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## **The United Nations Convention on the Rights of the Child and Japan's International Family Law including Nationality Law**

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## I. Introduction

The rights of children seem at first glance to be much better protected in Japan than in most other countries. Most Japanese children are well fed, clothed, educated, and safe from life threatening harm. Thus, the Japanese government found neither new legislation, nor reform of existing laws, nor accession to other conventions necessary, when in 1994 it ratified the United Nations Convention on the Rights of the Child (hereafter the "Child Convention").<sup>1</sup> However, the Child Convention regulates not only the basic human needs mentioned above, but also a variety of human rights such as the right to nationality and the right to registration of one's birth. It further deals with various family matters with foreign elements such as inter-country adoption, recovery abroad of maintenance, and international child abduction.

This Article seeks to clarify where Japanese law does not well regulate these matters and thus breaches the Child Convention. Despite this conclusion here, the Japanese government has denied any violation in its reports of 1996 and 2001 on the implementation of the Child Convention (hereafter the "First and Second Japan Reports").<sup>2</sup> While Japan has achieved great success in economic developments and contributed to the growth of world trade, it has been criticized as closed in human relations. To be a true world-leading country and respected globally, Japan should make more efforts to protect human rights. Thus, this Article seeks to develop a rational and enlightened framework for Japan's approach to international family law within the context of the Child Convention. Part II first addresses the registration of births and the right to nationality. Part III then examines the right to preserve nationality. Finally, Part IV considers some international family matters, namely, inter-country adoption, recovery abroad of maintenance, and international child abduction.<sup>3</sup>

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<sup>1</sup> The Child Convention was adopted by General Assembly resolution 44/25 of 20 November 1989. The English authentic text is available at <<http://www.mofa.go.jp/policy/human/child/convention.html>>.

<sup>2</sup> CRC/C/41/Add.1 <<http://www.mofa.go.jp/policy/human/child/initialreport/index.html>>; CRC/C/104/Add.2 <<http://www.mofa.go.jp/policy/human/child/report2/index.html>>.

<sup>3</sup> The noted issues are not always lucidly addressed in the preparatory works of the Child Convention. However, this should not be understood to mean that these problems are excluded from the application of this Convention. The Convention's text should be interpreted according to its object and purpose, that

## II. Registration of Birth and Right to Nationality

### 1. Overview

Foreigners registered in Japan for a stay of at least 6 months exceeded 1,000,000 in 1990 and 1,600,000 in 2000. By nationality this includes, in order: 635,000 Koreans; 335,000 Chinese; 254,000 Brazilians; and 144,000 Filipinos.<sup>4</sup> Nonetheless, because of the difficulty in attaining a long stay or working visa under Japanese immigration law, there are many foreigners who overstay their visas and work illegally in Japan. According to the Immigration Office, overstaying foreigners peaked at 298,000 in 1993 and has slowly decreased since then though there are still estimated to be over 200,000. By nationality this includes, in order: 55,000 Koreans; 29,000 Filipinos; and 27,000 Chinese.<sup>5</sup>

It is extremely difficult for the children of these overstaying foreigners to be registered and acquire Japanese nationality, even in the event one of their parents is a Japanese national. Moreover, children born in Japan to parents from South American countries are often stateless, since these countries often follow the *jus soli* rule (nationality of place of birth) for acquisition of nationality by birth, while Japan applies the *jus sanguinis* rule (nationality of parents).

From late 2000 to early 2001, the International Social Service, Japan (ISSJ) administered a survey to Japan's 174 Child Support Offices concerning the registration and the nationality of children within its system. The survey resulted in responses covering 241 children (hereafter the "ISSJ Report").<sup>6</sup> The results noted that the births of 80 of the children had yet to be registered in Japan, while at the same time the births of 100 of the children had yet to be registered in the parents' home countries.<sup>7</sup> Ninety

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is, "the best interests of the child" (Article 3 (1) of this Convention). See also Article 31 (1) of the Vienna Convention of the Law of Treaties.

<sup>4</sup> Statistics on registered foreigners by nationality are available at <<http://www.stat.go.jp/data/nenkan/02.htm>> (in Japanese).

<sup>5</sup> Statistic on overstaying foreigners are available at <<http://www.moj.go.jp/PRESS/020322-1/020322-1.html>> (in Japanese).

<sup>6</sup> I reviewed and analyzed the responses to this survey, and have published those results as, Y. OKUDA, *Sūji de miru kodomo no kokuseki to zairyū shikaku* [Nationality and Visa of the Child: Statistical Analysis] (2002).

<sup>7</sup> *Ibid.*, at 130, 135.

(90) of the children were born to a Japanese national and foreigner, though only 13 of these children formally acquired Japanese nationality and were duly noted in the Japanese parent's family registry.<sup>8</sup> Seventeen (17) of the children born in Japan were stateless. Both parents of 4 of the children and mothers of 11 of the children born out of wedlock were Brazilians, and the mothers of 2 of the children born out of wedlock were Peruvians.<sup>9</sup>

It is easily presumed that many other children not placed with the Child Support Offices have similar problems. In spite of this fact, the Second Japan Report refers only to the relevant provisions of the Family Registration Act, the Nationality Act, and so forth, which do not capture these cases.<sup>10</sup> Thus, it is imperative that the Japanese government amend its own municipal laws and administrative practice to fit the actual status of foreign and mixed foreign-Japanese families.

## 2. Registration of Birth

The Child Convention provides in Article 7 (1) that a child shall be registered immediately after birth. To implement this provision in Japan, it is necessary to remove some pragmatic barriers to registration. From the teleological interpretation of Article 7 (1) according to its object and purpose it is also concluded that Japanese registration should include the precise details of the child including his or her nationality.

### (1) Pragmatic Barriers to Registration

The Second Japan Report states that the Family Registration Act obliges specific persons to report the birth of a child born in Japan, irrespective of his or her nationality.<sup>11</sup> However, foreign parents sometimes refrain from reporting births, because they fear that Family Registration Officials will notify the Immigration Office of their illegal immigration status which will result in their deportation.<sup>12</sup> In general, under the Immigration Act a public servant is obliged to notify the Immigration Office

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<sup>8</sup> *Ibid.*, at 118.

<sup>9</sup> *Ibid.*, at 111.

<sup>10</sup> CRC/C/104/Add.2, paras. 134-140. See also First Japan Report, CRC/C/41/Add.1, paras. 72-75.

<sup>11</sup> *Ibid.*, para. 135

<sup>12</sup> Pursuant to the ISSJ Report, 14 children are not registered in Japan because of such a reason. See OKUDA, *supra* note 6, at 128, 132.

when he or she discovers an overstaying foreigner.<sup>13</sup> Thus, to remove this pragmatic barrier to the registration of children, Family Registration Officials should be exempted from this obligation. In fact, the Labor Standard Bureau does not give notice to the Immigration Office even when it discovers an overstaying foreigner during the investigation of a breach of the Labor Standard Act.<sup>14</sup>

Sometimes a doctor will refuse to issue a birth certificate to foreign parents maintaining that the parents are not willing to pay for the costs of the birth. As a result, because a birth certificate by a doctor must be attached to report a birth under the family registration law,<sup>15</sup> the foreign parent cannot report the birth of the child.<sup>16</sup> Another law obliges doctors to issue birth certificates of birth at the request of a parent,<sup>17</sup> but this law lacks any penalty for non-compliance. A penalty is needed to promote reporting of births.

## (2) Finding of nationality

The Second Japan Report argues that the Japanese government adequately provides training and on-the-spot guidance to Family Registration Officials.<sup>18</sup> However, Family Registration Officials often err in determining the nationality of children. The ISSJ Report shows that most children registered as "stateless" should in fact be registered as Japanese. The Japanese nationality law adopts the *jus sanguinis* rule for the acquisition

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<sup>13</sup> Article 62 (2) of *Shutsunyūkoku kanri oyobi nanmin nintei hō* [Immigration Control and Refugee Recognition Act], Cabinet Order No. 319/1951, last amended by Law No. 136/2001 (hereafter cited as "Immigration Act"). The English translation is available at <<http://www.moj.go.jp/ENGLISH/IB/ib-19.html>>.

<sup>14</sup> See the notice of the Ministry of Labor (now Ministry of Health, Labor and Welfare) of 31 October 1989, *Kikanhatsu* No. 41.

<sup>15</sup> Article 49 (2) of *Koseki hō* [Family Registration Act, but literally Civil Status Act], Law No. 224/1947, last amended by 100/2002. Under the second sentence of this Article, the requirement to attach a birth certificate shall not apply where the person concerned cannot submit such a document due to a cause not imputable to him or her. However, in most cases the foreign parent and even Family Registration Officials are unaware of this exception clause.

<sup>16</sup> Pursuant to the ISSJ Report, 2 children were not registered in Japan because of such a reason. In addition, mothers of 3 children reported that they had forgot in which hospital their children were born. Thus, they could not report the children's births. See OKUDA, *supra* note 6, at 128, 133.

<sup>17</sup> Article 19 (2) of *Ishi hō* [Medical Practitioner Act], Law No. 201/1948, last amended by Law No. 1/2002. See also Article 39 (2) of *Hokenshi josanshi kangoshi hō* [Health Nurse, Midwife, and Hospital Nurse Act], Law No. 203/1948, last amended by Law No. 153/2001.

<sup>18</sup> CRC/C/104/Add.2, para. 136.

of nationality by birth, but when both parents are unknown or stateless, a child born in Japan acquires Japanese nationality in accordance with the subsidiary *jus soli* rule.<sup>19</sup> The mothers of those children generally go missing after their birth, and their fathers are not known at all. Thus, Family Registration Officials should recognize that such children have acquired Japanese nationality.<sup>20</sup>

The ISSJ Report also shows that some children who are registered with Brazilian nationality are in fact stateless. These children do not fulfill the requirements for acquisition of their parent's nationality when born outside that country's domestic territory. Thus, Family Registration Officials who are unaware of or have ignored these requirements have erred in finding these children's nationality.<sup>21</sup> This error seems to be an infringement of Article 7 (1) of the Child Convention that requires exact data of the child in the registration of birth.

### 3. Elimination of Statelessness

#### (1) Parents from South American countries

The Child Convention provides further in Article 7 (1) that a child shall have the right to acquire a nationality. However, some countries, including Japan, adopt the *jus sanguinis* rule while others, including most South American countries, the *jus soli* rule. Thus, this Article does not prescribe which country is responsible for attributing nationality to a child when these rules conflict. When a child is born in Japan to parents from a South American country, neither Japan nor the home country of the parents

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<sup>19</sup> Article 2 (iii) of *Kokuseki hō* [Nationality Act], Law No. 147/1950, last amended by Law No. 89/1993. The English translation is available at <<http://www.moj.go.jp/ENGLISH/CIAB/law01.html>>.

<sup>20</sup> The ISSJ Report shows 17 children who should have acquired Japanese nationality under Article 2 (iii) of the Nationality Act. OKUDA, *supra* note 6, at 118-119.

<sup>21</sup> The ISSJ Report shows 15 children fall under this category. This includes 4 children born of Brazilian spouses and 11 children born out of wedlock of Brazilian mothers. Article 12 (1) of *Constituição da República Federativa do Brasil* of 1988, last amended in 2001 provides that Brazilians by birth include "(c) those who were born abroad of a Brazilian father or a Brazilian mother, when they take their residence in the Federal Republic of Brazil and opt, in any time, for Brazilian nationality." The original text is available at <<http://www.georgetown.edu/pdba/Constitutions/Brazil/brazil88.html>>. Thus, these children who were born in Japan were stateless at the time of their birth. They can acquire a Brazilian passport by filing their birth with a Consul of Brazil. However, in this passport it is noted that they do not acquire Brazilian nationality until they satisfy the residency requirement in Brazil and complete the procedural requirements for Brazilian nationality before a federal judge. OKUDA, *supra* note 6, at 41.

seems at first glance to have any responsibility for the statelessness.<sup>22</sup>

However, some countries (including Peru, Bolivia, and Columbia) will grant nationality to a child born in Japan to one of its nationals as an exception to the *jus soli* rule when its birth is reported to the appropriate Consul.<sup>23</sup> Pursuant to the ISSJ Report, however, some births still cannot be reported under this exception, because sometimes Japanese doctors refuse to issue birth certificates.<sup>24</sup> To eliminate statelessness in conformity with Article 7(1) of the Child Convention, the Japanese government should prevent doctors from making such refusals by imposing penalties on those who fail to comply with requests for birth certificates.

## (2) Unknown Parents

The Child Convention provides in Article 7 (2) that State Parties shall ensure the implementation of a right to nationality in accordance with their national laws, "in particular where the child would otherwise be stateless." Article 2 (iii) of the Japanese Nationality Act attributes Japanese nationality to a child whose parents are both unknown and who was born in Japan. One of the leading cases involving this Article is a decision of the Supreme Court on 27 January 1995.<sup>25</sup>

In this case, the mother of a child left the hospital and disappeared a few days after the child's birth but before any registration. The Japanese government collected all of the available information including the hospital registration card that showed the mother's name as "Cecille M. Rosete" and date of birth as 21 November 1965. The

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<sup>22</sup> See also S. DETRICK, *The United Nations Conventions on the Rights of the Child – A Guide to the "Travaux Préparatoire"* (1992), at 123 *et seq.* (*passim*); Y. OKUDA, *Kokusai jinken hō ni okeru kokuseki shutoku ken* [The Right to Nationality in International Human Rights Law], in: K. TAKAMI (ed.), *Jinken ron no shin tenkai* [New Developments of Doctrine on Human Rights] (1999), 95, at 132-137.

<sup>23</sup> Article 2, Para. 1 (3), of *Ley de Nacionalidad* of Peru, Law No. 26574/1996; Article 36 (2) of *Constitución Política del Estado* of Bolivia, Law No. 1615/1995; Article 96 (1) (b) of *Constitución Política de Colombia* of 1991, last amended in 2001. The texts are available at <<http://www.leyes.congreso.gob.pe/imagenes/Leyes/26574.pdf>>; <<http://www.georgetown.edu/pdba/Constitutions/Bolivia/consboliv1615.html>>; <<http://www.georgetown.edu/pdba/Constitutions/Colombia/col91.html>>.

<sup>24</sup> The ISSJ Report noted two children born out of wedlock to Peruvian mothers who were stateless because of such a reason. OKUDA, *supra* note 6, at 111, 116.

<sup>25</sup> Supreme Court, 27 January 1995, in: *Minshū*, Vol. 49, No. 1, 56; *The Japanese Annual of International Law*, No. 40 (1997), 129. See also Y. OKUDA *et al.*, *Chronique de jurisprudence japonaise*, in: *Journal du Droit international* (1995), 377, at 381-383 (with comment).

Immigration Office had records from an Embarkation and Disembarkation Card (hereafter "E.D. Card") that noted a Philippine national named "ROSETE, CECILIA, M." born on 21 November 1960 who arrived in Osaka from Manila on a short-term sightseeing visa. It had no record of her departure. The Japanese government argued that the mother of the child was the Filipino woman of the E.D. Card, despite the slight differences in the name and date of birth. The Supreme Court rejected this argument and held that the parents were both unknown, thus, the child acquired Japanese nationality pursuant to Article 2 (iii) of the Nationality Act.

After this decision, the Japanese government commented that though the Supreme Court held that its determination of nationality was inappropriate, it would continue to research E.D. Cards to determine nationality.<sup>26</sup> This approach, however, is incompatible with the object and purpose of Article 2 (iii) of the Nationality Act. First, this approach aims to discover documents concerning the mother, not the mother herself. Furthermore, a determination in this manner has no effect whatsoever as a matter of the mother's alleged home country law.<sup>27</sup> Thus, the child is left *de facto* stateless, neither a Japanese national under the exception nor necessarily a national of the foreign mother's alleged country. Second, in the case where the hospital in which the child was born is unknown, the child will be registered as Japanese within 24 hours of filing.<sup>28</sup> In contrast, when the hospital is known, the doctor is obliged to report the birth of the child,<sup>29</sup> and when he or she does not know the nationality of the mother, the research of the E.D. card is required, which generally takes several months. Thus, there is a significant time difference in how substantively similar cases are processed. Third, the Japanese government does not report the number of children to whom Article 2 (iii) of the Nationality Act has applied.<sup>30</sup> Regarding this silence, one might assume that this

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<sup>26</sup> Y. OKUDA, *Kazoku to Kokuseki* [Family and Nationality] (1996), at 59.

<sup>27</sup> In fact, the Ambassador of the Philippines confirmed this when the American adoptive parents of the child applied for a passport on his behalf. *Ibid.*, at 42.

<sup>28</sup> Article 57 of the Family Registration Act. As to the practice of the family registration, see OKUDA, *supra* note 26, at 45.

<sup>29</sup> Specifically, if the parents cannot report the birth of the child, the chief-doctor of the hospital is obliged to do so. Article 56 of the Family Registration Act. Failing this, the statute requires, in turn, any person who lived with the mother at the birth of the child (for example, a father who does not recognize paternity) or the doctor who was responsible at the birth to report the birth. *Ibid.*, Article 52 (3).

<sup>30</sup> As to the application of Article 2 (iii) of the Nationality Act, one case has been reported in a newspaper (cited in OKUDA, *supra* note 26, at 59-60) and another case by an official of the Ministry of

provision is very rarely applied, yet the ISSJ Report shows 17 children who were born in a situation similar to the Supreme Court case discussed above and who were treated as stateless.<sup>31</sup>

### (3) Naturalization as substitute?

The Second Japan Report argues that a stateless child who was born in Japan and has a domicile in Japan for more than three years from birth can naturalize in Japan under more favorable conditions than other foreigners.<sup>32</sup> However, under Japanese nationality law, the naturalization depends on the discretionary permission of the Minister of Justice.<sup>33</sup> A foreigner has no right to naturalization in Japan. On the one hand, the Japanese government has affirmatively asserted this position, for example, in a foreigner's attempt to overturn the administrative denial of his naturalization application;<sup>34</sup> yet, on the other hand, it still maintains that naturalization can be a substitute for acquisition of nationality by birth.<sup>35</sup> The argument of the Japanese government is inconsistent. Moreover, stateless children born in Japan to Brazilian parents are treated as nationals of their parents' home country by the Japanese government.<sup>36</sup> As a result, these children can apply for naturalization only after his or her twentieth birthday.<sup>37</sup> In any event, the application for naturalization is so complicated that most stateless children must wait for their majority.<sup>38</sup> Thus, in

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Justice. See M. ÔNO, *Kokuseki hō dai 2 jō dai 3 gō no kitei ni motozuku shussei niyoru nippon kokuseki no shutoku nitsuite* [On the Acquisition of Japanese Nationality by Birth under Article 2 (iii)], in *Minji Geppō*, Vol. 57, No. 1, 7, at 16-19.

<sup>31</sup> See *supra* note 20.

<sup>32</sup> CRC/C/104/Add.2, para. 140, citing Article 8 (iv) of the Nationality Act. See also First Japan Report, CRC/C/41/Add.1, para. 75.

<sup>33</sup> Article 4 (2) of the Nationality Act. Articles 5 to 8 provide the conditions for the Minister of Justice to permit naturalization, rather than a foreigner's right to naturalization.

<sup>34</sup> Hiroshima High Court, 29 August 1983, *Shōmu Geppō*, Vol. 30, No. 2, 222; Hiroshima District Court, 21 September 1982, *Shōmu Geppō*, Vol. 29, No. 4, 732.

<sup>35</sup> See also Osaka High Court, 25 September 1998, *Hanrei Taimuzu*, No. 992, 103; Osaka District Court, 28 June 1996, *Hanrei Jihō*, No. 1604, 123. The courts agreed with this argument in these judgments when they denied that the government acted unconstitutionally in discriminating with regards to nationality against a child born out of wedlock. See below note 44.

<sup>36</sup> See *supra* note 21.

<sup>37</sup> These children fall within of Article 6 (ii) of the Nationality Act, not the category of Article 8(iv) of the Act.

<sup>38</sup> In general, a foreigner needs one year to collect and elaborate on the documents to be attached to a naturalization application and a second year for the Ministry of Justice to examine these documents and conduct any supplementary investigation and inquiry. See OKUDA, *supra* note 26, at 68.

practice, naturalization simply is not a substitute for acquisition of nationality by birth.

#### 4. Nationality of Child out of Wedlock

##### (1) Overview

The Child Convention provides in Article 2 (1) that the rights set forth in the Convention shall be respected without discrimination of any kind. Thus, in connection with Article 7 (1), a child shall have the right under Article 2 (1) to acquire nationality "without discrimination." Furthermore, even though matters of nationality are generally considered to be within the domestic jurisdiction of each country,<sup>39</sup> any excessive restriction to the acquisition of nationality would violate the right to nationality. Accordingly the Japanese rule whereby a child born out of wedlock to a Japanese father and a foreign mother does not acquire Japanese nationality unless the father files a prenatal recognition of the paternity is questionable.

Article 2 (i) of the Nationality Act provides that a child acquires Japanese nationality when the father or mother is a Japanese national at the time of his or her birth. This requires a strict construction of who is a "father" at the time of birth. The parental relationship of an illegitimate child with regard to its father (paternity) shall be governed by the national law of the father,<sup>40</sup> that is Japanese law. Under Japanese law, paternity must be recognized by the father.<sup>41</sup> Thus, the recognition must be made before the child's birth for his or her acquisition of Japanese nationality.<sup>42</sup> In contrast, a child recognized after his or her birth would not satisfy the requirements for acquisition of Japanese nationality by birth. Postnatal recognition has no retroactive effect with regard to nationality.<sup>43</sup>

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<sup>39</sup> *Tunis and Morocco Nationality Decrees, PCIJ Reports (1923), Series B. No. 4, 4.*

<sup>40</sup> Article 18 (1), First Sentence, of *Hōrei* [Act on the Application of Laws], Law No. 10/1898, last amended by Law No. 151/1999. The English translation is available at <<http://www.hawaii.edu/aplpj/pdfs/v3-08-Okuda.pdf>>.

<sup>41</sup> Article 779 of *Minpō* [Civil Code], Title 4, Law No. 9/1898, last amended by Law No. 149/1999.

<sup>42</sup> The recognition can be made before the child's birth. Civil Code, Article 783 (1).

<sup>43</sup> This is clear from the context of the Nationality Act. Even the child legitimated as a result of recognition of the father and marriage of the parents acquires Japanese nationality only after filing with the Minister of Justice. Article 3 of the Nationality Act. On the other hand, under the Civil Code, the recognition shall have effect retroactively to the time of the child's birth. Article 784 of the Civil Code. See OKUDA, *supra* note 26, at 120-121.

After receiving the First Japan Report, the Committee on the Rights of the Child asked the Japanese government to clarify the rights of a child born out of wedlock with regard to nationality. The Japanese government answered as follows:

[I]f the retroactivity of recognition is authorized with regard to the application of the Nationality Law, the nationality would be automatically changed by the recognition after the birth, without considering the will of the father or the child. This does not conform to the spirit of Article 24 Paragraph 2, of the Constitution whose basic principle is the ‘dignity of an individual.’... An illegitimate child, who was not able to acquire Japanese nationality at birth because the recognition was not made before the child is [*sic*] born, acquires the position of a legitimated child by the recognition by the Japanese father and the marriage between the father and the mother, and can acquire Japanese nationality by filing a notification with the Ministry of Justice (Article 3 of the current Nationality Law). In addition, the child who has been recognized by the Japanese father can acquire Japanese nationality by satisfying the highly relaxed condition for naturalization taking parental relationship into consideration, even if the father and mother are not married (Article 8 of the current Nationality Law).<sup>44</sup>

This argument, however, is not convincing.

## (2) “Dignity of an Individual”

Recognition of a child born out of wedlock is normally made after the child’s birth by filing with the Family Registration Office or with the court.<sup>45</sup> However, the prenatal recognition can be made only by filing with the Family Registration Office.<sup>46</sup> This means that the child born out of wedlock to a Japanese father and a foreign mother can

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<sup>44</sup> CRC/C/Q/JAP.1, para. 20. A similar opinion has been declared by Osaka High Court, 25 September 1998, *Hanrei Taimuzu*, No. 992, 103; *The Japanese Annual of International Law*, No. 43 (2000), 190. See also Y. OKUDA *et al.*, Chronique de jurisprudence japonaise, in: *Journal du Droit international* (2001), 549, at 550-553 (with comment). This judgment was affirmed by the Supreme Court, 22 November 2002, for different reasons, available at <<http://courtdomino2.courts.go.jp/home.nsf>> (in Japanese).

<sup>45</sup> Articles 781, 787 of the Civil Code.

<sup>46</sup> This is because the child is not yet born and unable to bring a suit for recognition against his or her father.

acquire Japanese nationality only if the father has known about the requirement of prenatal recognition and is willing to make it. Pursuant to the ISSJ Report, there are 64 children born out of wedlock to a Japanese father and a foreign mother, not one of whom acquired Japanese nationality by prenatal recognition.<sup>47</sup> Most fathers did not know about the requirement for prenatal recognition for Japanese nationality. Other fathers failed to make it for lack of documents to be attached, refusal of Family Registration Officials to accept the filing, marriage of mothers with other men, and so forth.<sup>48</sup>

First, the necessity of prenatal recognition for this purpose is rarely known, even by lawyers who sometimes give incorrect advice to the Japanese fathers.<sup>49</sup> Second, some foreign mothers have been deprived of their passports by brokers who act as intermediaries for illegal immigration and work in Japan. It is necessary to have a foreign mother's passport examined for prenatal recognition of their children.<sup>50</sup> Moreover, most mothers do not know that an alternative document as evidence of their nationality is available by mail from their home country. Family Registration Officials also do not know to advise this and to accept the notice of prenatal recognition but postpone examination until the documents arrive. As a result, prenatal recognition applications are often denied for lack of documentation.<sup>51</sup> Third, the marriage of

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<sup>47</sup> OKUDA, *supra* note 6, at 117. Among these children, 7 were legitimated by the marriage of their parents, but did not acquire Japanese nationality by filing with the Minister of Justice pursuant to Article 3 of the Nationality Act for lack of knowledge. See below II 4 (3).

<sup>48</sup> OKUDA, *supra* note 6, at 94-108.

<sup>49</sup> When asked by a Japanese father about the nationality of his child with a Chinese mother, one attorney answered that prenatal recognition was not necessary before birth. Subsequently, the father filed a complaint for mediation with the Bar Association of Nagoya seeking 10,000,000 yen (about US\$100,000) and maintaining that his child did not acquire Japanese nationality due to the erroneous advice of the attorney. OKUDA, *supra* note 6, at 175.

<sup>50</sup> The recognition shall be governed by the national law of the father or of the child. However, in the case where the national law of the father shall apply, the requirement of the consent of the child or a third party under the national law of the child must also be satisfied. Article 18 (2) of the Act on the Application of Laws. The national law of the child before the birth shall be deemed to be the same as that of the mother. Thus, the passport of the mother is necessary for evidence of her nationality. See OKUDA, *supra* note 26, at 145.

<sup>51</sup> In one case, a Japanese father tried to file for prenatal recognition of a child to be born to a Filipino mother with the Family Registration Office. The mother was deprived of her passport by a broker and asked her family in the Philippines to send an alternative document by mail. However, due to a volcano eruption the document was delayed in arriving in Japan. The Family Registration Official refused the

mothers to other men results in the rejection of the prenatal recognition under family registration practice. Because husbands of mothers are presumed to be fathers of children,<sup>52</sup> recognition by other men is not permissible. However, the rejection may be revoked if a court confirms that a husband is not the father of the child.<sup>53</sup> Familiarity with this legal technique is even rarer than prenatal recognition itself.

In short, the nationality of the child born out of wedlock depends haphazardly on the legal knowledge and intent of the father as well as the advice of Family Registration Officials. Such a system under the Japanese nationality law infringes the "dignity of the child."

### (3) Filing after Legitimation

Article 3 of the Nationality Act concerning the acquisition of nationality after legitimation requires not only the recognition of the child by the Japanese father, but also the marriage of the parents and filing with the Minister of Justice. However, a child cannot force its parents to marry. Moreover, the marriage is often impossible when the foreign mother is staying illegally in Japan and has no documents to be attached to the notification of marriage, which in turn means that the Family Registration Official will refuse to accept the marriage application. Further, most parents do not know that their children may acquire Japanese nationality by filing with the Minister of Justice. Pursuant to the ISSJ Report, there were 7 children who did not have Japanese nationality though they were legitimated by marriage between their Japanese fathers and foreign mothers.<sup>54</sup>

A legitimated child may lose the nationality of his or her mother if he or she

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acceptance of the prenatal recognition maintaining that the document was not attached. Subsequently the Family Registration Office accepted the document when it arrived but the child had already been born and nationality was denied. The mother then brought a suit for confirmation of Japanese nationality of the child. Consequently, the case was settled when the Japanese government agreed to recognize nationality because the Family Registration Official erred in refusing the prenatal recognition. See OKUDA, *supra* note 6, at 11-12; OKUDA, *supra* note 26, at 140-148.

<sup>52</sup> Article 772 of the Civil Code.

<sup>53</sup> The Family Registration Official examines only the documents and does not consider the fact that the spouses were living separately at the time of conception of the child. Thus, the judgment of court is necessary to affirm the legality of the recognition. This decision has effect retroactively to the time when the prenatal recognition was filed. Y. OKUDA/S. YANAGAWA, *Gaikokujin no hōritsu sōdan chekku manyuaru* [Manual on the Legal Advice for Foreigners] (2001), at 76-78.

<sup>54</sup> OKUDA, *supra* note 6, at 117.

acquires Japanese nationality by filing under Article 3 of the Nationality Act. Most Asian countries provide for the loss of nationality if the national acquires another nationality by his or her own choice.<sup>55</sup> Thus, the acquisition of Japanese nationality by filing often results in the loss of the nationality of the foreign mother. In contrast to this, the legitimate child by birth generally retains both nationalities of his or her parents. This is discrimination between the legitimate and legitimated children. The Japanese government should amend Article 3 of the Nationality Act and attribute Japanese nationality automatically until majority for any children born out of wedlock where they are recognized by their Japanese fathers.<sup>56</sup>

#### (4) Naturalization as Substitute?

As mentioned above in II 3 (3), a foreigner has no right to naturalization in Japan, whether under a "highly relaxed condition" or not. Further, to bring a suit for recognition and to have the privilege of this "highly relaxed condition," a child must discover his or her father without any assistance from the Japanese government. Because there are no agencies charged with assisting in this complicated work, in practice the child must wait until attaining majority to apply for naturalization. Another pragmatic barrier for naturalization is the requirement of domicile in Japan.<sup>57</sup> Domicile for this purpose requires a legitimate stay with a visa. However, the ISSJ Report shows

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<sup>55</sup> See for example Article 15 (1) of the Nationality Act of Korea <<http://www.geocities.co.jp/WallStreet/1747/kokusekihoh.html>> (Japanese translation); Article 9 of the Nationality Act of the People's Republic of China; Section I of the Commonwealth Act No. 63 of the Philippines <<http://www.chanrobles.com/commonwealthactno63.html>>.

<sup>56</sup> Most European laws provide for acquisition of nationality by recognition. Article 4 (1) of the German *RuStAG* (until 23 years); Article 20-1 of the French *Code civil* (during minority); Article 3 of the Belgian *Code de la nationalité* (during minority); Art. 2 (1) of the Italian *nuova disciplina sulla cittadinanza* (during minority). See Y. OKUDA, *Ninchi niyoru kokuseki shutoku nikansuru hikakuhôteki kôzatsû* [Comparative Study on the Acquisition of Nationality by Recognition of Child], in: *Kokusai Hô Gaikô Zasshi*, Vol. 94, No. 3, 1. In the decision of the Supreme Court, *supra* note 44, three of five judges suspected that Article 3 of the Nationality Act is unconstitutional because it requires the marriage of the parents. However, even if that Article is in breach of the equality clause of the Constitution, the child as plaintiff does not acquire Japanese nationality by birth but instead only after first filing with the Minister of Justice. Accordingly, the judges stated this in obiter dictum in their decision that rejected the confirmation of Japanese nationality of the child.

<sup>57</sup> The conditions of domicile in Japan are required for all types of foreigners (Articles 5-8 of the Nationality Act) except for a person who has rendered especially meritorious service to Japan (*Ibid.*, Article 9).

that more than 100 children stayed in Japan without visas. This is a direct result of the fact that they were born to foreign mothers illegally staying in Japan and had no chance to apply for appropriate visas.<sup>58</sup> Thus, these children cannot apply for naturalization. Even if they can acquire Japanese nationality by naturalization, as mentioned above in II 4 (3), they are disadvantaged by losing the nationality of their mothers.

#### (5) Precedents

Discrimination of children born out of wedlock with regard to nationality has already been criticized by various United Nations' Committees. For example, the British Nationality Act provides that a child born out of wedlock to a British father and a foreign mother does not acquire British nationality.<sup>59</sup> The Committee on the Rights of the Child recommended the amendment of this provision in its concluding observations of 1995 and 2002.<sup>60</sup> The Human Rights Committee was also concerned about discrimination against children born out of wedlock, particularly with regard to nationality, when the Japanese government submitted its fourth report on the implementation of the International Covenant on Civil and Political Rights.<sup>61</sup> Thus, it is likely undisputable that the discrimination of children born out of wedlock with regard to nationality is a breach of the human rights conventions.

### III. Right to Preserve Nationality

Article 8 (1) of the Child Convention provides a child with the right to preserve his or her nationality. However, the Japanese Nationality Act stipulates the automatic loss of nationality where a child fails to file for retention or selection of Japanese nationality as well as where a child acquires or selects a foreign nationality. These provisions contravene Article 8 (1) of the Child Convention.

#### 1. Retention of Nationality

The Japanese child who is born in a foreign country and also acquires a foreign

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<sup>58</sup> OKUDA, *supra* note 6, at 141.

<sup>59</sup> Section 50 (9) in connection with Sections 1 (1) and 47 of the British Nationality Act.

<sup>60</sup> CRC/C/15/Add.34, paras. 12, 29; CRC/C/15/Add.188, para. 23.

<sup>61</sup> CCPR/C/79/Add.102, para. 12. The text is available at <[http://www.mofa.go.jp/policy/human/civil\\_ccpr.html](http://www.mofa.go.jp/policy/human/civil_ccpr.html)>.

nationality shall lose his or her Japanese nationality retroactively to the time of his or her birth unless he or she files for retention of Japanese nationality within 3 months from his or her birth.<sup>62</sup> A child who has lost Japanese nationality cannot reacquire Japanese nationality until he or she applies to the Minister of Justice after establishing domicile in Japan.<sup>63</sup> Three points are at issue in this context.

First, the period of three months is prohibitively short for the retention of nationality. Retention under this policy depends upon the knowledge and intent of the parents, and the child has no chance to decide it. Moreover, a slight default in applying for retention within 3 months results in the loss of nationality, which can be considered a serious deprivation of a basic human right.<sup>64</sup> This result is not proportional. Thus, the Japanese government should abolish this requirement for the retention of nationality or prolong the period in which retention may be sought to a certain number of years after the child attains majority.<sup>65</sup>

Second, the reacquisition of nationality requires domicile in Japan, which in turn requires a child to establish its principal place of residence in Japan under a valid visa. However, in practice there are in fact many children abandoned by the Japanese fathers throughout Southeast Asia. The mothers of these children have no knowledge of Japanese nationality law and, therefore, cannot complete the necessary procedures for retention of nationality on behalf of their children. Furthermore, it is almost impossible to locate the fathers in Japan, and even if they are located, long-term visas are rarely forthcoming because these fathers generally are unwilling to submit personal references for their children.<sup>66</sup> In short, these children cannot establish domicile in Japan.

Third, any reacquisition of Japanese nationality by filing with the Minister of Justice

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<sup>62</sup> Article 12 of the Nationality Act; Article 104 of the Family Registration Act.

<sup>63</sup> Article 17 (1) of the Nationality Act.

<sup>64</sup> See *Perez v. Brownell*, 356 U.S. 44, 64 (1958); *Trop v. Dulles*, 356 U.S. 86, 101-102 (1958) (Nationality is "right to have rights").

<sup>65</sup> There is a similar system of retention of nationality in Switzerland. However, a child of dual nationality born abroad can file for his or her retention of Swiss nationality until his or her 22nd birthday. Article 10 (1) of the *Bundesgesetz über Erwerb und Verlust des Schweizer Bürgerrechts*. See also OKUDA, *supra* note 26, at 109.

<sup>66</sup> List No. 3-2 appended to the Implementing Rule of the Immigration Act, Ministry Justice Rule No. 54/1981, last amended by Rule No. 13/2002.

likely will result in a child losing its mother's nationality acquired by birth. Most Asian countries provide for the automatic loss of nationality in the case of acquisition of a foreign nationality by choice, as mentioned above in II 4 (3). In contrast, children who are born in Japan and acquire foreign nationality may retain both their father's and mother's nationalities.

## 2. Selection of Nationality

Dual national children who have satisfied the gauntlet for retention of Japanese nationality or who were born in Japan are required by Article 14 (1) of the Nationality Act to select one nationality before their twenty-second (22) birthday. The selection of Japanese nationality shall be made by a declaration in which the dual national swears that he or she selects Japanese nationality and renounces his or her foreign nationality under Article 14 (2) of the Nationality Act. This declaration is to be submitted to the Family Registration Office of Japan<sup>67</sup> and in general has no effect on the foreign nationality. As far as known, there is no foreign law which provides for loss of nationality in case of such a declaration.<sup>68</sup>

Article 14 (1) is modeled on the resolution which was adopted in 1977 by the Committee of Ministers of the Council of Europe. However, this resolution was only followed by Italy which then abolished the provision on the selection of nationality in 1992.<sup>69</sup> Furthermore, in 1997 the Committee of Ministers of the Council of Europe adopted the European Convention on Nationality. It provides in contrast to the resolution of 1977 that a State shall allow children having different nationalities acquired automatically at birth to retain these nationalities.<sup>70</sup>

Under Article 15 (1) of the Nationality Act, the dual national who fails to make the declaration within the period prescribed in Article 14 (1) is entitled to receive a notice from the Minister of Justice for selection of one nationality. If following notification, a dual national still does not select Japanese nationality within one month, he or she

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<sup>67</sup> Article 104-2 of the Family Registration Act.

<sup>68</sup> See, e.g., U.S. Dep't of State, U.S. Embassy Tokyo, Japan, *Dual Nationality and Loss of Citizenship*, available at <<http://usembassy.state.gov/posts/jal/www7118.html>>.

<sup>69</sup> See OKUDA, *supra* note 26, at 105.

<sup>70</sup> Article 14 (1) (a) of the European Convention on Nationality, done at Strasbourg on 6 November 1997, European Treaty Series/166.

loses Japanese nationality under Article 15 (3). However, in response to a journalist's recent inquires, the Ministry of Justice admits that it has never sent out warnings of selection.<sup>71</sup> However, the Ministry of Justice may change this policy on the warning at anytime, since the wording of Article 15 (1) leaves it to the discretion of the Minister of Justice. Thus, dual nationals are always at risk of losing their Japanese nationality. It is submitted that such a system is an unfair and arbitrary deprivation of nationality.

### 3. Acquisition or Selection of Foreign Nationality

Under Article 11 of the Nationality Act, the child shall lose automatically his or her Japanese nationality when he or she acquires another nationality by his or her own choice or selects it in accordance with a foreign law similar to Article 14 of the Nationality Act.<sup>72</sup> Officials of the Ministry of Justice justify this position by maintaining that these acts can be regarded as an implied renunciation of Japanese nationality.<sup>73</sup> However, the child is exposed in this manner to the deprivation of nationality against his or her intent. Two examples follow.

First, there are many Koreans living in Japan.<sup>74</sup> Formerly a child born of a Japanese husband and a Korean wife did not acquire Korean nationality.<sup>75</sup> However, since the enactment of the Law Reforming the Korean Nationality Act on 14 June 1998, a child born of a Korean father or mother acquires Korean nationality by birth.<sup>76</sup> Moreover, a child born to a Korean mother and a foreign father within 10 years of this act taking effect can file notification for acquisition of nationality with the Korean Minister of Justice within 3 years.<sup>77</sup> However, this filing results in the loss of Japanese nationality

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<sup>71</sup> S. YANAGIHARA, "Nijūkoku-seki" yōnin ga kono kuni wo kaeru [Approval of "dual nationality" can change this country, Japan], in: *Gendai*, Vol. 35, No. 7 (2001), at 218, <<http://www.kouenkai.org/~ist/doc/y Yanagihara.html>>.

<sup>72</sup> The text of Article 11 (2) of the Nationality Act does not provide that the foreign law must be similar to Article 14 of the said Act. However, the legislator clearly presupposed such a similarity. See T. KUROKI/K. HOSOKAWA, *Gaijin hō kokuseki hō* [Foreigners Law and Nationality Law] (1988), at 376.

<sup>73</sup> *Ibid.*, at 363 (with regard to the acquisition of another nationality by choice).

<sup>74</sup> See *supra* note 4.

<sup>75</sup> This was because the former Korean nationality law, like Japan's law until 1985, adopted the rule of transmitting the father's nationality to the child.

<sup>76</sup> Article 2 (1) (i) of the Korean Nationality Act.

<sup>77</sup> Article 7 of the Law Reforming the Korean Nationality Act. The text is available at the website, *supra* note 55.

according to Article 11 of the Japanese Nationality Act. Anecdotal evidence suggests that some Korean mothers residing in Japan have filed the notification of Korean nationality on behalf of their children without knowing that this will result in the loss of Japanese nationality.<sup>78</sup>

Second, a child born of a Japanese and a Brazilian in Japan acquires Brazilian nationality only when he or she has completed a residency requirement in Brasilia and the procedures for application of nationality before a Federal Court.<sup>79</sup> The Ministry of Justice officials again state that this would fall under the selection of another nationality within the meaning of Article 11 (2) of the Nationality Act resulting in the loss of Japanese nationality.<sup>80</sup> This interpretation, however, fails to recognize that the legislator who sponsored the Nationality Act presupposed only a selection process similar to the one under Article 14 of the Nationality Act,<sup>81</sup> while the option under Brazilian law is a requirement for Brazilian nationality by birth which should be distinguished from selection under Japanese law.<sup>82</sup> Thus, it is unclear whether the option under Brazilian law results in the loss of Japanese nationality. However, children fearing this result hesitate to complete the procedure for confirmation of Brazilian nationality.<sup>83</sup>

In short, Article 11 of the Japanese Nationality Act deprives a child born from a mixed marriage of Japanese nationality against his or her intent. The Japanese government should abolish this Article. In the alternative, the article should be revised so that nationality is only lost following the explicit renunciation of Japanese nationality by the child or its parents upon acquisition or selection of another nationality after birth.

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<sup>78</sup> See *Kankoku no kokuseki hō kaisei* [Reform of the Korean Nationality Act], <<http://cgi.sainet.or.jp/~ikumi/mishuk/news/980614.html>>.

<sup>79</sup> See *supra* note 21.

<sup>80</sup> KUROKI/HOSOKAWA, *supra* note 72, at 376.

<sup>81</sup> *Ibid.*

<sup>82</sup> In other words, the process under Brazilian law does not confer new Brazilian nationality on the child, but merely confirms the Brazilian nationality the child was born with. C. R. BASTOS/I. G. MARTINS, *Comentários à Constituição do Brasil*, Vol. 1 (1988), at 555.

<sup>83</sup> In fact, according to a Japanese colleague who inquired regarding his English born child of a Brazilian mother, Japan's Ministry of Justice stated that the option under Brazilian law results in the loss of Japanese nationality.

## IV. International Family Matters

### 1. Inter-country Adoption

#### (1) Overview

Adoption in Japan tends to focus on the interests of parents, particularly for succession of a family name or property, satisfaction of childless spouses, and so forth. Thus, because Japanese adoption seldom centers on a child's needs, children born out of wedlock and handicapped children have difficulty finding adoptive parents in Japan. In fact, U.S. Immigration Office statistics report several dozen Japanese children being adopted by American parents every year. For example, 57 in 1990, 87 in 1991, 68 in 1992, 64 in 1993, 49 in 1994, 63 in 1995, 33 in 1996, 55 in 1997, 46 in 1998, 42 in 1999, and 40 in 2000.<sup>84</sup> The Japanese government, however, shows no intention of addressing this outflow of children which seems shockingly large for a highly developed country.

The concluding observations of the Committee on the Rights of the Child involving the First Japan Report recommended that Japan take the necessary steps to ensure the protection of children in inter-country adoptions and that it consider the ratification of the Hague Convention of 1993 on Protection of Children and Cooperation in Respect of Inter-country Adoption.<sup>85</sup> However, the Second Japan Report ignored this recommendation, thus it appears Japanese law contravenes Article 21 of the Child Convention.

#### (2) Preference of Domestic Adoption

The Child Convention provides in Article 21 (b) for the subsidiary nature of inter-country adoption. That is, inter-country adoptions should only be considered where domestic adoption is unavailable or insufficient to protect the interests of a

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<sup>84</sup> See <[http://travel.state.gov/orphan\\_numbers.html](http://travel.state.gov/orphan_numbers.html)>; <[http://travel.state.gov/adoption\\_japan.html](http://travel.state.gov/adoption_japan.html)>; <[http://travel.state.gov/orphan\\_sources.html](http://travel.state.gov/orphan_sources.html)>.

<sup>85</sup> CRC/C/15/Add.90, para. 38. The English text is available at <<http://www.mofa.go.jp/policy/human/child/initialreport/observation.html>>. The text of the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption concluded 29 May 1993 is available at <<http://www.hcch.net/e/conventions/text33e.html>>. Sixty (60) countries are State Parties of this Convention <<http://www.hcch.net/e/status/stat33e.html>> (visit on 26 November 2002).

child. However, the Japanese government does not take measures to promote domestic adoption. The Second Japan Report stated only the choice of law rules on adoption and that the family court will treat domestic and inter-country adoption equally considering the child's situation.<sup>86</sup> This Report failed to address the following features of inter-country adoption.

First, the outflow of children to foreign countries is not restrained by the examination of the family court. The Japanese government should, as much as possible, take measures to locate adoptive parents in Japan. For example, the Korean government has made efforts to promote domestic adoption since the enactment of the Special Act on Adoption in 1976.<sup>87</sup> Pursuant to the Korean Ministry of Health and Welfare's statistics more than 8,000 children were removed to foreign countries in 1986, while since 1990 that has been reduced to less than 3,000.<sup>88</sup>

Second, the Japanese government has shown no interest in controlling the emigration of children for or after adoption. In contrast, the Korean law and the Philippines' 1995 Inter-country Adoption Act both require special permission of designated public authorities when a foreigner wants to take a child out of his or her home country.<sup>89</sup> Similar emigration controls have been adopted in India, Nepal, Thailand, Chile, and other countries.<sup>90</sup> In contrast, a valid passport is enough for emigration of a Japanese child.<sup>91</sup> Thus, agencies are free to send Japanese children to foreign countries for adoption.

Third, the Japanese government appears to have no concern for the child after their emigration. It is well known that inter-country adoptions risk being used for prostitution, pornography, organ transplants, and so forth.<sup>92</sup> Thus, to combat these

<sup>86</sup> CRC/C/104/Add.2, para. 194. See also the First Report, CRC/C/41/Add.1, paras. 146-148.

<sup>87</sup> The Special Act on Adoption of Korea was promulgated in 1976 as Law No. 2977, which was totally amended by Law No. 4913/1995 and newly titled as Act on Promotion and Procedure of Adoption. This Act was last amended by Law No. 6151/2000. The Japanese translation of the Act amended by Law No. 5670/1999 is available at <<http://www.geocities.co.jp/WallStreet/9133/yousiengumi.html>>.

<sup>88</sup> Y. NOBE, *Kankoku niokeru kokusai yōshiengumi no genkyō* [Contemporary Situation of Inter-country Adoption in Korea], *Atarasi Kazoku*, No. 40, 52, at 53, 55.

<sup>89</sup> Article 17 of the Act on Promotion and Procedure of Adoption of Korea; Sections 10, 11, 16 of the Inter-country Adoption Act of the Philippines <<http://www.chanrobles.com/republicactno8043.htm>>.

<sup>90</sup> J. H. A. VAN LOON, International Co-operation and Procedure of Children with Regard to Intercountry Adoption, *Recueil des Cours*, 1993-VII, 191, at 288-289.

<sup>91</sup> Article 60 of the Japanese Immigration Act.

<sup>92</sup> See for example the report of Special Rapporteur of the Commission on Human Rights on the sale of children, child prostitution and child pornography, A/50/456, para. 40 <[http://eurochild.gla.ac.uk/Documents/UN/Sexual\\_Exploitation/SaleOfChildren/A-50-456.htm](http://eurochild.gla.ac.uk/Documents/UN/Sexual_Exploitation/SaleOfChildren/A-50-456.htm)>. As to organ transplants, see VAN LOON, *supra* note 90, at 254-255.

misuses, some countries—such as Indonesia, Mauritius, Sri Lanka, Costa Rica, Honduras, Nicaragua, Peru, and others—certify the emigration of the child only after the adoption procedure is completed in the home country of the child. Further, Ecuador and Ethiopia require annual reports on the child after his or her arrival in the country of the adoptive parents.<sup>93</sup>

As mentioned above, most so-called export countries of children regulate inter-country adoption more strictly than domestic adoption. Similarly, the Child Convention provides for the preference of domestic adoption. This trend shows that inter-country adoption may be harmful for a child's development. However, given Japan's approach one can only conclude that the Japanese government does not understand at all the object and purpose of Article 21 (b) of the Child Convention.

### (3) Improper Financial Gain

The Second Japan Report stated that the Child Welfare Act prohibits intermediary acts of adoption for financial gain.<sup>94</sup> However, the violation of this prohibition is punishable only by imprisonment of less than one year or a fine of under 300,000 yen (about 3,000 U.S. dollars).<sup>95</sup> Moreover, a person who is engaged in the intermediary acts of adoption is obliged to registration under the Social Welfare Services Act,<sup>96</sup> which does not provide a punishment for non-compliance. Another law provides that a person who traffics a child for prostitution or pornography is only punished with one to ten years imprisonment.<sup>97</sup> In contrast to this, the Inter-country Adoption Act of the Philippines requires the authorization of the Inter-country Adoption Board to act as adoption agency and punishes violators with imprisonment from 6 to 12 years and/or a fine between 50,000 to 200,000 pesos (about 1,000 to 4,000 U.S. dollars). Child

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<sup>93</sup> See VAN LOON, *supra* note 90, at 289-291.

<sup>94</sup> CRC/C/104/Add.2, para. 195. See also First Japan Report, CRC/C/41/Add.1, para. 149.

<sup>95</sup> Article 60 (2) of *Jidō fukushi hō* [Child Welfare Act], Law No. 164/1947, last amended by Law No. 1/2002.

<sup>96</sup> Articles 2 (3) (ii), 69 of *Shakai fukushi hō* [Social Welfare Services Act], Law No. 45/1951, last amended by Law No. 50/2002.

<sup>97</sup> Article 8 of *Jidō baishun jidō poruno nikakaru kōitō no shobatsu oyobi jidō no hogotō nikansuru hōritsu* [Act for Punishing Conducts Related to Child Prostitution and Child Pornography, and for Protecting Children], Law No. 52/1999. The English translation is available at <<http://www.moj.go.jp/ENGLISH/CRAB/law01.html>>.

trafficking merits a life sentence.<sup>98</sup> Compared with Filipino law, Japanese law is not sufficient to prevent child trafficking. Pursuant to an inquiry, Japanese adoption agencies receive approximately a 1,250,000 yen (about 12,500 U.S. dollars) “contribution” when they act as intermediaries for adoption of a Japanese child by American parents.<sup>99</sup> This should be deemed as improper financial gain in the meaning of Article 21 (d) of the Child Convention.

#### (4) International Agreement

As mentioned above, the Japanese government has not ratified the Hague Convention of 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption, though the Committee on the Rights of the Child recommended it.<sup>100</sup> Presumably, the Japanese government thinks Article 21 (e) of the Child Convention only obliges an effort to conclude international agreements, which in turn depends on the discretion of each State. However, Japan is a so-called export country of children—rare for a highly developed country—and lacks an effective legal system for regulating inter-country adoption. Under these circumstances, Japan’s reluctance to ratify the Hague Convention contravenes Article 21 (e) of the Child Convention.

## 2. Recovery Abroad of Maintenance

### (1) Overview

Since 1990, Japanese newspapers have often reported on Japanese men who fail to pay maintenance for children born of their marriages to women from Southeast Asia. According to one newspaper, more than 10,000 children in metropolitan Manila have been abandoned by Japanese fathers.<sup>101</sup> Similarly, many American soldiers have failed to pay maintenance to their children born from marriages with Japanese women who remain in Japan.<sup>102</sup> However, few legal cases have been brought for recovery of

<sup>98</sup> Articles 10, 16 of the Inter-country Adoption Act of the Philippines.

<sup>99</sup> ASAHI SHIMBUN ŌSAKA SHAKAIBU, *Umi wo wataru akachan* [Babies Transferred Overseas] (1995), at 75-76.

<sup>100</sup> The Hague Convention is not at all mentioned in the Second Japan Report. See CRC/C/104/Add.2, paras. 195-196.

<sup>101</sup> Mainichi Shimbun, Tokyo edition, 16 April 1997.

<sup>102</sup> As to the situation in Okinawa, which hosts the largest base of the American Army in Japan, see K. KINJŌ, *Kokusekihō iken soshō to kanwi kika seido: Okinawa no jitsujō wo kangaeru* [Legal Proceedings on the Constitutionality of the Nationality Act and Naturalization under a Relaxed Condition from the Perspective of Okinawa], *Juristo* No. 745, 112, at 113.

maintenance from fathers living abroad. Two cases do exist where mothers living in the United States successfully sued on behalf of their children for enforcement of U.S. maintenance judgments against fathers in Japan.<sup>103</sup> However, in both of those cases all parties were Japanese, thus, many of the practical difficulties were surmountable. Otherwise, because the Japanese government does not give assistance in any form, children cannot successfully sue for maintenance from abroad.

Regarding cases where a child and the parent with legal financial responsibility live in different countries, the Second Japan Report addressed the issue merely by referring to the First Japan Report.<sup>104</sup> The First Japan Report, however, stated nothing other than the statutory rules concerning which domestic court has jurisdiction and the choice of law rules for maintenance.<sup>105</sup> The Japanese government has ignored the pragmatic barriers that a foreign child faces in bringing a suit in Japan against his or her Japanese father, and that Japanese child faces in enforcing a Japanese judgment, if any is obtained, in a foreign country.

## (2) Appropriate Measures in National Law

For a foreign child, it is very difficult or nearly impossible in Japan to locate a Japanese father who has abandoned him or her, and equally, to pay the necessary legal costs. The Japan Legal Aid Association extends loans for such costs to person who lives in Japan,<sup>106</sup> however, under Japanese immigration law, a foreign child abandoned by a Japanese father cannot easily procure a long-term visa.<sup>107</sup> Similar problems occur when a foreign child seeks to enforce a foreign maintenance judgment in Japan.<sup>108</sup> As for a Japanese child who wants to recover maintenance from a foreign father, the Japanese government provides no assistance in locating the father or bringing a suit.

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<sup>103</sup> Tokyo High Court, 18 September 1997, *Hanrei Jihô* No. 1630, 62; Tokyo High Court, 26 February 1998, *Hanrei Jihô* No. 1647, 107. As a result, the former rejected the enforcement of the American judgment, while the later ordered it.

<sup>104</sup> CRC/C/104/Add.2, para. 190.

<sup>105</sup> CRC/C/41/Add.1, paras. 136, 137.

<sup>106</sup> R. YAMADA *et al.*, *Wakariyasui kokusai kekkon to hô* [Introduction to the Law of Marriage with Foreigners], 2d ed. (1995), at 88.

<sup>107</sup> See *supra* III 1.

<sup>108</sup> Article 22 (vi) of *Minji shikkô hô* [Civil Enforcement Act], Law No. 4/1979, last amended by Law No. 100/2002.

In short, children and mothers have no help from the Japanese government in recovering maintenance. Furthermore, as a practical matter recovery from abroad is impossible without the assistance of the government. This is easily understandable considering a foreign legal proceeding is difficult for even a large corporation. Thus, though in the first sentence of Article 27 (4) the Child Convention provides for appropriate measures to secure recovery of maintenance for children living in a country different to his or her parent, Japan does not satisfy this obligation as it takes no measure for this purpose.

### (3) International Agreement

The recovery of maintenance from abroad needs cooperation between the country of the child and the country of the father. Thus, promotion of international agreements is provided for in the second sentence of Article 27 (4) of the Child Convention. For example, more than 50 countries are State Parties to the United Nations Convention on Recovery Abroad of Maintenance.<sup>109</sup> Under this Convention a child can apply for recovery of maintenance to an agency of the country of his residence. That agency shall transmit the documents to the reciprocal agency in the country of the father. The latter shall take all steps necessary for the recovery of maintenance including legal proceedings. Another system also exists in countries such as the United States, Canada, South Africa, India, Singapore, and so forth. Under this system, each country or federal state must enact a substantially similar reciprocal law and declare which other states satisfy reciprocity, in doing so the administrative agencies are able to cooperate in the recovery of maintenance. Moreover, several countries such as Germany, France, United Kingdom, Sweden, Norway, Poland, Hungary, Australia, New Zealand, Mexico, and so forth have acceded both to the U.N. Convention and the alternative system.<sup>110</sup> Japan by failure of adopting any system for recovery of maintenance from abroad is in breach of the second sentence of Article 27 (4) of the Child Convention.

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<sup>109</sup> Convention on the Recovery Abroad of Maintenance, done at New York on 20 June 1956, 268 UNTS 3, No. 3850 (1956).

<sup>110</sup> Y. OKUDA, *Gaikoku niokeru fuyōryō toritate shisutemu no kōchiku* [Construction of a System for Recovery Abroad of Maintenance], *Hokudai Hōgaku Ronshū*, Vol. 53, No. 5, 1.

### 3. International Child Abduction

The 1980 Hague Convention on the Civil Aspects of International Child Abduction provides for cooperation among countries in securing the prompt return of children wrongfully removed abroad.<sup>111</sup> Seventy-three (73) countries are State Parties to this Convention, which does not include Japan.<sup>112</sup> Thus, Japan is one of the most difficult countries from which to retrieve an abducted child to its country of origin.

In fact, only one case has been reported where a foreign mother was successful in retrieving her child from her Japanese husband.<sup>113</sup> In other cases, the courts in rejecting the claims had relied in part on the fact that the children had already resided for a significant period in Japan.<sup>114</sup> However, these foreign parents had received no assistance from the Japanese government in locating their children or bringing suit in Japan. Thus, any delays in starting legal proceedings should be attributed to the failure of assistance by the Japanese government. As a result, it has been reported that American parents who have been unable to repatriate their children removed to Japan are considering a class-action suit against the Japanese government.<sup>115</sup> In the reverse situation as well, the Japanese government has been conspicuously inactive. Thus, the Japanese government presumably did not assist Japanese parents in seeking redress in Hawaii following a Japanese court's refusal to grant their habeas corpus request to retrieve their child from adoptive parents living together in Hawaii.<sup>116</sup>

These cases are likely to be only the tip of an iceberg of international child abductions. Many parents fail to initiate legal proceedings as they have no means whatsoever to locate their children abroad. Thus, the Japanese government should ratify the Hague Convention so as to take away the barriers to the return of abducted children. Otherwise, Japan likely is in violation of its obligations under Articles 11 and 35 of the Child Convention which oblige State Parties to conclude international agreements to combat the illicit transfer and abduction of the child.

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<sup>111</sup> The Hague Convention on the Civil Aspects of International Child Abduction concluded October 25, 1980 <<http://www.hcch.net/e/conventions/text28e.html>>.

<sup>112</sup> <<http://www.hcch.net/e/status/stat28e.html>>(visit on 26 November 2002).

<sup>113</sup> Supreme Court, 29 June 1978, *Katei Saiban Geppô*, Vol. 30, No. 11, 50.

<sup>114</sup> Supreme Court, 26 February 1985, *Katei Saiban Geppô*, Vol. 37, No. 6, 25; Tokyo High Court, 15 November 1993, *Katei Saiban Geppô*, Vol. 46, No. 6, 47.

<sup>115</sup> <<http://www.asahi.com/english/weekend/K2002012700081.html>>.

<sup>116</sup> Osaka District Court, 16 June 1980, *Hanrei Taimuzu*, No. 417, 129.

Finally, the Second Japan Report refers to Article 8 (2) of the Act for Punishing Conducts Related to Child Prostitution and Child Pornography, and for Protecting Children which provides that "A Japanese national who transfers a child living in a foreign country kidnapped, abducted, and trafficked out of that country" shall be punished.<sup>117</sup> However, this Article is applicable only if the transfer's aim is prostitution or pornography. There is no legal provision for assistance in returning a child abducted by his or her parent.

## V. Conclusion

The Japanese government has long restricted immigration by foreigners while promoting emigration of Japanese abroad. It has justified this stance by asserting that Japan is a small country with a large population. This orientation is reflected in the Nationality Act and its practice. As a result, children have difficulty in acquiring and retaining Japanese nationality and are always at risk of losing their nationality rights. The Japanese government seems ignorant to the fact that nationality is the most important human right. Instead, it argues that nationality is a subject for the domestic jurisdiction of each country that is not restricted by international law. By such assertions, the Japanese government ignores the fact that nationality has often been regulated by international agreements including the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws, the 1948 Universal Declaration of Human Rights (Article 15), the 1961 Convention on the Reduction of Statelessness, the 1966 International Covenant on Civil and Political Rights (Article 24 (3)), and so forth.<sup>118</sup> It is no wonder that Articles 7 and 8 of the Child Convention provide for the right of a child to acquire and preserve his or her nationality.

Another argument the Japanese government asserts is that a state should not interfere in family matters. Thus, adoption, the recovery of maintenance, and child abduction by a parent are left to the self-restraint and self-help of family members.<sup>119</sup> However, in

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<sup>117</sup> CRC/C/104/Add.2, para. 188. As for that Act, see *supra* note 97.

<sup>118</sup> See also J. M. M. CHAN, The Right to a Nationality as a Human Right, in: *Human Rights Law Journal*, Vol. 12 No. 1-2, 1.

<sup>119</sup> In theory, the father who does not pay maintenance for a child may be punished under Article 218 of

cases with foreign elements, children need more protection from the government than usually. The Japanese government is ignorant regarding the practical features of cases with foreign elements. These cases cannot be controlled by family members without legal assistance and international cooperation of governments.

Finally, Japan has a long tradition of resisting international influences in modifying its family law. For example, it was reported at the 1926 meeting on the foundation of the International Institute for the Unification of Private Law that the Japanese delegate insisted in another meeting on excluding the unification of family law from the objectives of the Institute.<sup>120</sup> It is also reported in the diplomatic conference of 1956 on the United Nations Convention on Recovery Abroad of Maintenance that the Japanese delegate insisted on excluding claims of maintenance from divorced spouses from the application of the Convention.<sup>121</sup>

Similarly, it is not easy to pressure the Japanese government to change the above mentioned policy in the field of international family law including nationality law. In fact, *discrimination of children born out of wedlock with regards to succession* has been criticized four times by the Human Rights Committee<sup>122</sup> and once by the Committee on the Rights of the Child.<sup>123</sup> However, the Japanese government still asserts that Japanese law on succession is not in breach of the conventions on human rights.<sup>124</sup> There are some non-governmental organizations in Japan that work for the protection of the child, but they do not have sufficient means for lobbying parliament. Thus, one cannot be optimistic that the Committee on the Rights of the Child's concluding observations on the Second Japan Report, to be published in 2003, will have any influence on Japanese legislative policy.

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*Keihō* [Penal Code], Law No. 45/1907, last amended by Law No. 153/2001 concerning the abandonment of a child by the parent. Similarly, a parent who abducts a child from another parent may be punished by Article 224 of the said Code where the abduction is of the minority. However, there are few cases where a parent has been punished under the Penal Code. The Japanese police are notoriously reluctant to investigate any family matters.

<sup>120</sup> See SOCIÉTÉ DES NATIONS, COMMISSION INTERNATIONALE DE COOPERATION INTELLECTUELLE, *Procès-Verbal de la septième session*, C. 87. M. 43. 1926 XII, at 18.

<sup>121</sup> See A. Bülow/K.-H. Böckstiegel, *Der internationale Rechtsverkehr in Zivil- und Handelssachen* (Looseleaf), E 5, at 794-12.

<sup>122</sup> As to the concluding observation on the fourth report, see CCPR/C/79/Add.102, para. 12.

<sup>123</sup> CRC/C/15/Add.90, para. 14.

<sup>124</sup> CRC/C/104/Add.2, para. 138.