

The Improvement of Chinese Parental Supervision System Under Traditional Culture

Xiaoqin Zou^{1,*}

¹College of Civil and Commercial Law, Shandong University of Political Science and Law, Ji'nan, Shandong 250014, China

*Corresponding author. Email: fossil80@163.com

ABSTRACT

In view of the defects of parental rights supervision system in China, this paper adopts the methods of historical research and comparative research, analyzes the parental rights in our traditional culture and the current situation and problems of parental rights and paternalism legislation, and puts forward some suggestions for the improvement of parental rights supervision system. That is, on the one hand, it is necessary to observe the principle of children's interests; on the other hand, the existing social resources should be rationally utilized to protect the interests of minor children to the greatest extent possible.

Keywords: parent-child relationship, patriarchy, parental rights, *parens patriae*

I. INTRODUCTION

As a nuclear family relationship, the parent-child relationship has not changed in modern society, and has always been characterized by intimate human relations. Such relation features strong Chinese traditional culture, passing down family culture. The examples of power authority's involvement in parent-child relation have been rare in China due to traditional parent-child ethics. The lack of legal compulsory means actually cannot guarantee the due assumption of moral responsibility, while legal rules can enhance the sense of family responsibility. With researches on the role of legal culture tradition on parent-child relationship as basis, the paper discusses the necessity and feasibility of public power's foray in parent-child relationship, in a bid to improve parental supervision system and better protect the interests of minor children.

II. PARENTAL RIGHTS IN TRADITIONAL CULTURE

Parental rights are not clearly defined in Chinese law. The academic circle generally hold that "parental system refers to the system with the purpose and function of educating and protecting minor children, which enjoys the nature of both rights and obligations." [1] Given the fact that the evolution of patriarchy

spawned parental system, parental system in early stage features strong paternalism. Despite their shared identity basis, the duo differs significantly in content and objects. In the West, the earliest parental system was designed to protect the interests of parents, that is, male parents enjoyed absolute possession and domination over their children and other family members based on their identity as parents. Therefore, the initial parental system had nothing to do with the protection of children's rights. More attention was paid to the protection of interests of children and women in families thanks to the "transition from status to contract" movement. The subject and right of patriarchy are restricted, which leads to the restriction of patriarchy in a certain extent. The final elimination of patriarchy gives birth to parental system in the modern sense.

However, the social concept of parenthood in China is still affected by patriarchy. In Chinese history, "patriarchy" and "seniority power", primary aiming to maintain family and social order, contributed much to the stability of the feudal family and society, which is closely connected with parental system. The traditional Confucian culture holds that the relationship between people, whether between relatives or family members, should be in line with "classification of noble and inferior, and respect of elders". There are no exceptions from the royal family and nobles to the general public. However, such hierarchical thought and human ethics are mostly obvious in family, which is manifested as respect for the will of parents and emphasis on the obedience of children. Traditional Confucianism is a double-edged sword to parental system: on the one hand, the ideal blueprint of parent-child relationship in

*Fund: This paper is the research result of Research Center of Civil and Commercial Law and People's Livelihood of Humanities and Social Science Research Base of Universities in Shandong Province, and Interpretation of Parent-child Law under Confucian Culture (2015SKZZ-18), a key project of social science popularization and application in Shandong Province.

traditional ethics is kindly father and filial son, which helps the establishment of a harmonious and healthy parent-child relationship. On the other hand, the traditional thoughts of "patriarchy" results in parents' unduly control over children, which prejudices the interests of minor children.

The ethical and moral system shaping parent-child relationship serves as an essential integral of the feudal patriarchal clan system in traditional Chinese society. "Son's obedience to father" is one of the basic contents of the three cardinal guides. The parent-child relationship, an important part of family relationship, is mainly shaped by the feudal ethics, while the law can only play a supplementary and auxiliary role. Analysis of the statutes of various dynasties shows that Chinese law has a negative attitude in dealing with parent-child disputes. For example, *Legal Questions and Answers*, a bamboo-slip of Qin Dynasty, states that a child who steals from parents, a parent who kills or maims his child, slave or concubine without permission is litigation not related with state, that is, cases that the government does not prosecute. It's obvious that the law is extremely subdued when it comes to family relations, especially parent-child relations. When the law is not deeply involved in issues concerning family relations, how to supervise the exercise of parental rights and protect the interests of the minor to the greatest extent has become a challenge for judicial practice.

III. CURRENT SITUATION AND PROBLEMS OF PARENTAL SYSTEM LEGISLATION

Despite the differences between legal system and traditional culture, parental system, an important system to regulate the relationship between rights and obligations of parents and children, has attracted the attention of most countries. Chinese law stipulates that the rights and obligations between parents, the legal guardians of the minor, and children, are subject to many legal norms to guarantee the greatest interests of the latter. China's current legislative system offers governing provisions by virtue of *General Principles of Civil Code*, encourages the establishment of harmonious parent-child relationship by *Marriage and Family Law*, and prohibits the violation of interests of minors through *Law on the Protection of Minors*. Although a standard and universal parental system has not been formed and the concept of parental rights was not employed in the above laws, parental system is reflected in the above laws, which indicates the initial establishment of parental system in a substantial sense. However, due to the scattered provisions on parental system in current laws, the relevant rules are disordered and abstract, and the judicial practice lacks operability, which fails to meet the requirements of parent-child relationship. To be specific, the following three problems stand out:

The first is the lack of clear concept of parental rights. The boundary between guardianship and parental rights is fuzzy. Most countries make a clear distinction between parental rights and guardianship, and establish independent parental system. In Part IV, Family, *Japanese Civil Code* elaborates parental rights and guardianship in two chapters respectively. The details are as follows. Article 11 states that "a person who is mentally impaired or wasteful should be protected by another person". Article 820 states that "a parent who enjoys parental rights shall be obliged to supervise and educate his or her children and assume responsibilities." [2] Thus it can be seen that Japanese legislation has made a clear division between guardianship and parental rights. However, the current *General Principles of the Civil Law of the People's Republic of China*, the guiding norms of civil acts, fails to mention the concept and rules of parental rights. The provisions on guardianship do exist. The provisions in specific rules relating to the legal relationship between parents and children only cover the fact that parents are guardians of minors. As a special law, *Marriage and Family Law* fails to include parental system. However, it do make specific provisions on parent-child relationship. *Law on the Protection of Minors*, a special law designed to protect the interests of minors, just covers the protection of minors by parents and other guardians. Although the current law does not involve the clear definition of parental rights, it actually distinguishes the guardianship from parental system, and considers parental rights the combination of rights and obligations. When the illegal and improper behavior of the minor damages the third party, the parents should bear economic compensation liability, which is consistent with the extension of parental rights in theory. As for China's lack of a clear distinction between guardianship and parental rights, some scholars take that: "When it comes to the protection of minor children, the civil law system regards guardianship as the supplement and extension of parental rights. Specifically, the parent-child relationship is subject to parental rules when the parents of minor children are still alive and capable of raising and educating their children. However, the relationship between the fosterer and the minor shall be subject to guardianship system if the parents of minor children are unable to bear the responsibility of bringing up their children in real life (including death, disappearance, incapacity or improper upbringing)." [3] *General Principles of the Civil Law* that treated minors and other mentally impaired persons alike expanded the coverage of guardianship and imposed parental rights on guardianship of minors, which not only disturbs the original clear guardianship system, but also undermines the protection of interests of minor children. Considering family relationship, *Marriage Law* has made provisions on parent-child relation, which goes beyond the scope of the basic civil theory, resulting in

the confusion of guardianship system. Therefore, it is necessary to separate parental right from guardianship in legislation and define the former clearly.

The second is the lack of a complete parental deprivation mechanism. Parents are obliged, in their capacity, to fulfill their responsibility for the upbringing, protection and punishment of their minor children. However, parents should comply with the provisions of law in the exercise of parental rights, and raise their children in a lawful, appropriate and reasonable way. Otherwise, once the parents have committed improper or unlawful acts and infringed upon the rights and interests of the minor, they shall immediately be declared through judicial procedures that all or part of their parental rights shall be terminated. It is the right and duty of parents to protect their minor children from external harm and to educate their minor children not to harm others. When paternal right holders fail to actively exercise paternal right, or the paternal right is improperly exercised, which harms the interests of the minor or others, can the holder be deprived of paternal right besides restriction? *Law on the Protection of Minors* only stipulates in Article 53 that when the statutory conditions are met, the court may either passively revoke the guardianship of the minor's guardian upon the application of the party concerned, or, on its own initiative, revokes the guardianship of the minor's guardian based on its authority. Under what circumstances can the exercise of parental rights be suspended or deprived? How can public power intervene in parental rights when parents are suspended or deprived of parental rights? These are not specified in the existing laws and regulations.

The third is the lack of feasible parental supervision system. The lack of supervision mechanism is the biggest challenge for parental system. Given the fact that parental right originally developed from patriarchy, the idea of parental control over children in patriarchy has long swayed parental right. The traditional concept holds that parents are entitled with the right and duty to protect and educate their children. As for duty, "the child's intelligence and ignorance, gains and losses and merits and demerits all implicate the father". In terms of rights, all behaviors of parents towards their children are acceptable and forgivable, including those of disciplining their children. Despite parents' selfless and profound love for their children, it is still necessary for the law to intervene within relations concerning family and parent-child. Many social ills, including child abuse, abandonment, sale of children and illegal use of child labor, can be explained by parents' failure to perform their duties. In some criminal cases involving minors, such as the murder of a 13-year-old in Dalian, parents are clearly equally to blame. As the perpetrator, the 13-year-old is also the victim of inadequate parental discipline on another level, which proves the urgency of regulating parental rights. However, due to the

exaggeration and absolute trust of parental love, the current legislation often ignores parental supervision rules.

IV. THE IMPROVEMENT OF PARENTAL SUPERVISION SYSTEM

As for the improvement of interests of minor children, for one thing, protecting the rights and interests of minors from infringement is a social concern. People cannot tolerate social infringement of minor children. For another, the law fails to position itself properly when it comes to the violation of minor children within family and the violation of minor children to others due to improper exercise of parental rights. Considering current family relationship in China, the protection of interests of minor children is unfavorable. Therefore, it is necessary to learn from other countries' mature related systems and improve China's parental supervision system.

A. Establishing the value of "standard of right of children"

The parental supervision mechanism aims at protecting the interests of minor children, which is based on the establishment of the value of "standard of right of children" in parental system. To be specific, the improvement of parental system first requires the correction of the traditional concept of "patriarchy", and makes the protection of minor children's interests priority. The core value of "standard of right of children" lies in the protection of rights and interests of children, which, on the premise of ensuring a balanced distribution of rights and obligations between parents and children, guardians and minors, tries every tricks to maximize the protection of minors' interests. The principle of children's "best interests" has long been established in the *UN Convention on the Rights of the Child*. Its Paragraph 1 Article 3 clearly sets out the basic principle of child protection, namely, that the best interests of the child shall be priority in all matters relating to the child, whether carried out by the executive, legislative and judicial organs of the State or by social organizations. Nowadays, the principle of children's best interests has been widely accepted by international community and is regarded as the single highest criterion and basis for matters concerning custody and upbringing of children. Since the interests of minors in real life are also harmed by family, it is necessary not only to promote "standard of right of children" values in the society to protect the healthy growth of minors, but also to adhere to such values in family.

B. Introduction of parens patriae system

The traditional Chinese view takes that parents' love for children is selfless and great, thus no need for legal

restrictions and supervision. Moreover, the saying that "children are from parents" leads to the conclusion that all parents' punishment of their children is understandable. Even if parents do harm their children, it is justifiable for them to do so for the sake of their children's growth. As a result, parental involvement by someone other than a parent is traditionally unacceptable and can be considered "meddling". However, when parents fail to perform or perform their duties correctly, morality alone cannot guarantee the interests of minor children, and legal intervention is indispensable. It is imperative for China to draw from *parens patriae* and introduce corresponding system to supervise the exercise of parental rights effectively.

The theoretical basis of state involvement in parental rights lies in *parens patriae*, which takes children not only as the children of their parents, but also members of the society in theory. Therefore, the state is obliged to guarantee the survival of each member. Once it is discovered that family may endanger the health and life of child, the society will intervene in the parent-child relationship. Meanwhile, the social welfare service also included "intervention mechanism of unfavorable family" to protect the legitimate rights and interests of minors and safe and healthy growth of social members, which is exactly the purpose of *parens patriae* system. The protection of rights and interests of minors requires the combination of family guardianship and state guardianship, which vary in priority. Relatively speaking, family guardianship bears the primary responsibility, while state guardianship the ultimate responsibility. The duo complement each other and jointly realize the care and responsibility for children. [4] In comparative law, the British *parens patriae* serves as a supplement to natural parental rights, while *parens patriae* of the United States is more reflected in special protection of the vulnerable groups. What's more, *parens patriae* in countries adopting anglo-american law system serves as the theoretical basis for legally depriving parents of their natural parental rights, as well as the basis of juvenile justice. The exercise of *parens patriae* should follow strict conditions, which is only a supplement and substitute for the parents who cannot bear the responsibility of raising their children. According to *UN Convention on the Rights of the Child* on parental supervision and parental deprivation system provisions, when guardians, including parents, perform their duty of care and upbringing for minors, shall ensure that minors are not subject to any form of physical and mental abuse, including physical and psychological harm, personality insult, abuse, abandonment, cold violence, labor exploitation, sexual assault, etc., otherwise the guardian will be deprived of guardianship of the minor. Many countries enjoy perfect and specific parental supervision and deprivation systems. For example, the federal *Child Abuse Prevention and*

Treatment Act of the United States stipulates that anyone, whether a neighbor or a passer-by, who finds that a child has been abused by family member can call the police. A 24-hour hotline has been set up.

In Contrast, in China, although the rules and systems of *parens patriae* have been practiced in reality, the construction of *parens patriae* legislation and norms has not received much attention. [5] The improvement of *parens patriae* in system and regulation is practically needed, as well as essential for protecting children's interests. The lack of corresponding social welfare supporting mechanism makes it difficult to implement Article 62 of *Law on the Protection of Minors*. After the introduction of *parens patriae*, the most important thing is to choose a suitable surrogate care institution based on China's national conditions. To be specific, the intervention of *parens patriae* on parent-child relationship should be supplemented by clear and specific departments (welfare institutions or specialized child protection agencies) that exercises parental rights. Given China's imperfect social security system, the two grassroots organizations, neighborhood committee and village committee, are in line with the traditional living habits and traditional public psychology, which makes them stand out among organizations concerning parental supervision. Marriage and family relationship, including parent-child relationship, are most closely related to real life. Therefore, the specific rules of parent-child relationship adjustment must cater to the public's psychology, so as to better play its adjustment role. In *Law and Its Local Resource*, Su Li points out that it is necessary to find delve home resources including traditional culture to improve the construction of the rule of law. However, local resources exist in not only formal and orthodox rules and regulations of historical books, but also a large number of informal rules and regulations. The latter is more hidden, but more valuable local rule of law resources. Therefore, the vision of local resources should be applied to the broad and scattered social practice. The perfection of parental supervision system requires the positive restraint and guidance of traditional ethics on parent-child relationship, as well as the power of informal organization in social life. It is worth trying to make use of the advantages of China's traditional grassroots organizations and endow neighborhood committee and village committee the responsibility of supervising family.

C. The improvement of legal procedure and relief system of parental supervision

China's existing parental system has laid a solid foundation for the protection of minor children's interests. However, related norms and supervision are far from perfect and meticulous, especially the lack of legislation in supporting legal procedures and relief agencies. For example, what are the criteria for judging

that parents are not exercising their parental rights properly? Which individuals and institutions are responsible for monitoring and reporting? More importantly, once parents are deprived or temporarily deprived of their right of raising and educating children, what procedures are employed to select appropriate custody institutions for minors? As a result, the improvement of parental supervision system demands standard legal procedures and relief system, scientific and reasonable reporting system, investigation system, evaluation system and relief system.

Article 6 of *Law on the Protection of Minors* in China clarifies the right of relevant departments to report and file charges against acts violating the rights and interests of minors. According to the article, those who are entitled to report and file charges include state organs, all other social organizations, and all adults, including the guardian himself. When a minor is infringed upon, the subject mentioned above has the right to report and charge. The law itself endows a very wide range of persons with the right to report. Most Chinese, influenced by traditional thinking, hold that outsiders should not interfere in other people's domestic affairs. Even if a report is made, the lack of specific investigation and evaluation institutions and operating systems makes it difficult for police to focus abuse and injury of minor children within the family, which hampers the enthusiasm of the masses. Therefore, China can learn from the legal procedures and relief systems of parental supervision in other countries. The federal *Child Abuse Prevention Act* in United States is an example. While entitled to enact its own laws based on actual needs, each state should ensure timely and effective protection of abused children in a procedural manner. First, states set up special numbers in police departments or child protection departments to receive reports of child abuse cases. Secondly, the operator analyzes and filters the reported content to determine the next thing to do, such as whether the police need to take emergency protective measures, or submit it to the investigator for an in-home investigation first. Third, state public or private institutions recruit foster families, and the government pays for the family support allowance to take care of abused children. Finally, the government department supervises the family raising to ensure the healthy life of children. Meanwhile, the local court will decide whether to end the parental custody after hearing the case. [6]

The current legal system in China does not provide the departments, procedures, methods, time, time limit, responsibility system and punishment measures of parental supervision. The next step should be to establish and improve investigation institution, investigation procedure and relief system of parental supervision. The first is to standardize the time limit, processing procedure and processing result supervision system of the authority after receiving the report. The

next is that, upon receipt of the report, specific personnel should be assigned to investigate the case, assess the plight of the minor and whether intervention and action are required against the family. The last is measures that best protect the best interests of child and least affect the family are taken based on investigations and assessments. If the circumstances are minor, the method of evaluation and education can be adopted. If the circumstances are serious, administrative penalties can be adopted. If the circumstances are extremely serious, parents and other guardians shall be deprived of their guardianship qualifications, and the children shall be rearranged for adoption or other long-term placement. It should be noted that China's current social security system is not sound, and parents and other guardians should not be deprived of their guardianship without determining the specific receiving department. A more feasible approach is as follows. On the one hand, the influence of traditional concept of patriarchy should be eliminated, and the advantages of traditional culture should be utilized to promote the tradition of fatherhood and filial piety, so as to maintain a stable, harmonious and healthy parent-child relationship. On the other hand, existing resources should be utilized to fully play the role of two grassroots organizations, neighborhood committee and villagers committee, in the protection of minors. The investment of social security funds should also be increased to establish feasible child protection institutions, so as to effectively protect the best interests of children and give minors a healthy and safe growing environment when they are harmed by their families.

V. CONCLUSION

Even the intervention of public power in parent-child relationship has been rare in China, supervision is indispensable for parental power. As a result, the regulation of parental rights exercise in legal system can better protect the healthy growth of minors.

References

- [1] Shi Shangkuan. Family Law [M]. Taiwan Rongtai Press. 1980: 590. (in Chinese)
- [2] Translated by Wang Shujiang. Japanese Civil Code [M]. People's Public Security Publishing House. 1999: 5-66. (in Chinese)
- [3] Chen Xiaojun, Yi Jun. Research on Parental Rights System and Legislative Construction [A]. Wu Handong. Private Law Research (Initiation Issue) [C]. China University of Political Science and Law Press. 2002: 232. (in Chinese)
- [4] Feng Yuan. Modern Transformation of Child Wardship Model and the Response from Civil Code [J]. *Oriental Law*. 2019(4). (in Chinese)
- [5] Xu Guodong. The National Paternity System in Common Law and Its Roots of Roman Law [J]. *Gansu Social Sciences*. 2011(1). (in Chinese)
- [6] Wang Pengxiang. On Parental Power Legislation to Prevent the Juvenile Delinquency [J]. *Henan Social Sciences*. 2006(5). (in Chinese)