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PARENT-CHILD RELATIONSHIP IN THE JAPANESE CIVIL CODE:

Regarding Medical Technology for Reproductive Treatment

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I. Introduction

Regulations on medical technology for reproductive treatment have not yet been established in Japan. At the moment, the operation of the technology is controlled solely by self-imposed regulation by the Japan Society of Obstetrics and Gynaecology. However, because it is possible in this country for a medical doctor to practice without being a member of a professional association, unlike for example, attorneys, it is possible for a gynaecologist to ignore the regulations and use technologies that are not permitted. It is also possible for those who want to receive treatment to go abroad to get it. As a consequence, in practice children have already been born through this technology, and cases where parent-child relationships are disputed have come to court, leading to consecutive judgments by the Supreme Court since the year 2006, including, on September 4, 2006, judgment on a conception using the frozen sperm of a dead man,[1] and on March 23, 2007, judgment on a surrogate conception.[2] The former case was regarding a claim for the acknowledgement of the paternity of the dead father in the name of a child conceived using his frozen sperm. The latter case concerned a claim for the acknowledgment of a parent-child relationship between a Japanese couple and a child born by artificial insemination (between the couple) with another person as the surrogate mother, conducted in the US. Japan's Supreme Court dismissed both claims as non-material parent-child relationships.

Reporting of these cases by the vast majority of the media was against the court decisions, arguing that the court should serve the welfare of the children, and thus relax the current regulations and/or authorise the parent-child relationships as the claimants wished. The legal community – particularly civil law scholars – tended, on the contrary, to be in support of the Supreme Court judgments.

The reasons for the division between the media and the specialists are twofold. The first has to do with the evaluation of medical technology for reproductive treatment *per se*, an element that appeared more significantly in regard to the surrogate case than with the post-mortem conception. The Japanese mass media tended to

report positively about technology that would be able to fulfil the hopes of those who wanted to become "parents," taking on their supposed sentiment as victimized by a rigid and outdated legal system, and criticized the Family Register administration which refused the claimants/ "wannabe parents" attempt to register the surrogate baby as their own. This might at least partially be caused by the fact that the claimant couple in the surrogacy case were television celebrities and actively utilized their fame to appeal to the media. All in all, it seemed straightforwardly logical to stress the hopes and the right to self determination of wannabe parents trying to use every possible technology available to conceive a child. Moreover, the already-born child's existence, and the demand for its welfare, was overwhelming and undeniable. In contrast, it was difficult to discuss the more complex issues surrounding the case, including both the meaning of the life and welfare of children born by medical technology which permanently affects the futures of all relevant parties; and concerns about the social structure underpinning economic disparity and women's status that might pressurize those involved in the treatment, especially surrogate mothers. Acknowledging these issues would require deeper contemplation and imagination that might easily be disregarded in the discourse of the Japanese mass media. However, in real life, considering all these matters is essential if we are to solve problems surrounding reproductive technology. Moreover, the principal advantage of the specialist thought process of civil law is that it carefully considers issues with numbers of conflicting but interwoven legal interests, to find a fine line which negotiates all these, and devise an actual best legal option with the fewest possible unexpected side effects. Thus, the majority of civil law scholars agreed with the Supreme Court decision, it would be safe to say, as expected.

The second reason for the divided opinion has to do with lack of understanding by the Japanese general public of the concept of parent-child relationship in the Civil Code. Parent-child relationship is legally defined by Parent-child laws in Japan. In practice, the vast majority of parent-child relationships by law and parent-child relationships by blood lineage, or DNA, match. However, the definitions of each are different, and there are some rare cases in which these do not match. This fact, however, is not part of the basic assumptions of the Japanese general public; the public assumption has been that parent-child relationships by law and parent-child relationships by blood lineage must be the same, and there is no common knowledge about cases where there are inconsistencies.

There are cases in which those who are involved in medical technology for reproductive treatment sometimes want to have legal parent-child relationships different from the ones by blood lineage. The most representative and oldest form of such cases would be Artificial Insemination by Donor (AID) cases that have been taking place since the 1940s. The same is true of treatment using egg or embryo donation, which has been clandestinely practiced by travelling overseas as the Japan Society of Obstetrics and Gynaecology has a self-imposed restriction on this practice for its members. If public debate or recognition of such cases had been developed in relation to medical technology for reproductive treatment, the idea of having a legal parent-child relationship different from one by blood lineage could have become a public assumption, but these cases have not triggered public awareness because those who receive the treatments are able to register the children as legally theirs at birth (or not, as they wish), although there can be, and are, legal disputes over the registered parent-child relationships subsequently.

II. The Historical Development of Japanese Laws on Blood Lineage

1. Parent-Child Relationship Laws in the Civil Code, and Court Cases Regarding Recognition of Parent-Child Relationship

(1) The Establishment of the Japanese Civil Code

In 1873, when the Japanese nation state was struggling towards modernization after the establishment of the new Meiji administration, Shimpei Eto, the first Minister of Law, was recorded as regretting that "Japan is not equipped with any registration governing birth thus letting property rights between public [sic., meaning 'legitimate'] and private [sic., meaning 'illegitimate'] children not be distinguished and the people disguise or hide their children's ages or existence." The first Civil Code was established after Eto's call for it in 1898, based on its French and German predecessors, with laws on defining family relations and inheritance largely derived from the French counterpart. Parent-child relationship under this Civil Code consisted of regulations which are somewhere between substantive and evidentiary law. Proving the existence of parent-child relationship and filing law suits to confirm or deny them were defined so as to indirectly underpin legal recognition of parent-child relationship, including requirements for who could file a claim during what period of time. If neither of these conditions were met, no parent-child relationship would be legally recognized even with blood lineage.[3] The basic French law at that time was discriminatory against so-called "illegitimate" children's status which was made vulnerable vis-à-vis "legitimate" children's status which was protected by law.[4] Japan's Civil Code inherited this French Civil Code with the exception of provisions on the forced admission of paternity. "Legitimate" father-child relationship would be proven by the assumed "legitimacy" of the child [between a married couple], whilst this could also be denied by a law suit filed by the assumed father [a legal husband] alone and only within a period of one year after he became aware of the child's birth (Art. 772, 774 and 777).[5] Parent-child relationship out of wedlock was proven by the parent in question's acknowledgment of the child, both in father's and mother's cases (Art. 779 and 787),[6] and could be nullified by a law suit which could be filed by anyone at any time (Art. 786).[7] "Legitimate" mother-child relationship, however, was not defined by law as the Japanese Civil Code judged that this would be a matter of the Code of Civil Procedure. Relying on its French counterpart as a guideline, it assumed that mother-child relationship would be proven by a birth certificate as well as the fact that the child was actually nurtured as the child of the supposed mother, and could be challenged by a law suit. However, to date, neither the Code of Civil Procedure nor the Japanese Civil Code has defined "legitimate" mother-child relationship.

(2) How the Model Laws have Developed Leading to Differences from Japanese Law

The laws on parent-child relationship in the German and French Civil Codes have been radically amended since the days when the Japanese Civil Code was modelled on them. Recently, both the German Civil Code (in 1998) and the French Civil Code (in 2005) abolished the differentiation between "legitimate" and "illegitimate" children. They preserved the principle of assuming that the father would be the husband of the mother of a child, but, regardless

of who had given birth, protected the child's legal status on the basis of universal equality in case of a law suit between the assumed father and the child challenging the parent-child relationship. In other words, in Germany and France, it would not be permissible to deny a parent-child relationship disregarding a life and emotions built on the fact that there had been an actual long-term relationship even if there was no biological lineage. Although there are slight differences between the two countries, each has attempted to negotiate a middle ground between a relationship in actual life and the biological lineage of such parent-child relationships; their laws on parent-child relationship are systematically designed in recognition of the fact that there are legal parent-child relationships which conflict with DNA relationships.

The Japanese counterpart, however, has not seen such development. Although more than 100 years have passed since the establishment of the Civil Code, there has been no amendment to the laws on parent-child relationship as there have been to the model German and French laws. This has made the Japanese parent-child relationship laws become hollow words, so to speak, as precedents have instead been bending and interpreting them so as to fit these conditions. This flexibility has probably been caused by the existence of the uniquely Japanese Family Register System and frequent law suits stemming from it for confirmation of (non-)parent-child relationship. The Family Register predates the Civil Code, and confirming parent-child relationship through law suits has been recognized by precedent as a process for amending records on the Family Register.[8] Such a law suit would be to confirm a parent-child relationship by blood lineage as legal, and can be filed by anyone at anytime upon finding a record on the Register to be in contradiction with someone's blood relationship.

(3) Connections between Court Cases Regarding Recognition of Parent-Child Relationship and the Civil Code

This type of law suit as above, however, is not within the scope of the Civil Code, although in practice it overlaps with claims for/against the existence of parent-child relationship on the basis of the Civil Code. What has happened in practice is that the court has granted relief in these law suits and confirmed parent-child relationships on the basis of legal precedents without any legislative basis. In other words, the Japanese Supreme Court, which should regulate these claims reflecting the Civil Code's structure if it is to uphold the Civil Code as the principle body of law, has not been cautious enough in relation to the conflict between confirmation law suits and the Civil Code. A Supreme Court Judgment rendered on July 7, 2006, stated that "since it has a function to confirm the accuracy of the record on the Family Register to publicly prove parent-child relationship based on blood lineage as legitimate parent-child relationship, the law should principally allow claims to confirm otherwise if there is a discrepancy between an actual parent-child relationship based on blood lineage and the record."[9] However, this judgment, as I will explain in more detail later, was one which in conclusion dismissed a claim seeking confirmation of a non parent-child relationship as a case of abuse of the related right under the Civil Code. Thus this judgment was in fact epoch-making for acknowledging an exception to the principle of admitting claims challenging parent-child relationships. However, the Supreme Court itself appeared to have been unaware of the significance of issuing a judgment which shed light on the potential conflict between the Civil Code and law suits seeking (non-)confirmation of parent-child relationships. The principle above of parent-child relationship matching blood lineage

survived, and the known function of the law of precedent has kept on transforming the content of parent-child laws, resulting in the Civil Code losing its substance. This transformation has been effected without legally amending the Civil Code but occurred through interpretation, allowing the law suits for confirmation of (non-)parent-child relationship to intrude into the domain of the Civil Code and, as an overall consequence, fitting legal parent-child relationships into ones of blood lineage.

2. The Family Register System

(1) What is the Family Register System?

Before looking at the Civil Code losing its substance through the effect of the law of precedents, I would like to make a point about the Family Register System of Japan.[10] This register system of people's statuses has no resemblance to a public record of status or a certificate of status in the European laws which were the foundation of the Civil Code.

Certificates of status in Western law originated from the birth, marriage and death certificates recorded through the churches, and were basically intended to prove such family relationships. In contrast, the Japanese Family Register System was not established to prove status. When the system started at the beginning of the Meiji era, it was designed to name every Japanese person living at an address at the time of registration, thus similar to our contemporary Resident Card. The "domicile of origin," which functions to identify a certain family register, is used as a record of the house number of someone's residence. But, because another system to register one's place of residence, the Resident Card, was set up, the Family Register became a unique system functioning to register one's social status. In other words, the essence of the Family Register system is to register people as national subjects, as family relations and as residents of certain places all at once. Although the "domicile of origin" does not necessarily reflect an actual place of residence for a person or family any longer, and the place of residence is now legally recorded by a Residence Card, an authorized party can track down someone's record on the Residence Card through the Family Register and *vice versa,* as both systems are linked and inter-referable. Thus the Family Register works as a register of residents. It also works as a register of family relations as it interconnects multiple registers of different families, enabling not only connections to be seen between parent-child or sibling relations within a family but also wider searches for which families and individuals are related. This means that all family relations of Japanese people are registered as part of a web, and when a child is born she/he is incorporated into the web as a part of her/his mother's family register. Furthermore, a Japanese person is always recorded as an existence within one and only one family register, through which her/his family relations as well as place of residence are pinpointed. As a result of holding all three elements, the Family Resister functions as a certificate of the social statuses of Japanese people. It is a convenient and accurate system to prove one's status. At the same time, it means Japanese people are always conscious of the existence of the register and the pressure of being bound by it, resulting in various discriminations with regard to nationality, "illegitimacy," and so on.

(2) Characteristics of the Family Register System

In the West, the certificate of status is basically a different scheme as it is not, in principle, possible to track down anyone's social status without knowing where her/his birth certificate is. Nation-wide systems to identify citizens by code-numbers

and/or to computerize personal data have been controversial wherever they have been introduced; as this provokes tension between individuals' right to privacy and control over personal information by the government. Seen in this light, the Family Register System of Japan, through its long history since its establishment in the Meiji era, precedes and exceeds the emerging idea of ID control systems as a publicly accessible and thorough register of people as national subjects. Anyone who knows a Japanese person's name and address can access details of the existence (or not) of her/his parents, spouses, and children, as well as their current residences, dates of birth, marriages, etc., and addresses and other information about their relatives. Although access has now been restricted to a certain level since the long-standing publicly open nature of the Family Register System had such an enormously negative effect, it is still possible for anyone with public sanction or legal license, such as a lawyer, to have free access to anyone's register. However much different individuals' value judgments on such a system are divided, it is true that the Japanese have created "the world's preeminent" Family Register system.[11]

A significant feature of the Family Register which has been described as the aspect which most distinguishes the system from the Western certificate of status is the registration form. This is a form that registers a list of family members with the same family name in one record, which clearly differs from the Western certificates as individual records of social status. In the Meiji era, the Japanese Family Register had already been transformed into a national register of people's social status which recorded their family relations. However, as stated above, it was originally a record of residence by which the nation documented all households with their places of residence, and this tradition is still reflected in its form. Then, when the first Civil Code was enacted, those who designed the Code utilized this form to define a "household" as consisting of one family sharing one record in the Family Register, and created a family system unique to Japan consisting of *ie* [lit. "houses"]; that is, the official feudal registration of people centred around the household head. The post-war revision of the Civil Code abolished this *ie* family system and the Family Register was transformed to being based on a married couple (husband and wife) as the foundational unit, not a house or household in the sense of the previous *ie* system. Yet the old form of the Family Register which merged with the feudal *ie* system, was basically kept intact; one person should belong to one register only; each register have one representative person, akin to the head of household or master of the house in the previous system, now called the head of a family register; and other family members should be identified by their relationship to this central representative. In addition, even when a family member moves from one register to another, e.g. by marriage, divorce or changing the registered place of origin, her/his new status of belonging and/or address should be recorded on her/his old family register which will still be preserved. Especially important is that the form of the Family Register has kept the definition of a family sharing one register as based on a shared family name and origin. In addition to the legal requirement for a married couple to have the same family name, this fact has worked to preserve the consciousness of the *ie* system widely in Japanese society for more than 60 years after the actual system's abolishment.[12]

(3) The *Ie* System and Family Register System: Ideology of Family Consciousness

The *ie* system, in passing, refers to the grouping of families which are organized around the right to inherit the family assets attached to the heads

of the houses (*ie*), who govern and control their members. Since the days of this *ie* system, Family Law in the Japanese Civil Code has been a body of law without the typical functions of Family Law in the west, of defining the rights and obligations of family members in order to protect the weaker members such as wives and children. Its ineffectiveness on this point remained unchanged at the time of the post-war revision.

An especially symbolic example of this ineffectiveness has been the existence of uncontested divorce. Divorces without going to court are permitted in the Japanese Civil Code. A divorce can be established quite easily as long as there is consent and a notification from the two parties involved. Most divorces in Japan are finalized uncontested even today. Wives who want a divorce are often forced to accept the conditions proposed by their husbands, even if they are so disadvantageous as to forfeit all their benefits.

The first (Meiji) Civil Code however, had the very powerful ideological effect of creating a family consciousness among Japanese people as national subjects by pronouncing how an authentic family should be under the *ie* system. The Family Register System of the time (much like the Basic Resident Register of today) was a reflection of actual living arrangements, as it was made to register the residents of each *messuage*. Thus, the *ie* system, sustained by the Family Register System, was probably used because it had a close connection to the emotional and actual lives of family members. However, as it was institutionalized in the Meiji Civil Code, it in turn had a significant purpose for the Japanese people as national subjects forming a consciousness about family. In a way, the *ie* system, which forced a single family name, and thus a sense of bonding, onto the whole family, was promoted as a state-endorsed ideology; and the fact that husband and wife had kept different family names on the registration before the establishment of the Meiji Civil Code was quickly swept away.

The impact of the Family Register System, or the same family name regulation as an institution, was perhaps greater than that of the Meiji Civil Code *per se* in forming a national family consciousness. The post-war revision, by which the *ie* system was legally abolished, was certainly a major turning point for the Civil Code. However, family consciousness had already taken root by that time. It would be reasonable to argue that the impact of family consciousness was in large part due to the practice of the family naming system, as the representation of an individual by having their own name significantly represents their personal rights. The current Japanese Civil Code still leaves no choice but to change the family name of one party to her/his spouse's upon marriage, even when this is, strictly speaking, against their will. This is a clear indication of the ideology that marriage is a forcible transfer of an individual from one household to another, as under the *ie* system.

(4) Ways of Describing Parent-Child Relationship

To return to th.e main theme of this paper, it is also important to note that the form of the Family Register necessarily shows parent-child relationship completely differently from the certificates of status in the West. Under the Family Register System, a child is incorporated into her/his parent's family register by clarifying her/his relationship to the parent. The parent, in other words, exhibits the child on her/his own family register. In comparison to the Western certificate of status, the Family Register has significant capacity to publicly exhibit the social status of people, as it does not allow, for instance, a mother who gives birth out of wedlock to remain anonymous even if she wishes to do so. If a mother wants to avoid recording the "illegitimate" status of her

child on the Family Register, it is necessary to register the birth with false information about the parent(s). The prospective false parents would usually be a married couple among the mother's family relations or outside of the family who want to actually adopt the child. However, parent-child relationship once recorded on a family register cannot be changed and if the adoption is legally carried out, the register makes it permanently evident that the child was adopted. As a result adoptive parents also often want an undocumented procedure, and report the birth of the child with false information. Thus, reporting of births with false parent-child relationships is not rare in Japan. Still, the legal framework has been that it is an absolute requirement to have true, *i.e.* blood-related, parent-child relationships on the records of the Family Register, and birth records with false information must be amended if uncovered at any time, regardless of how fully and how long the parent-child relationships have been lived as an actual relationship in real life. At first the Family Register was thus amended with ease, solely by the request of any related party to the responsible (municipal) administration. This eventually changed to require a court's permission and this procedure developed into law suits seeking confirmation of (non-)parent-child relationships.

In the Western certificate of status, in contrast, a birth certificate is newly created with each new-born individual. The parents are only recorded by their names on that certificate, can even be unrecorded, or be in a fake "marriage" (that is, the "mother" and the "father" are not necessarily married even if they sign the certificate as "married"), and can even be non-existent people. If a woman gives birth to a child whose father is not her husband, there is still no problem in creating a birth certificate including the names of both blood parents, unlike Japanese cases where the child would have to be incorporated into her/his mother's family register. In the case of children born out of wedlock, there is no obligation to record their fathers' names. There are even jurisdictions, such as France, that allow mothers to be anonymous, *i.e.* not record either parent's name on the certificates out of respect for privacy and/or the right to pursue individual freedom in family relations.[13] The regulation of actual parent-child relationships in Western civil laws is principally based on this system of birth certificates, differentiating conditions for proving mother-child relationship from father-child relationship, and also differentiating parent-child relationship within wedlock from those outside wedlock according to the parents' marital status. The Japanese Civil Code originally inherited these ideas, for example the anonymity of mothers when registering birth in the French law was passed on to the Japanese counterpart to prove "illegitimate" mother-child relationship by the mother's acknowledgement of her child. However, this is the very cause of the contradiction between the Japanese Civil Code and the Family Register and is evident in the process of law suits regarding parent-child relationship.

3. The Civil Code Losing Its Substance through the Law of Precedent

(1) Family Register Amendments and Court Cases Regarding Recognition of Parent-Child Relationship

As the social status of Japanese people is based on the record on the Family Register, someone who contests a parent-child relationship would demand the record in question to be changed by filing a "confirmation law suit" intended to confirm that the recorded parent-child relationship does not exist. The right to file this kind of law suit is not limited to any person nor is there a fixed time within which to file a case. The law suit may be filed by any person at any time and may overturn

a substantial and longstanding life for the parent and child simply because the parent-child status does not match the blood lineage. This has had a critical impact on those who are involved, but court precedents have admitted it throughout history. A change occurred only in relation to whether such a law suit may involve a dead person or not. Precedents used to exclude relationships with the dead as they limited confirmation suits to treating relationships involving those who have current legal existences.[14] Those who wanted to seek changes to certain family registers, typically motivated by the possibility of receiving the bereaved family pension of those injured/killed in war, were filing confirmation suits against surviving collateral relatives. Specialists tended to debate whether these would need to be changed into direct law suits for claimants to prove the existence of their own parent-child relationships with the dead.[15] On July 15, 1970, a Supreme Court Grand Bench judgment revised precedents by expanding the scope of the confirmation law suits to include the dead in possible relevant parties.[16] In the French as well as the German Civil Codes, which were models for these types of law suits (such as confirmation law suits for (non-)parent-child relationship) there were many restrictions on putting forward such suits: the French Law governed them within its Civil Code as a whole and the German Law by its Civil Procedure Code (Art. 640 and relevant clauses). In Japan, as I have argued, this was not the case. There was no doubt in the courts about the interpretation of the law that even the parent-child relationships of collateral relatives could be challenged in confirmation cases, perhaps because the concept of having legal parent-child relationship outside of blood lineage was not conceived of. The consciousness of Japanese law as such was symbolically demonstrated by the fact that the above Grand Bench decision noted a minority opinion among the judges that it would be enough to overturn a parent-child relationship by only administratively amending the family register in question, *i.e.* there was no need to treat it as a court case.

Precedents, as I will discuss below, denied Civil Code regulations by interpretation for the first time when the defendants of various law suits that sought to challenge their parent-child relationships employed Civil Code articles to maintain the challenged relationships. However, "legitimate" mother-child relationship was out of the question to start with as there was no regulation regarding this, and no way to defend it in the Civil Code. Thus it was thought to be clear that this relationship could be challenged by confirmation law suits. "Illegitimate" mother-child relationship, on the other hand, only became subject to confirmation law suits after a Supreme Court judgment on April 27, 1962 which denied outright a Civil Code regulation to prove mother-child relationship by acknowledgement by the mother, holding that it should be proven by evidence of who gave birth.[17] In any case it might have been impossible for the Civil Code regulation of a mother's acknowledgement of a child out of wedlock to actually function. This rule, as stated above, was originally created in the French counterpart as a provision which was inseparable from the mother's right to anonymity at giving birth, which contradicted with the Japanese Family Register necessitating a child to be incorporated into her/his mother's family register to report the birth.

Confirmation for/against "illegitimate" father-child relationship has had a different development. Under the Civil Code, what are known as "forceful affiliation law suits" are equivalent to claiming confirmation of the existence of "illegitimate" father-child relationship; whilst what are known as "nullifying affiliation law suits" are equivalent to claiming confirmation of the non-existence of

a father-child relationship. A forceful affiliation law suit may only be filed by the supposed child against the supposed father, and within 3 years of death if the supposed father is dead. The right to file the suit is limited to the potential child, but there is no time limit on filing the suit after the child's birth, making it possible for a 60 year old to claim affiliation to an 80 year old father, for instance. As for a nullifying affiliation law suit, there is no limit on either who has the right to file a suit or the time period, making it possible for anyone to overturn such existing father-child relationships at anytime. However, a confirmation law suit for the "non-existence" of parent-child relationship, which could overturn an existing lived relationship, would have a more critical impact on the security of the child's status than a law suit to confirm a parent-child relationship.

However, there is no difference between the Civil Code's discourse about "illegitimate" father-child relationship and the law suits regarding confirmation of parent-child relationship or non-relationship, except the restriction on the time limit by which to file a forceful affiliation law suit against the dead. Therefore, those who fight over "illegitimate" father-child relationships, as well as precedents on this issue utilize the Civil Code's (forceful affiliation or nullifying affiliation law suits') discourse to construct their claims.

(2) Conflict over the Recognition of "Legitimacy"

The most controversial point of argument has been the conflict over "legitimate" father-child relationship. "Denial of legitimacy" within the Civil Code has strict conditions and gives the right to file a suit only to the "legitimate" father in question and within one year of finding out about the child's birth. Within the scope of the Family Register, birth is recorded only as a part of the mother's register. When the mother is married, or within 300 days of being divorced, her new born child is legally accepted only as her husband's or previous husband's offspring (except during the first 200 days of the marriage). The blood father's acknowledgement of affiliation to the child is not accepted if he is not the legal husband. Thus, it is not legally possible to report a child's birth at the time with correct information about the blood father if the birth is outside of the mother's marriage, even with the willingness of all parties involved. The French Civil Code, which the Japanese counterpart was originally based on, abolished the system of presumption of legitimacy by amending it to admit any report of birth or affiliation and as a consequence nullifying the effectiveness of such presumption.[18] However, in Japan, even if a woman in de-facto divorce gives birth to a child, it is legally recognized only as her husband's if the couple is still recorded as married on the Family Register. As a result, there is no dispute within legal thought over the necessity to ease the conditions for filing law suits for denial of legitimacy in some way, although the legal community is still divided into various academic theories in terms of where to set the limit to the right to file such cases. Administrative practices and courts' precedents regarding the Family Register have been constructing a rigid system; on the one hand rejecting related parties' wills at the time of reporting birth within the Family Resister, while on the other flexibly admitting ways to overturn this later. For example, when a consensus was reached to negate a "legitimate" father-child relationship between relevant parties, a Family Court decided to overturn the presumed "legitimacy" in question based on Article 23 of Domestic Causes Inquiries Act, without dwelling too much on the conditions for challenging "legitimacy" in the Civil Code,[19] and the relevant parties amended the records of their family registers. A Supreme Court Judgment on May 29, 1969, decided that it was possible to overturn the

"legitimacy" of a father-child relationship by a law suit seeking to confirm the non-existence of that relationship if the begetting of the child by the father in question had not been objectively possible – such as in cases when the presumed "father" was abroad, in prison, or this father and the mother of the child were in de-facto divorce – thus the child would not be presumed "legitimate."[20] What became the focus of academic debate was where to draw the boundary for this child to be "presumed legitimate" or not. At one time, this debate went so far as to give a place to a theory that denied the meaning of presumed legitimacy altogether, *i.e.* if there was no blood lineage with its father, the child would be largely acknowledged as "not presumed legitimate" even with its necessarily "legitimate" status on the family register. Currently, however, a theory which emphasizes the reasons for the existence of parent-child relationship in law is more firmly supported.

(3) Parent-Child Relationships in Law and by Blood Lineage

The reason for the existence of parent-child relationship in law is to meet the need of a child to have a legal parent and to secure the child's identity and/or social status, although this would be based on blood-lineage. In other words, parent-child relationship in law is a system that the law defines in order to protect the security of children's upbringing. Biological facts are included in this system but should not be the only defining factor. Presumption of "legitimacy," for instance, is one technique to sustain this system. No matter what we call this system, such as the current German or French counterpart describing it as "to presume paternity," the gist is to prevent children's status from being insecure. If there is no system to define the husband of a woman as her child's father, the status of a child who cannot seek any other as its father would become very fragile as a husband would be able to, as he wishes, abandon a child other than those who are proven to be his. To render all to the freedom of the relevant parties is actually to render all to the desire of the strong. Then, the law must intervene to protect the vulnerable from the rule of the strong (parent or husband). If there is incompetence in this intervention, it is necessary to amend it. And the amendment needs to bear enough complexity of thought to consider diverse perspectives and possibilities and take into account not only current but also future conflicting cases which require delicate balancing.

The theoretical tendency described above seems to have had an effect on recent Supreme Court judgments. Since the above 1969 Supreme Court Judgment, the lower courts' decisions have allowed law suits to confirm the non-existence of father-child relationship more widely than the 1969 Supreme Court Judgment which was made on the basis of objective conditions. However, a Judgment rendered on August 31, 1998, rejected a claim by the presumed father seeking confirmation of the non-existence of father-child relationship;[21] it stated that it would be unreasonable to say that there had been no practice of marriage between the father in question and his legal wife as they had had opportunity to have sexual intercourse while they had lived separately about 9 months before the child's birth.

The Supreme Court Judgment on July 7, 2006, as discussed already, was an epoch-making judgment in a sense because for the first time it rejected a claim seeking confirmation of the non-existence of a parent-child relationship as an abuse of the right to file such a law suit. The theoretical tendency to emphasize parent-child relationship by law was also seen here. The case was as follows. The child cum defendant had been brought up as a child of the parents on his family register since his birth in 1939. As recently as 2002, however,

a dispute over inheritance occurred between him and his older sister according to the family register. This led to the sister filing a law suit seeking to confirm the non-existence of parent-child relationship between their parents and the defendant in order to nullify the inheritance rights of the defendant. As mentioned above, at the time of his birth, adopting a baby by reporting its birth with false information about its parent(s) was known as "cottage adoption" and widely practiced in Japanese society. This fulfilled the wishes of all concerned, including the birth mother who did not want to have an "illegitimate" child on her family register, and the adoptive parents who didn't want to record that their child was adopted. However, precedents since the pre-war period had always held that such parent-child relationships were bound to be nullified by confirmation law suits on the basis that the questioned relationships were not blood relations. The status of a child of "cottage adoption" on the Family Register was vulnerable as it could always be overturned when it was legally contested. Yet the child of "cottage adoption"'s status was based on a false birth report which the child could not be blamed for. It would have seemed a very unfair outcome that the child should always lose their status at the point of an inheritance dispute after enjoying it for her/his whole life, but the courts did not compromise until quite recently as they prioritized the demand that the Family Register needed to be accurate as a public record of parent-child relationships by blood. This tradition was overturned at last by the above Supreme Court Judgment which stated that "it was clear that the demand for accuracy of the record on the Family Register would recognize exceptions, as the Civil Code in certain cases restricts the record from matching with the relevant parent-child relationships by blood."

As we have seen so far from the framework of the contemporary parent-child law in Japan, how it will be transformed or remain is an infinite question. It is unknown how far the new tendency observed in the 2006 Supreme Court Judgment will undermine the previous framework of confirmation law suits which were constructed on the basis that the parent-child relationship recorded on Family Register should be that of blood lineage, and whether this evolution will reconstruct the framework so as not to contradict with the scope of the Civil Code. Ideally, the law would be officially amended to restrict the conditions for filing law suits to confirm the (non-)existence of parent-child relationship, such as who has the right to file a case or the period for filing it. But, as this seems impossible in today's circumstances, we would have to utilize the logic applied by the Supreme Court, of defining some such cases as abuses of the right. In doing so, it would be necessary to extend the logic to flexibly include more recent cases, i.e. to apply it to cases filed more recently after the birth of the child in question, in order to protect children's status. A significant obstacle would be the fact that the courts have been positive about using DNA identification as a simple and straightforward way to prove a parent-child relationship, as this agrees with the tradition of the law regarding blood lineage as the legal parent-child relationship in most cases. Nevertheless, we are required to consider parent-child relationship created through reproductive medical technology in the light of this current climate surrounding the laws on parent-child relationship.

Ⅲ. Parent-Child Relationship When a Child Is Born Using Medical Technology for Reproductive Treatment

1. Towards Legislation

As already discussed, significant conflict exists in Japan over restrictions on medical technology for reproductive treatment which has not yet reached agreement. There are numerous points of dispute including how far specialists allow various degrees of such treatment. One strong voice demands much greater liberalization, criticizing the self-regulation of the Japan Society of Obstetrics and Gynaecology.[22] However the opposition, within which I include myself, is also strong. While there is no obvious opposition to medical reproductive treatment for a living heterosexual couple who want to have their own biological children, if they want to use a donor for an artificial insemination opposition is apparent even though this is endorsed by the JSOG. When it comes to using an egg or embryo from a donor, AID involving a dead person, or using a surrogate mother, each case provokes fierce opposition for various reasons such as the presumed difficulty that the mother can guarantee her unconditional love for a child born using such treatment, difficulty securing the child's identity, and/or the problem of possible exploitation of women's reproductive capacity. Only one regulation regarding medical technology for reproductive treatment has so far been established, namely, the prohibition against using clones in the Act on Regulation of Human Cloning Techniques (enacted on December 5, 2001).

However, the following preparations for introducing legislation have been carried out by the Ministry of Health, Labour and Welfare, and the Ministry of Justice, respectively. Regarding restrictions on interventions, the Committee for Medical Reproductive Treatment in Health Science Council published a report in April 2003 stating that it would permit the supply of sperm, eggs or embryos by a third party but prohibit surrogate conception, and that it would recognize the child's right to know her/his own origin and thus demand access to the relevant information when she/he reached 15 years of age.[23] Regarding parent-child relationship, in July of the same year the Legislative Committee for Parent-child law Regarding Medical Reproductive Treatment in the Legislative Council published a "tentative proposal" stating that the mother of a child should be the woman who gave birth to that child; that the father of a child born by AID should be the husband of the mother when there was his previous consent to the AID; and that the donor of the sperm would not be able to legally affiliate the child by their acknowledgement. These perspectives on legislation, however, have been at a standstill since they were strongly opposed by some members of parliament who considered they were too stringent. Surrogate conception was particularly focused on. Because the above cited claimants in the Supreme Court Judgment on March 23, 2007 were a celebrity couple (a television personality and a professional show-wrestler) and campaigned for the legal admission of surrogate conception through the mass media, the Minister of Labour and Welfare together with the Minister of Justice decided to consult the Science Council of Japan (SCJ) on the matter. The SCJ's Explanatory Committee for Medical Technology for Reproductive Treatment, deliberated the matter for more than a year and released a report principally banning surrogate conception in March 2008, but this has not yet brought about any legislation.

2. The Necessity for Restrictions

Those people who want to have children via artificial insemination either by a living donor or a dead husband, and their sympathizers, assert that it is an unjustifiable intervention in the freedom of self-determination to regulate medical reproductive treatment as there is no concretely existing other who suffers harmful effects from the decision to use such treatment. Certainly, it is the very charm of jurisprudence that it has maintained reservations about regulation in order to respect the principle of individuals' freedom of action, even if a particular action might be disapproved of by the majority. Take the incest-taboo or many other crimes defined by the Penal Code; those crimes which are established as crimes in society usually acquired their current status over a long historical period. If the action in question is merely against the majority's values, without this being established as a social value as a whole, the law refraining from forcing the majority's view upon others functions to secure the minority's freedom. However, there are matters too risky to be left to the free hand of the spontaneous development of social values. Matters where people's consciousness cannot catch up with technological development are an example. Medical technology for reproductive treatment is typical of this, and in such cases the law needs to set limits purposefully on certain points in order to maintain a society in which the members can coexist. Also, the claim that there is no other to suffer serious harm through medical reproductive treatment is questionable. Those who may suffer harm do already appear to exist, such as the children who will be born and/or women who bear the weight of maternity and labour for others, and who may possibly be exploited, and do so not without danger to their own lives.

3. Recognition of Parent-Child Relationship When a Child Is Born through Medical Technology

(1) Pros and Cons of Medical Technology and Parent-Child Relationship

No matter how deeply discussants support restrictions on medical technology for reproduction, the majority of them would also argue that the law should recognize the parent-child relationship after a child is born through such technology.[24] It is reasonable to consider restriction of the act of reproductive treatment and laws on parent-child relationship separately. Even if a particular medical treatment is something that should be banned, the child born out of it has no responsibility for "using" it. It would be sound to argue that the law should consider the child's welfare first and foremost and support the parent-child relationship which would bring the best possible benefit for the child. Then, this argument would include recognition of the parent-child relationship of parents who desired and planned a child via medical technology.

Despite the logic above, it cannot be denied that judging whether this kind of parent-child relationship should be recognized by law is closely connected to one's evaluation of medical technology for reproductive treatment. As can be typically imagined in surrogate conceptions, if the planned parent-child relationship could be achieved as a consequence of prioritizing the born child's welfare, banning such treatment would have little deterrent effect. Also, a dishonoring social stigma might be attached by this very parent-child relationship if a sense of taboo against such treatment were created in our future society, just like the incest-taboo today. In the case of using dead persons' sperms or eggs, this would be made possible by the very recognition of the

parent-child relationship, as the child in question would necessarily be marked as born via medical technology. Particularly as there is no legislation restricting medical reproductive technology in Japan, there is significant fear that the court's recognition of parent-child relationship through such technology, though still legally disputed, might in effect appear to legally sanction the technology that created this relationship. For the court to recognize parent-child relationship created through this technology might foreseeably lead to enabling children to be born with ever greater risks one after another, such as a child born through surrogate conception and labour without secure social conditions; a child conceived with sperm from an already dead father; a child with a higher likelihood of suffering from an identity crisis due to the fact that she/he was born by AID. "Demand for the child's welfare" sounds supremely logical, but, if possible consequences such as the above are taken into consideration, this principle would have different functions depending on which "child's" standpoint the court employs: the child in focus in a particular court case, or the many children who are not yet born but would possibly be born in the future and also be affected by the court's decision.

(2) The Supreme Court Judgments

The above mentioned Supreme Court Judgment on September 4, 2006, which dismissed a claim seeking acknowledgment of the paternity of a dead father whose frozen sperm was used to conceive the claimant child, clarified the court's negative evaluation of the medical technology employed in its supporting opinions: "if on the basis of the child's welfare the law admits a legal relationship between a child and a parent who was already dead when the child was born, this may well lead to allowing children who are fatherless from conception to be born wherever there is a blood lineage and the will of the parent(s)" (Judge Takii); and "it is not agreeable to acknowledge such a relationship as this would mean creating a significant problem by the law supporting the practice of birth by conception using a dead father's sperm which was conducted without enough social consensus" (Judge Imai). These supporting opinions demonstrate the court's idea that it is necessary to establish legislation to suppress child-bearing by conception using a dead father's sperm.

By comparison, whether the judgment is against medical technology for surrogate conception or not is not so clear in the March 23, 2007 Supreme Court Judgment, also mentioned above, although it also demanded swift legislation regarding restrictions on medical reproductive technology. In this judgment the court held that the bearer of the child should be the mother because it had no other basis but to apply the Civil Code which contains no provision regarding such new phenomena as surrogate conception. However, as advocates of surrogate conception argue, this judgment can also be read as demanding legislation to allow surrogate conception and acknowledge the surrogacy client as the mother. It seems that the Supreme Court employed neutral expressions on surrogate conception.

(3) Regulations in the Civil Code

The parent-child relationship presumed in the Civil Code is by natural reproduction. It would be reasonable to interpret the Code's discourse to also include other technology guided reproduction such as those between living parents and their biological children born by external fertilization when both parents' desired the treatment. However, children born by post-mortem or surrogate conception fall into a matter of interpretation without regulation by the law, as it would be difficult to see these cases as included in the Civil Code's discourse. When there is no legislation, the freedom of

interpretation increases. But this does not mean that the law is rendered to free interpretation. It is restricted by the overall academic norm of the general principles of law. For the purpose of this paper, interpretation here should be done within the scope and limitations of normative legal principle which considers what the existing parent-child law is. Even if the Civil Code was applied to a parent-child relationship created by post-mortem or surrogate conception, just as it is to such a relationship by natural conception, this would still be the outcome of a process of contemplating whether such application of the Civil Code was appropriate to the legal principles of parent-child relationship law. The above decision to define the woman who carried the child as the mother in a surrogate conception, for example, can be evaluated as employing the Civil Code as a result of such contemplation; it was not necessarily based on critical concern about surrogate conception as medical reproductive technology alone, but also based on concerns about the demands within the Civil Code, which as a rule presumes the child-bearer to be the mother, in order to affiliate a child to one mother and to emphasize the definition of motherhood as having nurtured a child though pregnancy.

4. Designing Parent-Child Relationship Law

(1) The Making of Parent-Child Relationship

I have argued that the legal parent-child relationship defined by the Civil Code is a "system" which stands not only on parent-child relationship by blood lineage but also on considerations of complex and diverse demands including the needs to give a child a legal parent and to safeguard the identity and status of a child. It is a system, like other systems of law, worked out through never-ending negotiation with the living society, which has a history dating back to Roman Law. The function of the law to protect legal entities implied here is too enormous to grasp as a whole even for lawyers. We are thus only able to continue revising and developing this system in order to diminish problems when it is applied to our reality, imagining what inconvenience it would cause if this system was lost. When we are to design a new system necessitated by new conditions brought about by the development of medical technology for reproductive treatment, it is necessary not to start again from scratch, but to take into account the wisdom of civil law that the current Parent-child law embraces.

Currently the argument is focused on issues that arise immediately after the child's birth, namely, whether to admit the parent-child relationship desired by parents who utilized medical reproductive treatments. However, designing a new parent-child law requires clearer vision over a longer time-span. A couple who acquired a child through medical reproductive treatment of course want to be true parents of the child. And at first it is easy for the law to give them that status as their report of the birth would usually be accepted and processed by a local family register office without hindrance. The cases treated by the Supreme Court were filed as law suits because of their exceptional circumstances: one in which the child-birth was reported with a father who was dead at the time of conception; and the other in which the claimants were famous persons known to have had a contract for surrogate conception in Nevada, US. The vast majority of those who acquired children via donation of egg or embryo, or surrogate conception, which are theoretically not available within Japan but are available abroad, would already have had the desired relationships in their birth reports incorporated into their family registers.

(2) Protection of Children's Status in the Future

We can imagine that it would be extremely difficult to create an accurate record of children born by medical reproductive treatment. Parents would try hard to hide the fact, and third parties including institutions engaging in registration would not be able to grasp it. It is possible that future legislation will legitimize medical treatment using donated eggs or embryos, and medical institutions, out of concern for the children's right to know their origins and so forth, may construct a register to accurately record the parents and children who used these treatments. Still, it is imaginable that parents would give medical institutions false information of their identities if possible. To date, similar cases have always occurred: it has always been a criminal offence to report a birth with false information, and a doctor's birth certificate must be attached to the report, in order to prohibit "cottage adoption." However, a birth mother using the adoptive mother's name to see a doctor and gain the "right" certificate, for instance, has always been practiced. Adoption in Japanese law is very different from so-called "complete" adoption in the counterpart laws in Western Europe. The need to hide the status of adopted child is significant in Japan as the relationship with the blood parents would be visible in the adopting parents' and child's family register, even when the adoption is one which legally extinguishes the child's relationship to her/his blood parents.[25]

If the fact that a child was born by medical reproductive treatment is hidden, how to protect the status of the child when, challenged, becomes an issue. A judge would not know the fact unless the parents make it clear. If there is a law suit challenging the status of a child, and this child happens to be born by artificial insemination by donor, she/he cannot rely on a DNA test as it would reveal that there is no biological relationship between the child and the current legal father, thus this would be likely to be used to support the challenge. There are also numerous cases in which parents who used AID divorce and both sides then want to overturn the existing father-child relationships whose original falsification would otherwise be hidden. Similarly, with the knowledge that someone was born by AID, it would be tempting to file a law suit against them seeking to confirm the non-existence of parent-child relationship after their legal father's death if such confirmation would bring the claimant the right to inherit their property. As long as the parent is alive and determined to preserve the parentage, the status of the child is secured. But when the parent dies or changes his mind, the status of the child can be easily contested. In order to protect the status of the child, non-existence of biological tie should not be invoked once legal parentage has been established. It is easy to prove that there is no blood relation by a biological test to overturn the parent-child relationship in question, while it is far more difficult to prove that someone was born by medical reproductive treatment in order to protect her/his status.

(3) The Limitations of Legal Records as a Solution

A report by the Committee of Medical Reproductive Treatment in Health Science Council in April 2003 seems to argue for registering and controlling the complete record of medical reproductive treatment through a public institution. However, no matter how complete the record is, making it possible to prove that someone was born by the technology by allowing relevant parties to access the record, this alone would not solve the problem as a whole. If it is made known by a DNA test that a child born by medical reproductive technology has no blood relation with her/his parent(s), it would become necessary for her/him to prove that she/he was born with that technology

in a law suit to protect her/his legal status. On top of the legal conflict, the psychological damage might not be negligible. The tentative proposal put forward by the Legislative Committee for Parent-child law Regarding Medical Reproductive Treatment in Legislative Council in July, 2003, which tried to define who the mother and the father are in AID cases (see page 13 above), still has limitations regarding the security of parent-child relationship, and would also have longstanding effects. This is considered to be another reflection of the limitations of parent-child law in Japan as stated in Section 2 above.

The relationships between parents and children born by medical reproductive treatment should, after all, be protected in the same legal manner as the relationships between parents and naturally conceived children have been protected in current parent-child law. For example, the status of a child born by AID can be protected by the idea of presumed "legitimacy" under the Civil Code. Although another rule in the Code allows a husband to challenge the "legitimacy" of his presumed child within one year of the child's birth, this should not be the case when the husband agreed with his wife/the child's mother to have AID. Then, it would be necessary to establish a law to regulate such claims. However, as usually it is more than a year before a husband files this kind of law suit; the child's status in this case would still not be as vulnerable in practice. Overall however, Japanese law does not have a firm function to protect children's status. The legal framework that defines as well as challenges parent-child relationship, and the administrative process to amend the Family Register contradict each other in terms of their principles, as discussed above. The inevitable evaluation is that the current Japanese law in this area is in structural confusion. We should keep an eye on its future development following the Supreme Court judgment which for the first time dismissed a confirmation law suit for the non-existence of parent-child relationship as an abuse of the right to file such a case.

Ⅳ. Conclusion

In trying to design a law relating to medical reproductive treatment, negotiating with varying legal interests and the existing Civil Code discourse, and not focusing on conflicts, we come back to the problem that current parent-child law in Japan is simply not up to such a contemporary issue. There is also a danger that the law defining actual parent-child relationship could be degenerated at the very same opportunity for establishing a new law around medical reproductive treatment. For example, to establish a definition that "there is a parent-child relationship between a child and its parents even if there is no blood lineage in the case of a child born by the parents' usage of medical reproductive treatment" would be to legislatively confirm a reverse interpretation that "a parent-child relationship is established by blood lineage with the parents in the case of a child not born by such treatment." Japanese law has not provided any systematic support to mothers who are not able to bring up the new born. This is one cause of the illicit custom of "cottage adoption," which has long and unjustly deprived the children involved of the right to inherit from their adoptive parents when their status is challenged. Such challenges must also have left some of these children without any means to find their blood parents afterwards. Legislation relying on the registration of those who use medical reproductive treatment might simply

repeat this history. Besides, a person's genetic information is one of the core aspects of privacy; parent-child law should be able to define children's status without disclosing such information. If the law can create a framework in which every child's status is protected, the status of children born by medical reproductive treatment can also be truly protected for the first time.

We do not know where Japanese legislation regarding medical technology for reproductive treatment is heading from now on. It might develop with enough consideration for the serious consequences in the lives of children born by such technology, or it might develop in the opposite direction, for instance permitting the widest range of medical reproductive treatment out of a short-sighted political decision to help push up the decreasing birth rate, escalated by the logic of "self-determination and individual freedom." We certainly need to stop and consider that certainly self-determination and individual freedom should be a counter logic to the general tendency to suppress of freedom in Japanese society, but this logic is too often used to maintain obstinate conservatism in the politics of family law. We should be critically aware of this irony in considering how to design new laws in this area from now on.

Notes:

1 Supreme Court (Second Petty Bench), Judgment, September 4, 2006, 60 Minshu (7) 2563, H.J. (1952) 36. The original Takamatsu District Court Judgment, July 16, 2004 (56 Kasai Geppo (11) 41), decided otherwise, admitting the claim for the parent-child relationship. See Noriko Mizuno, Case Note, H.T. (1169) 98-105 [2005].

2 Supreme Court (Second Petty Bench), Order, March 23, 2007, 61 Minshu (2) 619, H.J. (1967) 36. See commentaries by, for example, Yuko Tsuchiya, Case Note, *Jurisuto* [Jurist], No. 1341 (2007), p. 165. The original Tokyo District Court Judgment, September 29, 2006 (59 Kasai Geppo (7) 89) admitted the claim using the logic that the mother-child relationship between the claimant and the child would not be recognized in the Japanese Civil Code but that the court would at the same time accept the verdict of Nevada State which had accepted the relationship as valid. On this original verdict, see commentaries by e.g. Shinichiro Hayakawa, Case Note, H.T. (1225) 58-75 [2007].

3 Noriko Mizuno, "Jitsu-oyako Kankei to Ketsuen-shugi ni kansuru Ichi Kosatsu: Furansu Ho wo Chushin ni [An Idea about Blood-Line Parent-Child Relationship and Blood Lineage-ism]," in Nakagawa *et al*. eds., *Nihon Mimpo-gaku no Keisei to Kadai* (*Ge*) [The Making of the Japanese Civil Code; Studies and their Challenges (2nd Volume)] (1996), pp. 1131-1164.

4 The French Civil Code, which was the model body of law, at the time of the establishment of the Japanese counterpart still kept some clauses intact which originated from its foundation in 1804. These clauses defined the acknowledgment of "illegitimate" children: prohibiting the acknowledgement of children born out of incest or adultery (Art. 335); depriving acknowledged "illegitimate" children of the same rights as "legitimate" ones (Art. 338); allowing all relevant parties to challenge the effect of the acknowledgement (Art. 339); and prohibiting the forced acknowledgement of fathers (Art. 340), etc.

5 The Articles state as follows:
(Presumption of Child in Wedlock)
Article 772 A child conceived by a wife during marriage shall be presumed to be a child of her husband.
(2) A child born after 200 days from the formation of marriage or within 300 days of the day of the dissolution or rescission of marriage shall be presumed to have been conceived during marriage.
(Rebutting Presumption of Legitimacy)
Article 774 Under the circumstances described in Article 772, a husband may rebut the presumption of the child in wedlock.
(Limitation upon Action of Rebutting Presumption)
Article 777 A husband shall bring an action to rebut the presumption of the child in wedlock within one year of knowing of the child's birth.

6 The Articles state as follows:
(Affiliation)
Article 779 A father or a mother may affiliate his/her child out of wedlock.
(Action for Affiliation)
Article 787 A child, his/her lineal descendant, or the legal representative of either, may bring an action for affiliation; provided that this shall not apply if three years have passed since the day of the death of the parent.

7 The Article states as follows:
(Assertion of Opposing Facts against Affiliation)
Article 786 A child or any other interested person may assert opposing facts against an affiliation.

8 Court cases regarding recognition of parent-child relationship have long been admitted, since, for instance, the Great court of Judicature judgment rendered on April 17, 1899 (Great Court of Judicature Reports (Civil cases)Minroku, Vol.6, No.4, p.84), and the Great court of Judicature judgment rendered on January 23, 1934 (Great Court of Judicature Reports (Civil cases) Minshu, Vol. 13, p.47).

9 Supreme Court (Second Petty Bench), Judgment, July 7, 2006, 60 Minshu (6) 2307, H.J. (1966) 58. See commentary by Noriko Mizuno, Case Note, *Jurisuto zokan* [Jurist, Special Issue], No. 1332 (2007), p.87.

10 Noriko Mizuno, "Koseki Seido [Family Register System]," *Jurisuto* [Jurist], No. 1000 (1992), pp. 163-171.

11 Quote from Masasuke Omori, "Koseki no Shinrai Hoji Seisaku ni tsuite [On Policy to Keep the Family Register Credible]," Kiyoshi Hosokawa ed., *Kazoku-ho to Koseki* [The Family Law and Family Register System] (1986), p.443.

12 Noriko Mizuno, "La famille au japon, la notion de famille," *Revue international de droit comparé*, No.4, (2001), pp. 831-851; Alain Bénabent *et al*. eds., *La famille au Japon et en France* (2001), pp. 23-46 [Noriko Mizuno].

13 French Law has always allowed women to give birth anonymously. The current French Civil Code defines that a mother-child relationship is established when the mother's name is on the birth certificate (Art. 311-25).

14 The Great court of Judicature judgment rendered on July 12, 1940, *Horitsu Shimbun* [Law Newspaper], No. 4598, p.12, and the Great court of Judicature judgment rendered on July 16, 1940, (Great Court of Judicature Reports (Civil cases) Minshu, Vol.19, p.1278).

15 Commentaries by Shigeto Hozumi on 103 cases in the fiscal year 1899 of Civil Code Precedents, by Zennosuke Nakagawa on Precedents in *Min-sho-ho Zasshi* [Civil and Commercial Law Magazine], 13(2)(1941), by Saburo Kurusu on 23 cases in the FY 1944 of Civil Code Precedents, etc.

16 Supreme Court (Grand Bench), Judgment, July 15, 1970, 24 Minshu (7) 861, H.J. (597) 64.

17 Supreme Court (Second Petty Bench), Judgment, April 27, 1962, 26 Minshu (7) 1247.

18 Birth certificates, as defined by the French Civil Code, do not require parents' names, as discussed above.

19 Article 23 of Domestic Causes Inquiries Act states as follows [not an official translation]:

At a conciliation by a conciliation committee on a case of nullification of marriage or adoption, where an agreement is reached and there is no dispute over the existence of the cause of the said nullification between the parties involved, a family court can issue a judgment in accordance with the agreement after investigating the case, hearing the committee members and determining that the agreement is legally sound.

(2) the above regulation is applied to conciliations by conciliation committee on the following cases: nullification of divorce or separation by agreement; acknowledgement of a child; nullification of acknowledgment of a child; defining a father under the regulation of Article 773 of the Civil Code; and confirmation of the existence of legitimate blood lineage or status.

20 Supreme Court (First Petty Bench), Judgment, May 29, 1969, 23 Minshu (6) 1064, H.J. (559) 45.

21 Supreme Court (Second Petty Bench), Judgment, August 31, 1998, 51 Kasai Geppo (4) 33, H.J. (1655) 112.

22 *E.g*. Yahiro Nezu, a practitioner of medical reproductive treatment and author of various non-academic publications such as *Nayamu Kanja ga iru kagiri Watashi wa tsuzuketai* [I am Driven to Continue as long as There are Patients in Agony] (1999).

23 See the website at <http://www.mhlw.go.jp/shingi/2003/04/s0428-5.html>.

24 There are numerous opposing commentaries on the fact that the Supreme Court judgments on September 4, 2006, and March 23, 2007, did not recognize the parent-child relationships in question. The majority of them stated that the court should have given recognition to such relationships, particularly at the primal stage of the court cases.

25 There are two types of adoption in Japan: "regular" adoption and "special" adoption. The former is effected by the consensus of all involved parties (with a minor party being represented by a person with parental authority), and the latter by the courts' judgment. A regular adoptee usually carries on having a relationship with her/his blood parents, having four parents in most cases. A special adoptee, in contrast, cuts off the relationship with her/his blood parents. The majority of adoptions in Japan have been ones between adult "children" and "parents," which are a kind of legal and social contract for various inheritance purposes. Special adoptions have been very few. In many Western European nations, adoption is usually conducted as "complete" adoption which nullifies the child's original birth certificate and creates a new one. In Japanese cases, unlike the Western counterparts, an adoptee in a regular adoption has four named parents, and even an adoptee in a special adoption has a clear record of the adoption on her/his family register. This record is also almost freely accessible thus available to anyone who can employ a qualified person such as an attorney.

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