ON THE ESTABLISHMENT OF THE PARAMOUNT PRINCIPLE OF THE BEST INTERESTS OF THE CHILD IN MARRIAGE AND FAMILY LAW OF THE PEOPLE’S REPUBLIC OF CHINA

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Abstract: The Declaration of the Rights of the Child 1959, the Convention on Rights of the Child 1989 and other international literatures initiated that in dealing with matters concerning children, children’s best interests should be the paramount consideration. Many states in the world have taken the Best Interests of the Child as the paramount principle in their legislation of family law and judicial practices. The government of China is always valuing the protection of children’s interests. Both the Constitution of China and the Law on the Protection of the Minors of the People’s Republic of China have described the general provisions of the protection of children. Because of the lack of the Paramount Principle of Children’s Best Interests, some provisions of the current Marriage Law of China, amended in 2001, reflect the Parent-Oriented tendency. The Chinese legislators should give weight to the requirements of the Vulnerable Groups of the society of China in order to keep the promise that the State respects and protects the human rights prescribed in the Amended Constitution of China 2004. So the preference to the Best Interests of the Child should be instituted in our family law and guarantee that the principle will be implemented well in every field of the law. This paper analyzes and evaluates the achievements and defects of the present marriage and family law of China. According to the Chinese realities, the legislative experience of foreign countries and Taiwan District, we suggest the Paramount Principle of Child’s Best Interests should be established in the marriage and family law of China and some relevant systems should be also amended and supplemented.

Key words: Paramount Principle of the Best Interests of the Child; Marriage and Family Law of China; suggestions on the amendment
1. INTRODUCTION

It’s very important to establish the Paramount Principle of Best Interests of the Child (PPBIC) in the marriage and family law of China. The Declaration of the Rights of the Child 1959 firstly put forward the international principle as a direction: In the enactment of laws, the Best Interests of the Child should be the paramount consideration, so that the interests of the child can be protected well. Since then, both the Convention on the Elimination of All Forms of Discrimination against Women of the UN 1979 and the Convention on the Rights of the Child of the UN 1989 advocated the PPBIC. Children are the future of the world and the hope of a nation. Children’s rights are significant components of the basic human rights. Children are parts of the vulnerable groups of the society, so laws should protect their interests firstly. In the modern society, it’s one of the development tendencies for the marriage and family law to pay more attention to the respect and protection of children’s interests. (Chen Wei, 2000: 45-46, 49.). In according to realize the promise made in the Constitutional Amendment of 2004 that “the State should respect and protect human rights”, legislators should pay more attention to the interests of the minors. We hold that, children’s interests are not always consistent with those of their parents in the society, thus, it’s vitally necessary to establish the priority principle to protect the children’s interests in the marriage and family law of China and safeguard that this principle can be carried out in every field of family and marriage law.

2. PROVISIONS CONCERNING THE RELATIONSHIPS BETWEEN CHILDREN AND PARENTS PRESCRIBED IN THE LAWS AND JUDICIAL INTERPRETATIONS OF CHINA

A. Legal Status of Children and Parents

(a) Legal Status of Children Born in Wedlock and Their Parents

“the principle of the best interests of the child is to be the paramount consideration in decision making about child matters.” It is always called “the child’s best interests principle” for short in national and international literatures. We think this principle should be call “Paramount Principle of the Best Interests of the Child” to show its preference.

Declaration of the Rights of the Child 1959, Principle 2: The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and under conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration. Principle7: The best interests of the child should be the guiding principle to the persons responsible for the education and guidance of the child; parents of the children should bear responsibility first.

See: Convention on the Elimination of All Forms of Discrimination against Women of the UN 1979, s5 (b), s 16.1(d)(f); the Convention on the Rights of the Child of the UN 1989, s3 (1): In all activities concerning children, whether carried out by public or private, social welfare institutions, courts, administrative authorities or legislatures, the best interests of the child shall be a principal consideration.
Children born in wedlock and their parents are fully equal as regards their legal status.

(b) Legal Status of Children Born out of Wedlock and Their Parents

Children born out of wedlock shall enjoy the same rights as those born in wedlock and have fully equal status with their parents.

(c) Legal Status of Children Born out of Artificial Insemination and Their Parents

If a child was born out of artificial insemination on both parties’ agreement, such a child is regarded as the child born in wedlock of both parents, and he or she has fully equal status with his or her parents.

(d) Legal Status of Adopted Children and Adoptive Parents

The legal status of adopted children and adoptive parents is the same as that of children and their natural parents.

(e) Legal Status of Stepchildren and Stepparents

Stepchildren and stepparents are fully equal as regards their legal status. Maltreatment and discrimination shall not be allowed between stepchildren and stepparents. There are two kinds of relations between stepparents and stepchildren: one kind is the relationship between stepparents and stepchildren who have received support and education of the stepfather or stepmother, under such circumstances, the mutual rights and duties of them are subject to relevant provisions of marriage law governing the relationships between natural parents and their children; another is the relationships between stepparents and stepchildren who have not received the support and education provided for by the stepfather or stepmother, under such circumstances, they are affinity and they don’t have parents-children rights or duties to each other in law.

B. Provisions on Children’s Right to be Born and Spouses’ Child-Bearing Right

Children’s right to be born and health rights are connected closely with the spouses’ child-bearing right. In order to protect children’s interests better, the legislation of China imposes some restrictions on the spouses’ child-bearing right.

C. Child Support and Custody

(a) Parents’ Support to the Minor Child

Subject to Section21 of the current Marriage Law of China 2001(ML2001), parents shall have the duty to support and educate their minor children.

In China, the grounds to judge whether the support and educational relationship between stepchildren and stepfather or stepmother is formed is that: if the stepfather or stepmother supports the minor child in economy or cares for his living after he or she marries to the minor’s natural mother or father, the support and educational relationship can be established; if not or at the time of the marriage the stepchildren has already been of age and lived independently, there is no relationship of support and education.
(b) Other Near Relatives’ Support to the Minor Child

Two articles were added into Marriage Law of China 1980 as Section22 and Section23: Grandparents and maternal grandparents who can afford it shall have the duty to bring up their minor grandchildren and maternal grandchildren whose parents were dead or have no means to bring them up. Elder brothers or sisters who can afford it shall have the duty to maintain their minor younger brothers and sisters, where their parents were dead or have no means to support them. ML2001 reserves those provisions.

(c) Parents and other Near Relatives’ Custody of the Minor Child

Subject to Section16 of General Principle of the Civil Law of the People’s Republic of China 1986(GPCL1986), provisions on the extent of guardians of the minor child are as follow: The parents of a minor shall be his guardians. If the parents of a minor were dead or lack the competence to be his or her guardians, the following person or persons who has the competence to be a guardian shall act as his or her guardian: (1) paternal or maternal grandparents; (2) elder brothers or sisters having been of the age; (3) any other closely connected relatives or friends willing to perform the obligation of guardianship and approved by the units of the minor’s parents or the neighborhood or village committee where the minors are resident.

D. Provisions on Child Support of Divorced Parents

(a) Determination on Parent’s Direct Support of Children after Divorce

The parents-children relationship shall not come to an end with the parents’ divorce. After divorce, whether the children are direct in the support of the father or the mother, they shall still be the children of both parents. In principle, the mother shall have the custody of a breast-fed (below two years old) infant after divorce.

(b) Child Maintenance Paid by Parents

Both parents shall have the right and duty to support and educate their children after divorce. If, after divorce, one party is in custody of a child, the other party shall bear part or the whole of the child’s necessary living and educational expenses; the two parties shall seek agreement regarding the amount and duration of such a payment; if such an agreement failed, the People’s Court shall make a judgment: The amount can be determined according to the special needs of the child, parents’ capacity of paying maintenance and the local living level in practice. As for the parents with steady

“Direct Support” means that, one party of parents lives together with the minor child after divorce and he or she exercises the child guardianship directly; “Indirect Support” means that, one party of the divorced parents does not live together with the child after divorce and so he or she will not exercise the guardianship directly, but he or she must shoulder the maintenance.

Subject to Section 21 of the Judicial Interpretation of the Supreme People’s Court Regarding Some Questions in the Application of the Marriage Law of the People’s Republic of China (I), adopted on Dec.24, 2001 (herein called Judicial Interpretation (I) for short), the maintenance comprises child living expenses, educational costs and medical charges, etc.
incomes, the maintenance may be generally paid at the rate of twenty to thirty percent
of the total monthly incomes. The rate may be appropriately adjusted higher if either of
the parties supports more than two children, but generally can’t exceed fifty percent of
their monthly incomes. As for the parents without steady incomes, the amount of the
maintenance shall be determined according to the total annual incomes or the average
incomes in the same trade referring to the aforesaid rate. The maintenance shall be paid
until the child is eighteen years old generally.

(c) Adjustment of Child Support Relationship and the Increase of Child
Maintenance
As for the adjustment of child support relationship, at the request of either party,
adjustment of the support relationship shall be supported under one of the following
circumstances: (1) the party living with the child is unable to continue bringing up the
child due to suffering from serious diseases or disability; (2) the party living with the
child did not fulfill his or her support duty or maltreated the child, or his or her living
together with the child really had adverse affect on the child’s body and mind; (3) the
minor child over ten years old is willing to live with the other party and the said party
has support capacity; or (4) other reasonable grounds on which rearing should be
adjusted. The adjustment of support relationship on the agreement of parents shall be
permitted. However, the law doesn’t provide that the paramount consideration of the
best interests of the child must be considered.

As for the increase of the child maintenance, where the father or mother is capable of
paying such costs, the child’s request for increasing the maintenance shall be supported
under one of the following conditions: (1) the previously-fixed amount of maintenance
is insufficient to maintain the local living level in practice; (2) the specific needs have
exceed the previously- fixed amount due to the fact that the child is suffering from
diseases or studying in school; or (3) other reasonable grounds on which that the
maintenance shall be increased.

E. Parent’s Access Right to Children after divorce
As for the parents’ access right to a child after divorce, a section was supplemented
in ML2001 as Section38: After divorce, the father or the mother who does not directly
bring up the child shall have the right to contact with his or her child, and the other
party shall have the duty to cooperate.

3. ACHIEVEMENTS AND DEFECTS OF PROVISIONS ON PARENTHOOD
RELATIONS PRESCRIBED IN CURRENT MARRIAGE LAW OF CHINA
Comparing with the previous relevant legislation of China, we hold that the
provisions on parenthood relations prescribed in the current marriage law and relevant
judicial interpretations are progressive and successful on the whole, but there are still
some defects.

See: ss16, 17, Some Particular Opinions on Dealing with Child Support Issue in the Trial of
Divorce Cases by the People’s Court 1993.
A. Achievements

(a) Insisting on the Principle of Equal Status of Children and Parents.

(b) Protecting the Infant’s Birth and Health Right and the Spouses’ Child-bearing Right Equally.

(c) In General Prior Consideration of the Interests of the Child in Dealing with Issues Regarding Child Support and Custody.

(d) Dealing with Such Issues Concerning Child Contact Right Reflecting the Sprit of PPBIC.

B. Defects

(a) PPBIC Has not Been Definitely Established in the Parenthood Law.

(b) The Title of Child Born out of Wedlock Reserved in the Law.

(c) The Lack of the Advocacy of PPBIC in Exercising the Spouses’ Child-Bearing Right

(d) Lack of PPBIC in Determining and Varying Child Support Relationship

(e) Lack of the Guardians ad litem for the Minor in Divorce Proceedings

(f) No PPBIC is Provided for in the Termination of Adoption Relationship on Agreement

(g) No Guardianship Supervision System for Divorced Parents’ Exercising of the Guardianship to a Minor

4. GENERAL LEGISLATION OF PPBIC IN SOME FOREIGN STATES AND DISTRICTS

As what mentioned above, the international guiding principle requiring that the best interests of the child should be the paramount consideration when enacting laws was first put forward in the Declaration of Rights of the Child 1959. Since then, the Convention on the Rights of the Child 1989 reaffirms that principle again. At present, the legislation of many States including both countries of Anglo-American Law System and countries of Continental Law System have established or embodied this paramount principle.
A. Legislation on PPBIC in the States of Anglo-American Law System

(a) Legislation on PPBIC in UK

(b) Legislation on PPBIC in Australia

(c) Legislation on PPBIC in Canada

(d) Legislation on PPBIC in America

B. Legislation on PPBIC in the States of the Continental Law System

One subsection was added to Civil Code of Germany as Subsection1697(a) in 1997 and Taiwan District of China revised its Law of Kindred of Civil Act and one section was added as Section1055 in 1996, so that the paramount principle of the child’s best interests has been established expressly in Germany and Taiwan District. To be frank, except the legislation of Germany and Taiwan District of China, the legislation in most States of the Continental Law System, such as France, Japan, Switzerland and Italy, has not established the principle definitely, but the provisions regarding child custody, parental right (It is called parental care right in modern society), the exercising of the parent’s contact right and so on reflect the principle.

Furthermore, it’s worth pointing out that, the legislation in Ethiopia (Civil Code of Ethiopia, published on May 5, 1960 and effective on September 1, 1960) and Germany (Civil Code of Germany, effective in 1998), has abolished the titles of Child Born in Wedlock and Child Born out of Wedlock. Any minor is called Child without considering whether his or her parents have marriage relationship or not. Subject to that shift, parenthood relationship is determined in the light of parents and establishes the System of the Presumption, Rebutting as well the Rescinding of Fatherhood between the parents with marriage relationship and their children. As for parents without marriage relationship and their children, the System of Acknowledgment of Fatherhood (Voluntary acknowledgement) and determining fatherhood by the Court (Compulsory acknowledgement) as well are also established. (Chen Wei, Jin Yuxin, 2003: 245-47). We hold that, those provisions reflect the respect for the child and are beneficial to the protection of the best interests of the child.

5. Suggestions on the Revision to Marriage and Family Law of China and Relevant Legislation

As what mentioned above, there are still some provisions adverse to the protection of the best interests of the child in the current marriage law and judicial interpretations of China. We suggest that we should revise and supplement relevant legislation of China, referring to beneficial legislative experience of foreign states and Taiwan District of China mentioned above and considering the realities of China to protect the interests of the minor child better and keep the promise made by China while signing the
Convention on the Rights of the Child of UN 1989, These suggestions are as below:

A. Establishing PPBIC in the Legislation of China

B. Revising Relevant Legislation Under PPBIC

Particular legal systems concerned shall be revised or supplemented according to PPBIC as bellow:

(a) Canceling the Title of Child Born out of Wedlock.

(b) Exercising Spouses’ Child-Bearing Right should follow the PPBIC.

(c) Determining and Changing Parental Support to the Minor Child shall follow the PPBIC.

(d) Exercising Right of Child Contact by the Divorced Parent should follow the PPBIC.

(e) The Apportioning of Child Maintenance by Parents should follow the PPBIC.

(f) Supplementing Written Agreement on the Arrangement of the Minor Child in the System of Divorce by Registration

(g) Supplementing the Guardian ad litem System in favor of the Minor Child in Divorce Proceedings.

(h) Establishing the Paramount Principle of the Best Interests of the Adopted Child in Adoption Law of China.

(i) Supplementing the Child Custody Supervision System in GPCL1986

REFERENCES


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