. Overall, the relevant system of visitation rights not only protects the interests of the parties involved but also serves as a powerful means of supervision over their actions. ^[6] Social coercive power is influenced not only by law but also by various factors such as morality and belief. Each member is a member of their own family, and each family is a component of the entire society. The magnitude of social coercive power and the effectiveness of the exercise of visitation rights complement each other. For this reason, visitation rights achieve the ultimate goal of maintaining the stability of the entire social order by maintaining a harmonious environment within each family.

2. The Current Judicial Situation and Key Conflicts of Visitation Rights

2.1. Judicial Practice

The author conducted a search on the China Judgments Online with the keyword "visitation rights disputes". Within the time limit from January 1, 2021 to November 1, 2023, a total of 2,080 judgments were found. In terms of document types, 854 were judgments, 1,021 were rulings, only 73 were mediation documents, ^[7] and 1 was a decision document. This indicates that in the trial of visitation rights disputes, the mediation system was insufficiently applied and its role was not exerted. There may be situations such as insufficient mediators and the parties' lack of recognition of the effectiveness of mediation.

The shortcomings of this system can no longer better meet people's real-life needs and adapt to the increasingly complex problems in parent-child relationships. In judicial practice, disputes over visitation rights have become more and more prominent. The call from all sectors of society to comprehensively improve the content of the visitation rights system under the Civil Code system is growing stronger and stronger. Therefore, we call for the content of the visitation rights system to keep pace with The Times and continuously develop in the direction of being advanced, systematic and scientific.

2.2. The key points of institutional disputes revealed in the judgment

Regarding the subjects of visitation rights, Article 1086, Paragraph 1 of the Civil Code stipulates that the subjects of visitation rights only include the father or the mother. However, in real life, there are many other situations that cannot be ignored, ^[8] such as whether grandparents and siblings can be considered as included in the scope of their subjects? The narrow scope of visitation rights subjects restricts judges in handling cases, forcing them to seek public order and good customs or moral values as the basis for judgment outside the law, ultimately leading to the phenomenon of "different judgments for the same case".

2.2.1. Visitation rights have not been granted to minor children

Visitation rights are not only the right that parents enjoy towards their children, but children should also be granted visitation rights. The visitation rights system in our country should not only consider the emotional needs of parents for family affection, but also pay more attention to the

separation.

The emotional needs of children for their parents and elders in a married family. Article 1086, Paragraph 1 of the Civil Code of our country only takes into account the rights and interests of the divorced parties after divorce, and pays less attention to the interests of minor children. Even if some minor children with limited capacity for civil conduct can only make naive value judgments, it is still necessary to consider their simple emotional choices and grant them corresponding visitation rights.

In the first-instance civil judgment on the visitation rights dispute between Dou Mou 1 et al. And Dou Mou 3 et al., the court ruled that "Although the 'Marriage Law' of our country does not explicitly stipulate that grandchildren can visit their grandparents, it also does not explicitly prohibit them from doing so. Based on the principle that what is not explicitly stipulated in the law is acceptable, the litigation requests for grandchildren to visit their grandparents should not be completely denied."^[9] Instead, it should be confirmed in combination with specific circumstances. Grandparent-grandchild close relatives also fall within the ranks of legal guardians. Although the two plaintiffs, as grandchildren, are considered as waiting guardians in the legal sense, based on the extended meaning of guardianship, their request to visit the ward does not exceed the connotation and extension of guardianship. Whether considering from the aspects of identity, blood relationship, parental inheritance, or natural rights attributes, Grandparents and close relatives should recognize the visitation rights enjoyed by the ward with the consent of the ward.

2.2.2. Visitation rights were not granted to grandparents

Labor force flows to resource-intensive and economically developed areas. There are objectively "left-behind children" in both urban and rural areas. Due to the pressure of survival and the complexity of work, parents do not have much energy to take on the responsibility of raising minor children. Grandparents have to take on the responsibility of looking after minor children in order to reduce the burden of family work. In life, most underage children live and eat together with their grandparents. Such deep love for their children and filial piety are hard to let go. Regarding whether grandparents enjoy visitation rights, the "Draft of the Marriage and Family Chapter of the Civil Code (First Review Draft)" of our country has included grandparents within the scope of subjects based on judicial practice. However, opponents argue that such regulations are too broad in scope. When granting grandparents the status of visitation rights subjects, certain restrictive conditions should be added. The Draft of the Marriage and Family Chapter of the Civil Code (Second Review Draft) It is stipulated that if the grandparents have fulfilled their duty of support or if one of the parents of a minor child passes away, the grandparents will be included in the scope of their subjects. However, during the review process, there were multiple opinions on this regulation. As the parties failed to reach a consensus, the clause on visitation by grandparents was deleted in the third draft.

In judicial practice, many courts have ruled that grandparents can visit their grandchildren across generations under certain conditions. Article 8 of the Civil Code of the People's Republic of China also stipulates that engaging in civil activities shall not violate public order and good customs. It is also contrary to public order and good customs to prevent grandparents from visiting their granddaughters. In the case of Su Keying, Wang Chengjun and Zhang Hong's visitation rights dispute,

3. Suggestions for Improving the Visitation Rights System

In the legislation on visitation rights, it should be clearly stipulated that in the legal relationship of visitation rights, minor children have an independent legal status. They have an independent personality and are not dependent on either the father or the mother. They also have the right to

request visitation from the parent who does not live with them. Only in this way can the equal status between minor children and their parents be maintained. This enables minor children in both abnormal and normal marital and family states to have the same opportunity to receive care from both parents.

3.1. Consider the non-exclusivity of visitation rights

The Civil Code's provisions on the subject of visitation rights are too narrow, only applicable to the party who has not lived with the children after divorce. In the legislation of visitation rights, many disputes over visitation rights outside such subjects have emerged in judicial practice. When judges handle visitation rights disputes in unconventional situations that arise in practice, different handling results will occur. ^[10]Therefore, it is necessary to reasonably expand the scope of visitation rights subjects. In practice, there have been a large number of cases where grandparents requested to visit their grandchildren, but were refused because the law did not stipulate that they were the subjects of visitation rights. In response to this phenomenon, many scholars have put forward relevant suggestions, arguing that grandparents and maternal grandparents should have the right to visit their grandchildren. This is because, whether considering cultural traditions or basic national conditions, grandparents should have the right to visit their grandchildren. The close relationship between grandparents and grandchildren is also very close. In life, many grandparents and grandchildren live together. When parents are busy with work, they entrust part of the responsibility of taking care of their minor children to their own parents. Therefore, from the perspective of upbringing and inheritance, the visitation rights between grandparents and grandchildren cannot be denied either. Apart from the relationship between grandparents and grandchildren, there is also a real and undeniable blood and kinship among siblings. Siblings are part of a family. It is obviously inappropriate to exclude them from the scope of visitation rights. In legislation, it can be considered to refer to the research reports of psychology and cultural anthropology to formulate a basic period that can be referred to and applied, which can be used as a value consideration for the discretionary power of judges.

3.2. The exercise of visitation rights should be centered on the interests of the children

The legislative purpose of visitation rights is to ensure the healthy growth of children. When exercising judicial power, the people's court must take the wishes of the children into consideration. Although a child's age, cognitive ability and other factors may affect their judgment or expression, soliciting opinions is a consideration of the interests of all parties and does not necessarily mean that the judgment will be made based on the opinions. When a child's cognitive ability is insufficient, the child's will can be taken as an important reference factor, and a judgment can be made by integrating other factors. Especially when children are old or have sufficient cognitive ability to express their will clearly and truly, it is even more necessary to seek their will. Completely disregarding the wishes of the children themselves and only considering the formal balance of interests in visitation rights between the divorced parties may instead lead to the children's resistance to visitation, resulting in consequences that violate the principle of the children's best interests. Therefore, the exercise of visitation rights is closely related to the interests of children. When the people's court determines the way, time and other matters for the exercise of visitation rights, it shall seek and respect the opinions of the children themselves.

In the case of *Li v. Bao* regarding the dispute over visitation rights, the reasoning of the judgment reflects the following value orientation: "When making a judgment, the people's court should not make overly detailed judgments on the exercise of visitation rights. It is sufficient to clearly define the principles or rules that both parties must abide by, leaving room for adjustment in the specific

exercise of visitation rights in the future."

3.3. Clearly define the reasons for suspension

Visitation rights are the emotional satisfaction and spiritual comfort that children and parents obtain through communication and interaction with each other. They are a kind of spiritual benefit that is difficult to quantify and concretize, and therefore cannot be abandoned or transferred. However, the judicial interpretation takes "having a negative impact on the physical and mental health of minor children" as the sole reason for suspending visitation rights. The definition of "negative image" is too general. The reasons for suspension should be specified and detailed to facilitate the parties and interested parties to protect their reasonable rights and interests in a timely and sufficient manner. It also provides more specific operational guidelines for courts when handling cases involving the suspension of visitation rights.

Relief measures when innovation encounters implementation difficulties. In the process of realizing visitation rights, it is often encountered that either the father or the mother does not cooperate with the court's judgment and ruling on visitation rights. However, due to the particularity of visitation rights, whether it is compulsory visitation under the supervision of a judge or judicial detention measures are taken against uncooperative parties, these measures not only consume a large amount of judicial resources but also are highly likely to cause secondary harm to minor children. Therefore, the author believes that when facing enforcement difficulties, educational communication should be the main approach. Judicial authorities should enhance communication with community committees, schools, and public welfare organizations, encouraging them to mediate between parents based on the principle of "maximizing the interests of children", and making parents understand how much trauma their non-cooperation can cause to their children.

In light of the circumstances that arise in the practice of this country, the following provisions may be made for it: (1) The visitation right holder does not have full capacity for civil conduct; (2) Where a minor child over the age of eight clearly refuses; (3) Where a visitation right holder fails to perform or refuses to perform the support obligations that he or she should undertake as a parent, such as failing to pay the support fees in full and on time; (4) The visitation rights holder suffers from an infectious disease; (5) Where a visitation right holder exceeds the boundaries of his rights and abuses his rights, causing adverse effects on the normal life of the child; (6) Where a visitation right holder engages in violent behavior towards the child during the visitation process; (7) Where the visitation right holder has bad habits such as drug abuse or gambling that are difficult to correct; (8) Where a visitation right holder takes the opportunity to deliberately remove the child from the guardianship of the guardian and instill incorrect values in the child; (9) Where a visitation right holder disseminates obscene materials to the child while exercising the visitation right; (10) Where the visitation right holder has other behaviors that have an adverse effect on the physical and mental health of the child. Where any of the above circumstances occurs, the people's court shall, upon the application of the parties, take into account the specific circumstances and the opinions of all parties, and make a ruling to suspend visitation in accordance with the law.

3.4. Refine the principles for the enforcement of rights

The exercise of any right is not without boundaries. Visitation rights should also abide by the principle of good faith and not be abused. Meanwhile, in order to better exercise one's rights, one should also abide by principles such as public order and good customs. The exercise of visitation rights is not unilateral physical exertion, but requires the joint cooperation of both parties and the creation of conditions. It is not only the right holders who need to abide by the legal principles; the obligors also have certain principles to follow. Therefore, for visitation rights to be exercised better,

the law needs to refine the enforcement principles between the two parties of the rights.

Specifically, when the right holder conducts visitation, they should abide by the following principles: (1) Observe the agreement or judgment, follow the child's daily routine for visitation, and do not affect the child's normal life; (2) Adhering to the concept of safeguarding the interests of children and promoting their healthy growth; (3) Do not provide improper education to children, and do not overly express negative emotions during the short period of visitation, which may affect the family harmony of children. (4) When visiting children directly, one must not cut off their contact with the outside world, especially with their direct caregivers. If one deliberately conceals their whereabouts or incites the children not to reply to their messages. That is, when exercising visitation rights, the visitation right holder should not be limited to their own interests but also respect the interests of the children and their caregivers.

Although the obligor has the right to demand that the right holder exercise the visitation rights appropriately within the scope permitted by law, they must not exercise the visitation rights at will, which may have a negative impact on the children. However, rights and obligations are relative, and they should also fulfill corresponding obligations and follow corresponding principles: (1) Provide necessary conditions for the exercise of visitation rights, such as agreeing on a specific visitation time with the right holder, providing a venue when necessary, and assisting in the better exercise of visitation rights; (2) Do not transfer the grudges with the original spouse to the children, do not provide improper education to the children, and instill incorrect values in them; (3) Not concealing children or deliberately making it impossible for the rights holder to contact the children; (4) Do not induce children to refuse visitation rights when expressing their will. If the right holder and the obligation holder violate the above-mentioned acts, the other party may first apply for mediation. If they cannot reach an agreement, they may file a lawsuit with the court to suspend the exercise of visitation rights or to enforce visitation rights.

4. Conclusion

The visitation rights system in our country is still not very perfect. Improving the legislation on visitation rights is conducive to protecting children's right to be cared for and plays an important guiding role in social morality under the modern rule of law. Judicial decisions should fully play their role in evaluating and guiding social behaviors, widely gain the understanding, recognition and support of the public, and obtain judicial credibility. They cannot rely on mechanical application of legal provisions. They must adhere to a good social value orientation, organically integrate the legal effect of case handling with the social effect, and fully embody the spirit of the rule of law that "law is a fair and virtuous art". Realize good laws and good governance.

References

- [1] Yang Z. *The Current State of Visitation Rights in China and Suggestions for Improvement*[J].*International Journal of Frontiers in Sociology*,2024,6(11)
- [2] Arne B. *Involuntary Absent Fathers? Separated Fathers with Disputed Child Custody or Visitation Rights* [J].*Zeitschrift Fur Soziologie Der Erziehung Und Sozialisation*, 2011, 31(2):169-185.
- [3] Hout V C M, Klankwarth B U, Stöver H. *Conjugal visitation rights, privileges and standards of provision inside European prisons: A socio-legal study of extant literature*. [J].*Social science & medicine* (1982),2025,374117879.
- [4] Wang Zeli. "Comparison of Visitation Law Systems between China and the United States". *Journal of Sichuan Police College*, 4:57-61.
- [5] Long Yifei. *Legal thinking and legislative suggestions on the compilation of marriage and family in the Civil Code* [J]. *Law and social development*, 2020, 26(2):15.
- [6] Chen Wei, He Haiyan. *On the legislative ideas and new regulations of marriage and family in China's Civil Code* [J]. *Hebei Law*, 2021, 39(1):25.
- [7] Gu Rui. *How to improve the legal system of marriage and family based on the Civil Code* [J]. *People of the Times*,

2022(19):3.

[8] Lan X, Sun Q. *Exploring psychosocial adjustment profiles in Chinese adolescents from divorced families: The interplay of parental attachment and adolescent's gender* [J]. *Current Psychology*, 2020, 41(9):1-17.

[9] Li N. *Research on the Protection of the Rights and Interests of Minor Children after Their Parents' Divorce* [J]. *Journal of Social Science and Humanities*, 2024, 6(6):29-34.

[10] Vallgård K, Bjerre C. *Childhood, Divorce, and Emotions: Danish Custody and Visitation Rights Battles in the 1920s* [J]. *The Journal of the History of Childhood and Youth*, 2016, 9(3):470-488.