

## Children's Rights in Japan

### —Controversial Issues with regard to the UN Convention on the Rights of the Child

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### **Preface**

During the Edo era, some 250 years ago, a famous judicial precedent called "Ooka Sabaki" (judgement by Lord Ooka) was set. This story is loved by the Japanese people, and is still performed as a famous "Kabuki" play today. In the case, two women claimed maternal right to the same boy. Neither woman had any legal proof of identity, the judge devised an unusual method to determine who the mother really was. The judge, Lord Ooka, ordered the about 5 year old boy to stand between the two women, and each woman held him by one arm. He stated that the true mother must pull the hardest. As the women began pulling, the boy cried out in pain, and instantly one woman released him. Then, contrary to expectation, the judge determined that that woman must be the true mother. Because, in reality, he knew that the true mother could never hurt her child and she would not bear to see her son in pain.

The reason why Japanese people love this story is that it shows the true face of parental affection. The feeling that a child's pain is the mother's pain shows the unity between mother and child. Truly, every parent feels this unity, yet in Japan this feeling sometimes goes so far as to deny a child's individual identity. A unique

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problem in Japanese Family Law is this failure to recognise the opinions or rights of the child. Today we are struggling to transform the relationship between parent and child into one of partnership rather than one of unity or harmony within the family structure.

### I. Introduction

The International Convention on the Rights of the Child adopted by the General Assembly of the United Nations in November 1989 has been ratified by 134 countries<sup>1)</sup>. The awareness of people worldwide of the importance of the rights of the child is ever increasing.

Japan became a signatory to the Convention on 20th September 1990. The proposal for its ratification was submitted to the Diet in March 1992. After much discussion the proposal was approved by the House of Representatives in May 1993. However, just before the the proposal was approved by the House of Councillors, the Diet was dissolved and the proposal was abandoned.

It is expected that the proposal will be put before the new Diet, and a similar debate will take place. The House debate will concentrate on the following topics: educational issues (Convention Article 28 and 29); the rights of children to express their opinions (Article 12); the status of illegitimate children (Article 2); adoption (Article 21); right of access (Article 9(3)); joint custody and parental responsibilities (Article 18 and 27(4)); juvenile justice (Article 37, 39 and 40) and other related items.

During the last debate it became evident that the government considered that it would be unnecessary to reform existing laws

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1) UNICEF Japan Office. "Jido no Kenrijoyaku" *Update* no. 29, (20 Apr. 1993).

concerning children<sup>2)</sup>. The government explained that this was due to the fact that the Convention follows the beliefs of the Japanese Constitution, which is based on the respect for fundamental human rights. However there have been many suggestions by academics, legal practitioners and non-governmental groups for the reform of existing laws.

In Japan, the German *Pandecten* system of Civil Law is used and legal precedents are built around the interpretation of the relevant code. Although in practice the lower courts are bound to follow the judgments of the Supreme Court, in principle they do not strictly form precedents as in common law. However the judgments of the courts undoubtedly play a significant role in applying a “general” law to a specific real-life situation. The courts take into account what is considered to be the “done thing” in today’s society and by supplementing the deficiencies of an abstract code with a search for justice in an individual case. I hope that our approach to precedents will be appreciated by those who practise common law; otherwise some of the arguments currently made in Japan might be misunderstood<sup>3)</sup>.

The purpose of this paper is to provide an overview for those readers who are not particularly familiar with children’s rights under Japanese law. Therefore, I will describe the possibility of the direct applicability of the Convention, a summary on legal rights of parents and children under Japanese Civil Law, and controversial

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2) See the minutes of the 126th Diet foreign affairs committee meeting, vol. 7, (11 May 1993): 2.

3) The most important English books on Japanese Law are: Oda, Hiroshi. *Japanese Law* London: Butterworth, 1992.; Tanaka, Hideo. *The Japanese Legal System* Univ. of Tokyo Press, 1976.; Noda, Yoshiyuki. *Introduction to Japanese Law* Univ. of Tokyo Press, 1976.

children's rights issues with regard to the Convention. I hope to inform readers objectively, rather than persuade them of the author's own opinions. I shall from time to time make references to the relevant articles of the Convention, and summarise majority (and sometimes minority) academic opinions on important issues with regard to current legal problems in the area of the child's rights in Japan.

## II. The Possibility of the Direct Applicability of the Convention

Before I go any further, I would like to describe a few words on the procedure involved in incorporating to the Convention into Japanese Law. The question of direct applicability of the Convention in domestic judicial proceedings is of utmost importance, particularly in the light of the increasing opportunities to sign the Human Rights Conventions. However, there has been little discussion on this point<sup>4</sup>, because there have only been a small number of judicial proceedings in which this point became a material issue, and partly because the Japanese Constitution provides a long and open-ended list of fundamental rights which seemingly make it unnecessary to resort to the Conventions.

Initially, the Government signs treaties which must then be approved by the Diet before they are ratified by the Government. They are incorporated into the Japanese legal system without transforming national law. Since the Constitution provides that

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4) As a valuable contribution, see Iwasawa, Yuji. *Joyaku no Kokunai Tekiyō Kanousei* Tokyo: Yuhikaku, 1985.

treaties to which Japan is a party should be observed faithfully<sup>5)</sup> and as the approval of the Diet is needed it is generally agreed that international treaties are superior to national law. Therefore before ratification, all laws, and the application of those laws, are reviewed. If there is a conflict the national law is changed.

However, the traditional view is that not all provisions in a treaty are directly applicable to the court<sup>6)</sup>. That, in order for a treaty to be directly applicable, it must be evident from its purpose, language style and the history leading to its creation that it is to be used as a rule of law in our judicial proceedings. If a treaty fits into this category, the Legislature also presumes that in signing it the treaty was intended to be directly applicable by the Government.

On the other hand, where a treaty does not fit into this category, it is thought that the Parliament has considerable discretion in determining how to apply that treaty. It seems apparent that the Convention on the Rights of the Child does not fall into the first category. The Convention is regarded as a program in interpreting the spirit of national law. Some progressive scholars believe that human rights treaties are always directly applicable, and the debate has not yet been resolved.

There has probably been no case in Japan in which the only legal basis for the complaint was an international treaty. The litigants normally use human rights provisions in our Constitution and treaties together. The first issue for the court is whether the act or law in question is Constitutional or not. If it is constitutional, the court tends to conclude that it is not a violation of the treaty either,

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5) Constitution, Article 98 (2).

6) See Fujishita, Ken. "Jido no Kenri ni kansuru Joyaku to Minji Horei ni tsuite" *Minji Geppo* vol. 46, no. 4, (May 1991): 11-12.

and to avoid getting into any detailed interpretation or judgment of the treaty<sup>7)</sup>.

### III. Legal Rights of Parents and Children under Japanese Civil Law

#### A. Historical Background

The history of our present Civil Code dates back to the Meiji Restoration in the middle of the 19th century. The Meiji government came to power in 1868 and immediately commenced modernisation of our country by replacing the feudal system, based on Confucian political philosophy, with a strong western style government whose powers were to be centralised and concentrated in the hands of the Emperor. In terms of both domestic and foreign policies it was necessary to create a modern legal system. Domestically, the legal system needed to be unified and modernised in order for the new government to control people nationwide. Externally, the prevention of colonisation by western superpowers and the abolition of unfair treaties which were imposed on Japan provided the two principal reasons for having an effective legal order.

The Civil Code ("Meiji-Minpo") enacted in 1898 is, with certain modifications, still in force today. It was based on the German *Pandecten* system and contained property law provisions, which were designed to be compatible with the development of capitalism, and two chapters on family and inheritance provisions, which reflected the paternalistic "Iye (extended family)" system<sup>8)</sup> of society

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7) For instance, see *Gyoseijiken Saibanreisyu* vol. 42, no. 5: 711.

8) About "Iye", see Isono, Fujiko. "The Evolution of Modern Family Law

at the time.

Under the old provisions of the Civil Code the purpose of family law was the maintenance of the hierarchical “Iye” system. For example, a first son was, in principle, the sole heir of the family property. The head of a family had full responsibility for the children’s maintenance, and at the same time governed over children and could even ouster non-obedient children. However, as the capitalist economy developed and the size of families became smaller, the focus of the relationship between parent and child shifted from “Iye” to the individual parent and child themselves. Family Law came to exist for the benefit of parents who exercised total control over their children.

After the Second World War, new provisions of the Civil Code came into effect in 1948 abolishing the “Iye” system and taking away various feudalistic rights of the head of a family. The focus of the law of parents and children changed from parental rights to parental “responsibilities”. Today it is generally considered that the law of parents and children exists for the benefit of children. However, there are still some provisions which “favour” parents. The question of how to protect the welfare of a child is one of the problems to be solved in interpreting these provisions<sup>9)</sup>. Nearly half a century has passed, and the Civil Code has once again come under review<sup>10)</sup>.

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in Japan” *International Journal of Law and the Family* vol. 2, (1988): 183-202.

9) See Yonekura, Akira. “Shinkengainen no Tenkan no Hitsuyosei” *Gen-daishakai to Minpogaku no Doko* (the last volume) Tokyo: Yuhikaku, 1992: 359-407.

10) Moves are now underway to reform the Civil Code provisions that apply to marriage and divorce. In December 1992 a sub-committee of the Ministry of Justice’s Legislative Council produced an outline of its

B. Outline of the Law of Parents and Children

As in many other countries, relationships between parents and children are based either on natural blood relations or on adoptive relations. The former is further divided by the existence or non-existence of a marital relationship between parents with the consequence that a child born to them is either legitimate or illegitimate. Generally, Japanese Family Law places a heavy emphasis on biological connections in parent-child relationships.

Under the Civil Code a child born during marriage is presumed to be legitimate. A child born within 200 days of, or 300 days after the dissolution of, marriage is also presumed to be conceived during the marriage<sup>11)</sup>. Article 772 was designed to achieve the establishment of the legal status of a child at a very early stage, and to stabilize the family relationship. Accordingly, the presumption of legitimacy also applies to a child born to a married woman and a man other than her husband so long as the child is born during their marriage. Only a husband is allowed to challenge this presumption within one year from the time of his knowledge of the child's birth, and the law requires strict proof of certain conditions before the presumption can be rebutted. However, there are exceptions to this strict requirement in interpreting the Code in case law. For instance, if it is impossible for someone to father a child, by reason of impotence or a long separation, the presumption does not apply

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proposed reforms. About details, see, Matsushima, Yukiko. "Japan: Commentary on Report Proposing Reform of Family Law" *Journal of Family Law* vol. 32, (1994).

11) Civil Code, Article 772.

and any interested party can bring a lawsuit to challenge the father-child relationship.

Legal marriage is only established after registration in “Koseki (family registration system)”. The courts have ruled that where a couple fails to register their marriage despite the fact that they have led a de-facto married life, marriage is legally effective as common-law marriage and produces the same legal consequences as normal marriage. However, these precedents do not apply to inheritance rights and the question of legitimacy of the couple’s children.

A child born to an unmarried couple is illegitimate. In this case, a relationship between the father and the child is created either through voluntary acknowledgement by the father’s registration in Koseki, or mandatory acknowledgement through court proceedings brought by the child or his legal guardian during the life of, or within three years after the death of, the father<sup>12)</sup>. A relationship between a mother and a child could also be established by voluntary or mandatory acknowledgement, but the Supreme Court has held that the act of delivery is conclusive fact<sup>13)</sup>.

The relationship between parent and child could also be created by adoption. There are two types of adoption in Japan: special adoption and ordinary adoption. In special adoption a baby or young child below 6 years old is adopted by a family and all relations with the child’s natural parents are severed<sup>14)</sup>. In ordinary adoption, a child or even an adult is adopted. Adult adoption is peculiar to Japan.

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12) Civil Code, Article 787.

13) Judgement of the Supreme Court, 27 April 1962, *Minshu* 16-7: 1247

14) About special adoption, see Ishikawa, Minoru. “Reform of the Adoption Law in Japan” *The Japanese Annual of International Law* No. 32, (1989): 67-72.

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In this case, a person or a couple in their twenties or thirties is brought into a childless family in order to continue that family's name or lineage, support the parents, and inherit property<sup>15)</sup>. I will further describe minor adoption later.

### C. The Contents of Parental Rights

There are two categories of parental rights: custody, and rights to administer the property of a child. The former rights include (a) parental rights and responsibilities to have custody of and to educate a child, (b) rights to determine the residence of a child, (c) rights to punish a child "to the extent that is necessary" and (d) rights to approve the vocation of a child. The latter rights include (a) parental rights and responsibilities to administer the property of a child and (b) rights to represent a child in a legally effective act concerning the child's property (except where there is a conflict of interest between the parent and child)<sup>16)</sup>.

The parental rights of a minor (a child under 20) are exercised jointly by both parents so long as they are married. On the other hand, it may not always be realistic to expect a divorced or unmarried couple to act jointly and if that is the case, only one parent may exercise parental rights. In the case of an illegitimate child, it is usually the mother who is given parental rights. If the parents are divorced, they agree between themselves, or failing an

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15) The average of adult adoption in the last few years is more than 70% of the whole adoption, see Kato, Ichiro. "The Adoption of Majors in Japan" *An Aging World; Dilemmas and Challenges for Law and Society* Eekelaar, John. M. and David Pearl ed. Oxford: Clarendon Press, 1989: 161-166.

16) Civil Code, Article 820~826.

agreement, the Family Court decides as to whom will be given parental rights. It is possible to divide parental rights between a mother and father: for example it is possible to give custody of the child to the mother and property administration rights to the father. Should there be any abuse of parental rights, the Family Court may order the removal of parental rights from the parent who has abused them.

If a minor has no parent a guardian will be appointed. A guardianship is regarded as supplementary to parental rights but the main difference between the two is that the former may be subject to stricter supervision by the state<sup>17)</sup>.

#### D. The Protective Function of the Family Court

I now turn to the special and important functions of the Family Court in protecting a child. The Family Court established on the 1st of January 1949 has been a forum for resolving many matrimonial conflicts and dealing with juvenile offenders<sup>18)</sup>.

The Family Court also plays an important role in adoption. Article 21(a) of the Convention provides that "State Parties... shall ensure that adoption of a child is authorised only by competent authorities...". In Japan, Article 798 of the Civil Code requires the

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17) Recently some even argue for an abolition of parental rights altogether and for the unification of parental rights and guardianship which should be merged into general guardianship.

18) According to the report by the Supreme Court Secretariat in 1993, the number of Family Court organizations is: 50 courts, 201 branch offices and 79 sub-branch offices. The staff of the Family Court is: 350 judges, 1200 court clerks, 1500 Family Court probation officers, 50 medical officers, 50 nurses and 2350 other members (mediators, etc.).

permission of the Family Court for the adoption of a minor except where the minor is the direct descendant (e. g. grandchild) or the stepchild of the adoptive parent<sup>19)</sup>. Where an adoptive child who is over 15, or an adoptive or natural parent, or the legal representative of an adoptive child who is under 15, makes an application for adoption, a judge of the Family Court questions the parties including adoptive and natural parents, focusing on the welfare of the child. In many cases a probation officer of the Family Court conducts an additional investigation. Proceedings at the Family Court cover a wide range of matters, including the purpose of adoption, suitability of the adoptive parents, family environment and compatibility of the adoptive parents and child, as well as the wishes of the child where the child is capable of making a relevant judgement. If the Family Court decides that an adoption is contrary to the welfare of a child, it may refuse to grant the necessary permission<sup>20)</sup>. In particular, the role of the Family Court in "special adoption" proceedings established in 1987 is indispensable in protecting the welfare of a child, in that the special adoption has the drastic effect of severing all family relationships between natural parents and an adopted child<sup>21)</sup>.

With regard to Article 9 of the Convention, more than 90% of all divorces are settled by the parties' agreement<sup>22)</sup> and any questions

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19) Critics argue that the Family Court should also be involved in cases concerning the adoption of a stepchild: see the minutes (supra note 2), vol. 13, (26 May 1993): 12.

20) In fact about 10% of all applications for the adoption of a minor have been refused or withdrawn.

21) Civil Code, Article 817-2~817-9.

22) There are three types of divorce systems in Japan; divorce by mutual consent, divorce by mediation in the Family Court and divorce by judgement under Article 770 of the Civil Code in the ordinary court. Statistically, about 90% of divorce cases in Japan are decided by mutual

concerning children are left to be agreed on by the parties themselves. If the parties cannot agree as to who should have custody of a minor child, the matter is resolved through mediation conducted at the Family Court. The Family Court considers how the child's best interests can be served and may take into account her wishes if she has the ability to decide for herself (from around the age of ten years). The Family Court can also change parental rights at a subsequent date or remove them from a parent, for example on the grounds of cruelty. Child maintenance may also be determined by the Family Court.

With regard to Article 37 of the Convention, the equally significant role of the Family Court in dealing with juvenile offenders is discussed at the end of this paper.

#### **IV. Controversial Children's Rights Issues with regard to the Convention**

##### **A. Cruelty**

Article 19(1) of the Convention provides protection for children from abuse, neglect, and exploitation by their parents. Cruelty against children tends to occur behind closed doors and victims are usually not able to report the fact to the outside world. Consequently it is not entirely clear how often child abuse occurs. According to a report by the National Child Welfare Station (NCWS) published in June 1989, there were about 1,069 reported cases of child abuse

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consent, 9% of divorces are solved at the Family Court and the remaining 1% are solved at the ordinary court. In 1993 the divorce rate was 1.53 in 1,000, a total of 189,000 divorces in the year.

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in half a year. According to the NCWS, the most common type of abuse was child neglect, such as failing to feed the child properly or leaving the child in unsanitary conditions (37.9%), followed by physical violence (26.5%), desertion (22%), and sexual abuse (4.6%)<sup>23)</sup>. Child abuse is more widespread in city areas and is increasing every year. In many cases the parents lack the ability to raise a child and are not even aware that they are abusing their child. Some parents have no stable employment or have a low income and tend to consider that they can treat their child in any way they like. These parents would repeat the abuse soon after the child is returned from protective facilities, unless in the meantime their lives have stabilised and they have been re-educated as to their responsibilities as parents.

There are three possible remedies for child abuse: (a) criminal sanction, (b) removal of parental rights, and (c) enforcement of child welfare laws. I would like to focus on (b), although (a) and (c) are equally important. Suffice it to say that criminal sanction against a parent who abuses his right is not always in the best interests of the child who may well need a continuing relationship with the parent.

Article 834 of the Civil Code provides that the Family Court may declare the parental rights of a parent lost where he or she abuses them or fails to exercise them properly. Child abuse is no doubt grounds for such a declaration.

This procedure, however, is subject to limitations and according to the Annual Report of Judicial Statistics in 1990 the declaration

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23) For the facts of child abuse cases, see the report by the Japan Bar Association, "Shinken wo Meguru Hotekishomondai to Teigen" *Jiyu to Seigi* vol. 44, no. 1, (Jan. 1990).

was granted in only 10 cases out of 130 applications. The reasons for this number being so small are as follows. First of all, the Family Court has no power to order that the child should live separately from the parent. Thus even after the removal of parental rights, the daily life of the child often remains unchanged and the declaration may be meaningless. Secondly, the petition for the removal of parental rights may be made either by a relative of the child, or by a public prosecutor, or by the president of the NCWS, all of whom are often reluctant to resort to such a drastic course of action. In particular, it is the policy of the NCWS to help parents and children rebuild their relationship as a family and the NCWS tries to avoid at all costs categorizing parents as failed parents through legal proceedings. Thirdly, Article 834 of the Civil Code lacks flexibility in that it only provides for the total removal of parental rights. This “all-or-nothing” approach produces reluctance in the minds of decision-makers.

Thus it has been suggested that new measures should be introduced enabling the Family Court to remove parental rights in stages<sup>24)</sup>, a view which I share. The new procedure should include temporary suspension of parental rights and will be flexible enough to pave the way towards a solution for certain aspects of child abuse.

## B. Discrimination against Illegitimate Children

Article 2(1) of the Convention prohibits discrimination against any child. During the 126th session of the last Diet, one of the most

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24) Ibid.

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controversial matters debated was discrimination against illegitimate children, a discrimination still existing in our society and legal system. I shall summarise the main points below and then consider the problem of Koseki and inheritance in detail later.

The debate focused on these two points: (a) in recording a child in Koseki<sup>25)</sup> and Jumin-hyo (residents' cards)<sup>26)</sup>, a distinction is made between legitimate and illegitimate children, and (b) when a parent dies, an illegitimate child will only be entitled to inherit half of that to which a legitimate child is entitled. As to the first question, the government answered as follows: the mere fact that the Koseki and Jumin-hyo record whether the child is legitimate or not does not make it unreasonable discrimination against the illegitimate child, because Koseki and Jumin-hyo simply record the truth. As to the second question, the government argued that the Article 2 of the Convention cannot be interpreted to cover inheritance and thus does not conflict with the proviso to Article 900(4) of the Civil Code which provides the inheritance share of the illegitimate child. However, these replies by the government do not redress discrimination which illegitimate children encounter every day.

Other differences between legitimate and illegitimate children are their treatment for the purpose of tax and social security. Under

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25) "Koseki" is a registration system under which every family, husband, wife and unmarried children, is recorded with the government. Birth, marriage, divorce and death are recorded and relationship between each person is also recorded. This carries great legal and social significance in Japan. Recently, criticism against the Koseki system has increased from young scholars. They advocate the modification of the family registration system to an individual registration system.

26) "Jumin-hyo" are residents' cards in which people's present address and everyone in the household is mentioned. Their relationships based on "Koseki" are also mentioned.

the Income Taxation Act a widow is entitled to certain exemptions, while a single mother who has lost her partner is not. In the absence of such exemptions it is inevitable that the income tax and residence tax for a single mother are higher than those of a widow. Moreover, single mothers are also at a disadvantage in the calculation of the premium of national health insurance and national pension insurance.

The disadvantages of having or being an illegitimate child do not stop there. In our society the illegitimate child is discriminated against socially, including entry into private schools, and marriage or employment opportunities. The social discrimination and legal disadvantages can be said to discourage people from having any children outside marriage. This social pressure ensures that the number of illegitimate children born in Japan is very low, only 1.03% of the total number of newly born babies (1989), compared to Sweden's 49.9% (1987), Denmark's 43% (1985), France's 26.3% (1988), the U. S. A.'s 21.0% (1984) and the U. K.'s 19.2% (1985)<sup>27)</sup>.

In 1979 an attempt was made to abolish the distinction between legitimate and illegitimate children but the law was not reformed because public opinion favoured the maintenance of the distinction<sup>28)</sup>.

### 1. *Problems concerning Koseki and Jumin-hyo*

In January 1994 one couple's attempt to name their first son "Akuma (Devil)" caused great controversy. The parents rejected the city's recommendation that they should change the name because it would be harmful to the child. Although parents have an unlimited

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27) See Ninomiya, Shuhei. "Hichakushutsushi no Syusseisu, Jinkoshizansu, Ninchisu" *Hogaku Seminar* vol. 37, no. 1, (Jan. 1992): 29.

28) A survey showed that 48% of the people surveyed were in favour, as opposed to 16% who were against it.

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right under the Family Registration Law to name their child, the city registry for Koseki refused to register the name on the grounds that it was an abuse of the parental right. The parents are seeking to have the refusal of the city quashed by the Family Court. Consequently, even five months after the birth, the child remains nameless. Koseki also plays an important role as the established proof of a Japanese person's nationality.

Since the Meiji era, Koseki has proved most useful for successive governments. Every person of a particular family was registered in the Koseki, which enabled the central government to extend its control nationwide. Koseki played a key role in effective administration of conscription and collection of taxes. The essence of the Koseki system was the national registration of every citizen, their blood relationships and permanent residence. It is said that Koseki is more comprehensive and efficient than any other similar system in the world, such as a system of birth and marriage certificate.

When a child is born the birth of the child must be reported within 14 days by registering the fact under Koseki. In Koseki it is compulsory to register the name of the child, the date of birth, the name of the child's natural parents and their family relationships<sup>29)</sup>. In the last respect, a distinction is made between a legitimate and an illegitimate child. For example, if a child is a first born legitimate daughter or a second born legitimate son, she or he is registered as "First daughter" or "Second son". If a child is illegitimate, he or she is simply registered as "Male" or "Female". In Jumin-hyo, a legitimate child is registered as "First son" or "First daughter", while an illegitimate child is simply registered as "A child".

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29) Family Registration Law, Article 13.

Recently a lawsuit was brought in respect of the registration system in Jumin-hyo<sup>30)</sup>. The question arose out of the marrying couple's wish that the wife should not change her surname after marriage (incidentally this is one of the most controversial topics in the reform of the Civil Code). This is not allowed under the current law and the parties chose not to register their marriage. Their child was accordingly illegitimate under the law and the Jumin-hyo recorded the child simply as "A child", clearly indicating the illegitimacy. The parties argued that the differential language used in Jumin-hyo would further discriminate against the illegitimate child and would thus violate the equal protection and basic human rights provision in Article 13 and 14 of the Constitution and the Convention on the Rights of the Child. However, on the 23rd May 1991 the Tokyo District Court held that the present law is not unconstitutional with the reasoning that it is based on reasonable grounds. This means that since there is a distinction between the legitimate and illegitimate child under the present law, the differential treatment as embodied in the language used in Jumin-hyo is not unconstitutional.

However, so long as these distinctions help maintain discrimination towards the illegitimate child, they must be urgently abolished. The reform in this respect would not by any means affect the authenticity of Koseki nor cause any disturbance or inconvenience in the Jumin-hyo system.

## 2. *Problem of Entitlement to Inheritance of an Illegitimate Child*

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30) Judgement of the Tokyo District Court, 23 May 1991, *Gyoseijiken Saibanreishu* vol. 42, no. 5: 688. Now this case is pending before the Tokyo High Court.

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The proviso to Article 900 (4) of the Civil Code provides that an illegitimate child is entitled to inherit only half the amount to which a legitimate child is entitled. The first case which challenged the constitutionality of the proviso came before the court a few years ago<sup>31)</sup>. In that case, the plaintiff whose father had predeceased her, inherited a proportion of the assets of her grandmother. However, because the plaintiff's father was an illegitimate son of her grandmother, she could inherit only half of what the legitimate children inherited<sup>32)</sup>.

The Family Court rejected her argument that the grandmother's estate should be divided equally among all children regardless of legitimacy, so she appealed. On 29th March 1991 the Tokyo High Court gave a judgment declaring Article 900(4) constitutional, and held that the question of entitlement to succession is one of state policy and thus for the Legislature to determine. The High Court approved the decision of the Family Court. The traditional view of the court was that, apart from some legislative problems, the distinction between the legitimate and illegitimate child was constitutional because its purpose was to protect legal marriage and to maintain social order. The plaintiff's final appeal to the Supreme

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31) Judgement of Tokyo High Court, 29 March 1991, *Hanrei Times* no. 764: 133, *Jurist* no. 1002: 22.

32) In Japan it is not common for the deceased to leave a will, and the estate is usually distributed in accordance with the rules of intestate succession. Under the law of succession, a surviving spouse always become an heir. The priority of other heirs are; children, then lineal ascendants, and finally siblings. The share of each heir would depend upon the composition of the beneficiaries. For example, if the beneficiaries are a surviving spouse and children, they will each inherit a half of the estate, and the share of the child is divided equally among all the children (Civil Code Article 900(4)). A common-law wife has no right of inheritance.

Court is still pending.

However, in another case, on 23rd June 1993 the Tokyo High Court decided for the first time that the proviso to Article 900(4) was unconstitutional<sup>33)</sup>. The case was brought by a 38-year-old piano teacher, an illegitimate child, whose father had died intestate. The case was against his legitimate child, who was the other heir to the father's estate under the law. She demanded an equal share of their father's estate.

The grounds for the judgment are very detailed but can be summarised as follows: "Article 14 of the Constitution prohibits discrimination based on race, creed or social status. The phrase 'social status' refers to social positions that are determined at birth". The proviso to Article 900(4) of the Civil Code is a discrimination in economic and social relations based on social status. Article 900 is intended to encourage and respect proper marriages and to protect family relationships based on lawful marriage, and these purposes must still be respected. However, at the same time the individual dignity of illegitimate children must be equally protected. The Court concluded that in today's society where people have a variety of views as to the value of marriage, any attempt by the government to restrict the birth of the child outside marriage is futile, and that the proviso no longer has any reasonable basis. The Court further noted that in recent years the strong tendency among other nations is to enact laws that ensure equal rights between the legitimate and the illegitimate child. The Court also stated that any conflict between the idea of protecting the family relations based on lawful

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33) See *Hanrei Jiho* no. 1465: 55-65, and also see Ninomiya, Shuhei., and Koichi Yonezawa. "Hichakushutsushi Sabetsu wa Kuzureta" *Hogaku Seminar* vol. 38, no. 9 (Sep. 1993): 53-61.

marriage and the idea of protecting the individual dignity of the illegitimate child must be resolved in such a way that both ideas remain valid. The Court said that its ruling was particularly true in the light of the spirit of Article 24(1) of the International Convention on Civil and Political Rights, and Article 2(2) of the Convention on the Rights of the Child, which is due to be ratified in Japan shortly.

This judgment accords with the general trend of today's academic opinions. There was no final appeal to the Supreme Court in this case. There has been no judgment by the Supreme Court on this point up to the present. Therefore it remains to be seen what impact the judgment of the Tokyo High Court will have. In any event the reform of the proviso seems inevitable. Even before its ratification, the Convention is already providing impetus for reform.

### C. Rights of a Child after the Parent's Divorce

#### 1. *Custody*

Article 18(1) of the Convention provides that primary responsibility for upbringing of children rests on both parents. Thus, even after divorce, parents should continue to fulfill their parental responsibilities jointly.

However, as to custody of the child, unlike the United States or some other countries, Japanese law does not allow joint custody. Therefore, only one of the parents becomes the custodian of the child<sup>34)</sup>. In practice, in more than 70% of cases, custody is given to the mother<sup>35)</sup>.

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34) Civil Code, Article 819.

35) According to the Demographic statistics published by the Ministry

The procedure for divorce by consent in Japan is unique in that all that is necessary is the consent of both parties to divorce and this registration in Koseki. In the case of divorce by agreement, even when the custody of the child is at issue, the child is frequently only being used as a pawn in determining the amount of matrimonial relief and division of property. Moreover, in practice, Japanese divorce cases are extremely acrimonious. In these circumstances, unless the parties can show a more mature attitude to divorce, the joint custody would not work effectively even if it is introduced now. This is because if all decisions are to be made jointly, it would cause considerable inconvenience to the child, and further, it might disturb the emotional stability of the child, in particular a small child, if he or she had to go back and forth between his or her parents.

However, what is an even more serious problem in many cases may be the fact that the father who has lost custody tends to abandon his parental responsibilities altogether. Some even forget about their child. In order to prevent that from happening, and in order for the child to feel loved and needed by the father it is essential to establish some form of joint parental rights or rights of access by a non-custodial parent after divorce. Today, in Japan, family styles are changing as is seen in the emergence of nuclear families or the increasing economic independence of working women. As lifestyles change and the number of children born in a family decreases<sup>36)</sup>, young fathers are becoming more interested in helping to raise a child. Sooner or later there will be many parents who

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of Health and Welfare, in 71.3% of all cases a wife exercises all parental rights over a child.

36) The average number of birth rate is 1.5 for each couple in 1993.

want to share parental responsibilities even after their divorce<sup>37)</sup>.

## 2. Access

Article 9(3) of the Convention provides rights for a child who is separated from one or both parents to contact them. In Japan there is no provision in the Civil Code expressing the access right. However, the right has been recognised in case law. Article 766(1) of the Civil Code states that custody and other "necessary matters" for a child should be determined at the time of divorce by consent. The Supreme Court has ruled that access to a child after divorce is one of these matters<sup>38)</sup>. In reality, however, a survey shows that in 61% of the divorce cases there was no contact between father and child, in 11% of the cases fathers originally had some contact but gradually lost it, and in only 26% of all cases fathers still maintained contact with their children<sup>39)</sup>. This is partly due to the reluctance on the part of the custodial mothers to let the children see their fathers, as some wives prefer to sever all contact with their ex-husband once they are divorced by reason of the husband's violence, adultery or desertion. On the other hand, some parents force their children to see them against the children's will.

Access should be decided in the best interests of the child and should not be dependent on the egoism or self-interest of the parent. Until now the right of access has been mainly parent-oriented. However the child's desire to meet a parent after divorce should also be an established right.

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37) The proposal for the 1994 United Nations International Year of Family also refers to joint custody of a child after divorce.

38) Judgment of the Supreme Court on 6 July 1984, *Kasai Geppo* vol. 37, no. 5: 35-39.

39) Report by Nihon Jido Mondai Chosakai, "Rikon to Boshikatei" 1986.

### 3. *The Right to Express the Views of the Child*

Article 12(1) of the Convention provides the right of a child to express his views. It is important to listen to the views of the child at the time of divorce, in the light of the right of the child to express his or her views. At present, when the child is 15 years old or over, the Family Court has a legal duty to listen to the statement of the child before making decisions as to the custody of the child<sup>40)</sup>. Moreover, even when the child is under 15 years of age, there are many instances where the probation officers or the Family Court mediators ask the opinion of the child<sup>41)</sup>. In Family Court practice, children over 10 years old are to be asked their opinion. Therefore, in these cases it can be said that the child's view is considered.

However, in divorce by consent, which amounts to 90% of all divorces, there is no system to check the opinion of the child. Therefore it is desirable, even in cases of divorce by consent, that it is referred either to the Family Court or some public service in order to ensure the welfare of the child. The Bar Association has also suggested that an independent system of a "special representative" should be established, who will represent the interests of the child during mediation, litigation, or even at a consensual divorce settlement<sup>42)</sup>.

In any event the wishes of the child should be more respected in determining custody, and commonly held assumptions in Japan such as "young children are always better off in their mother's care", or

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40) The Rule of the Family Court Proceedings, Article 54.

41) See debate "Ko ga Ibasho wo Erabu made" *Case Kenkyu* no. 227, (May 1991): 23-55.

42) See Sugii, Shizuko. "Bengoshi ga Mita Kodomo no Genjo; Rikon to Kodomo no Kenri" *Jiyu to Seigi* vol. 42, no. 2, (Feb. 1991).

“children's views are trifling”, should be abandoned.

#### 4. *Enforcement of Child Maintenance Payments*

Article 27(4) of the Convention provides enforcement measures to secure child maintenance from the parents. The most serious problem facing the mother who has custody of the child is how to ensure maintenance payment for the child. According to a report in 1988, as many as 75.4% of the mothers have never received any payments from their ex-husband. Even among the remaining 24.6% of the single mothers, 14% of them constantly received the payments, whereas 10.6% of them received payments only in the past<sup>43)</sup>.

Among the divorces which were mediated by the Family Court in 1990, only 51.7% of the decisions imposed some sort of payment towards the cost of the upbringing of the child. The method of payment was usually a fixed monthly payment. The most common rate of payment was 20,000 to 40,000 yen (£120~240 sterling) per month per child<sup>44)</sup>.

However, in many cases the money is never paid. The reason for this is the ineffectiveness of the means of enforcement, and in cases of divorce by consent, no enforcement can be provided. Therefore the creation of some reforms of assurance and enforcement of payment towards the upbringing cost are urgently needed. For instance, the parties could be required to sign and file an agreement setting out the obligations of each party as to payment. As to establishing a strong enforcement process, it may be effective to

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43) National survey on the single mother family household by the Ministry of Welfare.

44) Annual Report of Judicial Statistics for 1990, vol. 3 Family Cases by General Secretariat, Supreme Court.

create a system, as in Sweden, whereby the state pays the cost of the upbringing of the child on behalf of the parties, or one of the parties, who must then repay it as a loan to the state.

Such a new system needs to be capable of effective enforcement, in order to ensure the recognition of the principle that the parents have common and primary responsibilities for the upbringing of the child. These are the issues which are being considered by the Law Commission.

#### D. Juvenile Justice and Other Matters

##### 1. *Juvenile Justice*

Articles 37, 39 and 40 of the Convention set out the structure for juvenile justice together with other United Nations regulations and guidelines. The Articles place importance on the attainment of the right to defence and the prevention of criminal sanctions in dealing with juvenile offences. The Convention recognises that criminal trials and punishments not only fail to deter juvenile offenders but also prevent their rehabilitation and are not in the interests of society as a whole.

The 1948 Juvenile Act was enacted on similar principles. Under the Act the Family Court is given jurisdiction to hear all juvenile cases independently of other courts, and different criteria are applied in making a decision. The purpose of a hearing is not to decide what is a proportionate punishment to the crime or wrongful conduct, but to consider what is the most effective way of reforming the offender, taking into account his family background and personality. The hearing is not open to the public and is conducted “in a kind and non-aggressive manner”<sup>45</sup>).

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Juvenile delinquents are classified into three categories: (a) those 14 or over and under 20 who have committed a punishable offence; (b) those under 14 who are not punishable according to Article 41 of the Criminal Code; and (c) those under 20 who have not yet committed an offence but are likely to do so in the near future. All cases in category (a) and some cases in category (b) are sent directly to the Family Court from the police or prosecutors. The rest of the cases are dealt with in accordance with the Child Welfare Act; some of these may still end up in the Family Court. The Family Court investigates facts, conducts a hearing and eventually determines an appropriate means of dealing with the juvenile. Those means include non-commencement of the proceedings or dismissal of the case, sending the case to the Child Welfare Stations, appointment of probation officers, sending the offender to a protective or juvenile offenders' institution or, in the worst cases, sending the case to a prosecutor for normal criminal proceedings.

In practice, however, more than 70% of the cases are terminated by way of non-commencement of the proceedings or dismissal. This is because most offenders show strong possibilities for reform during the course of the proceedings or the investigation by the Family Court, and judges of the Family Court tend to conclude that further proceedings are unnecessary. In resolving juvenile matters this way, the probation officers of the Family Court perform indispensable counselling and case work functions.

However, the environment surrounding the juvenile justice system has been changing since the 1960's. Recently the number of juvenile offences has reached the highest since the war and in particular

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45) Juvenile Act, Article 22 (1).

there were some serious offences in the late 1980's. Some now argue for tougher sanctions for juvenile offenders and for lowering the age limit for criminal liability. Consequently, the welfare aspect of the Family Court in protecting the interests of juveniles is gradually being replaced by the criminal justice function. The probation officers of the Family Court are also losing their independence and expertise, and being forced to cope with a considerable number of cases with more speed and mechanical efficiency<sup>46)</sup>.

There are new problems emerging from some Court decisions in dealing with minor offenders. For instance, in two recent decisions<sup>47)</sup> unusually severe punishments were imposed on offenders taking into account the cruel nature of the acts committed. These decisions have been criticized as merely making a scapegoat the particular offenders and failing to address the underlying reasons for the crime which continue to cause more youngsters to offend. In other two cases<sup>48)</sup> juveniles were left defenseless in the hands of the police

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46) For example, "Guideline in dealing with juvenile matters" drafted under an instruction by the Supreme Court has been criticised as too efficiency-oriented.

47) One case is the "High School Girl Murder" (Judgment of the Tokyo District Court on 12 July 1990, *Hanrei Jiho* no. 1396: 15-41). On 25 November 1988 several teenagers kidnapped a school girl, who died after 41 days of repeated rape and abuse. The defendants put the girl's body in an oil drum filled with cement and abandoned it at a construction site. The principal defendant (then 17 years old) was sentenced to 17 years of imprisonment. Another case is the "Otaka Ryokuchi Park Murder" (Judgment of the Nagoya District Court on 28 June 1989, *Hanrei Jiho* no. 1332: 36-49). Six youngsters who had just met each other kidnapped a couple from a park in order to steal valuables from them, murdered them and buried their bodies in a nearby mountain area. The principal defendant (then 19 years old) was sentenced to death. The others were also sentenced to life or 17 years imprisonment.

48) One case is the "Ayase Mother and Child Murder" (Dismissal at the Tokyo Family Court on 12 September 1989, *Hanrei Jiho* no. 1338: 157-162).

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authority without any legal or other assistance.

Although there have been considerable movements towards the introduction of criminal procedure, it must be remembered that juvenile justice system often requires different policy considerations. It is important to prevent juvenile proceedings from becoming criminal prosecution. It is thus widely acknowledged that the rights of juveniles should be protected at an earlier stage, for example by ensuring legal representation or assistance when questioned by the police.

At the same time the Family Court should try to restore its case work function and the investigation officers' expertise in counselling. Further, it is the living environment of the offenders which need improvement and too much attention should not be paid to the surface violent appearance of each offence.

### 2. *Children's Rights in Education*

Articles 28 and 29 of the Convention provide for the rights and purpose of the child for education. The child's right to express an opinion provided in Article 12 is also important in ensuring liberty

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On 16 November 1986 a 36-year-old mother and her 7-year-old son were strangled to death in their apartment in Ayase, Tokyo. Some cash was stolen. Three teenagers (15 and 16 years old) confessed during police interrogation to having committed the crime. They subsequently claimed innocence and further investigation revealed sloppiness in the original police investigation. Doubt was also raised as to whether there could be any safeguard for the rights of juveniles when faced with a biased judge at the Family Court. Another case (Decision at the Osaka Family Court on 29 March 1988, *Shonenho Tsushin* no. 36) is where a policeman intentionally made a false allegation that two teenagers (16 and 17 years old) assaulted him and interfered with his execution of public duty. The accused boys' supporters, including their lawyers, later successfully proved to the court that those allegations were unfounded and that there had been no delinquent behaviour on their part.

and fundamental human rights within a school. During the last session of the Diet educational issues caused heated debate. In Japan job market is very competitive and parents are traditionally enthusiastic about providing higher education for their children. Today more than 90% of all pupils proceed to senior high schools and well over 35% of students go to university.

However, too much competition has also produced drop-out students (“ochikobore”)<sup>49)</sup>. Some of them resorted to violence in schools, especially during 1980’s, as a result of which many schools tightened school regulations and imposed severe penalties for their violations. Although violence by pupils seemed to have died down after a while, in fact some teachers began exercising wrongful physical discipline on some pupils, and bullying among stressed students became widespread. The situations are worsening and there have been several instances of suicide by the victims of the violent discipline or bullying.

In recent years an increasing number of cases are coming before the court claiming the right of pupils or their parents<sup>50)</sup>. In most

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49) According to an education expert, the percentage of pupils who can keep up with school studies is said that 70% at elementary school, 50% in high school and only 30% in senior high school.

50) One such case is the “Nakano Fujimi High School Bullying” (Judgment of the Tokyo District Court on 27 March 1991, *Hanrei Jiho* no. 1378: 26). The Court denied any liability of a school in proceedings brought by the mother of a 14-year-old school boy who had committed suicide because of bullying. Another case is the “High School Girl who was Crushed to Death by a School Gate” (Judgment of the Kobe District Court on 10 February 1993, *Hanrei Jiho* no. 1460: 46). A school girl was killed when trapped by the school gate being closed by a school teacher who was attempting to prevent students who were late from entering the school premises. Although, in this case, the court held that teacher was guilty of manslaughter, the nation was shocked and saw it as one of the worst example of strict school enforcement in the present school

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cases, however, the courts have been reluctant to recognise the rights of a child and have not interfered with the exercise of educational discretion by schools. Parents are no longer able to challenge schools for the fear of causing competitive disadvantages for their children. There are no systems for helping drop-outs or supporting parents in raising such children. Towards the next century we need to create diversified values and new systems for different needs of pupils. School education needs to move away from conformity in order to encourage individual growth of each child.

Further, as Article 23 of the Convention states, special attention must be paid to the rights of handicapped children. It is essential to establish the right of those children to education<sup>51)</sup>. The government is reported to be considering a system whereby handicapped children may also attend normal schools. These are a few of the many problems facing our society, some of which have no doubt been triggered by the signing of the Convention.

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system.

51) Recently a very important judgment emerged indicating a movement towards normalization: the "Amagasaki High School Case" (Judgment of the Kobe District Court on 13 March 1992, *Hanrei Jiho* no. 1414: 26). The plaintiff was refused entry to a senior high school on the grounds of physical disability despite the fact that he had achieved satisfactory scores in the entrance examination. The court held that the school's refusal was illegal. The judgment is one of the rare examples in which a handicapped student was enabled to attend a normal school. Although most schools are in reality not equipped to look after handicapped children, it is expected this movement will grow.

## V. Conclusion

Parents and children in Japan tend to be much closer to one another than in other countries. Parents tend to feel that they and their children are a single “unit” and distinctions between individuals often become blurred. This sense of unity on the part of parents often leads to excessive control over their child and inhibits the development of respect for individuals. It is ironic that while parents seek so earnestly to protect their children they actually strip them of their rights as individuals.

Traditionally a child has been regarded as an object of protection by society, and not regarded as possessing independent rights. Japan finds itself constantly battling, with its ancient “national harmony” or “family harmony” philosophy conflicting with modern laws concerning individual rights. It is hoped that the Convention will lead to more discussions towards the establishment of the clear legal structure of family relationships which will in turn cause a change in the minds of Japanese people that the rights of every member of a family should be equally respected.

Japan is a consensus society. Because of this, law reforms seem to be very slow, often even impossible to achieve. Many important law reforms in the past have happened through pressure from foreign countries. For example, as a result of the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women, the Nationality Act was reformed in 1984. Now a child whose mother or father is Japanese can claim Japanese nationality. Previously this was only a paternal right.

Therefore, the Convention on the Rights of the Child is also likely

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to facilitate the process of reform for the acknowledgement of the rights of the child. I am confident that the Convention will make a strong impact in diversifying and improving the status of the child in Japanese law and practice.

### 《Postscript》

For a more concise version of this article, please refer to “Child’s Rights in Japan”, which will be published this year in London as part of a book addressing international child’s rights. This book will be edited by Professor Michael Freeman of University College London.