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Author(s)	Sunthari, Subramaniam Mogana
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# Is Visitation between a Child and Non-Custodial Parent a Right?

Subramaniam Mogana Sunthari\*

## Abstract

Visitation between a child and non-custodial parent has been a problematic legal issue for many decades. This article explores the notion of visitation under Malaysian and Japanese laws. In light of the United Nations Convention on the Rights of a Child this article examines whether visitation is the right of a non-custodial parent's or of a child. It concludes that visitation should be maintained as the right of the non-custodial parent and proposes a legal reform in Japan to guarantee visitation to children after parental divorce.

**Keywords :** Visitation, Rights, Non-Custodial Parent, Child, Legal Reform.

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\* Doctoral Candidate at Department of Comparative Public Policy Osaka School of International Public Policy, Osaka University

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## INTRODUCTION

“If visitation were never to be allowed to children on the part of either father or mother, if the father or mother was not always and on all occasions perfectly discreet and wise, there are a great many parents who never would have the opportunity of seeing their children again”

*Atkin LJ, B v B [1924] P 176 at page 191.*

During the existence of a harmonious matrimonial relationship children are loved and cared for by both of their parents. However, when the marital relationship turns sour, children become the most contentious object. Both parents often claim equal rights over their children and place them in a most difficult position of having to choose between their father or mother. Eventually, when the parents separate or divorce, disputes concerning the care and support of their children often arise. Parental divorce requires a restructuring of parental rights and responsibilities in relation to children. If the parents can agree to a restructuring arrangement, there is no dispute for the court to decide. However, if the parents are unable to reach such an agreement, the courts help to determine the relative allocation of decision making authority and physical contact each parent will have with the child. Usually, when one parent has sole custody<sup>1)</sup>, the other parent<sup>2)</sup> is granted visitation. In light of having both parents in the child's life following a divorce, the courts in most jurisdictions often grant reasonable visitation to the non-custodial parent.

Visitation<sup>3)</sup> (*mensetsu kousho*) is thus a license for a non-custodial parent to visit children who are under the custody of a custodial parent. A parent having visitation is entitled to visit and be visited by the children. Visitation can be classified as direct and indirect visitation. Direct visitation need not be personal in nature, but the children and their non-custodial parent can be allowed to interact through exchange of letters, e-mails or contact vide telephone or computer. Indirect visitation is allowed when interaction is not permitted; that is by requesting the custodial parent to notify the non-custodial parent of the progress and development of their children by sending photographs, videos or by furnishing a report on the children's education or health matters, until such time where direct communication becomes permissible. In short, visitation is any mode of communication which helps preserve the relationship between the children and the non-custodial parent following a divorce or parental separation.

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1) A parent having custody or parental authority is hereinafter referred to as “custodial parent”

2) The other parent is hereinafter referred to as “non-custodial parent”

3) Access, visitation or contact are the terms used to describe the right of a non-custodial parent to visit and be visited by his or her child placed in the custody of a custodian. For the purpose of this article, the term “visitation” shall refer to access (Malaysia), *mensetsu koushou ken* (Japan) and contact (English Order). Although visitation is allowed in appropriate circumstances to third parties including grandparents, siblings or other close relative, this discussion is restricted to the right and responsibilities of non-custodial parents.

## SIGNIFICANCE OF VISITATION

Visitation between non-custodial parents and their children is important for maintaining family relationships and supporting goals for reunification following divorce. It can alleviate some of the problems experienced by children when they are separated from their families, such as attachment disorders and fear of abandonment. A number of scientific studies worldwide show the negative impact of a child not being exposed to his or her non-custodial parent after divorce.<sup>4)</sup> *Firestone* summarized that “30% of the children in the study experienced a marked decrease in their academic performance following parental separation, and this was evident three years later. Access to both parents seemed to be the most protective factor, in that it was associated with better academic adjustment. Moreover, data revealed that non-custodial parents (mostly fathers) were very influential in their children’s development. These data also support the interpretation that the more time a child spends with the non-custodial parent the better the overall adjustment of the child.”<sup>5)</sup> *Rebecca* claims that “the continued involvement of the non-custodial parent in the child’s life appears crucial in preventing an intense sense of loss in the child. The importance of the relationship with the non-custodial parent may also have implications for the legal issues of custodial arrangements and visitation. The results of this study indicate that arrangements where both parents are equally involved with the child are optimal. When this type of arrangement is not possible, the child’s continued relationship with the non-custodial parent remains essential.”<sup>6)</sup>

## THE LAW

In Malaysia, various statutory laws deal with custody and visitation of children. In deciding in whose custody a child should be placed, the paramount consideration is the *welfare of the child* and subject to this the courts have regard to the wishes of the parents and to the wishes of the child, where he or she is of an age to express an independent opinion. There is a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother. An order for custody normally contains provision on reasonable visitation to the child by the non-custodial parent at such times and with such frequency as the court may consider reasonable. Even in cases of separation prior to a divorce, the resident parent is usually encouraged to allow visitation between the children and the non-resident parent unless he or she is proved to be harmful. Only in a very exceptional situation do the Malaysian courts restrict or deny visitation bearing in mind that the non-custodial parent is entitled to visitation

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4) Research conducted in the US stress that visitation by non-custodial parent is vital to the development of the children.

5) L. Bisnaire, PhD; P. Firestone, PhD; D. Rynard, MA Sc, Factors Associated with Academic Achievement in Children Following Parental Separation, *American Journal of Orthopsychiatry*, 60(1), January, 1990.

6) Rebecca L. Drill, Ph.D., Young Adult Children of Divorced Parents: Depression and the Perception of Loss, Harvard University. *Journal of Divorce*, V. 10, Fall/Winter 1986.

under the law following a divorce.

In Japan, when parents divorce or separate they have to agree on matters relating to custody and visitation of their children. But, if they fail to reach an agreement on the terms of custody and visitation, family courts shall determine it based on the *welfare of the child* standard. In the past fathers were appointed as a parent having parental authority but since forty years ago, the custody trend has changed whereby now mothers are appointed as the parent having parental authority over the child and the physical custody of the child is also vested in the mother. Visitation is *not expressly* provided for in the Japanese Civil Code and therefore it is not deemed as a right but rather a *measure* awarded at the discretion of the custodial parent or the family court. The non-custodial parent, in most cases the father seldom secures the opportunity to visit or to make any kind of contact with the child after a divorce or separation. Even if the non-custodial parent is promised child visitation by the custodial parent in a mutual consent divorce or granted by a family court, it is usually a couple of hours in a month or a year making it impossible for the non-custodial parent and the children to form a meaningful relationship.

As visitation orders are usually made in conjunction with guardianship or custody orders, it is necessary to firstly analyze the laws and practice prevalent on guardianship and custody matters in Malaysia<sup>7)</sup> and Japan.

## 1. Right to Guardianship

In Malaysia, the rights, duties and liabilities of parents are stipulated in the Guardianship of Infants Act (the 1961 Act).<sup>8)</sup> The former Guardianship of Infants Act, 1961<sup>9)</sup> provides that “the father of an infant<sup>10)</sup> shall be the guardian of the infant’s person and property but the court or a judge may make such orders as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent and may vary or discharge such order at any time on the application of either parent.<sup>11)</sup> Where the infant

7) In Malaysia the English laws are applicable to custody and control of child cases but regard had to be made to the religious and customs of the parties. The Malaysian Civil Law Act 1956 in s27 provides that in all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England, regard being had to the religion and customs of the parties concerned unless other provisions is or shall be made by any written law. Buttrose J had in *Re Satpal Singh, An Infant* [1958] 1 MLJ 283 cautioned that the courts exercising its discretion under the then Section 11 of the Guardianship of Infants Ordinance should bear in mind the customs of the parties but should not consider itself bound by them.

8) Act 351. This Act only applies to Peninsular Malaysia and to Muslims in any State where the law made by the legislature of that State has adopted it. It has been held in *Re Balasingham and Paravathy* [1970] 2 MLJ 74 that the Act does not apply to illegitimate children.

9) Equivalent English statute is Guardianship of Minors Act 1971. The recent changes in England have made the concepts of guardianship, custody and visitation obsolete and have been superceded by what are termed as ‘section 8’ orders made under section 8 of the Children Act 1989. These changes are irrelevant to Malaysia and only the pre-1989 English law is relevant to understand the concepts of guardianship, custody and visitation.

10) Section 2 (1) defines that an infant is a person who has not attained the age of majority. Section 2 (2) (a) (ii) clarifies that “every other person shall be deemed to have attained his majority when he shall have completed his age of twenty one (21) years and not before”.

11) Article 5 of the 1961 Act provides that generally the father of the infant shall be the guardian of the infant’s person and property but this proposition may be changed in accordance with Section 10 if the court or a judge thinks it necessary.

has no lawful father living, the mother of the infant shall be the guardian of his person and property.<sup>12)</sup> ”

It indicates that generally the father is the lawful guardian and possesses the rights of custody and total access to the infant. This law of paternal preference has been criticized as being discriminatory towards mothers who equally share the parenting obligations of children. In exceptional situations, the guardian is the father while the mother is granted the custody of the infant. If the mother is determined to be the custodian, visitation may be given to the father who is the legal guardian as well as the non-custodian parent. It is to be noted that if the court awards custody to the mother, the father being the guardian does not enjoy a right to unlimited visitation but it is necessary for the court to make such orders as it deems fit. Guardianship concept guarantees participation of both parents in the upbringing of the child. The custodial parent may not be able to make major decisions with respect to the child without the consent of the non-custodial parent cum guardian.<sup>13)</sup>

The 1961 Act had undergone a fundamental change and effective 1 October 1999 both the parents are vested with equal parenting rights.<sup>14)</sup> Now, the provisions of section 5 are clear and unambiguous in that a parent may be granted sole guardianship or the parents could be granted joint guardianship.<sup>15)</sup> It is pertinent to point out that section 11 of the 1961 Act requires the court to have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them.<sup>16)</sup>

In contrast to Malaysia, guardianship is perceived in a totally different context in Japan. Appointment of a guardian is made in accordance with Article 838 of the Japanese Civil Code which states guardianship commences if there is no one to exercise parental power over a minor, or if the person who exercises parental power has no right of management or if the adjudication for commencement of guardianship has been made. A guardian shall be appointed for minor<sup>17)</sup> children who are in need of protection<sup>18)</sup> or when their parents are forfeited of their parental authority for specific reasons.<sup>19)</sup> A guardian is also required for persons who are declared to have no legal capacity, for example a mentally incapacitated person. The main duty of the guardian is to make decision on behalf of the child and manage its property.

12) Prescribed in Section 6 of the 1961 Act and it further states that the court or a judge may appoint some other person to be the guardian of the infant's person of property, or either of them to act jointly with the mother.

13) Until recently, the consent of the father was required for issuance of identification card and passport to his children. On the one hand, it was deemed as a safeguard to avoid a custodial mother from abducting her child abroad. On the other hand, if the father has deserted the family, the child may not be able to obtain passport even to further its studies abroad, until and unless the court orders otherwise.

14) Section 5 says that in relation to the custody or upbringing of an infant; a mother shall have the same rights and authority as the law allows to the father, and title rights and authority of mother and father shall be equal. The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.

15) As ruled by Low Hop Bing J in the unreported Judgement of *Jennifer Patricia A/P Thomas v Calvin Martin A/L Victor David* (15/08/2005).

16) The corresponding English provision is Section 1 of the Guardianship of Minors Act 1971 which states “the court shall regard the welfare of the minor as the first and paramount consideration.”

17) Article 3 of the Civil Code states that the age of majority is twenty (20) years old.

18) In Japan, the term ‘orphan’ is not used to refer to children without parents. Instead they are considered as children in need of protection. Protection is also extended to mentally disabled children who are not capable of making their own decision.

19) Article 841 of Civil Code.

However, in practice, where there is no person to exercise parental authority over a minor, the relatives care for the child without formally appointing a guardian. Only in cases where a parent is declared incompetent does another parent become a guardian. If the child is placed under the custody of a child support center, a parent forfeited of his or her parental rights on the basis of neglect or abandonment might apply to maintain parental ties with the child or visitation orders, but how far the Japanese family courts will entertain such an application is yet to be tested.

## 2. Right to Custody

In Malaysia, provisions pertaining to the protection of children and visitation are also contained in the Law Reform (Marriage and Divorce) Act 1976 (the LRA).<sup>20)</sup> The LRA provides in Article 88 that “the court may at any time by order place a child<sup>21)</sup> in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the object of which include the child welfare or to any other suitable person. In deciding in whose custody a child should be placed, the paramount consideration is the welfare of the child and the court shall have regard to the wishes of the parents of the child and to the wishes of the child, where he or she is of an age to express an independent opinion.”

Joint custody is not a commonly accepted concept in Malaysia as the LRA emphasizes on sole custody. The law provides that both parents have equal right to apply for the custody of their child and the parent given custody is entitled to decide all matters relating to the upbringing and education of the child. The court is duty bound to apply the welfare of the child as the overriding factor in deciding in whose custody the child should be placed. The wishes of the parents and the child who is capable of voicing out its independent opinions are also given sufficient weight in custody battles and in awarding visitation.<sup>22)</sup> There is a rebuttable presumption that it is good for a child below the age of seven years to be placed with his or her mother.

In Japan, two concepts are relevant for child protection, namely parental authority (*Shinken*)<sup>23)</sup> and custody rights (*Kangoken*). Article 818 of the Civil Code provides for parents to jointly exercise parental authority during marriage.<sup>24)</sup> Article 819(1) of Civil Code provides for the exercise of sole parental

20) Act 34. This Act applies in addition to Guardianship of Infants Act, 1961 but does not apply to Muslims and only applies to Peninsular Malaysia.

21) Section 2 defines child as a person who is under the age of eighteen (18) years, and a child of both parties to the marriage or of either one party to the marriage. Child also includes an illegitimate child and a child adopted by either one of the parties to the marriage pursuant to an adoption order.

22) Liberalization and the inception of tender years doctrine in England brought forth positive changes to mother's rights in Malaysia. Maternal preference had been embodied since the conception of LRA, though prior to that paternal preference was the dominating element.

23) For the purpose of this article a parent vested with parental authority under the Japanese law will be addressed as custodial parent.

24) Article 818 of provides that (1) A child who had not yet attained majority is subject to the parental power of its father and mother. (2) If such child is an adopted one, it is subject to the parental power of its parent by adoption. (3) While father and mother are in matrimonial relation, they jointly exercise the parental power. However, if either the father or the mother is unable to exercise the parental power, the other parent exercises it.

authority after divorce.<sup>25)</sup> It is clear from these provisions that parents jointly share parental authority over their children during the existence of their marriage. But, when the marriage is dissolved by mutual agreement of the parties (*kyogi rikon*)<sup>26)</sup> or by the court (*saiban rikon*) the Civil Code does not permit parents to jointly exercise parental authority.

When parents divorce by mutual consent, the law requires that they decide between themselves which parent assumes parental rights after the divorce. It shows that parents have complete autonomy to agree on matters concerning their children, such as visitation and maintenance. They are neither bound by legal standards nor is there any judicial or administrative intervention in the divorce process. In fact, ninety percent (90%) of all divorce cases in Japan are resolved by mutual consent.<sup>27)</sup> If parents fail to reach an agreement regarding their children, they are entitled to apply for a family court hearing, which is said to take years.<sup>28)</sup> In most cases, only one parent is awarded parental authority by the court and he or she shall be vested with the responsibilities of providing the child with custody and education.<sup>29)</sup>

Article 766 (1) of the Civil Code provides for custody rights of parents over their children.<sup>30)</sup> But it is noted that in practice, it is quite rare for the family courts to invoke Article 766 (1) to expressly award custody to a parent. The parent who has parental authority is presumed to have custodial rights because the child resides with that parent. Only in very exceptional cases do the courts grant parental authority to one parent and vest the other with custody rights. Article 766(1) is sometimes interpreted and applied by way of analogy to grant custody rights to persons other than parents, like grandparents when a parent has been forfeited of his or her parental authority. The non-custodial parent is usually left without any sort of rights or authority over the child. He or she is not considered as a parent except for the purpose of providing maintenance and in succession matters.

Hypothetically, having parental authority in Japan is similar to having both guardianship and custody rights in Malaysia. Thus, the parent vested with parental authority has the physical custody of the child

25) Article 819(1) says that if father and mother have effected divorce by agreement, they shall determine one of them to have the parental power by agreement.

26) Article 763 of Civil Code states "Husband and wife may effect divorce by agreement".

27) This involves approximately 170,000 children per year. Vital Statistics 2003 (1)

28) Satoshi Minamikata, Resolution of Disputes over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Nonlitigious Approach in Chotei (Family Court Mediation), Family Law Quarterly, Volume 39, Number 2, Summer 2005 & Tokyo FO14Dec, 1964, Katei Saiban Geppo 17-4-55 explained about the *Chotei* proceedings in length. "Firstly, prior to court litigation, the parents are required to go through the compulsory process of mediation called *Chotei*. If the parties are unable to reach an agreement, a family court will intervene to issue a determination. Secondly, the parties are also required to participate in a *Chotei* procedure. If no agreement is reached at *Chotei*, the case can take either of the two approach; if the parents agree on the divorce but have disagreements on issues involving their children, they shall apply for a determination from a Judge on the issue of children; if however, the parties fail to reach an agreement on both the divorce and issues of parental rights or maintenance, they may proceed with a divorce petition, in which case the issue of children will be decided as an ancillary matter."

29) Article 820 provides that "a person who exercises parental power has the right and incurs the duty of providing for the custody and of educating the child"

30) Article 766(1) says that in cases father and mother effect a divorce by agreement, the person who is to take the custody of their children and other matters necessary for the custody shall be determined by their agreement, and if no agreement is reached or possible, such matters shall be determined by the Family Court.



and unilaterally makes major decisions for the child. The decision making authority vested in the parent having parental authority is very wide and lacks a 'check and balance' mechanism. The underlying principle of having the concepts of guardianship and custody in Malaysia is to allow both parents to exercise their parental authority over their children and at the same time to limit unwarranted exercise of power by any one of the parents which may be against the welfare of the child. Unlike, Japan almost all custody orders in Malaysia have provisions for reasonable visitation to enhance the parent-child relationship between the child and the non-custodial parent.

### 3. Right to Visitation

In Malaysia, visitation is reflected in the statutes as the right of non-custodial parent. It is provided as the basis for a non-custodial parent to continue his parental rights and duties towards the child who is not in his or her custody. The court in making an order for custody may impose such conditions as it thinks fit and may provide for the child to visit a parent deprived of custody<sup>31)</sup> or member of the family of a parent who is dead<sup>32)</sup> at such times and for such periods as the court may consider reasonable upon evaluation of the evidence produced before it.

In granting rights of visitation the court is merely exercising a power in the course of the exercise of the jurisdiction to award custody. The courts make visitation orders by taking into consideration the welfare of the child. It is a norm for the courts to awards sole custody of tender aged children to their mother and allow reasonable visitation to the non-custodial father. But, if the welfare of the child requires custody to be granted to the father, the mother shall be given regular visitation. Kamalanathan Ratnam J has stated very clearly in the unreported judgement of *Foo Kok Soon v Leony Rosalina* (12/02/1998) that "It is in recognition of the parental right to reach out to their children that the Court grants to one, custody and to the other the right of access. This is a statutory right bestowed in this case upon the defendant (mother) and no wicked manipulation, nor monumental hatred can deprive the mother of the right to access. The right of access (visitation) is for the mutual benefit of both the parent deprived of custody and for the children."

Therefore, in Malaysia unless the court has concerns about a person's parenting ability, it will generally award the non-custodial parent as much visitation as possible. Visitation may be unrestricted<sup>33)</sup> or at any reasonable time<sup>34)</sup> or it may be specified, for example, on weekends<sup>35)</sup> and in addition during

31) Section 89 (2) (d) provides that "Order for custody may give a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody the right of access to the child at such times and for such periods as the court may consider reasonable.

32) Section 89 (2) (c) provide for a child to visit a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody at such times and for such periods as the court may consider reasonable.

33) *Loh Kon Fah v Lee Moy Lan* [1976] 2 MLJ 88

34) *Winnie Young v William Lee Say Beng* [1990] 1 MLJ 123

35) *Lee Soh Choo v Tan Ket Huat* [1987] 1 MLJ 255

school vacation.<sup>36)</sup> A custodial parent may also be ordered to render every facility, convenience and co-operation to non-custodial parent to make the visitation a reality.<sup>37)</sup> A non-custodial parent is never denied visitation by the courts unless in very exceptional cases when the welfare of the child is significantly harmed.

Unlike Malaysia, there is no specific provision for visitation rights (*mensetsu kousho ken*) in Japan. The Japanese Civil Code is silent on visitation opportunity. Parents who divorce by mutual consent are encouraged to make provisions for visitation but not required to reduce their agreement in writing for registration of divorce form (*rikon todoke sho*) with the city office. In recent years mothers are vested with custody, care and control of the children and the fathers are obliged to pay maintenance for the child as well as compensation<sup>38)</sup> without having a right to visitation. In contested divorce proceedings, it is recommended that parents make arrangements for visitations at mediation and family court sessions, but they are not required to do so under the law. Article 766 (1) of the Japanese Civil Code allows the courts to determine custody rights and other matters necessary for the custody if the parties fail to reach amicable settlement on their matrimonial dispute.

Although the Japanese Civil Code contains no express provision regarding child visitation and it is not considered as a right or privilege of the non-custodial parent, it is regarded by lawyers and legal scholars as essential for the welfare of the child and it has been recognized by the courts as early as 1964.<sup>39)</sup> Case law plays an important role in the establishment of the concept of child visitation in Japan. In the landmark case of 1964, the parties agreed by mutual consent that the father be vested with parental authority and the mother be given visitation with her 6 year old son. Eventually the custodial father denied visitation and the mother applied to the family court for a visitation order. The Tokyo Family Court<sup>40)</sup> had for the first time interpreted Article 766(1) of the Civil Code and Article 9, para. 1, category Otsu, item 4 of Law for Adjudgement of Domestic Relations and established that a non-custodial parent has a right to visitation. The court went on to further state that the right to visitation is a minimum demand that could be made by a non-custodial parent as her natural right as a parent and that visitation should be granted to a non-custodial parent unless it infringes a child's welfare. The court also stressed that both parents must co-operate in deciding visitation arrangements but if that is not possible the court may order appropriate terms for visitation.

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33) *Loh Kon Fah v Lee Moy Lan* [1976] 2 MLJ 88

34) *Winnie Young v William Lee Say Beng* [1990] 1 MLJ 123

35) *Lee Soh Choo v Tan Ket Huat* [1987] 1 MLJ 255

36) *In Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* {2000} 6 MLJ 48 a father was allowed a two thirds of short school term holidays and half of the December school term holidays.

37) *Gan Koo Kea v Gan Shiow Lih* [2003] 4 CLJ 539

38) Compensation here means "isharyou" which is normally paid in lump sum by the person responsible for the divorce.

39) Satoshi Minamikata, Resolution of Disputes over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Nonlitigious Approach in Chotei (Family Court Mediation), Family Law Quarterly, Volume 39, Number 2, Summer 2005.

40) Judgement dated 14.12.1964 (17-4-55)

Likewise, visitation was also held to be possible prior to divorce when parties live in separation. In this case<sup>41)</sup> an application was made for negotiation for visitation by a father not living with the child due to separation as a result of broken matrimonial relation. The wife left the matrimonial home with her son, due to the husband's alleged adultery, and since stayed separately. She subsequently applied for mediation (*Chotei*) and allowed the husband to visit their son twice a month. However, due to disagreement in the distribution of matrimonial property and payment of maintenance, the mediation failed. Pending the filing of a divorce in the court, visitation was denied and the husband made a fresh application to the family court for visitation. The Supreme Court held that in cases where negotiation for visitation between a father and mother living in separation failed or where such negotiation is not possible due to lack of compromise between the parties, the Family Court may apply Article 766 of the Civil Code by way of analogy and order proper measures for such negotiation in accordance with Article 9, para. 1, category Otsu, item 4 of Law for Adjudgement of Domestic Relations. I would argue that during a separation, before a divorce order is granted both parents have equal rights and obligations over their children as stipulated by Article 818(3) of the Civil Code. In this case, the father applied for visitation during a separation and not custody rights over his child and therefore the court should have upheld the father's right to visit his child based on Article 818 (3) of Civil Code instead of applying Article 766(1) by way of analogy.

Since visitation is not a right in Japan there is no assurance of visitation for a non-custodial parent. Nevertheless, visitation is regarded as an ancillary relief and is granted at the sole discretion of the family courts. Therefore, in Japan visitation has been described by an American practitioner as "a vaguely defined notion created by judicial precedent without any definite assurance and in reality, both custody and visitation are considered as administrative decisions made at the discretion of judges and untrained mediators<sup>42)</sup> some of whom may even regard visitation as harmful to children".<sup>43)</sup>

## PARENT'S RIGHT OR CHILD'S RIGHT

Whether visitation is predominantly a parent's right or a child's right<sup>44)</sup> is unclear.<sup>45)</sup> A child has the right to have basic needs met and thus its parents are regarded as providers; having the obligations to provide food, clothing, and medical care. These are survival needs, but children must also be nurtured

41) Case number: 2000 (Kyo) No.5, Minshu Vol. 54, No. 5, at 1607

42) Mediation (*Chotei*) Commissioners are laypersons. There are no required qualifications for appointments to the office except age limitations. They must be forty and under seventy years old (The Civil Affairs and Family Affairs Commissioners Rule r.1)

43) Colin P.A. Jones, Child Custody in Japan isn't based on rules, SFGate.com 2005.

44) Lyn Laverty Gunkel argued in her Master of Liberal Arts Thesis (2004) that the right to adequate visitation with the non-custodial parent which will best serve the child's needs and wishes; These rights are perhaps better described as moral principles than "rights" as defined by the legal system. They are factors that will, presumably, allow the child of divorce to have as normal a childhood as possible.

45) In recent years many courts in the US have settled this question by claiming that visitation between a child and a non-custodial parent is both a privilege of the non-custodial parent and a right of the child, and is to be allowed unless there is a likelihood that the child's physical or emotional health will be endangered.

and loved. They must be protected from harm, physical and emotional; they must be educated. The list is seemingly endless. Therefore, basically, parents have to remain in their child's life to furnish its materials needs. Arguably, parents have more responsibilities than rights over their children. In Malaysia the non-custodial parent has a statutory right to visitation but the position in Japan is vague due to the ambiguity in case law.

Historically, children have been regarded as their parents' property in Malaysia and Japan and therefore do not possess any rights of their own. Parents make decision on all aspects of life for their children during the existence of their marriage and after divorce decision making becomes an absolute right of custodial parent. So, it is not surprising that children are expected to follow their parents or the custodial parent's wishes at all times. The right to be heard is a minimum legal protection bestowed upon the older children in matrimonial disputes. The law requires the courts to consider the wishes of a child who is able to express his or her wishes in Malaysia and the judges to consider the wishes of a child above 15 years old in Japan before a decision is made affecting his or her interests. However, it cannot be denied that in many instances the wishes of the parents override the wishes of a child. It is a well known fact that in Japan the custodial parent's wishes is given priority over the wishes of the non-custodial parent and the child in visitation disputes.

What is the international standing on the right to visitation? The Convention on the Rights of the Child (CRC) 1989 is the first legally binding international instrument to incorporate the full range of human rights and it stemmed from the idea that children needed a special convention just for them because persons under 18 years old often need special care and protection that adults do not. The CRC's objective was to make sure that the world recognized that children have human rights too. In line with its objective the CRC emphasizes in Article 9(3) that a child has *a right* to have visitation with its parents unless it is against the child's best interests.<sup>46)</sup> In Article 3 it stresses that the welfare of the child must be a primary consideration in all cases concerning children.<sup>47)</sup> Further in Article 18(1) it places great responsibilities on both parents to contribute to the development of their children.<sup>48)</sup>

It is interesting to note that way before the CRC was drafted a British court has defined visitation as the 'right of the child' to the companionship of his non-custodial parent.<sup>49)</sup> Malaysian court in the case of Harban Singh a/l Gurdial Singh v Baljit Kaur a/p Bhagawan Singh<sup>50)</sup> accepted and affirmed the view of

46) Article 9(3) states that State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

47) Article 3 states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be *a primary consideration*.

48) Article 18(1) reads "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

49) *M v M (Child: Access)* [1973] 2 All ER by Wrangham J

50) Unreported case, [1998] Originating Summons no. 24-525-1997

the English court and held that visitation is the basic right of a child and denying this right will cause damage to the child's physiological well-being in the long run. The learned judge also asserted that a child needs both parents in its upbringing. Unfortunately, this notion is neither developed by Malaysian case law nor reflected in the statutes.

Having ratified the CRC in 1995 and to show its seriousness in protecting children's rights, Child Act 2001 was enacted in Malaysia. In the preamble of the Act, it is stated that it attempts to promote the right of a child. However, it is regrettably observed that the Act has failed to address the issue of visitation in line with Article 9 of the CRC among other shortcomings. Therefore, the position under the 1961 Act and the LRA remain emphasizing visitation as a right of the non-custodial parent and not as a right of the child.

Likewise, Japan signed the CRC in 1990 and ratified it in 1994 with reservation and declarations. In June 1997, the Child Welfare Law and other relevant laws were amended to reflect the objective of the CRC. In May 1999, Japan adopted the Law on Punishing Acts related to Child Prostitution and Child Pornography and on Protecting Children. However to date, the Japanese Civil Code has not been amended to incorporate the right to visitation or to award joint parenting authority as underlined by Article 9 and Article 18(1) of the CRC. In Japan, in the absence of clear statutory provisions visitation is not considered as a right in the first place. Some commentators claim that it is not a right of a child because children are still considered as belonging to their parents and do not possess rights of their own.

Case law in Japan prior to the ratification of the CRC suggests that visitation is regarded only as a measure to maintain parent-child relationship if there is no consensus between the parents to allow visitation. The Urawa Family Court<sup>51)</sup> held that visitation is a natural right of a parent to maintain contact with his or her child. It is to be exercised through agreement achieved between the parents through mediation or decided by a court. This shows that visitation could be exercised if custodial parent does not oppose to it. The Tokyo Family Court<sup>52)</sup> held that visitation should be given to every parent who does not possess custody as a minimum opportunity to guarantee the continuity of parent-child relationship. The Osaka Family Court<sup>53)</sup> held that visitation should be considered as a right of a child to have affection from his or her parent and is necessary for the well being of the child. Evidently, there is no uniformity in Japanese family courts as to whether visitation is a right of the non-custodial parent or the child's. Even though the Tokyo Family Court held that visitation should be granted to every non-custodial parent in cases involving children, it will remain a myth until the Supreme Court delivers a ruling on visitation or until the legislature incorporates it in the Japanese Civil Code.

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51) Judgement of Showa 57.4.2

52) Judgement of Showa 62.3.31

53) Judgement of Heisei 5.12.22

## CONCLUSION

Under the Malaysian law visitation appears to be a right of a non-custodial parent but the Japanese case law suggest that it is merely a measure to maintain parent-child relationship upon parental divorce. The literal reading of especially Article 9 of the CRC shows that a child has a right to have direct contact with his or her parent on a regular basis. The rest is up to the parents and courts to decide based on the welfare of each child. It must be pointed out that the ratification of the CRC *per se* will not change the perception of Japanese judges on child's rights, needs and protection. Initiative of the legislature is certainly warranted in Japan to establish visitation as a right of either the non-custodial parent or the child. Due the increasing international marriage, there is recently pressure from international practitioners and organizations for Japan to conform to the CRC. However, at present it may be arduous to convince the Japanese legislature to provide visitation as the right of a child.

I argue that it is immaterial whether visitation is a right of the non-custodial parent or that of the child or simply a measure to continue parent-child relationship; it should nevertheless be regarded as a *basic need* of children and granted in every divorce case involving children unless it causes grave harm to the welfare of the children. The government, custodial parent and non-custodial parent must be vested with obligations to safeguard and promote visitation as a basic need of a child. My proposal is for the Japanese law to grant mandatory visitation right to the non-custodial parent, similar to that of the Malaysian system, to fulfill the basic need of the children. This means that the child will reside with the custodial parent and the non-custodial parent will be given the opportunity to maintain a meaningful parent-child relationship after divorce. This provision will provide a legal guarantee to the child to be met and be contacted by his or her non-custodial parent. It must not only be clear and unambiguous, it must guarantee visitation irrespective of the child's gender and parent's nationality. It must emphasize frequent and meaningful visitation between the child and its non-custodial parent, taking into consideration the age, gender and welfare of the child.

The law must address the conflicting interests of the custodial parent's rights to non-interference in raising children and the non-custodial parent's right to visitation. It is a well known fact that the custodial parent usually claim that the non-custodial parent uses visitation as a means to interfere with the way the custodial parent brings up the children. Whereas, the non-custodial parent often than not claim that the custodial parent deliberately interferes with the visitation. It is necessary to strike a balance between the rights of the custodial and non-custodial parent. The law must vest upon the custodial parent a duty to take the necessary measures to ensure visitation takes place as agreed by the parties or ordered by the court. More importantly, the law must impose an obligation on the custodial parent to allow and encourage visitation because due to post-divorce conflicts many custodial parents absolutely ignore

visitation arrangements. Visitation should be regarded as a responsibility of the non-custodial parent and made mandatory bearing in mind that some non-custodial parents do not maintain any relationship with their children after divorce. This compulsion is necessary because children also need the involvement of the non-custodial parent for his or her development. It is hoped that the emphasis on visitation as a basic need of children keeps both parents in children's life upon parental divorce.

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