

“NEVER HAD A CHOICE AND HAVE NO POWER TO ALTER”:  
ILLEGITIMATE CHILDREN AND THE SUPREME COURT OF JAPAN

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## I. INTRODUCTION

Many countries in the world once distinguished between legitimate children and illegitimate children and maintained various forms of discrimination against illegitimate children.<sup>1</sup> Gradually, such discrimination came to receive strong criticism and was eventually abandoned in many places to grant equal status to illegitimate children. In Japan, although the number of such children is quite small, illegitimate children are still subjected to social prejudice and various forms of legal discrimination. In the past, Japanese courts had been reluctant to find in favor of constitutional challenges involving discrimination against illegitimate children despite the constitutional guarantees of the equality right in Article 14<sup>2</sup> and the mandate of sexual equality and individual dignity in family law matters in Article 24 enshrined in the Constitution of Japan.<sup>3</sup> However, recently, the Supreme Court of Japan struck down two statutory provisions involving discrimination against illegitimate children—one provision discriminating against illegitimate children with respect to granting Japanese citizenship,<sup>4</sup> and the other provision discriminating against illegitimate children with respect to succession.<sup>5</sup> These rulings indicate the emerging willingness of the Supreme Court of Japan to protect illegitimate children.

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<sup>1</sup> The term “illegitimate” is discriminatory, and an increasing number of people now use other terms such as “non-matrimonial” or “non-marital.” See, e.g., Michael J. Dale, *The Evolving Constitutional Rights of Nonmarital Children: Mixed Blessings*, 5 GA. ST. U. L. REV. 523 (1989); Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011); Camille M. Davidson, *Mother’s Baby, Father’s Maybe!-Intestate Succession: When Should A Child Born Out of Wedlock Have A Right to Inherit from or Through His or Her Biological Father?*, 22 COLUM. J. GENDER & L. 531 (2011); Serena Mayeri, *Foundling Fathers: (Non-)marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292 (2016). In this Article, however, the term “illegitimate” is used because it is the term used in the relevant statutory provisions in Japan.

<sup>2</sup> NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 14(1) (Japan) (“All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.”).

<sup>3</sup> *Id.* art. 24(1) (“Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.”); *id.* art. 24(2) (“With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.”).

<sup>4</sup> Saikō Saibansho [Sup. Ct.], June 4, 2008, grand bench, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1367 (Japan).

<sup>5</sup> Saikō Saibansho [Sup. Ct.], Sept. 4, 2013, grand bench, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1320 (Japan).

This Article intends to analyze these recent developments in Japan to examine the current status of illegitimate children and to explore the future agenda for reform. In Part II, this Article describes the legal status of illegitimate children in Japan—explaining the marriage system, family registration system, and local residence registration system. It also explains the different treatment between legitimate children and illegitimate children and the reluctance of the Japanese government to abandon discrimination. Part III examines two recent rulings of the Supreme Court of Japan on the unconstitutional discrimination against illegitimate children—explaining the background, lower court judgments, and basic reasoning of the rulings. Part IV explores the implications of the rulings of the Supreme Court of Japan and examines the potential future agenda for reform. Although Japan has taken very significant steps in granting equal status to illegitimate children, this Article concludes that there is still a long way to go to achieve equality between legitimate and illegitimate children and to eliminate the concept of illegitimacy.

## II. JAPANESE LAW REGARDING MARRIAGE AND CHILDREN

In order to examine discrimination against illegitimate children, it is essential to have a basic understanding of the meaning of legal marriage and its implication for the status of children. It is also important to understand the significance of the family registration and local residence registration system in Japan to know the difference between legitimate children and illegitimate children.

### *A. Marriage and Children*

#### *1. Legal Marriage*

In order to become legally married in Japan, a man and a woman must have the intent to get married, satisfy the requirements for marriage stipulated in the Civil Code, and file a marriage registration application in accordance with the Family Register Act at a municipal office.<sup>6</sup> The requirements for marriage are as follows:

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<sup>6</sup> Koseki-hō [Family Register Act], Law No. 224 of 1947, art. 75 (Japan) [hereinafter Family Register Act]; MINPŌ [MINPŌ][CIV. C.] art. 739(1) (Japan) [hereinafter Civil Code]; TAKASHI UCHIDA, MINPŌ IV: SHINZOKU SŌZOKU (ZŌHOBAN) [CIVIL LAW: FAMILY LAW & SUCCESSION] 54–78 (2012); SHUHEI MINOMIYA, KAZOKUHŌ [FAMILY LAW] 35–47 (4th ed. 2013); ATSUSHI OMURA, KAZOKUHŌ [FAMILY LAW] 123–45 (3d ed. 2010). For a general

- a. The man is at least eighteen years old and the woman is at least sixteen years old,<sup>7</sup>
- b. The man and the woman are not married already,<sup>8</sup>
- c. The man and the woman are not in a close family relationship,<sup>9</sup> and
- d. 100 days have passed for the woman after a divorce or rescission of marriage.<sup>10</sup>

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discussion on marriage law in Japan, see HIROSHI ODA, *JAPANESE LAW* 202–04 (3d ed. 2009); Jun’ichi Akiba & Minoru Ishikawa, *Marriage and Divorce Regulation and Recognition in Japan*, 29 *FAM. L.Q.* 589, 590–92 (1995); MARK D. WEST, *LOVESICK JAPAN: SEX, MARRIAGE, ROMANCE, LAW* (2011). If a couple did not have the intent to marry, the marriage is invalid and a party can file a suit for annulment. Civil Code, art. 742(1). A marriage that did not satisfy the listed requirements but was accepted could be rescinded. Civil Code, arts. 743–47.

<sup>7</sup> Civil Code, art. 731. This is an apparent form of sex discrimination. Although the difference in maturity for men and women has been given as a justification, there are suspicions that this age difference is rooted in the prejudiced idea that women could get married younger since they do not have to support the family (a husband is supposed to be the bread earner). The Ministry of Justice published family law reform proposals in 1996, which included an amendment to make both men and women eligible for marriage at the age of eighteen. Hōmushō [Ministry of Justice], Hōsei Shingikai [Legal Council], Minpō no ichibu wo kaiseisuru hōritsuan yōkō [Outline of a Bill to Amend Parts of Civil Code] (Feb. 26, 1996) [hereinafter Amendment Outline], available at [http://www.moj.go.jp/shing\\_i1/shingi\\_960226-1.html](http://www.moj.go.jp/shing_i1/shingi_960226-1.html). However, some of the 1996 proposals were strongly opposed by conservative members of the ruling party, and the Ministry of Justice could not come up with an official bill to be introduced into the Diet. Ayako Uchida, *Kazokuhō kaisei wo meguru giron no tairitsu [Disagreement on Amendment to Family Law]*, 306 *RIPPO TO CHOUSHA* 61, 63 (2010). See *infra* note 29. It must also be noted that in order for anyone under the age of twenty to get married, the consent of his or her parents is required. Civil Code, art. 737 (consent of one parent is sufficient).

<sup>8</sup> Civil Code, art. 732. Bigamy and polygamy are crimes punishable under the Criminal Code. KEIHŌ [PEN. C.], art. 184 (Japan).

<sup>9</sup> Marriage between lineal ascendants, lineal descendants, or collateral relatives by blood within a third degree relationship is prohibited. Civil Code, art. 734. As a result, one cannot marry his or her parent, grandparent, child, grandchild, brother or sister, or nephew or niece, but can marry his or her cousin. Marriage between lineal relatives by affinity is also prohibited even after divorce. *Id.* art. 735. Thus one cannot marry his or her spouse’s parent, grandparent, child, or grandchild, even after divorce. There is also a ban on marriage to an adopted child. *Id.* art. 736. Adopted children, their spouses, lineal descendants of an adoptee, and the descendants’ spouses may not marry the adoptive parents or their lineal ascendants. However, an adopted child can marry his or her legal brother or sister. *Id.*

<sup>10</sup> *Id.* art. 733(1). This requirement is only imposed on women and is a form of apparent sex discrimination. The reason for this requirement was rooted in the conflicting presumptions of paternity: while a child born to a couple after 200 days of marriage is presumed to be a child between that couple, a child born within 300 days after divorce or rescission of marriage is presumed to be the child of previous marriage. See *infra* note 40. Before 2016, women used to be mandated to wait for six months after divorce or rescission of

Japanese law does not provide for same-sex marriage. Thus, a marriage registration application from a same-sex couple is likely to be rejected by the municipal officer.<sup>11</sup> The marriage registration application must be signed by the applicants with additional signatures from two adult witnesses.<sup>12</sup> The municipal officer will review the application and check the couple's personal information to confirm their eligibility and fulfillment of all the requirements.<sup>13</sup> Once accepted by the municipal officer, the marriage is valid and will be entered on the family register.<sup>14</sup>

## 2. *Common Law Marriage and De Facto Marriage*

Some couples choose to have a common law marriage rather than a legal marriage. Such couples might want to start living like a married couple before submitting a marriage registration application. Others may be forced to have a common law relationship because legal marriage is not an option. For instance, a couple may be prevented from marrying because one party has a legal spouse, though the legal marriage with that spouse may have totally broken down.<sup>15</sup> In order to have a common law marriage, the couple must have the intent to marry and social circumstances must exist to show

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marriage except for women who were pregnant at the time of divorce or rescission of marriage and gave birth to a child. Yet, the Supreme Court of Japan struck it down as unconstitutional because it was not necessary to force women to wait more than 100 days in order to avoid the conflicting presumptions. Saikō Saibansho [Sup. Ct.], Dec. 16, 2015, grand bench, 69 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2427 (Japan). As a result, the Civil Code was amended to require only 100 days. Minpō no ichibuwo kaiseisuru hōritsu [Act to Amend Parts of Civil Code], Law No. 71 of 2016 (Japan). It also created the exception when the women were not pregnant at the time of divorce or rescission of marriage or when the women gave birth to a child after the divorce or rescission of marriage. Civil Code, art 733(2).

<sup>11</sup> Many believe that same-sex marriage is precluded by the Constitution due to the stipulation in Article 24(1) that marriage be based on the mutual consent of "both sexes." NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 24(1) (Japan). If a person is suffering from gender identity disorder and has sex reassignment surgery, he or she can legally change his or her sex in the family register under certain conditions. Seidōitsusei shōgaisha no seibetsu no toriatsukai no tokurei nikansuru hōritsu [Act on Special Cases in Handling Gender for People with Gender Identity Disorder], Law No. 111 of 2003 (Japan). Therefore, if a person is allowed to change his or her sex in the family register, he or she can marry a person with the same original biological sex.

<sup>12</sup> Civil Code, art. 739(2).

<sup>13</sup> *Id.* art. 740.

<sup>14</sup> Most couples also have wedding ceremonies, but such ceremonies are legally irrelevant.

<sup>15</sup> As stated below, this situation was a result of the refusal of the Supreme Court of Japan to grant a divorce for the spouse who was responsible for the marriage breakdown. Some couples are forced to remain separated for more than ten years, sometimes more than thirty years, and are still unable to get a divorce. *See infra* note 330 and accompanying text.

that the couple is living like a married couple.<sup>16</sup> Merely living together is not enough.<sup>17</sup> The only difference between a legal marriage and a common law marriage is the absence of marriage registration.<sup>18</sup>

Moreover, in order to become legally married, a couple must choose the family name of the husband or wife as their common family name.<sup>19</sup> A married couple cannot maintain different family names, and married spouses are generally prevented from adding their birth name as a middle name.<sup>20</sup> Before the Pacific War, couples in Japan were required to adopt the family name of the “house” (家, or “ie”) to which they belonged.<sup>21</sup> A “house” was a family unit headed by the “housemaster”—typically the father—who had powerful control over the other members of the house.<sup>22</sup> Women were often subjected to the control of the father as “housemaster.” For example, women were denied the right to manage their own property,<sup>23</sup> were practically precluded from obtaining higher education,<sup>24</sup> and were often forced to work in miserable conditions in the factories, exploited by manufacturers, or forced to work as prostitutes.<sup>25</sup>

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<sup>16</sup> Nihon shihō shien centa [Japan Legal Support Center], Dōsei [Cohabitation], available at [http://www.houterasu.or.jp/service/fuufu\\_danjo\\_trouble/dousei/faq1.html](http://www.houterasu.or.jp/service/fuufu_danjo_trouble/dousei/faq1.html).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Civil Code, art. 750.

<sup>20</sup> Japanese names consist only of a family name and given name. In order to change family name, the applicant needs a compelling reason and permission from the family court. Family Register Act, art. 107. On the other hand, in order to change the given name, the applicant only needs legitimate reason and permission of the family court. *Id.* art. 107-2.

<sup>21</sup> MINPŌ [MINPŌ][CIV. C.], Book 4 & 5, Law No. 9 of 1898 (Japan), Houreizensho [Code book], Kokuritsu kokkai toshokan [National Diet Library], available at <http://dl.ndl.go.jp/info:ndljp/pid/788007/16>, art. 746 (modified by Nihonkoku Kenpō no sekō nitomonau Minpō no oukyuteki sochi nikansuru hōritsu [Act on Special Measures on the Civil Code in Light of the Enforcement of the Constitution of Japan], Law No. 74 of 1947, revised by Minpō no ichibuwo kaiseisuru hōritsu [Act to Amend Parts of the Civil Code], Law No. 222 of 1947 (cited as Meiji Civil Code). For a general summary of family law under the Meiji government, see ODA, *supra* note 6, at 201; Akiba & Ishikawa, *supra* note 6, at 589.

<sup>22</sup> ODA, *supra* note 6, at 201.

<sup>23</sup> *Id.*

<sup>24</sup> SHIZUKO KOYAMA, RYŌSAI KENBO: THE EDUCATIONAL IDEAL OF ‘GOOD WIFE, WISE MOTHER’ IN MODERN JAPAN (Ochiai Emiko ed., Stephen Filler trans., 2012) (discussing the limited goal of female education—raising good wives and wise mothers).

<sup>25</sup> E. PATRICIA TSURUMI, FACTORY GIRLS: WOMEN IN THE THREAD MILLS OF MEIJI JAPAN (1990) (discussing miserable working conditions for young girls in the silk industry); Bill Mihelopoulos, *The Making of Prostitutes in Japan: The Karayuki-san*, 21 SOCIAL JUSTICE 161 (1994), available at [http://www.socialjusticejournal.org/archive/56\\_21\\_2\\_1994/56\\_11\\_MihaIopolous.pdf](http://www.socialjusticejournal.org/archive/56_21_2_1994/56_11_MihaIopolous.pdf); TOMOKO YAMAZAKI, SANDAKAN BROTHEL NO. 8: AN EPISODE IN THE HISTORY OF LOWER CLASS JAPANESE WOMEN (Karen Colligan-Taylor trans., 1999).

Article 14 and Article 24 of the Constitution of Japan were inserted based on Japan's sober reflection upon this past practice of gross sex discrimination.<sup>26</sup> Family law was radically revamped after the Pacific War in accordance with this constitutional command of sexual equality.<sup>27</sup> Unlike under the previous Civil Code, where married couples were required to adopt the family name of the house, typically the family name of the husband, as the family name of the couple, today, couples are free to choose the family name of either the husband or the wife, making the requirement sexually neutral. Nevertheless, in reality, more than 97.4% of couples choose the family name of the husband as the family name of the couple after marriage.<sup>28</sup> Thus, almost all women change their family names upon getting married. This same-family-name requirement proves difficult to accept for some women, and these women may choose to have a common law marriage rather than a legal marriage in order to keep their family names.<sup>29</sup> In such marriages, where the couple intentionally chooses to avoid legal marriage, the marriage is sometimes called a "de facto" marriage.<sup>30</sup>

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<sup>26</sup> Miyoko Tsujimura, *Women's Rights in Law and Praxis: The Significance of Three Statistics from Politics, the Household, and Labor*, in FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 155, 156–58 (Yoichi Higuchi ed. 2001); Shigenori Matsui, *The Constitution and the Family in Japan*, in JAPANESE FAMILY LAW IN COMPARATIVE PERSPECTIVE 33, 36 (Harry N. Scheiber & Laurent Mayali eds., 2009).

<sup>27</sup> Minpō no ichibuwo kaiseisuru hōritsu [Act to Amend Parts of the Civil Code], Law No. 222 of 1947 (Japan).

<sup>28</sup> Nihon bengoshi rengōkai [Japan Federation of Bar Associations], Sentakuteki fūfu besseisei dōnyū narabini hichakushutsushi sabsesu teppai no minpōkaisei nikansuru ketsugi [A Resolution concerning Civil Code Amendments Introducing the Family Name Selection System and Eliminating Discrimination against Illegitimate Children] (1996), available at [http://www.nichibenren.or.jp/activity/document/civil\\_liberties/year/1996/1996\\_2.html](http://www.nichibenren.or.jp/activity/document/civil_liberties/year/1996/1996_2.html).

<sup>29</sup> Yasuhide Kawashima, *Marriage and Name Change in Japanese Family Law*, 26 U.B.C. L. REV. 87, 90 (1992). The Ministry of Justice proposed a reform in 1996 allowing a husband and wife to have different family names. Amendment Outline, *supra* note 7. This proposal turned out to be quite controversial and the government was unable to come up with a bill due to very strong opposition from some conservative members of the ruling party. *See supra* note 7. The Supreme Court of Japan rejected a constitutional attack against this same family name requirement for a husband and a wife. Saikō Saibansho [Sup. Ct.], Dec. 16, 2015, grand bench, 69 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2586 (Japan).

<sup>30</sup> Eiko Hurukawa, *Jijitsukon-no hōtekihogoto naienhogohōri nitsuiteno ichikōsatsu [A Comment on Legal Protection of De Facto Marriage and Doctrine of Common Law Marriage]*, 27 OKAYAMA DAIGAKU DAIGAKUIN SHAKAIBUNKAKAGAKU KENKYUKA KIYO 41, 41 (2009). Sometimes, the concept of de facto marriage is used to mean common law marriage. However, legally speaking, when a couple in a de facto marriage does not have an intention to get married, it can be questioned whether the relationship should be treated as a marriage. *Id.*



There is not much difference between a legal marriage and a common law marriage. Spouses in both legal and common law marriages must carry out same obligations.<sup>31</sup> Similarly, both legal and common law marriages allow for social security benefits such as allowances for spouses,<sup>32</sup> and both legal and common law spouses can demand the division of property in the event that the relationship breaks down.<sup>33</sup>

Aside from the choice of family name, the only significant difference is in tax and succession. A common law spouse is not entitled to claim a deduction for income tax.<sup>34</sup> A common law spouse is also not entitled to legal succession.<sup>35</sup> Only legal spouses are entitled to succession as a spouse.<sup>36</sup> Of course, an individual may leave a will for the benefit of their common law spouse,<sup>37</sup> however, Japanese law requires that a minimum amount of entitlement be reserved for family members; and that amount cannot be taken

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<sup>31</sup> Civil Code, art. 752 (obligation to live together and support each other); *id.* art. 761 (joint liability for expenses for everyday necessities). Each also has an obligation to be faithful to the other. *Id.* art. 770. If a common law spouse is unfaithful, then that spouse is liable for psychological pains to other partner from the unfaithfulness. Tokyo Chihō Saibansho [Tokyo Dist. Ct.], Mar. 25, 1987, 646 HANREI TIMES 161 (Japan).

<sup>32</sup> Kenkō hokenhō [Health Insurance Act], Law No. 70 of 1922, art. 3(7) (Japan) (eligible for public health insurance as a spouse); Rōdōsha saigai hoshōhokenhō [Workers Compensation Insurance Act], Law No. 50 of 1947, art. 16-2(1) (Japan) (eligible for surviving spouse's compensation); Kousei nenkin hokenhō [Employees' Pension Insurance Act], Law No. 115 of 1954, art. 3(2) (Japan) (eligible for surviving spouse's pension).

<sup>33</sup> Civil Code, art. 768. However, the actual relationship between a given couple is so individual and sometimes it is hard to tell whether they should be regarded as being in a common law marriage. Saikō Saibansho [Sup. Ct.], Nov. 16, 2004, 1st petty bench, 215 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 639 (Japan). *See generally* Fumio Taguchi, *Kon-ingai danjo kankeino hōtekihogo nikansuru ichikōsatu [A Comment on the Legal Protection of Couples out of the Legal Marriage]*, 97 SENSHU HŌGAKU RONSHU 47 (2006); Hurukawa, *supra* note 30.

<sup>34</sup> Shotoku zei hō [Income Tax Act], Law No. 33 of 1965, art. 83 (Japan) (income tax deduction for a legal spouse).

<sup>35</sup> Civil Code, art. 890 (legal spouse is included in the legal heirs). When a person dies intestate, the Civil Code provides for a succession rule for remaining family. A legal spouse is granted half the estate and any children will receive the remaining half. *See infra* note 106. No common law spouse is entitled to this legal succession. Very few people leave a will in Japan. *See infra* note 117. A common law spouse is not entitled to a reduction of inheritance tax as a spouse either. Sōzoku zei hō [Inheritance Tax Act], Law No. 73 of 1950, art. 19-20 (Japan) (reduction of succession tax for legal spouses).

<sup>36</sup> Although a common law spouse can demand the division of property at the time of separation, the Supreme Court of Japan refused to apply the provision on the division of property in a case where the other common law spouse had died. Saikō Saibansho [Sup. Ct.], Mar. 10, 2000, 1st petty bench, 54 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1040. When one dies, according to the Supreme Court of Japan, the division of property should be governed by the succession rules rather than the rules on division of property for separation. *Id.*

<sup>37</sup> Civil Code, art. 960.

away. As a result, at least one-third of the estate must be reserved for children, if only children are eligible for succession; and one-half of the estate must be reserved in all other cases.<sup>38</sup> In other words, if a father in a common law marriage also had a legal wife at the time of his death, the surviving common law spouse may only receive a limited part of his estate, even if he left a will.

### 3. *Legitimate Children and Illegitimate Children*

When it comes to the legal status of children, however, legal marriage brings a very significant difference. If a woman becomes pregnant during a legal marriage, the child is presumed to be the child of her husband.<sup>39</sup> Likewise, a child born to a couple after 200 days of marriage or within 300 days after divorce or rescission of marriage is presumed to have been conceived during the legal marriage.<sup>40</sup> Thus, a child born to parents in a legal marriage is considered legitimate, and any other child is considered illegitimate—that is, a child born to a couple in a common law marriage, to a couple simply living together, to a couple merely in a sexual relationship, or to a couple engaged in a casual sexual affair.

These presumptions, therefore, are presumptions of both paternity and legitimacy that only the husband can deny.<sup>41</sup> In order to deny the legitimacy of a child, the husband must file suit against either the child or mother,<sup>42</sup> and this suit must be filed within one year after the husband learns of the child's birth.<sup>43</sup> After this period, suits challenging the child's legitimacy or for confirmation of the absence of a parental relationship are generally barred.<sup>44</sup>

In rare cases, the Supreme Court of Japan has allowed evidence of objectively clear circumstances—such as the long absence of the husband at the time of conception—to be used to rebut the presumption in favor of

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<sup>38</sup> *Id.* art. 1028.

<sup>39</sup> *Id.* art. 772(1).

<sup>40</sup> *Id.* art. 772(2).

<sup>41</sup> *Id.* art. 774.

<sup>42</sup> *Id.* art. 775.

<sup>43</sup> *Id.* art. 777. In 2014, the Supreme Court of Japan upheld this time bar on suits seeking to deny legitimacy after one year. Saikō Saibansho [Sup. Ct.], Jul. 17, 2014, 1st petty bench, 68 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 547 (Japan). Also, once the husband acknowledges the legitimacy of the child after birth, he can no longer contest that legitimacy. Civil Code, art. 776.

<sup>44</sup> Saikō Saibansho [Sup. Ct.], Jul. 17, 2014, 1st petty bench, 68 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 547 (Japan).

paternity.<sup>45</sup> In such situations, interested parties may file suit seeking confirmation of the absence of a paternal relationship at any time. The Supreme Court of Japan also allows such suits where the child was wrongfully registered as the legitimate child of another couple, or when there is a discrepancy between the biological relationship and legal relationship on the family register.<sup>46</sup> In the absence of such exceptional circumstances, however, the presumptions in favor of paternity are applied.<sup>47</sup> Nevertheless, a court might reject a suit for confirmation of the absence of a parental

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<sup>45</sup> Saikō Saibansho [Sup. Ct.], May 29, 1969, 1st petty bench, 23 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1064 (Japan); Saikō Saibansho [Sup. Ct.], Aug. 31, 1998, 2nd petty bench, 189 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 497 (Japan).

<sup>46</sup> Saikō Saibansho [Sup.Ct.], July 7, 2006, 2nd petty bench, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2307 (Japan); Saikō Saibansho [Sup. Ct.], July 7, 2006, 2nd petty bench, 220 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI ] 673 (Japan). The Supreme Court of Japan, however, refused to allow a suit for confirmation of the absence of a parental relationship filed by a mother in her child’s name when DNA evidence confirmed that the father could not be the biological father. Saikō Saibansho [Sup. Ct.], July 17, 2014, 1st petty bench, 68 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 547 (Japan). In this case, the legal father did not know that his wife’s child was the child of another man, and he raised the child as his own. The couple later separated and the mother and child began living with the child’s biological father. The legal father did not want to lose his paternal relationship with the child. The Supreme Court of Japan held that the presumption of legitimacy is important for the welfare of a child and should not be disturbed unless objectively clear circumstances exist to indicate that the father could not be the father, such as a long absence from home when the wife becomes pregnant. Even if the DNA evidence shows that the legal father is not the biological father, the parents are separated, and the mother and child begin living with the biological father, the presumption should still be respected. Saikō Saibansho [Sup. Ct.], July 17, 2014, 1st petty bench, 247 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 79 (Japan). The judgment was a three to two split judgment with two dissenters who thought that the family register should be corrected when there was a discrepancy between the biological relationship and the legal relationship. *Id.*

<sup>47</sup> Saikō Saibansho [Sup. Ct.], Aug. 31, 1998, 2nd petty bench, 189 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 437 (Japan); Saikō Saibansho [Sup. Ct.], Mar. 14, 2000, 3rd petty bench, 197 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 375 (Japan). In one case, when a husband (who was born as a woman and had sex reassignment surgery) and his wife filed a childbirth registration application marking their child who was conceived using artificial insemination by donor sperm as legitimate, the municipal head added the child to the family register, but denied the presumption of legitimacy. The section for the father was left blank because the husband could not be the biological father. The Supreme Court of Japan held, however, that a couple in a legal marriage is entitled to have the presumption of legitimacy applied with respect to a child conceived during their legal marriage and allowed the correction to the family register. Saikō Saibansho [Sup. Ct.], Dec. 10, 2013, 3rd petty bench, 2210 HANREI JIHŌ 27 (Japan).

relationship as an abuse of rights if it finds the negative effects of denying paternity outweigh the benefits to the plaintiff.<sup>48</sup>

If a father acknowledges an illegitimate child as his own, he will be regarded as the legal father.<sup>49</sup> Additionally, an illegitimate child, his or her children or grandchildren, or their legal representatives can file a suit for acknowledgment,<sup>50</sup> but this suit must be filed while the father is still alive or within three years after his death.<sup>51</sup> Unless the child is acknowledged by the father or by a court order, a legal paternal relationship between the illegitimate child and the father will not be established.<sup>52</sup>

Once the father acknowledges the child, he cannot withdraw that acknowledgment.<sup>53</sup> Interested parties, however, can contest the acknowledgment by filing a suit seeking an annulment or rescission of the acknowledgment.<sup>54</sup> In 2014, the Supreme Court of Japan held that a father who acknowledges a child is considered an interested party, thus making it possible for a father to deny acknowledgment and file suit for annulment upon discovery of no biological relationship with the child.<sup>55</sup>

An illegitimate child can become a legitimate child if he or she is acknowledged by the father and the child's parents thereafter get married, or if a married couple acknowledges a previously unacknowledged child (called

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<sup>48</sup> Saikō Saibansho [Sup. Ct.], July 7, 2006, 2nd petty bench, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2307 (Japan); Saikō Saibansho [Sup. Ct.], July 7, 2006, 2nd petty bench, 220 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 673 (Japan).

<sup>49</sup> Civil Code, art. 779. In order to acknowledge the child, the father must file an application in accordance with the Family Register Act or acknowledge the child by a will. *Id.* art. 781. The acknowledgment takes effect retroactively dating back to the time of birth. *Id.* art. 784. The father can also acknowledge the child during pregnancy with the mother's consent. *Id.* art. 783(1).

<sup>50</sup> *Id.* art. 787.

<sup>51</sup> *Id.* The Supreme Court of Japan denied a suit seeking confirmation of the existence of a parental relationship after the statute of limitations for judicial acknowledgment had passed. Saikō Saibansho [Sup. Ct.], July 19, 1990, 1st petty bench, 160 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 271 (Japan). In exceptional cases, however, the Supreme Court of Japan is willing to extend the three-year statute of limitations. *See infra* note 309.

<sup>52</sup> Saikō Saibansho [Sup. Ct.], July 19, 1990, 1st petty bench, 160 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 271 (Japan) (illegitimate children cannot file a suit for confirmation of existence of parental relationship against a father without acknowledgment).

<sup>53</sup> Civil Code, art. 785.

<sup>54</sup> *Id.* art. 786; Jinji Soshohō [Personal Status Litigation Act], Law No. 109 of 2003, art. 2(ii).

<sup>55</sup> Saikō Saibansho [Sup. Ct.], Jan. 14, 2014, 3rd petty bench, 68 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1 (Japan); Saikō Saibansho [Sup. Ct.], Mar. 28, 2014, 2nd petty bench, 246 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 117 (Japan). However, the court can reject the suit if it finds the suit to be an abuse of right.

legitimation).<sup>56</sup> A person can also adopt a child, and the adopted child is considered legitimate.<sup>57</sup> Therefore, a father can adopt his illegitimate child in order to make an illegitimate child become legitimate.

### *B. Family Registration, Local Residence Registration, and Illegitimate Children*

In Japan, information on one’s status and residence is managed by two different registration systems: the family registration system and the local residence registration system. These registration systems have significant implications for legal marriage and for the status of illegitimate children.

#### *1. Family Registration and Local Residence Registration Systems*

The family registration system is a national identification and registration system designed to maintain and identify the personal status information of every Japanese citizen.<sup>58</sup> The register is maintained at the municipal government office where the original register of the “the first person listed” was created, and it includes information on couples in a legal marriage and their unmarried children sharing the same family name.<sup>59</sup>

The local residence registration system is designed to maintain and identify information on local residency for every local resident regardless of their citizenship.<sup>60</sup> Like the family registration system, the local residence register is managed by the municipal government where the head of the household is living. The register is organized by household, a social unit sharing the same residency and “same household economy.” A single “head of the household” is considered the person who supports the household.<sup>61</sup>

<sup>56</sup> Civil Code, art. 789(1). This means that when the mother has an illegitimate child who is legally acknowledged by the father, and she and the father get legally married, the illegitimate child will become legitimate. When the father and mother acknowledge an illegitimate child during marriage, that child will also be regarded as legitimate from the time of acknowledgment. *Id.* art. 789(2). Since the maternal relationship between a child and mother is established by the fact of childbirth, this means that an unacknowledged child could be legitimized by acknowledgment of the father when the mother and father are already in a legal marriage.

<sup>57</sup> *Id.* arts. 792, 809.

<sup>58</sup> Hōmushō [Ministry of Justice], Koseki no ABC [ABC on Family Registry], [http://www.moj.go.jp/MINJI/minji04\\_00031.html](http://www.moj.go.jp/MINJI/minji04_00031.html).

<sup>59</sup> Family Register Act, arts. 6, 8, 9. The first person listed does not necessarily mean the head of the family but many people tend to view this person as a head of the family.

<sup>60</sup> Jūminkihondaichōhō [Local Residence Registration Act], Law No. 81 of 1967, art. 1.

<sup>61</sup> *Id.* arts. 6(1), 7(iv).

Both registers are used for personal identification purposes: the local residence register is used for everyday identification, and the family register is used for more official government identification. In other words, when there is a need to verify personal identification, for government agencies, financial institutions or other private organizations, one must often go to the municipal office to get the official copy of the family register or local residence register. In the past, these records were open to the public, and anyone could request to look at them.

## 2. *Family Registration, Local Residence Registration, and Marriage*

When one becomes legally married and the marriage registration application is accepted, a new family register will be created for the couple, except where one spouse is entered on the family register of the person first listed.<sup>62</sup> The person first listed, the head of the family (usually the husband), is the person whose family name was adopted at the time of marriage as the family name for the couple.<sup>63</sup> Therefore, the wife will usually be entered into the family register under the name of her husband. In most cases the couple submits the new local residence registration application at the municipal office where they intend to live together, indicating the husband as the head of the household and adding the wife to that local residence registry.

On the other hand, when a couple is in a common law marriage, there is no change to the family register. Both remain on their original family registers. When the common law couple submits a local residence registration application, the municipal office will create a new register. The husband is likely to be the head of the household, and the wife will be added to the local residence registration of her husband.<sup>64</sup>

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<sup>62</sup> Family Register Act, art. 16(1).

<sup>63</sup> *Id.* arts. 14(1), 16(1)–(2).

<sup>64</sup> A common law wife can be entered in her common law husband's register as "wife (unregistered)," but when a common law wife is precluded from marrying her common law husband (either because he has a legal wife or because required period has not passed from her divorce), she must be entered as a "person with special connection." Osaka-shi [Osaka City], *Osakashi jūminkihondaichō jimushori yōkō* [*Outline for Handling Local Residence Registration Business of Osaka City*], OSAKA CITY [hereinafter Handling Guideline], available at <http://www.city.osaka.lg.jp/shimin/page/0000250767.html>.

### 3. Family Registration, Local Residence Registration, and Childbirth

When a child is born, the birth must be entered in the family register within fourteen days.<sup>65</sup> The childbirth registration application must indicate the name of the father and the mother together with the address of the family.<sup>66</sup> The relationship between the child and the mother is determined by the fact of childbirth,<sup>67</sup> but the paternal relationship is a little more complicated. As discussed above, when a woman becomes pregnant during a legal marriage, her husband is automatically presumed to be the father of the child even if the child’s biological father is not the husband.<sup>68</sup> In order to deny the paternal relationship created by this presumption, the husband must file a suit in court denying legitimacy.<sup>69</sup> It is only after the court accepts his claim that the biological father can acknowledge the child as his own and the mother can file the birth registration application indicating the biological father as the legal father.

A child born within 200 days after marriage or within 300 days after divorce or rescission of marriage is also presumed to have been conceived during the legal marriage.<sup>70</sup> Technically, a child conceived before marriage and born within 200 days after marriage is not presumed to be the husband’s child, but in practice, the municipal officer will accept the birth registration of the child as a legitimate child born during the marriage<sup>71</sup> unless the mother files an application designating otherwise.<sup>72</sup>

<sup>65</sup> Family Register Act, art. 49(1). The childbirth registration application form is available on the Ministry of Justice’s webpage on family registration. Hōmushō [Ministry of Justice], Shusseino todokede [Childbirth Registration Application Form], available at <http://www.moj.go.jp/content/000116682.pdf>. Failure to submit an application in time without a legitimate reason could lead to a monetary fine of up to 50,000JPY [\$440USD with the exchange rate of one USD to 113JPY]. Family Register Act, art. 135. When a child is legitimate, either of the parents can file an application, while the mother must file the application when the child is illegitimate. *Id.* art. 52(1)–(2).

<sup>66</sup> Family Register Act, art. 49(2). The childbirth registration application must be filed with the birth certificate signed by a physician or registered midwife. *Id.* art. 49(3).

<sup>67</sup> Saikō Saibansho [Sup. Ct.], Apr. 27, 1962, 2nd petty bench, 16 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1247. The maternal relationship will be verified by the birth certificate attached to the childbirth registration application.

<sup>68</sup> See *supra* note 39.

<sup>69</sup> See *supra* notes 41–42.

<sup>70</sup> See *supra* note 40.

<sup>71</sup> Hōmushō [Ministry of Justice], Minjikyokuchō tsūtatsu [Director of Civil Affairs Circular], No. 432 of 1940.

<sup>72</sup> Hōmushō [Ministry of Justice], Minjikyokuchō kaitō tsūtatsu [Bureau Director of Civil Affairs Circular], No. 1332 of 1951.

Additionally, a child born within 300 days after divorce is presumed to be the child of the ex-husband even when the mother became pregnant after the divorce.<sup>73</sup> In such case, the child must be registered as the child of the mother and her ex-husband, and the mother must ask her ex-husband to file a suit denying paternity in order to register the biological father. Where a woman is reluctant to make contact with her ex-husband—e.g., due to a history of domestic violence—and is unable to file a birth registration application, the child is left unregistered. In practice, the municipal officer will accept the application if filed with written proof from a physician showing that the mother became pregnant after the divorce without making her ex-husband the legal father and by allowing the biological father to become the legal father.<sup>74</sup>

The childbirth registration application also must show the relationship with the parents in addition to the child's sex. In other words, the applicant must mark whether the child born is legitimate or not.<sup>75</sup> If a mother fails to mark her child as illegitimate when filing an application, the municipal head can refuse to accept the application.<sup>76</sup>

When the application is accepted, a legitimate child is registered in the family register of the person first listed, usually the father, and carries the family name of the parents.<sup>77</sup> In contrast, an illegitimate child is registered in the mother's register, and a new family register will be created in which the mother is the person first listed (unless the mother is already the person first

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<sup>73</sup> See *supra* note 40.

<sup>74</sup> Hōmushō [Ministry of Justice], Minjikyokuchō tsūtatsu [Director of Civil Affairs Circular], No. 1007 of 2007; Hōmushō [Ministry of Justice], Kon-in no kaisho matawa torikeshigo 300 nichi inaini umareta ko no shusse no todokede no toriatsukai nitsuite [On Treatment of Birth Registration Application for a Child Born within 300 Days after Divorce or Rescission of Marriage] (May 7, 2007), available at <http://www.moj.go.jp/MINJI/minji137.html>.

<sup>75</sup> Family Register Act, art. 49(2)(i).

<sup>76</sup> However, since March 24, 2010, even when a mother refuses to mark her child as illegitimate after being prompted to do so by the officer, the municipal officer can prompt the applicant to indicate the family name to be given to the child or the register on which the child is to be entered. The municipal officer can also choose to include a note with the application if it is possible to revise the application in light of the application form, attached documents, or family register *ex officio*. Hōmushō [Ministry of Justice], Minjikyoku dai1kachō tsūchi [Division Manager of Civil Affairs Notice], Heisei22nen Hōmushō min 1 dai729gou (Mar. 24, 2010). See also *infra* note 305.

<sup>77</sup> Civil Code, art. 790(1); Family Register Act, arts. 18(1). The legal father and mother jointly exercise parental rights over their legitimate child. Civil Code, art. 818.



listed in her register) and the child will carry the family name of his or her mother.<sup>78</sup>

Before 2004, legitimate children were registered on family registry as “first-born boy/girl” or “second-born boy/girl.” Illegitimate children, however, were registered simply as “boy” or “girl.”<sup>79</sup> Further, the family register was open to everyone, so the fact that a child illegitimate was readily apparent. Illegitimate children and their families criticized this discriminatory treatment. In 2004, a lower court condemned this treatment as an unconstitutional invasion of the privacy rights of illegitimate children.<sup>80</sup> In response, the relevant regulation was amended such that all children are now registered as “first-born boy/girl” or “second-born boy/girl.”<sup>81</sup>

Despite the 2004 amendment abandoning the discriminatory registration practice, older records remain unchanged unless corrected by the applicant; thus leaving the possibility that the status of illegitimate children could still be disclosed.<sup>82</sup> Due to increasing privacy concerns, the family register record is now available only if access is necessary in order to exercise one’s legal rights, perform a legal duty, or present a copy to the government, or for another legitimate reason.<sup>83</sup> Although some legitimate reason must exist, non-family members can still access the family register.

<sup>78</sup> Civil Code, art. 790(2); Family Register Act, arts. 17, 18(2). The mother exercises parental rights over her illegitimate child. If the father acknowledges the child and if the father and mother agree, the father might be granted parental rights. Civil Code, art. 819(4). Unless the mother and father get married, however, they cannot jointly exercise their parental rights.

<sup>79</sup> CARL F. GOODMAN, *THE ROLE OF LAW IN JAPAN* 126 (2d ed. 2008).

<sup>80</sup> Tokyo Chihō Saibansho [Tokyo Dist. Ct.], Mar. 2, 2004, 51 SHŌMU GEPPŌ 549 (Japan).

<sup>81</sup> Kosekihō sekō kisoku [Family Register Act Enforcement Regulation], Ministry of Justice Order No. 94 of 1947, art. 33(1) & attached form no. 6 (Japan); Hōmushō [Ministry of Justice], Koseki no kisai no hinagata [Sample of Family Register], available at <http://www.moj.go.jp/content/000116681.pdf>. See also Hōmushō [Ministry of Justice], Koseki niokeru chakushutsudenai ko no huboto no tsuzukigara no kisai no henkō nitsuite [On Changes to Description on Relationship to Parents in the Family Register] (Nov. 1, 2004) [hereinafter MOJ Notification], available at <http://www.moj.go.jp/MINJI/minji66.html>.

<sup>82</sup> MOJ Notification, *supra* note 81. When a father acknowledges an illegitimate child, the fact of acknowledgment is entered into the father’s family register, along with the date of acknowledgment, the name of the child, the name of the mother, and the address of the mother’s family register. The mother’s register is also revised to indicate the date of acknowledgment, the name of the person who acknowledged the child, and the address of his family register.

<sup>83</sup> Family Register Act, art. 10-2(1); Hōmushō [Ministry of Justice], Koseki no madoguchideno hon-nin kakuninga hōritsujō no rurū ni narimashita [It Is Now Statutory Obligation to Check the Identity at the Office Window] (on mandating that the identity of persons requesting access to family register be checked) (May 2008), available at <http://www.moj.go.jp/MINJI/minji150.html>.

When a child is registered in the family register, he or she will also be registered in the local residence register under the name of the “head of the household,” with a description indicating his or her relationship to the household head.<sup>84</sup> Although legitimate children used to be listed as “first-born boy/girl” or “second-born boy/girl” in the column indicating his or her relationship to the household head, an illegitimate child was simply listed as “child.” The local residence register was open to the public and a copy of it is often required in everyday life—for instance, in applying for employment, opening a bank account, or proving one’s identity. As a result, an illegitimate child could not avoid revealing his or her status as such if it was indicated in the record. This was criticized and has now been amended so that no distinction is made in the record for legitimate versus illegitimate children: every child is registered only as “child.”<sup>85</sup> Like the restrictions on family registers, non-family members may have limited access to the local residence and may only gain such access where there is a legitimate reason.<sup>86</sup> Nevertheless, there is still a fear that the fact that one is an illegitimate child might be discovered through local residence registration.<sup>87</sup>

### C. Discrimination Against Illegitimate Children in Japan

Illegitimate children have been subjected to various kinds of social and statute-based discrimination in Japan and around the world. Most other countries have abandoned such discrimination, but the Japanese government has been very reluctant to eliminate it.

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<sup>84</sup> Jūminkihondaichōhō [Local Residence Registration Act], Law No. 81 of 1967, art. 7(iv) (Japan).

<sup>85</sup> Sōmushō [Ministry of Internal Affairs and Communications], Jichishin, No. 233 of 2004. When the child is a legitimate child of the household head, or when the child is born to a common law wife and is acknowledged by the household head, the child is registered as “child.” When the child is born to a common law wife and is not acknowledged by the father, the child will be recorded as “child of the wife (unregistered).” Handling Guideline, *supra* note 64.

<sup>86</sup> Jūminkihondaichōhō [Local Residence Registration Act], Law No. 81 of 1967, art. 12(3) (Japan). Only a copy of the abbreviated local residence register, including the name of the person it identifies, his/her birth date and sex, the date when that individual became a resident, and his/her local address will be provided to non-family members. *Id.*

<sup>87</sup> For example, persons included in the household can request a copy of all the records, including the address of the family register, the name of the person first listed, and his/her relationship with the person first listed. *Id.* art. 12(1). If such copy is used to verify the family members, then the status of an illegitimate child would be known. The municipal government official may refuse to include this additional information in a copy unless a special request is made, but there is no guarantee of such a restriction. *Id.* art. 12(5).

### 1. *Social Discrimination*

With the increasing number of people who prefer common law marriage and cohabitation, the legal marriage rate has gradually declined. Among women aged 25–29, 37.1% are married; among women aged 30–35, 61.8% are married; and among women aged 35–39, 72% are married.<sup>88</sup> Despite the gradual increase in the number of illegitimate children, however, 98.1% of the children born in 2003 were legitimate.<sup>89</sup> In other words, illegitimate children in Japan accounted for only 1.9% of all children.<sup>90</sup> The percentage of illegitimate children slightly increased to 2.2% in 2012,<sup>91</sup> but this is still a striking difference from European and North American countries. For instance, in 2003, 56% of the children born in Sweden were illegitimate, 44.3% of the children born in France were illegitimate, and 34% of the children born in the United States were illegitimate.<sup>92</sup>

This difference may be partially explained by the significant difference in the legal marriage rate; that is, countries that have a large number of illegitimate children are countries where people prefer common law marriage and cohabitation rather than legal marriage.<sup>93</sup> Whereas in Japan, couples tend to file a marriage registration application if the female partner becomes pregnant.<sup>94</sup>

Regardless of the explanation, in most countries illegitimate children have been subjected to widespread prejudice and discrimination. In Japan, illegitimate children are often called “bastard,” “mistress’ child,” or “child without father,” ridiculed and harassed in schools, and have even been refused employment by private companies.<sup>95</sup>

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<sup>88</sup> Naikaku [Cabinet Office], Danjo kyodo sankaku hakusho [Gender Equality Whitepaper] (2013), available at [http://www.gender.go.jp/about\\_danjo/whitepaper/h25/zenta\\_i/html/zuhyo/zuhyo01-00-18.html](http://www.gender.go.jp/about_danjo/whitepaper/h25/zenta_i/html/zuhyo/zuhyo01-00-18.html).

<sup>89</sup> Naikaku [Cabinet Office], Kokuminseikatsu hakusho [National Life Whitepaper] (2005) [hereinafter National Life Whitepaper], available at [http://www5.cao.go.jp/seikatsu/whitepaper/h17/01\\_honpen/](http://www5.cao.go.jp/seikatsu/whitepaper/h17/01_honpen/).

<sup>90</sup> *Id.*

<sup>91</sup> Naikaku [Cabinet Office], Shōshika mondai nitsuite [On the Decrease of Children] (2014), available at [http://www5.cao.go.jp/keizai-shimon/kaigi/special/future/0224/shiryō\\_03.pdf](http://www5.cao.go.jp/keizai-shimon/kaigi/special/future/0224/shiryō_03.pdf).

<sup>92</sup> National Life Whitepaper, *supra* note 89.

<sup>93</sup> *Id.* The whitepaper points out that 77% of women aged 20–24 in Sweden are in common law marriages or cohabitation, and 63% of women aged 20–24 in France are in common law marriages or cohabitation. *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Tokyo Chihō Saibansho [Tokyo Dist. Ct.], Mar. 2, 2004, 51 SHŌMU GEPPŌ 549 (noting illegitimate children have been subjected to intolerable discrimination in education, employment and marriage). Mothers of illegitimate children also face strong social

## 2. Statute-Based Discrimination

Various forms of discrimination exist against illegitimate children in Japanese statutory law. In the past, the two most conspicuous forms of statutory discrimination against illegitimate children were, (1) discrimination with respect to citizenship in the Nationality Act, and (2) discrimination with respect to succession in the Civil Code.

### a. Discrimination with Respect to the Grant of Citizenship

The Constitution of Japan does not define the meaning of Japanese citizenship and leaves the decision regarding its scope to the legislature. Specifically, Article 10 provides, “[t]he conditions necessary for being a Japanese national shall be determined by law.”<sup>96</sup> In response to this authorization, the Diet enacted the Nationality Act,<sup>97</sup> which originally gave priority of nationality to the father. That is, a child would receive Japanese citizenship only if he or she was born to a Japanese father.<sup>98</sup> When Japan ratified the Convention on the Elimination of All Forms of Discrimination Against Women,<sup>99</sup> however, the Diet amended the Act to provide citizenship equally to a child born to either a Japanese father or a Japanese mother.<sup>100</sup>

Nevertheless, the Nationality Act still discriminated on the basis of legitimacy. Thus, under Article 2(i) of the Nationality Act, a legitimate child automatically receives Japanese citizenship if born to a Japanese citizen.<sup>101</sup> Automatic citizenship is only bestowed upon an illegitimate child, however, if born to a Japanese mother.<sup>102</sup> If an illegitimate child is born to a Japanese father and a foreign mother, the child can only receive Japanese citizenship if he or she was acknowledged by the Japanese father before birth.<sup>103</sup>

If the illegitimate child between the Japanese father and foreign mother was not acknowledged before birth, the Nationality Act only granted

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condemnation. EKATERINA HERTOG, *TOUGH CHOICES: BEARING AN ILLEGITIMATE CHILD IN CONTEMPORARY JAPAN* (2009).

<sup>96</sup> NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 10(1).

<sup>97</sup> Kokusekihō [Nationality Act], Law No. 147 of 1950 (Japan).

<sup>98</sup> *Id.* art. 2(i) (before the 1984 amendment).

<sup>99</sup> U.N. Comm’n on the Status of Women, *Convention on the Elimination of All Forms of Discrimination Against Women*, Dec. 18, 1979, available at <http://www.ohchr.org/en/Professi onalInterest/pages/cedaw.aspx>.

<sup>100</sup> Kokusekihō [Nationality Act], Law No. 147 of 1950, art. 2(i) (Japan).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

Japanese citizenship under certain conditions. According to Article 3(1), newly added in 1984:

A child who became a legitimate child by the legal marriage of the parents and acknowledgment and who is under the age of 20 years (except for those who used to be Japanese nationals) may acquire Japanese citizenship by applying for registration when his or her father or mother who acknowledged him or her was a Japanese national at the time of birth and when the father or mother is currently a Japanese national or when the father or mother was a Japanese national at the time of his or her death.<sup>104</sup>

Then, according to Article 3(2), a child who applies for registration will acquire Japanese citizenship at the time of application.<sup>105</sup>

The practical result of Article 3(1) was to allow illegitimate children born to a Japanese father and a foreign mother to become Japanese nationals after birth only if the parents married and legitimized the child. Moreover, Japanese citizenship is granted at the time of application and not at the time of birth. Thus, these illegitimate children were discriminated against in comparison to legitimate children because they could not acquire Japanese citizenship at birth. They were also discriminated against in comparison to other illegitimate children born to a Japanese mother who can acquire Japanese citizenship upon birth. Moreover, illegitimate children born between a Japanese father and a foreign mother who were acknowledged by the Japanese father before birth can also acquire Japanese citizenship automatically at the time of birth.

*b. Discrimination with Respect to Succession*

According to Article 900(i) of the Civil Code, when a person dies without a will, his or her spouse will inherit half the estate and any children will inherit the remaining half.<sup>106</sup> Under Article 900(iv), the children must divide the estate equally.<sup>107</sup> According to Article 900(iv) proviso, however,

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<sup>104</sup> *Id.* art. 3(1) (before the 2008 amendment). This provision was amended in 2008 after the unconstitutional holding of the Supreme Court. See *infra* note 235.

<sup>105</sup> Nationality Act, art. 3(2).

<sup>106</sup> Civil Code, art. 900(i). See generally ODA, *supra* note 6, at 210; UCHIDA, *supra* note 6, at 333; NINOMIYA, *supra* note 6, at 276–77.

<sup>107</sup> Civil Code, art. 900(iv).

illegitimate children were only entitled to half of what legitimate children were entitled to in succession.<sup>108</sup> Therefore, if a father died intestate with an estate amounting to 100,000JPY, his wife would inherit 50,000JPY. If there were two legitimate children and one illegitimate child, then the two legitimate children would respectively inherit 20,000JPY while the illegitimate child would inherit 10,000JPY. The same discrimination was applicable to the minimum entitlement for family members when the deceased person left a will.<sup>109</sup>

Before the Pacific War, Japanese succession law was built upon the succession of all household property from one housemaster to the next.<sup>110</sup> In essence, only a legitimate first-born son was entitled to inherit the household property as housemaster. Other members of the family received nothing. This law was completely revamped after the Pacific War in 1947, and was amended to give all members of the family a share in the estate following the equality provision of the Constitution of Japan.<sup>111</sup> Nevertheless, resistance with respect to granting illegitimate children an equal share in succession persisted, and resulted in Article 900(iv) proviso.<sup>112</sup>

Article 900 is only applicable when an individual dies intestate; individuals remain able to freely donate<sup>113</sup> or divide their estate through the

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<sup>108</sup> *Id.* art. 900(iv) proviso (before the revision in 2013. See *infra* note 243. Note that illegitimate children are entitled to succeed to their father's estate only when their relationship with their father is legally established, i.e., when they have been acknowledged by him or by a court order. See *supra* note 52.

<sup>109</sup> Civil Code, art. 1044. See *supra* note 38.

<sup>110</sup> ODA, *supra* note 6, at 210; NINOMIYA, *supra* note 6, at 271–72; Yasuhei Taniguchi & Akiko Taniguchi, *Succession Law and Inheritance Disputes in Japanese Family Court Conciliation*, in *JAPANESE FAMILY LAW IN COMPARATIVE PERSPECTIVE* 119, 121–22 (Harry N. Scheiber & Laurent Mayali eds., 2009). When there was no first-born son, then an illegitimate son was granted preference to a legitimate daughter to succeed to the household property. In addition to succession of the household property, there was also succession of a decedent's individual property. But this did not have any significance.

<sup>111</sup> For general account on legal reforms during the occupation period, see ALFRED C. OPPLER, *LEGAL REFORM IN OCCUPIED JAPAN: A PARTICIPANT LOOKS BACK* 119 (1976); JOY PAULSON, *FAMILY LAW REFORM IN POSTWAR JAPAN: SUCCESSION AND ADOPTION* (2010).

<sup>112</sup> Uchida, *supra* note 7, at 62. See also Yuko Matsui, *Kongaishi no jinken nikansuru ichikousatsu* [A Comment on the Human Rights of Illegitimate Child], 5 *SYNEGETIC WELFARE SCIENCE* 35, 36 (2010) (noting the strong objection from female Diet members against granting the equal share, criticizing it as undermining the rights of legal wives); Junko Iida, *Hichakushutusushi no souzokuken nikansuru ichikousatsu* [A Consideration to the Right of Succession of an Illegitimate Child], 10 *TEIKYO TANKIDAIGAKU KIYO* 57, 58 (noting the explanation of chief drafter of the new Civil Code that this provision was meant to respect the legal marriages).

<sup>113</sup> Civil Code, art. 960.

use of a will.<sup>114</sup> Moreover, when an heir does not want to inherit the estate, he or she can refuse acceptance<sup>115</sup> and heirs are free to determine a division formula by unanimous consensus.<sup>116</sup> Thus, Article 900 does not mandate that the succession be carried out according to its terms in all circumstances. However, people in Japan rarely leave a will.<sup>117</sup> As a result, Article 900 plays a very important role in the succession process since the provision dictates the manner in which succession is carried out if heirs cannot reach an agreement. It also sets a minimum entitlement to the decedent’s estate when he or she left a will to leave the whole estate to persons other than heirs, thus making the entitlement of the illegitimate children at one-half of that of legitimate children.<sup>118</sup>

### 3. *Reluctance of the Government to Abandon Discrimination*

With gradual changes in society, an increasing number of people came to criticize the provisions that discriminate against illegitimate children, especially those related to succession in the Civil Code. In response, the government showed some willingness to reconsider the law. In 1979, the Ministry of Justice published an amendment proposal to abandon the discrimination with respect to succession.<sup>119</sup> The government could not come up with a bill, however, due to the existence of strong opposition.<sup>120</sup>

The international community also pressured the Japanese government to reconsider the succession provision. Japan ratified the International Covenant on Civil and Political Rights (ICCPR)<sup>121</sup> in 1979 and the

<sup>114</sup> *Id.* art. 902.

<sup>115</sup> *Id.* art. 915(1).

<sup>116</sup> *Id.* art. 907(1).

<sup>117</sup> Nihon kōshōnin rengōkai [Japan Nat’l Notaries Ass’n], Heisei 26 nendo niokeru kōseishousho yuigonshotō sakuseikensu nitsuite [Number of Wills Notarized in 2014], available at <http://www.koshonin.gr.jp/osi.html#20> (reporting 104,490 wills were notarized). In 2014, 1,273,020 people died in Japan. Kōseirōdōshō [Ministry of Health, Labor and Welfare], Jinko dōtai sōran no nenji suii [Annual Trend in Population], available at <http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/geppo/nengai14/dl/h1.pdf>. It could be assumed, therefore, that a will exists in less than 10% of all succession cases.

<sup>118</sup> Civil Code, art. 1044.

<sup>119</sup> Hōmushō [Ministry of Justice], Minjikyoku sanjikan shitsu [Civil Affairs Counselor Office], Sōzoku ni kansuru minpō kaisei yōkō shian [Draft outline of the Civil Code Amendment with respect to Succession], 699 JURISTO 44 (July 17, 1979) [hereinafter Draft Outline on Succession].

<sup>120</sup> Uchida, *supra* note 7, at 62. The government also unsuccessfully attempted to revise this discrimination in 1996 as well. See also *infra* note 181.

<sup>121</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, [hereinafter ICCPR] available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

Convention on the Rights of the Child (CRC)<sup>122</sup> in 1994, both of which prohibited discrimination based on the birth status of a child.<sup>123</sup> Under these international treaties, the U.N. Human Rights Committee and the Committee on the Rights of the Child have supervised compliance and issued opinions and recommendations to ratifying countries. These committees recommended that Japan abolish the discriminatory treatment of illegitimate children.<sup>124</sup> Nevertheless, the Japanese government was not moved. While other forms of discrimination against illegitimate children were eliminated,<sup>125</sup> these two discriminatory practices persisted.

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<sup>122</sup> Convention on the Rights of the Child Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC], available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>123</sup> Each provision states,

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR, *supra* note 121, art. 2(1).

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*Id.* art. 26.

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

CRC, *supra* note 122, art. 2(1).

<sup>124</sup> U.N. Human Rts. Comm., Concluding Observations: Japan, 64th Sess., para. 12, U.N. Doc. CCPR/C/79/Add.102 (Nov. 19, 1998); Comm. on the Rts. of the Child, Concluding Observations, 18th Sess., para. 14, U.N. Doc. CRC/C/15/Add.90 (June 5, 1998).

<sup>125</sup> For instance, the Child Support Benefit Act granted mothers entitlement to receive child support for a child whose father she has divorced, whose father is deceased, whose father suffers a disability as defined by cabinet order, whose father is unknown to be living or dead, or "who is designated by cabinet order as falling into similar circumstances to the foregoing circumstances." *Jidōhuyōteatehō* [Child Support Benefit Act], Law No. 238 of 1961, art. 4(i)(4). The cabinet order to implement the Child Support Benefit Act included illegitimate children as eligible but excluded illegitimate children who were acknowledged by their fathers from children "falling into similar circumstances to the foregoing circumstances." The child support benefit was thus terminated when illegitimate children were acknowledged by their fathers. This termination of child support benefit for illegitimate children upon being acknowledged by their fathers was quite controversial since acknowledgment does not guarantee that those children will receive support from their fathers and there was no reason to terminate the benefit. See Hidehiko Nagao, *Hichakushutsushi sabetsu no ichisokumen*:



### III. ILLEGITIMATE CHILDREN AND THE SUPREME COURT OF JAPAN

#### A. *The Japanese Courts’ Reluctance to Eradicate Discrimination*

Despite the existence of statute-based discrimination against illegitimate children and the right of equality guaranteed in both Article 14 and Article 24 of the Constitution of Japan, the Supreme Court of Japan had been reluctant to find in favor of constitutional challenges involving discrimination against illegitimate children.

##### 1. *Discrimination on the Grant of Citizenship*

In 2002, the Supreme Court of Japan sustained the denial of Japanese citizenship to an illegitimate child between Japanese father and foreign mother and upheld the Nationality Act against an attack based on Article 14(1) of the Constitution.<sup>126</sup> In that case, the plaintiff was born to a Japanese father and Filipino mother who were not legally married, and the father failed to acknowledge the child until two years and nine months after the birth. The child was not granted Japanese citizenship at birth and filed a suit seeking confirmation of citizenship and damages.

The Supreme Court of Japan first examined whether denying retroactive force to acknowledgement after birth and denying Japanese citizenship under Article 2(i) of the Nationality Act were based on reasonable grounds.<sup>127</sup> The Supreme Court of Japan reasoned that Article 2(i) granted citizenship to a child if either of the parents were Japanese since the existence of a legal parental relationship with either a Japanese mother or father was evidence of a close relationship between the child and Japan.<sup>128</sup> Moreover, it agreed with

*Jidōhuyōteate no shikyu sabetsu to kenpou 14 jou [One Aspect of Discrimination Against Illegitimate Children: Discrimination with Respect to Child Support Benefit and Article 14 of the Constitution]*, 30 CHUKYO HŌGAKU 1 (1995); Hidehiko Nagao, *Jidōhuyōteate shikyu niokeru hichakushutsushi sabetsu [Discrimination against Illegitimate Children with Respect to Grant of Child Support Benefit]*, 35 CHUKYO HŌGAKU 205 (2000). The Supreme Court of Japan eventually struck down the cabinet order as ultra vires, but did not hold it unconstitutional as a denial of the equality right of illegitimate children. Saikō Saibansho [Sup. Ct.], Jan. 31, 2002, 1st petty bench, 56 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 246 (Japan); Saikō Saibansho [Sup. Ct.], Feb. 22, 2002, 2nd petty bench, 205 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 505 (Japan). The exclusion was removed in 1998, before the 2013 judgment of the Supreme Court of Japan discussed below.

<sup>126</sup> Saikō Saibansho [Sup. Ct.], Nov. 22, 2002, 2nd petty bench, 208 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 495 (Japan).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

the government that the nationality of a child should be decided at the time of birth.<sup>129</sup> If an illegitimate child is not acknowledged before birth, it remains uncertain whether the child might be acknowledged by the father later on. The Supreme Court of Japan, therefore, concluded that the denial of the retroactive force of acknowledgment and the denial of citizenship at the time of birth had reasonable grounds and held that Article 2(i) of the Nationality Act did not violate Article 14(1) of the Constitution.<sup>130</sup>

The Supreme Court of Japan also rejected an attack of Article 3 of the Nationality Act, which at the time, prevented illegitimate children born to Japanese fathers and foreign mothers from becoming Japanese nationals after birth unless the parents married and legitimized the child.<sup>131</sup> It reasoned that even if it found the statutory provision unconstitutional, the plaintiff still would not be granted Japanese citizenship as no provision granted automatic citizenship to an illegitimate child born to a foreign mother at birth.<sup>132</sup> Since the constitutional attack would not affect the result of its decision, the Supreme Court of Japan simply refused to address the constitutional argument.<sup>133</sup>

## 2. *Discrimination with Respect to Succession*

In 1995, the Supreme Court of Japan also rejected a claim of discrimination against illegitimate children with respect to succession.<sup>134</sup> In this ruling, the Supreme Court of Japan started from the established premise that Article 14(1) of the Constitution prohibits only unreasonable discrimination, and that legal classification does not violate this prohibition

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* Justices Tsuguo Kameyama, Gen Kajitani, and Shigeo Takii delivered concurring opinions casting doubt on the reasonableness of Article 3. *Id.* Moreover, the Supreme Court of Japan was willing to expand the reach of Article 2 to grant Japanese citizenship to an illegitimate child who could not be acknowledged before birth because the mother was still in a legal marriage with another man at the time of birth. Saikō Saibansho [Sup. Ct.], Oct. 17, 1997, 2nd petty bench, 51 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 3925 (Japan). In such circumstances, the Supreme Court of Japan held, if a suit to confirm the absence of a parental relationship is immediately filed after birth and acknowledgment is granted immediately after the absence of a paternal relationship has been confirmed, then that should be sufficient to grant Japanese citizenship. *Id.*

<sup>134</sup> Saikō Saibansho [Sup. Ct.], July 5, 1995, grand bench, 49 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1789 (Japan).

so long as it remains reasonable.<sup>135</sup> After quickly reviewing the structure of the succession system and its history of reforms, the Supreme Court of Japan noted that Article 900(iv) is only one of many provisions on succession within the Civil Code.<sup>136</sup> Article 900 was rather a backup provision, and only applicable where a person died intestate and his or her heirs could not otherwise agree on the division of property.<sup>137</sup>

The Supreme Court of Japan also emphasized that the succession system varied with history and society, and that details of succession should be decided based upon tradition, social circumstances, and public opinion.<sup>138</sup> It stated that the succession system has a close relationship with society’s vision of family, and cannot be considered in isolation from marriage and family relationships.<sup>139</sup> Thus, it should be left to the reasonable discretion of the legislature to make changes to the system after considering all relevant factors.<sup>140</sup> The Supreme Court of Japan held that the differing treatment of legitimate children and illegitimate children could be viewed as unreasonable only when it had no rational basis in light of the discretion of the legislature.<sup>141</sup>

The Supreme Court of Japan stated that the system of legal marriage in the Civil Code did not violate Article 24 of the Constitution, and that the distinction between legitimate children and illegitimate children, which arises inevitably from the legal marriage system, was unavoidable.<sup>142</sup> It explained that the rationale behind Article 900(iv) proviso was to give respect to legal marriage and children born from a legal marriage while still acknowledging the status of illegitimate children.<sup>143</sup> Ultimately, the Supreme Court of Japan found this goal had a rational basis and concluded that the different treatment between legitimate and illegitimate children was within the reasonable discretion of the legislature.<sup>144</sup> As a result, the constitutional challenge based on Article 14(1) of the Constitution was rejected since the statutory provision was not grossly irrational in light of its legislative goal.

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Saikō Saibansho [Sup. Ct.], July 5, 1995, grand bench, 49 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1789 (Japan).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

This holding was not unanimous, and five justices dissented.<sup>145</sup> The dissenters emphasized that illegitimate children did not bear any responsibility for being born illegitimate and could not alter their status by their own effort or will.<sup>146</sup> The dissenters would have demanded a much stronger rationality requirement for the differing treatment between legitimate and illegitimate children under the law, but ultimately concluded that such discrimination with respect to succession did not even satisfy the minimum rationality requirement.<sup>147</sup> The dissenters noted that even if the law was reasonable at the time it was enacted, the publication of the family law reform proposal of the Ministry of Justice in 1979 demonstrated social change in accordance with an increasing trend in international law to eliminate discrimination against illegitimate children. The provision was therefore no longer reasonable.<sup>148</sup> Although the majority emphasized that this provision was merely a backup provision, the dissenters asserted that this provision led to the acceptance of the notion that illegitimate children were inferior to legitimate children.<sup>149</sup> Four other justices also indicated their doubt with regard to the reasonableness of the provision but joined the majority—concluding that the provision was not grossly unreasonable and legislative reform rather than judicial invalidation was an appropriate remedy.<sup>150</sup>

### 3. *Changing Society and Changing Public Opinion*

Although the Supreme Court of Japan had upheld discrimination against illegitimate children with respect to citizenship and succession, lawyers and commentators have noted an increasing recognition among the justices that such discrimination is unreasonable.<sup>151</sup> Some therefore expected that the Supreme Court of Japan could be persuaded to strike down the provisions involved; especially Article 900(iv) proviso of the Civil Code. The lower

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<sup>145</sup> *Id.* (Toshijirou Nakajima, J., Masao Ohno, J., Hisako Takahashi, J., Nobuyuki Ozaki, J., Mitsuo Endo, J., dissenting).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* (Katsuya Ohnishi, J., Itsuo Sonobe, J., concurring); *id.* (Hideo Chigusa, J., Shin-ichi Kawai, J., concurring).

<sup>151</sup> Nihon bengoshi rengōkai [Japan Federation of Bar Associations], Hōtei sōzokubun no hichakushutsushi sabetsu gōken hanketsu nikansuru seimei [Statement of the President on the Constitutional Holding on the Discrimination against Illegitimate Children with Respect to Succession] (July 7, 1995) [hereinafter Bar Statement on Succession], available at [http://www.nichibenren.or.jp/activity/document/statement/year/1995/1995\\_7.html](http://www.nichibenren.or.jp/activity/document/statement/year/1995/1995_7.html).

courts had long been casting doubt on the constitutionality of this provision.<sup>152</sup> Although the Supreme Court of Japan has affirmed its precedent and rejected a constitutional challenge as recently as 2009,<sup>153</sup> each decision has included concurring and dissenting opinions casting doubt on the reasonableness of the discrimination. As a result, some of the lower courts still continued to invalidate Article 900(iv) proviso of the Civil Code as unconstitutional even after the 2009 decision.<sup>154</sup>

Gradually, the number of people in Japan who support equal rights for illegitimate children has increased. In 2012, 60.8% of the public supported equal treatment between legitimate children and illegitimate children.<sup>155</sup> Although 35.6% of the public still supported discriminatory treatment of illegitimate children with respect to succession (with only 25.8% of the public supporting equal treatment),<sup>156</sup> an increasing number of lawyers and commentators thus came to expect the Supreme Court of Japan to reconsider its position. The Supreme Court of Japan has finally responded to this expectation.

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<sup>152</sup> Tokyo Kōtō Saibansho [Tokyo High Court], June 23, 1993, 1465 HANREI JIHŌ 55 (Japan); Tokyo Kōtō Saibansho [Tokyo High Court], Nov. 30, 1994, 1512 HANREI JIHŌ 3 (Japan). *See also* Tokyo Kōtō Saibansho [Tokyo High Court], Mar. 10, 2010, 1324 HANREI TIMES 210 (Japan).

<sup>153</sup> Saikō Saibansho [Sup. Ct.], Jan. 27, 2000, 1st petty bench, 54 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 69 (Japan); Saikō Saibansho [Sup. Ct.], Mar. 28, 2003, 2nd petty bench, 209 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 347 (Japan); Saikō Saibansho [Sup. Ct.], Mar. 31, 2003, 2nd petty bench, 209 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 397 (Japan); Saikō Saibansho [Sup. Ct.], Oct. 14, 2004, 1st petty bench, 215 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 253 (Japan); Saikō Saibansho [Sup. Ct.], Sept. 30, 2009, 2nd petty bench, 231 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 753 (Japan). In 2011, the Supreme Court of Japan faced another challenge to Article 900(iv) proviso of the Civil Code, and many lawyers and commentators expected the Supreme Court of Japan to reconsider its precedents. Just before its decision, however, the parties settled out of court, and the Supreme Court of Japan missed the opportunity to clarify its position. *See* Saikō Saibansho [Sup. Ct.], Mar. 9, 2011, 3rd petty bench, 65 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 723 (Japan).

<sup>154</sup> Osaka Kōtō Saibansho [Osaka High Ct.], Aug. 24, 2011, 2140 HANREI JIHŌ 19 (Japan). *See also* Nagoya Kōtō Saibansho [Nagoya High Ct.], Dec. 21, 2011, 2150 HANREI JIHŌ 41 (Japan) (precluding Article 1044 of the Civil Code, which applied Article 900(iv) proviso to the minimum entitlement to an estate).

<sup>155</sup> Naikaku [Cabinet Office], Kazokuno hōsei nikansuru yoronchōsa [Public Opinion Survey on Family Law] (2012), *available at* <http://www8.cao.go.jp/survey/h24/h24-kazoku/2-5.html>. Of those surveyed, 15.4% supported discriminatory treatment of illegitimate children in order to protect legal marriage. *Id.*

<sup>156</sup> *Id.*

## *B. The Supreme Court of Japan on Illegitimate Children and Citizenship*

### *1. Facts*

The initial sign of change was indicated in a judgment on discrimination against illegitimate children in the Nationality Act.

In 2008, the Supreme Court of Japan considered a case brought by children born to Japanese fathers and Filipino mothers not in legal marriages. After birth, the children were acknowledged by their fathers but were not granted Japanese citizenship. Even after submitting the application for registration, the children were denied citizenship because their fathers and mothers were not married at the time of application. The children filed suits seeking confirmation of their Japanese citizenship. Although the Tokyo District Court found in favor of their claims,<sup>157</sup> the Tokyo High Court reversed the judgment, holding that the courts could not grant Japanese citizenship even if the discrimination was unconstitutional.<sup>158</sup>

### *2. Discrimination Held Unconstitutional*

On June 4, 2008, the Supreme Court of Japan reversed the ruling of the Tokyo High Court, holding the discrimination unconstitutional<sup>159</sup> and granting Japanese citizenship to the children in a 10–5 decision.<sup>160</sup> The Supreme Court of Japan again started from the premise that Article 14(1) of the Constitution prohibits all kinds of legal discrimination unless it is based on reasonable grounds.<sup>161</sup> It reasoned that Article 10 of the Constitution meant to leave the decision on the requirements for citizenship to the discretion of the legislature because granting citizenship requires consideration of historical, traditional, political, social, economic, and

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<sup>157</sup> Tokyo Chihō Saibansho [Tokyo Dist. Ct.], Apr. 13, 2005, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1449 (Japan).

<sup>158</sup> Tokyo Kōtō Saibansho [Tokyo High Ct.], Feb. 28, 2006, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1479 (Japan).

<sup>159</sup> Saikō Saibansho [Sup. Ct.], June 4, 2008, grand bench, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1367 (Japan). See Craig Martin, *Glimmers of Hope: The Evolution of Equality Rights Doctrine in Japanese Courts from a Comparative Perspective*, 20 DUKE J. COMP. & INT'L L. 167, 223–38 (2010).

<sup>160</sup> The Supreme Court of Japan made the same decision in a companion case involving similar facts. See Saikō Saibansho [Sup. Ct.], June 4, 2008, grand bench, 228 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 101 (Japan).

<sup>161</sup> Saikō Saibansho [Sup. Ct.], June 4, 2008, grand bench, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1367 (Japan).

environmental factors.<sup>162</sup> The Supreme Court of Japan went on to say, however, that when the classification adopted by the legislature is not based on reasonable grounds or lacks a rational relationship between the classification and the intended goal, then the classification is unreasonable and unconstitutional.<sup>163</sup> In particular, the Supreme Court of Japan emphasized that Japanese citizenship is a very important legal status, because it bears a significant relationship to one’s eligibility to enjoy fundamental human rights and public benefits. On the other hand, whether the parents of a child are legally married is something that cannot be altered by the wish or effort of the child.<sup>164</sup> As a result, the Supreme Court of Japan recognized that examination of whether the marriage requirement is reasonable or not must be examined “carefully.”<sup>165</sup>

The Supreme Court of Japan found the main reason for requiring the parents to marry prior to granting Japanese citizenship to the child was to require a certain close relationship with Japan in addition to the existence of the paternal relationship.<sup>166</sup> This goal was found to be rational.<sup>167</sup> Moreover, this requirement was found to have a rational relationship with the legislative goals.<sup>168</sup> Many countries that granted citizenship to children based on a biological relationship required legitimation in addition to acknowledgement from the father, which was also a rational legislative purpose.<sup>169</sup>

However, in accordance with changes in social and economic circumstances, the Supreme Court of Japan found diversification of public opinion toward parental relationships, family relationships, and a growing number of illegitimate children. With globalization, the number of children born to a Japanese father and foreign mother had increased, and the degree of closeness in parent-child relationships has also diversified.<sup>170</sup> As a result, the Supreme Court of Japan held that the degree of closeness cannot be measured based on the existence of the parent’s marriage alone, so that the requirement for parental marriage as proof of a close relationship did not conform to the realities of family life.<sup>171</sup> The Supreme Court of Japan also noted significant international changes. Many foreign countries had begun

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

eliminating discrimination against illegitimate children in accordance with the requirements of the ICCPR and CRC, which are also ratified by Japan.<sup>172</sup> Many countries, which once had required legitimation as a condition for granting the citizenship, came to grant citizenship solely based on the acknowledgment.

The Supreme Court of Japan thus held that the requirement of legitimation by marriage after birth no longer bore any rational relationship to its legislative goal.<sup>173</sup> It not only found it difficult to rationalize the difference between illegitimate children acknowledged by their father before birth and those acknowledged after birth, but it also concluded the closeness of the relationship between the child and Japan bore no difference.<sup>174</sup> Furthermore, the Supreme Court of Japan stated that it is fundamentally inconsistent with sex equality that an illegitimate child born to a Japanese mother will acquire Japanese nationality at the time of birth, while an illegitimate child born to a Japanese father cannot acquire citizenship, even if acknowledged by the father after birth.<sup>175</sup> As a result, the Supreme Court of Japan concluded that treating parents' legal marriage as a condition of the child's citizenship violated Article 14(1).<sup>176</sup>

### 3. *Granting Japanese Citizenship*

Having found Article 3(1) of the Nationality Act unconstitutional, the Supreme Court of Japan faced extreme difficulties. It could not strike down Article 3(1), because striking it down would deprive illegitimate children of the Japanese citizenship they had acquired under the provision. It would also preclude the possibility that illegitimate children not acknowledged before birth could acquire Japanese citizenship.<sup>177</sup> The Supreme Court of Japan also could not simply create a new statutory provision to grant Japanese citizenship because that would require it to usurp legislative power.

Ultimately, the Supreme Court of Japan decided to maintain the basic philosophy of Article 3(1) regarding illegitimate children born between a Japanese father and a foreign mother who were not acknowledged before birth, and granted Japanese citizenship to such children by removing the

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* Three justices dissented and argued that this requirement still had a rational relationship and thus did not violate Article 14(1). *Id.* (Kazuko Yokoo, J., Osamu Tsuno, J., Yuki Huruta, J., dissenting).

<sup>177</sup> *Id.*



requirement of legitimation by legal marriage of the parents.<sup>178</sup> Applying this revised interpretation, it found the plaintiff children satisfied the requirement for acquiring Japanese citizenship and confirmed that they had acquired Japanese citizenship by filing the appropriate registration application.<sup>179</sup>

### C. *The Supreme Court of Japan on Illegitimate Children and Succession*

#### 1. *Facts*

In 2013, the Supreme Court of Japan took a similar position with respect to discrimination against illegitimate children with respect to succession rule.

Although the Supreme Court of Japan had consistently rejected constitutional challenges to the Article 900(iv) proviso, the provision had been subjected to strong condemnation.<sup>180</sup> In 1996, immediately after the 1995 decision sustaining the provision’s constitutionality, the Ministry of Justice had proposed a summary of a Family Law Reform bill that included repealing the discrimination in the proviso.<sup>181</sup> Although the bill was never introduced into the Diet because of strong opposition from the ruling party, the publication of the proposal reflected a changing trend in public opinion. The Ministry of Justice again attempted to introduce a similar bill in 2010.<sup>182</sup> Although the attempt failed, it further confirmed the public’s changing opinion.<sup>183</sup>

Two cases were before the Supreme Court of Japan in 2013. In one of these two cases, an application was filed by legitimate children against illegitimate children asking for division of an estate.<sup>184</sup> After hearings, the family court upheld the constitutionality of the Article 900(iv) proviso of the

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.* Five justices argued that it was beyond the power of the judiciary to rewrite the statutory provision and grant Japanese citizenship. *Id.* (Kazuko Yokoo, J., Osamu Tsuno, J., Yuki Furuta, J., dissenting); *id.* (Tatsuo Kainaka, J., Yukio Horigome, J., dissenting).

<sup>180</sup> See Bar Statement on Succession, *supra* note 151.

<sup>181</sup> Amendment Outline, *supra* note 7.

<sup>182</sup> Hōmushō [Ministry of Justice], Minpō oyobi kosekihō no ichibuwo kaiseisuru hōritsuan (kasho) no gaiyou [Outline of the Draft Bill to Amend Parts of the Civil Code and Family Register Act] [hereinafter Draft Family Register], available at <http://www.moj.go.jp/content/00010287.pdf>.

<sup>183</sup> Uchida, *supra* note 7, at 77 (noting the increase of public opinion in favor of equal treatment of all children in the poll).

<sup>184</sup> Tokyo Katei Saibansho [Tokyo Fam. Ct.], Mar. 26, 2012, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1345 (Japan).

Civil Code, and divided the estate according to the provision.<sup>185</sup> The Tokyo High Court also sustained the constitutionality of Article 900(iv) proviso and rejected the appeal.<sup>186</sup>

## 2. Article 900(iv) Proviso of the Civil Code Struck Down

On September 4, 2013, the Supreme Court of Japan unanimously struck down the discrimination in the proviso with respect to intestate succession by illegitimate children.<sup>187</sup> Following precedent, it recognized that Article 14(1) of the Constitution guarantees equality in the protection of the law and prohibits discriminatory treatment not based on reasonable grounds.<sup>188</sup> The Supreme Court of Japan also confirmed that the succession system requires taking into account tradition, social background, and public sentiment.<sup>189</sup> It thus found it necessary to consider the succession system along with public opinion on marriage and the family system.<sup>190</sup>

The Supreme Court of Japan held that the establishment and amendment of the succession system should be left to the reasonable discretion of the legislature in light of all considerations, and the legislature must have reasonable grounds to justify particular distinctions.<sup>191</sup> Since circumstances change over time, however, it declared that the reasonableness of the succession provision needed to be reexamined and evaluated in light of the goals of individual dignity and equality under the law.<sup>192</sup>

The Supreme Court of Japan began by pointing out that when the provision was adopted in 1947, public opinion favored the succession of estate by legitimate children, and that many people held discriminatory views toward illicit sexual relationships and illegitimate children.<sup>193</sup> It found, however, that significant changes in both public opinion and the reality of marriage and the family had occurred as a result of social and economic

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<sup>185</sup> *Id.*

<sup>186</sup> Tokyo Kōtō Saibansho [Tokyo High Ct.], June 22, 2012, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1352 (Japan).

<sup>187</sup> Saikō Saibansho [Sup. Ct.], Sept. 4, 2013, grand bench, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1320 (Japan). See also Colin P. Jones, *Legitimacy-Based Discrimination and the Development of the Judicial Power in Japan as Seen Through Two Supreme Court Cases*, 9 U. PA. E. ASIA L. REV. 99, 106–10 (2014).

<sup>188</sup> Saikō Saibansho [Sup. Ct.], Sept. 4, 2013, grand bench, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1320 (Japan).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

changes.<sup>194</sup> With the extension of life expectancy, the significance of the estate shifted from providing the means of living for children to providing means of support for surviving elderly spouses.<sup>195</sup> Furthermore, the number of illegitimate children had increased along with the number of single-member families, the number of middle-aged children living with their parents, and the number of divorces and remarriages involving minor children.<sup>196</sup>

The Supreme Court of Japan also considered changing trends internationally.<sup>197</sup> An increasing number of foreign countries that previously discriminated against illegitimate children with respect to succession had abandoned such discriminatory treatment. For example, European countries and the United States no longer maintained similar discriminatory practices.<sup>198</sup> Japan was one of the few countries that still practiced discriminatory treatment in succession.<sup>199</sup> Moreover, Japan had ratified the ICCPR and CRC—both of which prohibit discrimination based on the birth status of a child—and the U.N. Human Rights Committee and the Committee on the Rights of Child had repeatedly expressed concerns and recommended abolition of the discriminatory practices in Japan.<sup>200</sup>

In its analysis, the Supreme Court of Japan further recognized the changing treatment of illegitimate children under Japanese law. The discriminatory description in the family register as well as in the local residence register had been abolished,<sup>201</sup> and Article 3(1) of the Nationality Act had been held unconstitutional.<sup>202</sup> As a result, illegitimate children were granted Japanese citizenship in the same manner as legitimate children.<sup>203</sup> Discrimination between legitimate children and illegitimate children with respect to succession had been subject to discussion for some time as well. In 1979, the Ministry of Justice had proposed an amendment to the Civil Code abolishing any discriminatory practices in succession.<sup>204</sup> And in 1996, the Legal Council to the Justice Minister proposed a similar amendment, which would have provided for equal shares between legitimate children and

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> See *supra* notes 81, 85.

<sup>202</sup> See *supra* note 159.

<sup>203</sup> See *infra* note 237.

<sup>204</sup> See *supra* note 119.

illegitimate children in succession cases.<sup>205</sup> Finally, in 2010, the government had also prepared to introduce a bill to the same effect into the Diet.<sup>206</sup>

The Supreme Court of Japan questioned whether the reason that this discriminatory treatment was left unrevised had something to do with the small number of illegitimate children in Japan in comparison to the large number of illegitimate children in foreign countries.<sup>207</sup> It also considered the tendency of couples to file for marriage registration upon learning of pregnancy to avoid having an illegitimate child, which manifested continued respect for legal marriage.<sup>208</sup> Still, the Supreme Court of Japan held that the reasonableness of the provision needed to be decided based on whether the rights of illegitimate children were improperly infringed upon. The public's respect for legal marriage, the small number of illegitimate children, and the low ratio of illegitimate children compared with foreign countries would not directly affect the inquiry.<sup>209</sup>

Although the Supreme Court of Japan had consistently upheld the constitutionality of the provision,<sup>210</sup> five dissents and concurring opinions in its 1995 decision cast doubt on the reasonableness of the provision's different treatment of legitimate and illegitimate children.<sup>211</sup> Each decision since that time also included similar dissenting and concurring opinions.<sup>212</sup> Some of the justices believed that the abolition of different treatment necessitated a coordinated reconsideration of marriage, family, and succession,<sup>213</sup> but had expected the legislature to take action.<sup>214</sup> Ultimately, however, the Supreme Court of Japan determined that the abolition of the provision's discriminatory treatment could be accomplished without overhauling family and succession law, and that family law considerations should not prevent holding the provision unconstitutional.<sup>215</sup>

The Supreme Court of Japan also emphasized that the proviso merely served as a backup provision for intestate succession, and it did not prevent individual from granting an equal share of their estate to illegitimate children

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<sup>205</sup> See Amendment Outline, *supra* note 7.

<sup>206</sup> See *supra* note 182.

<sup>207</sup> Saikō Saibansho [Sup. Ct.], Sept. 4, 2013, grand bench, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1320 (Japan).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* See *supra* note 153.

<sup>211</sup> Saikō Saibansho [Sup. Ct.], Sept. 4, 2013, grand bench, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1320 (Japan).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

through a will. Nevertheless, the existence of the provision produced a discriminatory consciousness against illegitimate children from birth.<sup>216</sup> The Supreme Court of Japan thus found the fact that this provision was merely a backup provision unimportant for deciding whether the law was reasonable.<sup>217</sup>

The Supreme Court of Japan conceded that none of the foregoing factors alone were determinative to deem the different treatment unreasonable.<sup>218</sup> Yet, the factors taken together, and considering the significance given to individuals inside a family, it was impermissible to inflict disadvantages on children born outside of a legal marriage.<sup>219</sup> This was especially true when illegitimacy is a condition in which children “*never had a choice and have no power to alter.*”<sup>220</sup> The Supreme Court of Japan ultimately concluded that at the time the succession procedure began, in July 25, 2001, the provision no longer had reasonable grounds and was invalid.<sup>221</sup>

### 3. *Retroactivity*

The Supreme Court of Japan, however, did not overrule its previous judgments that sustained the constitutionality of Article 900(iv) proviso prior to July 25, 2001.<sup>222</sup> Moreover, if it had invalidated the provision dating back to July 25, 2001, it would have cast doubt on the legality of succession cases already settled and would have seriously harmed legal stability.<sup>223</sup> The Supreme Court of Japan thus decided to affirm the validity of all succession cases that had already been settled through agreements, family court decisions, and by court judgments since July 25, 2001 and invalidated Article 900(iv) proviso only in cases involving succession that started on July 25, 2001 or after and were still pending.<sup>224</sup>

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* (emphasis added).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* The Supreme Court of Japan declared in its judgment that Article 900(iv) proviso invalid as long as it was applied to succession “at least as of July, 2001.” As a result, although the succession at issue before the Supreme Court of Japan started on July 25, 2001, the Ministry of Justice thought that the decision invalidated the discriminatory provision as of July 1, 2001. Hōmushō [Ministry of Justice], Minpō no ichibuga kaisei saremashita [Part of the Civil Code Was Amended], available at [http://www.moj.go.jp/MINJI/minji07\\_00143.html](http://www.moj.go.jp/MINJI/minji07_00143.html).

The Supreme Court of Japan held the same in a companion case where the father died in November 2001.<sup>225</sup> Since Article 900(iv) proviso was upheld as reasonable in the previous decisions with respect to succession, which had begun on September, 2000, discrimination against illegitimate children became unreasonable at some time between September, 2000 and July 25, 2001.<sup>226</sup> The Supreme Court of Japan did not specify exactly when that occurred. Rather, it concluded that Article 900(iv) proviso was invalid on July 25, 2001, when the succession procedure involved began, but left for the future cases to specify the exact date on which it became invalid.

#### IV. FUTURE AGENDA FOR REFORM

What is the constitutional significance of these two rulings? What are their implications? The two recent rulings of the Supreme Court of Japan finding discriminations unconstitutional and striking them down surely forced the legislature to abandon some discriminations—but are they wiping out all discriminations against illegitimate children? Is there any room for maintaining a distinction between legitimate children and illegitimate children? Should succession law be reformed? The broader implications of these rulings need to be closely examined.

##### *A. Constitutional Significance of the Rulings*

These rulings are a very significant part of constitutional law in Japan. The Supreme Court of Japan has developed a very passive and conservative constitutional jurisprudence, upholding almost all legislative restrictions on

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<sup>225</sup> Saikō Saibansho [Sup. Ct.], Sept. 4, 2013, grand bench, 206 KANPŌ EXTRA EDITION 10 (Japan). This case involved two successions. One was the succession of the estate of a grandparent (*A*) who died in 1990 and was succeeded by a man (*B*) and his sibling (*Y3*). Before this succession was finalized, *B* died in November 2001. Therefore, *B*'s share to *A*'s estate was succeeded by his children (two legitimate children (*X1* and *X2*) as well as two illegitimate children (*D* and *Y1*)). *B*'s estate was succeeded by his legal wife (*C*) and his children. Since *D* died in 2004, *D*'s mother (*Y2*) succeeded *D*'s share. Two applications for a hearing on the division of the estate were combined together in this case: an application filed by *C*, *X1*, and *X2* against *Y3*, *Y1*, and *Y2* with respect to *A*'s estate and an application filed by *Y1* against *C*, *X1*, *X2*, and *Y2* with respect to *B*'s estate. After the applications were filed *C* died and her succession right was succeeded by *X1* and *X2*. Although the Supreme Court of Japan held that Article 900(iv) proviso was invalid in November 2001, when *B* died, it remained valid with respect to the succession of the estate of *A*, who died in 1990. *Id.* See also Saikō Saibansho [Sup. Ct.], Sept. 18, 2013, grand bench, 6142 KANPŌ 9 (Japan) (holding Article 900(iv) proviso invalid at the time of March, 2003).

<sup>226</sup> The Supreme Court of Japan has confirmed that Article 900(iv) proviso was valid in May, 2000. Saikō Saibansho [Sup. Ct.], Dec. 2, 2014, 3rd petty bench, unreported.

individual rights and rejecting almost all discrimination challenges during the seventy years of its history.<sup>227</sup> The Supreme Court of Japan had held statutory provisions as unconstitutional only seven times before these two rulings.<sup>228</sup> The 2008 ruling finding discrimination in the National Act unconstitutional was the eighth holding of its kind, and the 2013 ruling finding discrimination in the Civil Code with respect to illegitimate children unconstitutional was the ninth.<sup>229</sup> These decisions followed a 1973 decision holding a patricide provision in the Criminal Code unconstitutional.<sup>230</sup> It was previously the only law struck down as discriminatory and unconstitutional under the equality right.<sup>231</sup> It is very interesting that both two new cases addressed discrimination against illegitimate children. Furthermore, both had especially important social and political implications. These rulings are confirmation that the Supreme Court of Japan will not avoid judgments with such social and political implications.<sup>232</sup>

Finally, it is very interesting that these rulings were overwhelmingly welcomed by major mass media as well as lawyers.<sup>233</sup> Discrimination against illegitimate children seems unreasonable and many thought that invalidation was long overdue.

### *B. Aftermath of the Rulings*

As a result of the judgment striking down the Nationality Act’s discriminatory provision with respect to citizenship,<sup>234</sup> the Diet quickly

<sup>227</sup> Shigenori Matsui, *Why Is the Japanese Supreme Court So Conservative?*, 88 WASH. U. L. REV. 1375 (2011); David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425 (2011).

<sup>228</sup> Jones, *supra* note 187, at 103. The Supreme Court of Japan added one more unconstitutional judgment after this decision.

<sup>229</sup> *Id.* The tenth unconstitutional decision was the judgment on the waiting period for women to remarry after divorce. *See supra* note 10.

<sup>230</sup> Saikō Saibansho [Sup. Ct.], Apr. 4, 1973, grand bench, 27 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 266 (Japan). *See* Hidenori Tomatsu, *Equal Protection of the Law*, 53 LAW & CONTEMP. PROBS. 109, 111 (1990).

<sup>231</sup> Saikō Saibansho [Sup. Ct.], Apr. 4, 1973, grand bench, 27 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 266 (Japan).

<sup>232</sup> For discussion of the social and political significance of the judgments of the Supreme Court of Japan, *see* Shigenori Matsui, *Cloudy Weather, With Occasional Sunshine: Consumer Loans, the Legislature, and the Supreme Court of Japan*, 22 PAC. RIM L. & POL’Y J. 555 (2013).

<sup>233</sup> Tsuyoshi Tamura, *Top Court Rules Illegitimate Children Entitled to Equal Inheritance*, ASAHI SHIMBUN (Sept. 4, 2013), available at [http://ajw.asahi.com/article/behind\\_news/social\\_affairs/AJ201309040090](http://ajw.asahi.com/article/behind_news/social_affairs/AJ201309040090).

<sup>234</sup> *See supra* note 159.

revised the Nationality Act without much debate.<sup>235</sup> Now, an illegitimate child born to a Japanese father and foreign mother can acquire Japanese citizenship if the child is acknowledged by his or her father after birth.<sup>236</sup>

When the Supreme Court of Japan struck down the provision of the Civil Code discriminating against illegitimate children with respect to succession in 2013,<sup>237</sup> however, a response was not so forthcoming. Conservative members of the ruling Liberal Democratic Party were opposed to the decision, and some of the conservative media were quite critical of it.<sup>238</sup>

The 2013 case that led the Supreme Court of Japan to invalidate discrimination against illegitimate children with respect to succession involved the division of an estate among private individuals, so no specific fact-finding was attached to the decision. But, according to a popular magazine filled with news analysis and gossip, *Weekly Shinchō*, one of the two cases before the Supreme Court of Japan concerned a restaurant owner who expelled his wife who had been instrumental in achieving his success and began living with his mistress, a part-time worker at the restaurant.<sup>239</sup> Although the wife and mistress worked together at the restaurant, the wife was treated badly by her husband and his mistress.<sup>240</sup> The wife knew that her children would be protected by the Civil Code against the mistress's children and assured them of their entitlement to his estate,<sup>241</sup> but the decision of the Supreme Court of Japan ultimately left the children unprotected. In light of these facts, conservative critics cast doubt on the justification for eliminating the prior succession rules for legitimate children to illegitimate children.<sup>242</sup>

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<sup>235</sup> Kokusekihō no ichibuwo kaiseisuru hōritsu [Act to Amend Parts of the Nationality Act], Law No. 88 of 2008, art. 3.

<sup>236</sup> Kokusekihō [Nationality Act], Law No. 147 of 1950, art. 3.

<sup>237</sup> See *supra* note 187.

<sup>238</sup> “*Saikōsai ni shitagau hitusuyo nasi*,” *kongaishi sōzokude jimin homubukaiga hōgen renpatsu* [“No Need to Follow the Supreme Court”: Outrageous Statements of the Liberal Democratic Party’s Law Division on Discrimination against Illegitimate Children], GENDAI (Nov. 1, 2013), available at <http://gendai.net/articles/view/news/145628>; *Nihonshakai ni aunoka, saikōsai handan* [Does the Decision of the Supreme Court of Japan Conform to Japanese Society?], YOSHIKO SAKURAI (Sept. 19, 2013) [hereinafter Sakurai], available at <http://yoshiko-sakurai.jp/2013/09/19/4903>.

<sup>239</sup> *Kotsunikuno arasoiga bidan ni baketa* “*kongaishi*” *saikōsai handan no iwanan* [Bloody Fight Turned into Beautiful Story: Uncomfortable Truth behind the Decision of the Supreme Court on Illegitimate Children], SHŪKAN SHINCHO, Sept. 19, 2013, at 130.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> Hidetsugu Yagi, *Saikōsai hanketsuni ikarino baigaeshida: Kongaishi hutousouzoku kara kazokuwo mamoru minpō kaisei no hisaku* [Revenge Against the Ruling of the Supreme Court of Japan; Tactics to Amend the Civil Code to Protect the Family Against Inappropriate



Since this decision emanated from the Supreme Court of Japan, however, the government could not simply leave the provision unrevised. The Ministry of Justice decided to eliminate the discriminatory treatment and Article 900(iv) of the Civil Code was revised.<sup>243</sup>

### C. Comparison with the United States Supreme Court

Discrimination against illegitimate children has been subject to criticism all over the world, and many countries in the world are moving toward its eradication.<sup>244</sup> In most of these jurisdictions, it is the legislature and not the judiciary that has made an effort to effect change. In the United States, however, the U.S. Supreme Court is the institution that has brought significant changes to the legal status of illegitimate children. For this reason, a brief comparison between the U.S. Supreme Court and the Supreme Court of Japan will prove useful to understanding the different approaches adopted.

#### 1. Comparison with United States Supreme Court Cases

In *Levy v. Louisiana*,<sup>245</sup> the U.S. Supreme Court struck down a state statute that precluded illegitimate children from seeking damages for the wrongful death of a single mother. The decision was based on the Equal Protection Clause of the Fourteenth Amendment.<sup>246</sup> Similarly, in *Trimble v. Gordon*,<sup>247</sup> the Court struck down the Illinois Probate Act, which allowed illegitimate children to inherit by intestate succession only from their mothers. In effect, the state statute precluded illegitimate children from inheriting from the father unless the child was legitimized by marriage and acknowledged by the father. The Court, while denying that illegitimacy is a suspect classification that triggers strict scrutiny, held that the applicable

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*Succession Rule for the Illegitimate Children*], SEIRON (Oct. 15, 2013), available at <http://seiron-sankei.com/2529>.

<sup>243</sup> Minpō no ichibuwo kaiseisuru hōritsu [Act to Amend Parts of the Civil Code], Law No. 94 of 2013 (Japan), amending Article 900(iv) of the Civil Code. The amendment retroactively took effect dating back to September 5, 2013, the next day from the day that the Supreme Court of Japan struck down Article 900(iv) proviso.

<sup>244</sup> Johan Meeusen, *Judicial Disapproval of Discrimination Against Illegitimate Children: A Comparative Study of Developments in Europe and the United States*, 43 AM. J. COMP. L. 119 (1995).

<sup>245</sup> 391 U.S. 68 (1968).

<sup>246</sup> U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>247</sup> 430 U.S. 762 (1977).

rational basis test was “not a toothless one.”<sup>248</sup> It rejected the state’s justification for the statute as an attempt to promote legitimate family relationships, holding that the state may not influence the actions of men and women by imposing sanctions on the illegitimate children.<sup>249</sup> This decision triggered critical re-examination of the status of illegitimate children in each state and brought significant changes in the United States.

Despite these rulings in favor of illegitimate children, however, there are some ambiguities in the attitude of the U.S. Supreme Court. For example, the Court sustained discrimination against illegitimate children with respect to succession in *Labine v. Vincent*.<sup>250</sup> As summarized by the Court, under the Louisiana law at issue, children born out of wedlock who are not acknowledged by their parents have no rights to take property by intestate succession from their father’s estate.<sup>251</sup> In some instances, their father “may not even bequeath property to illegitimate children by will.”<sup>252</sup> Illegitimate children who were acknowledged by their fathers were deemed “natural children,” and could take from their father by intestate succession “to the exclusion only of the State.”<sup>253</sup> These children were allowed to receive either one-third or one-fourth of their father’s estate, but only if the father was not survived by legitimate children or their heirs.<sup>254</sup> On the other hand, if the child was legitimated or adopted, he or she could take property by intestate succession or by will like any other child.<sup>255</sup> The Court concluded that Louisiana’s succession rules for illegitimate children did not violate the Equal Protection Clause.<sup>256</sup> It still has not reversed this judgment, and thus leaves some doubt on its stance on discrimination against illegitimate children with respect to succession.<sup>257</sup>

The U.S. Supreme Court’s early holdings also provided ambiguous interpretations regarding time limitations for an acknowledgment claim of illegitimate children. In *Lalli v. Lalli*,<sup>258</sup> the Court sustained the constitutionality of a state statute that precluded illegitimate children from

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<sup>248</sup> *Id.* at 767.

<sup>249</sup> *Id.* at 768–70. This holding was confirmed in *Reed v. Campbell*, 476 U.S. 852 (1986).

<sup>250</sup> 401 U.S. 532 (1971).

<sup>251</sup> *Id.* at 537.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 539–40.

<sup>257</sup> See also *Gomez v. Perez*, 409 U.S. 535 (1973) (striking down a statute precluding illegitimate children from claiming paternal support from their father).

<sup>258</sup> 439 U.S. 259 (1978).

succeeding from their father unless the father filed for acknowledgment during the pregnancy or within two years after the child’s birth. In *Mills v. Habluetzel*,<sup>259</sup> however, the Court struck down a state statute that precluded illegitimate children from seeking paternal support from their father unless the child filed a suit to determine paternity before turning one-year-old. This one-year limitation was held to lack any substantial relationship to the legislative goal of preventing fraudulent claims.<sup>260</sup> Likewise, the Court has also held that a two-year time limitation was too short,<sup>261</sup> and has invalidated a state statute of limitations for support claims from illegitimate children for six years after the child’s birth.<sup>262</sup>

In its initial cases, the Court applied the baseline rational basis test, but gradually it came to adopt “intermediate scrutiny” in cases involving discrimination against illegitimate children. The Court held in *Clark*:

In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. . . . Classifications based on race or national origin . . . and classifications affecting fundamental rights . . . are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. . . .

To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective. Consequently we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because “visiting this condemnation on the head of an infant is illogical and unjust.” . . . Yet, in the seminal case concerning the child’s right to support, this Court acknowledged that it might be appropriate to treat illegitimate children differently in the

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<sup>259</sup> 456 U.S. 91 (1982).

<sup>260</sup> *Id.* at 100.

<sup>261</sup> *Pickett v. Brown*, 462 U.S. 1 (1983).

<sup>262</sup> *Clark v. Jeter*, 486 U.S. 456 (1988).

support context because of “lurking problems with respect to proof of paternity.”<sup>263</sup>

In light of this heightened scrutiny, it seems settled that discrimination against illegitimate children will not be sustained unless it is “substantially related to an important governmental objective.”<sup>264</sup> Nevertheless, it remains unclear if differing treatment towards illegitimate children will be deemed acceptable by the U.S. Supreme Court.<sup>265</sup>

## 2. *Different Approach Adopted by the Supreme Court of Japan*

### a. *Analytical Framework*

In contrast, the Supreme Court of Japan has adopted a different approach to discrimination against illegitimate children.

Since 1973, the Supreme Court of Japan has interpreted Article 14(1) of the Constitution as precluding all unreasonable discrimination.<sup>266</sup> Although Article 14(1) lists “race, creed, religion, sex, family origin or social status” as examples of impermissible classifications, the Supreme Court of Japan has never clearly distinguished these classifications as deserving a different standard of review.<sup>267</sup> Thus, discrimination against illegitimate children is subject to regular reasonableness review using a test akin to the rational basis

<sup>263</sup> *Id.* at 461 (citations omitted).

<sup>264</sup> *Id.* It must be noted that the U.S. Supreme Court upheld the constitutionality of Section 309 of the Immigration and Nationality Act of 1952 concerning U.S. citizenship for children born outside the U.S., out of wedlock, to an American parent. *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001). If a child is born abroad, out of wedlock, or to an American mother, the child automatically acquires U.S. citizenship at birth—provided the mother had “previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.” *Id.* at 60. An illegitimate foreign-born child of an American father and an alien mother, however, is recognized as a U.S. citizen only if the father’s paternity is convincingly established prior to the child’s eighteenth birthday, and the father agrees in writing to provide financial support to the child until he or she reaches age eighteen. *Id.* at 59. The Court rejected the assertion that this was unconstitutional sex discrimination by concluding that the classification serves “important governmental objectives and that the discriminatory means employed” are “substantially related to the achievement of those objectives.” *Id.* at 60–65.

<sup>265</sup> DONALD T. KRAMER, 1 *LEGAL RIGHTS OF CHILDREN* REV. 2D § 7.11 (2d ed. 1994); Scott E. Isaacson, *Equal Protection for Illegitimate Children: A Consistent Rule Emerges*, 1980 *BYU L. REV.* 142; Dale, *supra* note 1; Maldonado, *supra* note 1.

<sup>266</sup> Saikō Saibansho [Sup. Ct.], Apr. 4, 1973, grand bench, 27 *SAIKŌ SAIBANSHO KEIJI HANREISHŪ* [KEISHŪ] 266 (Japan).

<sup>267</sup> *Id.*

test used by courts in the United States. Usually this judicial review is highly deferential, so it is no wonder that the Supreme Court of Japan has sustained the constitutionality of different treatments in most of the cases.

On the other hand, an increasing number of commentators have followed the lead of the U.S. Supreme Court and applied heightened scrutiny to discrimination based on listed classifications, while applying less demanding scrutiny to other types of discrimination.<sup>268</sup> Discrimination against illegitimate children can be viewed as discrimination based on “social status” resulting in heightened scrutiny.<sup>269</sup>

The 2008 finding of unconstitutionality for the Nationality Act employed “careful” scrutiny, suggesting that the Supreme Court of Japan applied a kind of heightened scrutiny.<sup>270</sup> Since the case concerned discrimination against illegitimate children, as well as against Japanese fathers who were distinguished from Japanese mothers, there was apparent sex discrimination justifying heightened scrutiny. Justice Tokuji Izumi, in his concurring opinion, expressly acknowledged that illegitimacy is a social status, and discrimination against illegitimate children born to a Japanese father and foreign mother is discrimination based on the social status as well as the sex of the parent.<sup>271</sup> He also viewed the discrimination as related to the fundamental legal status of Japanese nationals.<sup>272</sup> He thus insisted that discrimination be justified under much heightened scrutiny and demanded that the classification have a practical and substantial relationship to an important government interest.<sup>273</sup>

However, the Supreme Court of Japan did not use heightened scrutiny in its 2013 decision on discrimination against illegitimate children with respect to succession.<sup>274</sup> Still, despite the highly deferential stance, it did strike down the discriminatory provision in the Civil Code.<sup>275</sup> If the majority

<sup>268</sup> NOBUYOSHI ASHIBE, KENPŌ [CONSTITUTION], 133 (5th ed. 2011); KOJI SATO, NIHONKOKUKENPŌRON [JAPANESE CONSTITUTIONAL LAW] 201 (2011); HIDEKI SHIBUTANI, KENPŌ [CONSTITUTION] 209 (2d ed. 2013).

<sup>269</sup> NOBUYOSHI ASHIBE, *supra* note 268, at 135; KOJI SATO, *supra* note 268, at 206, 211; HIDEKI SHIBUTANI, *supra* note 268, at 213. *See also* MIYOKO TSUJIMURA, KENPŌ [CONSTITUTION], 190 (3d ed. 2008); KAZUYUKI TAKAHASHI, RIKKENSHUGITO NIHONKOKUKENPŌ [CONSTITUTIONALISM AND THE CONSTITUTION OF JAPAN], 156 (3d ed. 2013).

<sup>270</sup> Jones, *supra* note 187, at 115.

<sup>271</sup> Saikō Saibansho [Sup. Ct. of Japan], June 4, 2008, grand bench, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1367 (Japan) (Tokuji Izumi, J., concurring).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> Jones, *supra* note 187, at 115.

<sup>275</sup> *Id.* at 117.

followed this kind of heightened scrutiny in its decision on the Civil Code provision, the unconstitutional ruling would have been even more powerful.

*b. Applications to the Cases before the Supreme Court of Japan*

Indeed, if we apply heightened scrutiny to discrimination against illegitimate children with respect to citizenship, the discrimination against illegitimate children at issue is evidently unreasonable. Parents' marital status has nothing to do with the relationship between the illegitimate children and Japan. Legitimate children are granted Japanese citizenship if either of the parents are Japanese, regardless of the relationship between the child and Japan. Illegitimate children born to a Japanese mother are granted Japanese citizenship simply because they were born to a Japanese mother.

On the other hand, prior to the Supreme Court of Japan decision, illegitimate children born to a Japanese father and foreign mother could only obtain Japanese citizenship if acknowledged before birth. No reasons justify why illegitimate children born between a Japanese father and foreign mother should not be able to obtain Japanese citizenship if acknowledged after birth. This discrimination was manifestly unreasonable.<sup>276</sup>

Similarly, there is no reason to justify discrimination against illegitimate children with respect to succession if heightened scrutiny is applied. The legal wife is already protected since one-half of the estate is granted to her. Discrimination against illegitimate children does not increase the entitlement of the legal wife. Further, as *Trimble* held, it is inappropriate for the government to deter illicit sexual relationships by imposing sanctions on children who are not responsible for being born illegitimate.<sup>277</sup>

However, the Supreme Court of Japan's reasoning in its decision on Article 900(iv) proviso of the Civil Code is hardly convincing. According to the Supreme Court of Japan, the changing public attitude toward illegitimate children, as well as the trend in foreign countries and international communities, were the main reasons for concluding that the discrimination

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<sup>276</sup> Shuhei Ninomiya, *Kokusekihō ni okeru kongaishi no byōdōshogu [Equal Treatment of Illegitimate Children in the Nationality Act]*, 250 RITSUMEIKAN HŌGAKU 1389 (1996); Hidehiko Nagao, *Kokusekihō 3 jou 1 kou no chakushutsu yōken no ikensei [Unconstitutionality of Requirement of Legitimacy in article 3(1) of the Nationality Act]*, 40 CHUKYO HŌGAKU 129 (2006); Hideo Yokoo, *Kokusekiho 3 jou 1 kou no gōkensei to iken no zesei hōhō [Constitutionality of Article 3(1) of the Nationality Act and the Remedy]*, 12 CHUKYO LAWYER 21 (2010).

<sup>277</sup> See *Trimble v. Gordon*, 430 U.S. 762 (1977).

was unreasonable.<sup>278</sup> The public attitude toward illegitimate children, however, should not be dispositive since equal rights are meant to protect the minority from the majority; therefore, how the majority views the different treatment should not matter. Moreover, it is puzzling why the trend in other countries was considered a justification for eliminating the discrimination against illegitimate children despite the significant social differences between Japan and other countries.<sup>279</sup> Indeed, European countries generally allow the division of property before succession, thus reducing its importance.<sup>280</sup> This makes a comparison with Japan more difficult.

Furthermore, it is hard to understand why different treatment, which was reasonable in 2000, is now suddenly unreasonable in 2001.<sup>281</sup> Although the end result might be justified,<sup>282</sup> the Supreme Court of Japan might have been better off striking the provision down as unreasonable from the beginning. Children “never had a choice and have no power to alter” their classification as an illegitimate child, yet the provision discriminated against them on that basis.<sup>283</sup> Illegitimate children should not be penalized for being born illegitimate, and the protection of legal marriage could have been accomplished by other means.

#### D. Remaining Discrimination in Japan

Two rulings of the Supreme Court of Japan discussed above removed the two most conspicuous forms of discrimination against illegitimate children. These rulings are consistent with developments in removing other forms of discrimination against illegitimate children as well. However, some discriminatory treatment still exists. Total equality cannot be achieved until

<sup>278</sup> Saikō Saibansho [Sup. Ct.], Sept. 4, 2013, grand bench, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1320 (Japan).

<sup>279</sup> Panel Discussion, *Hichakushutsushi no hōtekichii* [Legal Status of Illegitimate Children], 1032 JURISTO 34, 46 (1993) (Noriko Mizuno) (noting in European countries, unlike in Japan, the house occupied by the couple is usually left to the surviving wife).

<sup>280</sup> Kiyoko Nishi, *Kongaishi hoteli sōzokubun ikenkettei* [Unconstitutional Decision on Discrimination against Illegitimate Children with Respect to Succession], 403 HŌGAKU KYŌUSHITSU 52, 57–58 (2014).

<sup>281</sup> Jones, *supra* note 187, at 110 (arguing that the changes referred to in the majority opinion were already underway at the time of previous decisions and that there is no tipping point).

<sup>282</sup> MINOMIYA, *supra* note 6, at 281; Hidehiko Nagao, *Hichakushutsushi sōzokubun sabetsu “gōken” kettei no ronri* [Logic of Constitutional Decision on Discrimination Against Illegitimate Children with Respect to Succession], 31 CHUKYO HŌGAKU 1 (1996).

<sup>283</sup> Saikō Saibansho [Sup. Ct.], Sept. 4, 2013, grand bench, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1320 (Japan). See *supra* note 220.

the concept of illegitimacy is eradicated. What are the implications of these two rulings on the future of the legal system involving illegitimate children?

*1. Obligation to Mark a Child as Illegitimate*

As previously discussed, the relationship between father and child is still apparent in both the family register and the local residence registration.<sup>284</sup> Even when discrimination against illegitimate children with respect to succession was struck down, these descriptions still remained. Moreover, when submitting a childbirth application, one still has to mark whether a child is legitimate or not.<sup>285</sup> This remaining requirement raised questions as to whether such an obligation could be maintained.

In 2013, a case was brought before the Supreme Court of Japan by a couple who refused to mark their child as illegitimate when filing a childbirth registration application.<sup>286</sup> In this case, the couple had been living as common law spouses, and the husband had acknowledged the unborn child during the pregnancy.<sup>287</sup> Upon birth of their child in March 2005, the husband filed a childbirth registration application on April 11, 2005, refusing to mark the child as illegitimate.<sup>288</sup> The municipal officer prompted him to fill out the relevant section, but the father refused.<sup>289</sup> The officer even suggested submitting the application with a note attached, which would indicate the finding of the municipal head that the child was illegitimate, but the father also rejected this suggestion.<sup>290</sup> As a result, the officer refused to accept the application because it failed to satisfy the legal requirements.<sup>291</sup>

The father requested that the municipal head create a local residence register record for his child ex officio on May 19, 2005, but the municipal head refused since the child was never added to the family register.<sup>292</sup> On

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<sup>284</sup> See *supra* notes 77–78, 84.

<sup>285</sup> See *supra* note 75.

<sup>286</sup> Saikō Saibansho [Sup. Ct.], Sept. 26, 2013, 1st petty bench, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1384 (Japan).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* The legal challenge to this refusal was rejected by the lower courts and the Supreme Court of Japan ultimately sustained the decision. Saikō Saibansho [Sup. Ct.], Sept. 8, 2005, 3rd petty bench, unreported (Japan).

<sup>292</sup> *Id.* The couple challenged the municipal head's refusal to create the registration, seeking revocation and damages for the municipal head's failure to create the register record, but this challenge was again rejected by the Supreme Court of Japan. Saikō Saibansho [Sup. Ct.], Apr. 17, 2009, 2nd petty bench, 63 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 638 (Japan).



March 8, 2011, the couple filed suit seeking damages and revocation of the refusal against the government and the municipal head.<sup>293</sup> After bringing suit, the mother was prompted twice to file a childbirth registration application, but she still refused.<sup>294</sup> The municipal head then notified the mayor where the mother’s family register was maintained, and the mayor created a record for the child *ex officio*.<sup>295</sup> Then, the local government officer created the local residence register for their child. Once the municipal head created a local residence register for the child *ex officio*, the claim for revocation was no longer available.<sup>296</sup> However, the couple still maintained a claim for damages against the municipal head for failure to create a local residence register and a claim for damages against the government for its failure to remove the provision of law that mandated the reporting of illegitimacy on the application form.<sup>297</sup> Both Tokyo District Court<sup>298</sup> as well as the Tokyo High Court<sup>299</sup> rejected their claims.

Ultimately, the Supreme Court of Japan affirmed the judgment of the Tokyo High Court.<sup>300</sup> The Supreme Court of Japan held that the childbirth registration application was designed to report the fact of childbirth and does not have any legal effect.<sup>301</sup> The status of a child, legitimate or illegitimate, and the specific family status should be decided according to the provision of the Civil Code. Different treatment is justified because the legal system relies upon the system of legal marriage.<sup>302</sup> The provision at issue merely provided convenience for municipal heads to register children on the family register.<sup>303</sup> Failure to mark a child as legitimate or illegitimate made the application defective and allowed the municipal head to refuse the application, but the municipal head could still accept the application or create the record *ex officio*. As a result, the Supreme Court of Japan concluded that

<sup>293</sup> Saikō Saibansho [Sup. Ct.], Sept. 26, 2013, 1st petty bench, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1384 (Japan).

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> Tokyo Chihō Saibansho [Tokyo Dist. Ct.], Apr. 26, 2012, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1429.

<sup>299</sup> Tokyo Kōtō Saibansho [Tokyo High Ct.], Sept. 27, 2012, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1473.

<sup>300</sup> Saikō Saibansho [Sup. Ct.], Sept. 26, 2013, 1st petty bench, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1384; Jones, *supra* note 187, at 131–33.

<sup>301</sup> Saikō Saibansho [Sup. Ct.], Sept. 26, 2013, 1st petty bench, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1384.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

this provision alone did not create any real difference between legitimate children and illegitimate children or the legal status of a child's parents. As such, it was not an unreasonable form of discrimination in violation of Article 14(1) of the Constitution,<sup>304</sup> and the section on the registration application was left unrevised.<sup>305</sup>

## 2. *Acknowledgment*

Another lingering instance of discrimination is that illegitimate children can only succeed the estate of their father when their father has acknowledged them. When the father dies without having acknowledged his child, the unacknowledged illegitimate child has to file a suit seeking judicial acknowledgment to succeed and this suit can only be filed within three years after the father's death.<sup>306</sup> Although the child needs to decide to refuse the succession within three months after learning of his or her father's death,<sup>307</sup> there is no time limitation for succession.<sup>308</sup> This means that illegitimate children, if they fail to file a suit seeking judicial acknowledgement within three years after their father's death, cannot trigger succession after that time. This limitation is still left intact.

Of course, if it were possible for unacknowledged illegitimate children to come forward long after the succession was complete, the division of an estate by the heirs would not be finalized. A three-year limitation after the

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<sup>304</sup> *Id.*

<sup>305</sup> The Ministry of Justice has already relieved the burden caused by the obligation to mark whether a child is legitimate or illegitimate by allowing the mother to leave the section unmarked if she applies to register the child in her mother's register or to give the child her family name. See *supra* note 76. After repealing the Article 900(iv) proviso, the Ministry of Justice further issued a notification to confirm this practice. See *Kongaishi kinyu nashidemo jurika: Shussei todoke no hōmushō tsūchi [Birth Registration Application Acceptable without Marking on the Legitimacy: Ministry of Justice Notified]*, ASAHI SHINBUN (Dec. 21, 2013), available at <http://www.asahi.com/articles/DA2S10891368.html>. The city of Akashi in Hyogo Prefecture created its own childbirth registration application form, which omitted the section on legitimacy, but the Ministry of Justice warned that the form was a violation of the statute. The city promptly stopped using the form. *Chakushutsushiran hazushita shussei todoke kouhu chusi: Akashishi kunishiteki uke [Birth Registration Application Form Without Legitimacy Column No Longer Distributed: City of Akashi Stopped Upon Receiving Warning from the Central Government]* ASAHI SHINBUN (Oct. 4, 2013), available at <http://www.asahi.com/national/update/1004/OSK201310040139.html>.

<sup>306</sup> See *supra* note 51.

<sup>307</sup> Civil Code, art. 915(1).

<sup>308</sup> *Id.* art. 910 (if an illegitimate child comes forward after the death of his/her father and is judicially acknowledged after the estate has already been divided by the other heirs, he/she can only demand compensation from the other heirs).

father’s death might be justified to provide stability for division of the estate. On the other hand, especially when illegitimate children did not know their father or know of his death, the exclusion of an acknowledgment claim after three years might be too restrictive.<sup>309</sup> If a father dies suddenly in a traffic accident, for instance, an unacknowledged illegitimate child cannot bring a damage claim with respect to the accident if three years have passed since such a damage claim became a part of the estate to be succeeded.<sup>310</sup>

### *E. Issues Left to Be Addressed*

Discrimination against illegitimate children needs to be considered in light of much broader contexts than the limited context it has been considered within so far. First, family changes and the development of reproductive technology have started forcing the legislature to re-evaluate the purpose of legitimacy and to accept more different kinds of parental relationships. Second, the elimination of the discrimination against illegitimate children with respect to succession may force the government to reconsider the purpose and structure of the succession system. In other words, the government may be forced to come up with a succession system that can both protect an abandoned legal wife and her children and allow the legal wife to stay in the house owned by the deceased husband even after his death. Finally, the elimination of discrimination against illegitimate children might force the government to reconsider the whole structure of the family registration and local residence registration system as well as the family name system in Japan.

#### *1. Changing Families, Presumption of Paternity, and Legitimacy*

Critics of the Supreme Court of Japan’s decision on succession argue that the invalidation was unnecessary by pointing to the small number of

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<sup>309</sup> The Supreme Court of Japan made an exception to the three-year statute of limitations in a case where the father was missing, the child was improperly registered as a legitimate child (acknowledgment was therefore impossible), and an acknowledgement suit was precluded because three years had already passed after the father’s death when his death became known. Saikō Saibansho [Sup. Ct.], Mar. 19, 1982, 2nd petty bench, 36 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 432 (Japan). It is thus unclear whether the Supreme Court of Japan might create another exception in other circumstances.

<sup>310</sup> On the other hand, when the father dies in a traffic accident, an unacknowledged illegitimate child can still claim support, if the father was supporting the child, and may claim for emotional damages caused by the father’s death. Tsuneo Yoshida, *Mininchinokono hōekitchii* [Legal Status of Unacknowledged Child], 58 WASEDA HŌGAKU 221, 233–41 (1983).

illegitimate children in Japan, and to the differences in culture between European and North American countries and Japan.<sup>311</sup> These critics also point out that Japanese society places a strong emphasis on legal marriage<sup>312</sup>—a fact corroborated by the tendency of many unmarried couples to get married when they find out that the female partner is pregnant.<sup>313</sup>

While this may be true, however, the small number of illegitimate children should not operate as an excuse for discrimination. After all, children are not responsible for being born illegitimate, and cannot do anything to alter this status. The strong emphasis on legal marriage also should not justify discrimination against illegitimate children. The protection of legal marriage, if necessary, can be accomplished by other means.

Although the number of illegitimate children in Japan is still very small, the Supreme Court of Japan now accepts the undeniable reality that families are significantly, and constantly, changing. The Japanese traditional family used to be large. Three generations, sometimes four, would live in the same house. Now, with urbanization and economic development, younger families are leaving the traditional family to form separate families. The number of families that live with only a husband, wife, and unmarried young children (without other extended family members) has significantly increased.<sup>314</sup> In addition, with longer life expectancy, families with the senior head of the household have also increased,<sup>315</sup> and an increasing number of such families are comprised of only an elderly couple.<sup>316</sup> Single member families are also increasing.<sup>317</sup> Moreover, with the gradual increase of divorce,<sup>318</sup> families comprised of single mothers or single fathers have

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<sup>311</sup> Sakurai, *supra* note 238.

<sup>312</sup> *Id.*

<sup>313</sup> *See supra* note 94.

<sup>314</sup> Families living with only one couple and their unmarried children used to be 41% of all families in 1970, but now makes up 31.9% of all families. Naikakuhu [Cabinet Office], Heisei 13 nendo kokumin seikatsu hakusho [National Life White Paper 2001], available at <http://www5.cao.go.jp/seikatsu/whitepaper/wp-pl/wp-pl01/html/13105100.html>.

<sup>315</sup> Families with the senior head of the family occupied 23.8% of all families in 2000. *Id.*

<sup>316</sup> Families with only a husband and wife occupied 18.9% of all families in 2000. *Id.*

<sup>317</sup> Single member families occupied 27.6% of all families in 2000. *Id.*

<sup>318</sup> The total number of divorces in 2010 was 251,383 and the divorce rate per 1,000 persons was 1.99. Kōseirōdōshō [Ministry of Health, Labor and Welfare], Heisei 22 nen jinkōdōtaiōkei geppou nenkei no gaikyō [2010 Summary of Annual Total of Monthly Population Change], available at <http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/geppo/nengai10/kekka05.html>. This means that one out of three couples end up divorcing during their lifetime. *Hutatsuno rikonritsudemiru rikon no jittai [Reality of Divorce in Light of Two Divorce Rates]*, NTT (July 30, 2007), available at <http://research.nttcoms.com/database/data/000554/>.

significantly increased.<sup>319</sup> With the increase of re-marriage, an increasing number of families now include a husband with children from his first marriage and a wife with children from her first marriage.<sup>320</sup> Now, the actual picture of families in Japan is so diversified that it is too restrictive to base family law on the traditional family model of two legally married parents with their unmarried children.<sup>321</sup>

Furthermore, with the development of assisted reproductive technology, couples can have non-biological children, which further calls into question the legitimacy presumption.<sup>322</sup> When a legally married couple gives birth to a child using donor sperm, they submit the childbirth registration application indicating that the child is a legitimate child. The municipal officer accepts these applications and the courts apply the presumption of legitimacy.<sup>323</sup> The biological relationship is a hallmark of legitimacy, but an increasing number of children do not have any biological relationship with their parents because of this technological capability. This casts doubt on the very purpose of the legitimacy in current operation.<sup>324</sup> Another complicated situation arises in

<sup>319</sup> In 2011, there were 1,238,000 single-mother families and 223,000 single-father families. Kōseirōdōshō [Ministry of Health, Labor and Welfare], Heisei 23 nendo zenkoku boshisetaito chousano kekka [The Result of the 2011 Survey on Households of Single Parent] (Sept. 7, 2012), available at <http://www.mhlw.go.jp/stf/houdou/2r985200002j6es.html>.

<sup>320</sup> The 2010 survey shows that 25.5% of all households consist of one person, 22.6% consist of a couple, 30.7% consist of a couple with unmarried children, 6.5% consist of a single parent with unmarried children, and 7.9% consist of three generations. It is noteworthy that 6.8% of households are categorized as “other.” Kōseirōdōshō [Ministry of Health, Labor and Welfare], Kokumin seikatsu kiso chōsa [Survey on Basic National Life] (Mar. 2012), available at <http://www.mhlw.go.jp/toukei/list/dl/20-21-01.pdf>.

<sup>321</sup> See generally THE CHANGING JAPANESE FAMILY (Marcus Rabick & Ayui Takenaka eds., 2009).

<sup>322</sup> The Japan Society of Obstetrics and Gynecology, the largest association of gynecologists, used to allow artificial insemination using donated sperm. Nihonsanhujiinka gakkai [Japan Society of Obstetrics and Gynecology], Hihaiigushakan jinkōjusei nikansuru kenkaï [Opinion on Artificial Insemination Using Donor Sperm], available at [http://www.jsog.or.jp/about\\_us/view/html/kaikoku/H18\\_4\\_hihaiigusha.html](http://www.jsog.or.jp/about_us/view/html/kaikoku/H18_4_hihaiigusha.html). But it had not allowed the IVF using donated sperm or egg. Today, it will allow IVF using donor sperm and donor eggs in exceptional cases. Nihonsanhujiinka gakkai rinriinkai, Rinrishingikai [Japan Society for Obstetrics and Gynecology, Ethics Committee, Ethics Council] (Feb. 23, 2001), available at [http://www.jsog.or.jp/kaiin/html/Rinri/rinrishingikai/inf3\\_1\\_2001.html](http://www.jsog.or.jp/kaiin/html/Rinri/rinrishingikai/inf3_1_2001.html).

<sup>323</sup> Saikō Saibansho [Sup. Ct.], Dec. 10, 2013, 3rd petty bench, 2210 HANREI JIHŌ 27 (Japan). See *supra* note 47. When a legally married couple agrees to use donated sperm, neither are allowed to deny paternity after the child is born. Tokyo Kōtō Saibansho [Tokyo High Ct.], Sept. 16, 1998, 51 KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 165.

<sup>324</sup> As discussed previously, the Supreme Court of Japan rejected a suit for confirmation of the absence of a parental relationship even when the DNA evidence showed that the legal father was not the biological father. See *supra* note 46. These judgments consider a non-

that parents are now able to have a biological child from a surrogate mother.<sup>325</sup> When a child is born from a surrogate mother, the mother who gave birth to a child is registered as the legal mother.<sup>326</sup> Even if there is a biological relationship, the biological parents cannot be the legal parents. It is clearly an appropriate time to reconsider not only the idea of legitimacy, but also the whole system of presumptions and acknowledgment, including who should be considered the parent of a child.<sup>327</sup>

## 2. *The Need to Revisit Succession Law: Protecting Abandoned Wives*

Eliminating the provisions that discriminate against illegitimate children benefit those children, but their protection must be balanced with the protection needed in cases where the husband has been unfaithful. In order to protect abandoned wives, the succession system may have to be reconsidered in its entirety.

In Japan, if a couple agrees to divorce, they may do so at any time by filing a divorce application in a municipal office.<sup>328</sup> If one spouse is not willing to agree to a divorce, the spouse seeking a divorce must present a legitimate statutory reason to a court.<sup>329</sup> Importantly, the Supreme Court of Japan previously rejected a divorce application from a husband who was responsible for the breakdown of his marriage.<sup>330</sup> As a result, in some cases, husbands are unable to obtain a divorce even after thirty years of separation.

biological father, the husband, as the legal father in the absence of objectively clear evidence that he could not be the father of the child.

<sup>325</sup> The Japan Society of Obstetrics and Gynecology prohibits surrogate motherhood. Nihonsanhujiinka gakkai [Japan Society for Obstetrics and Gynecology], Dairikaitai nikansuru kenkai [Stance on Surrogate Motherhood], available at [http://www.jsog.or.jp/about\\_us/view/html/kaikoku/H15\\_4.html](http://www.jsog.or.jp/about_us/view/html/kaikoku/H15_4.html). Since this is merely a self-regulatory ban for gynecologists and not a statutory ban, some gynecologists have already assisted childbirths through surrogate mothers.

<sup>326</sup> Saikō Saibansho [Sup. Ct.], Mar. 23, 2007, 2nd petty bench, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 619 (Japan); Michiko Ishii, *Medically Assisted Reproduction and Family Law in Japan*, in *JAPANESE FAMILY LAW IN COMPARATIVE PERSPECTIVE* 175 (Harry N. Scheiber & Laurent Mayali eds., 2009).

<sup>327</sup> Norio Higuchi, *Parenthood Under Japanese Law*, in *FRONTIER OF FAMILY LAW* 95 (Andrew Bainham, David Pearl & Ros Pickford eds., 1995).

<sup>328</sup> Civil Code, art. 763.

<sup>329</sup> *Id.* art. 770(1). Legitimate reasons for judicial divorce include adultery, willful abandonment, being missing for three years, severe mental disability, and “other circumstances that make it impossible to maintain marriage.” A judge can refuse to allow a divorce, however, if he or she believes the divorce is not appropriate in the circumstances. *Id.* art. 770(2).

<sup>330</sup> Saikō Saibansho [Sup. Ct.], Feb. 19, 1952, 3rd petty bench, 6 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 110 (Japan).

Recently, the Supreme Court of Japan made it a bit easier for these husbands to seek divorce,<sup>331</sup> however, some hurdles still remain.<sup>332</sup> These hurdles were once used as leverage by wives as a means of forcing their unfaithful husbands to concede substantial monetary support after the divorce.<sup>333</sup> This kind of leverage was helpful for many wives, because many of them did not have jobs or had quit their jobs at the time of their marriage.<sup>334</sup> These women faced extreme difficulties in finding work after divorce,<sup>335</sup> and faced extreme difficulty supporting themselves.<sup>336</sup>

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<sup>331</sup> Saikō Saibansho [Sup. Ct.], Sept. 2, 1987, grand bench, 41 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1423 (Japan) (thirty-six year separation and absence of a minor child justified divorce); Saikō Saibansho [Sup. Ct.], Nov. 8, 1990, 1st petty bench, 161 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 203 (Japan) (eight-year separation and willingness to pay support to the wife justified divorce); Saikō Saibansho [Sup. Ct.], Nov. 18, 2004, 1st petty bench, 215 SAIKŌ SAIBANSHO SAIBANSHŪ MINJI [SAIBANSHŪ MINJI] 657 (Japan) (two-year and four month separation, existence of a minor child, and the wife’s illness did not justify divorce).

<sup>332</sup> See HARALD FUESS, *DIVORCE IN JAPAN: FAMILY, GENDER, AND THE STATE 1600–2000* (2004); see also Masayuki Murayama, *Convergence from Opposite Directions? Characteristics of Japanese Divorce Law in Comparative Perspective*, in *JAPANESE FAMILY LAW IN COMPARATIVE PERSPECTIVE* 61 (Harry N. Scheiber & Laurent Mayali eds., 2009).

<sup>333</sup> That is the reason that the 1996 amendment proposal of the Ministry of Justice would have allowed the parties to divorce after they have been separated for five years, while retaining discretion for the court to reject the application of divorce if the divorce might bring serious poverty or intolerable pains to the spouse or their children. Amendment Outline, *supra* note 7. See also Tomoko Kamei & Junko Ninomiya, *Josei to minpō: 5 nen bekkyo rikon wo kangaeru [Women and the Civil Code: Considering the Proposed Five-Years Separation Divorce Rule]*, 233 AGORA 2 (1997), available at [https://nwec.repo.nii.ac.jp/?action=pages\\_view\\_main&active\\_action=repository\\_view\\_main\\_item\\_detail&item\\_id=9027&item\\_no=1&page\\_id=13&block\\_id=21](https://nwec.repo.nii.ac.jp/?action=pages_view_main&active_action=repository_view_main_item_detail&item_id=9027&item_no=1&page_id=13&block_id=21) (noting the argument that the difficulty of divorce application by the responsible spouse forces the responsible spouse to increase the financial payment for the betrayed spouse).

<sup>334</sup> In Japan, 27.7% of employed women quit working after marriage. Naikakuho [Cabinet Office], *Danjo kyodosankaku hakusho heisei 25 nen [Gender Equality Whitepaper, 2013]*, available at [http://www.gender.go.jp/about\\_danjo/whitepaper/h25/zentai/html/zuhyo/zuhyo\\_01-00-27.html](http://www.gender.go.jp/about_danjo/whitepaper/h25/zentai/html/zuhyo/zuhyo_01-00-27.html). Twenty-four percent to forty percent of married women do not have jobs. *Id.* See also SUSAN D. HALLOWAY, *WOMEN AND FAMILY IN CONTEMPORARY JAPAN* (2010) (documenting the hardships Japanese women face by keeping a job while being married).

<sup>335</sup> These difficulties are partly caused by the lack of employment experience for many women, the absence of civil rights legislation prohibiting age discrimination in private employment, and the difficulty of working full time when women are expected to take care of their children. According to the data compiled by the Ministry of Health, Labor and Welfare, among single mothers who did not hold a job during marriage, only 69.1% have found jobs after becoming single mothers, and 57.4% of those jobs are part-time. *Kōseirōdōshō [Ministry of Health, Labor and Welfare], Heisei 23 nendo zenkoku boshisetaitō chōsakekka hōkoku [2011 Report of the Result of National Survey on Single Mothers’ Families]*, available at [http://www.mhlw.go.jp/seisakunitsui\\_te/bunya/kodomo/kodomo\\_kosodate/boshikatei/boshi-setai\\_h23/dl/h23\\_09.pdf](http://www.mhlw.go.jp/seisakunitsui_te/bunya/kodomo/kodomo_kosodate/boshikatei/boshi-setai_h23/dl/h23_09.pdf) [hereinafter *Single Mothers Survey*]. Most single

The discriminatory entitlement for legitimate children could function as another type of leverage for legal wives whose husbands were unfaithful. As long as the wife did not agree to a divorce, her children would be entitled to twice as large a share in the husband's estate. Today, however, almost all these types of leverage are gone, and many people wonder whether any leverage remains for a wife who has no job and who will face extreme difficulties after a divorce. Although discrimination against illegitimate children is grossly improper, their protection must not undermine the rights and protections of abandoned wives and children. Japan has not yet found an effective way to accomplish this balance.

Moreover, in a situation where a legal wife and legitimate children are living separately from a husband and father who is living with his common law wife and illegitimate children, the legal wife would be forced to sell her home and move out if the illegitimate children were given equal benefits as the legitimate children. In such circumstances, the house would be the most expensive property in the estate and there is no division of property before

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mothers are divorced and have custody of their children. The average family income for a single-mother household was 2,626,000JPY (roughly \$23,000 USD), while the average family income for all households was 5,496,000JPY (roughly \$48,280 USD) in 2010. Kōseirōdōshō [Ministry of Health, Labor and Welfare], Heisei 22 nen kokumin seikatsu kisochoōsa [2010 Survey on Basic National Life], available at <http://www.mhlw.go.jp/toukei/saikin/hw/k-tyosa/a/k-tyosa10/2-4.html>. Ninety-five point one percent of single-mother households are thus below the national average. *Id.* When a wife has custody of her children, she can demand that her husband pay child support after their divorce. However, overall only 40% of single mothers have an agreement on child support and even among single mothers who got divorce based upon mutual agreement it is only 30% that there is an agreement on child support. Single Mothers Survey, *supra*.

<sup>336</sup> This situation occurs because divorced women are unlikely to secure sufficient financial resources after divorce. Japanese marriage law assumes that each spouse can maintain separate property after marriage, though all expenses needed for everyday life must be shared by both. When a couple decides to divorce, one spouse can demand the division of property. Civil Code, arts. 760, 762, 768. In principle, all income earned during the marriage should be treated as shared property and each person should receive half, but in reality, many divorced women cannot expect that much when they get divorced. According to statistics compiled by the family court, the majority of women receive less than 4 million JPY (\$35,000 USD) after conciliation for divorce. Supreme Court of Japan, Judicial Statistics on Division of Property after Divorce (2013), available at <http://www.courts.go.jp/app/files/toukei/265/007265.pdf>. If the reason for a divorce was adultery committed by the husband, the wife can claim a damages award from him in addition to a claim for the division of property. But the amount of damages would not add much.

There is no provision on alimony in the Japanese Civil Code, and although a couple can agree on alimony upon divorce, a spouse cannot claim alimony as a legal entitlement. While dividing the property, a couple might consider the issue of alimony and add the wife's entitlement to the property, but the amount of property granted to wives is generally not very large.



succession for the legal wife. Thus, in order to protect the legal wife, the whole succession system may need to be reconsidered.<sup>337</sup>

### 3. *The Need to Revisit Family Registration, Local Residence Registration and Family Name*

The distinction between legitimate and illegitimate children is rooted in the legal marriage system. So long as the distinction between legal marriage and common law marriage remains, so too will the distinction between legitimate and illegitimate children. However, much of the different treatment between legitimate and illegitimate children has resulted from the family registration system, local residence registration system, and family name system. Japan’s family registration system has been especially criticized as oppressive to women<sup>338</sup> but it could be similarly criticized as oppressive to illegitimate children as well.<sup>339</sup>

Legitimate children are registered in the family register of their parents in a legal marriage.<sup>340</sup> This is the result of the family registration system, which creates registers on the basis of families, not individuals. The family register is organized based on the register of a legal husband and wife with unmarried children that share the same family name.<sup>341</sup> The head of the family on the

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<sup>337</sup> The team of scholars established inside the Ministry of Justice after the 2013 unconstitutional holding on succession law reform proposed the establishment of a new right to the continued use of the house owned by the husband to legal wife. The rule would have assigned the priority right to the legal wife and reduced the amount of money in the estate. It also proposed the creation of a succession system that would allow the division of property created jointly with the legal spouse before succession. Such a system would allow the legal spouse to receive more in light of her contribution. Sōzokuhōsei kentō wakingu chimu [Working Team for Succession Law Reform], Hōkokusho [Report], available at <http://www.moj.go.jp/content/001132246.pdf>. Legal Council, an advisory organ to Justice Minister, has proposed the interim draft on the possible reform by granting the right to continued use of the house to the legal wife and increasing the share of the legal wife if there are significant contribution or if the marriage continued for a long time. Hōsei Shingikai [Legal Council], Minpō bukai (Souzokukankei) [Civil Law Division on Succession], Minpō (souzokukankei)tō no kaisei ni kansuru chukan shian (an) [Interim Draft (Draft) of the Amendment to the Civil Code (on Succession)], available at <http://www.moj.go.jp/content/001186428.pdf>. There would be no objection to these proposals for discriminatory treatment of illegitimate children, but it remains to be seen whether these reforms would work to alleviate the plight of the betrayed legal wife.

<sup>338</sup> Taimie L. Bryant, *For the Sake of the Country, for the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan*, 39 UCLA L. REV. 109, 140–65 (1991).

<sup>339</sup> *Id.* at 133–34.

<sup>340</sup> *See supra* note 77.

<sup>341</sup> *See supra* note 59.

register, the first person listed, is the person whose family name was adopted when the couple were married; usually the husband.<sup>342</sup> If the couple gets divorced, the person whose family name was not adopted, usually the wife, will be removed from the family register. She will be reentered into her parents' register unless she prefers to have an independent new register.<sup>343</sup> Legitimate children remain in their original family register, again usually the husband's name.<sup>344</sup> When a woman gives birth to an illegitimate child, a new family register will be created for her, and the illegitimate child will be entered in the mother's register.<sup>345</sup> If Japan adopted a national registration system based on individuals rather than families, it could avoid these differences and complications.

Similarly, the local residence registration system is based upon the household unit, showing the head of the household first and indicating the relationship of all members of the household with that head of the household. Japan could have a local residence registration system also based on individuals rather than household, avoiding the complicated description on the relationship with the head of the household. Also it could be questioned why such description on the relationship with the head of the household is necessary to maintain local residence registration in the first place.

Moreover, the problem is closely tied with the family name system. Family members who share the same family name also provide the basis for the family registration system. A couple must choose the family name of the husband or the family name of the wife as the legal family name for both at the time of marriage.<sup>346</sup> When a wife divorces her husband, she reenters her parent's family register, adopting her previous maiden name. If she decides to have an independent register, she can adopt her previous maiden name or keep the family name she adopted at the time of marriage.<sup>347</sup> The family name of any child is decided based on the family register into which they are entered. If the child is illegitimate, he or she adopts the family name of the mother. Again, this may change if Japan decides to adopt a national

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<sup>342</sup> See *supra* note 63.

<sup>343</sup> Family Register Act, arts. 19(1), (3).

<sup>344</sup> Upon divorce, one of the parents must be granted a parental right over their child. Civil Code, art. 766(1). If the parental right is granted to the mother—who will have left her former-husband's family register—the mother can petition the family court to change the family name of the child, then move the child's family register to the mother's family register. *Id.* art. 791; Family Register Act, art. 98. When her child is entered into mother's registry, the mother needs to have a separate family register from her parents.

<sup>345</sup> See *supra* note 78.

<sup>346</sup> See *supra* note 19.

<sup>347</sup> Civil Code, art. 767.

registration system to allow husband, wife and children to have an independent family name.

In order to eliminate discrimination against illegitimate children, or better, to abandon any concept of illegitimate children altogether, the government may need to alter the family registration system, the local residence registration system, and the current family name system. If Japan maintains the current legal marriage system, but eliminates the above three systems, almost all discriminatory treatment between legitimate children and illegitimate children would cease to exist. Further, there would no longer be any need to maintain the concept of illegitimate children. However, Japan is unlikely to accomplish such drastic reform in the foreseeable future.<sup>348</sup>

## V. CONCLUSION

In the past, illegitimate children in Japan endured various forms of discrimination, and the Supreme Court of Japan continually sustained the constitutionality of that discrimination. Two recent rulings of the Supreme Court of Japan, however, demonstrate a new attitude toward illegitimate children. Japan is heading toward eliminating discrimination against illegitimate children, but still has improvements to make. Important differences in the treatment between legitimate and illegitimate children still remain in the Japanese legal system, and there is a long way to go before equality is attained. Nevertheless, Japan's experience provides an example that change is possible, and should serve as a lesson for other countries facing similar issues.

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<sup>348</sup> A proposal to allow a husband and wife to have different family names proved to be very controversial and prevented the reform bill from being introduced into the Diet. *See supra* note 29. A survey revealed that some 60% of those surveyed believed that a husband and wife should have the same family name, while 35% agreed a husband and wife should be able to have different family names. Hōmushō [Ministry of Justice], Heisei 24 nendo no yoronchōsa no kekka [Result of the 2012 Opinion Survey], available at <http://www.moj.go.jp/MINJI/minji36-05.html>. The survey also revealed that the number of people who supported the use of different family names was not on the rise.

