12 Birth registration and the right to have rights
The changing family and the unchanging koseki

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Introduction: The koseki and its others

The major system for the identification of individuals in modern Japanese society is the koseki (family registration) system. This can be contrasted with Anglophone countries where the basic document of identification is the individual birth certificate, which lists date and place of birth and the names of parents (if known); and with separate documents to certify marriage, divorce or death. In Japan, on birth, each individual is listed in a family register which sets out the relationship between family members, and records births, deaths, marriages, divorces and adoptions. The koseki is based on a particular view of the family, centered on a heterosexual couple with children, and placing importance on birth order. The koseki system can also, however, accommodate some other ways of making families such as adoption. The current system assumes a two-generation nuclear family of two parents and children, unlike the pre-1945 system which assumed a stem family with a patriarchal head who passed on property and authority according to rules of patrilineality and primogeniture.¹

The modern koseki system has been in force for two major historical periods: the years from 1872 to 1947 and from 1947 to the present (on the history of the koseki system, see Chapman 2011). As Shimazu reminds us, the family registration system ‘was born not in feudalism, but in modern Japan’ (1994: 86). Before the enactment of the Household Registry Law (kosekihō, enacted 1871, effective 1872) and the Meiji Civil Code (minpō, 1898), family forms were more fluid. Feudal households were made of kin, servants and apprentices. Children could be sent to relatives’ households or join other households as servants, apprentices or trainee geisha. Families regularly incorporated the children of extramarital relationships or the children of concubines. The imperial line regularly included the children of concubines, particularly where there was no legitimate heir. In the years leading up to the finalization of the Meiji Civil Code in 1898, there was controversy about whether to recognize the children of concubines as legitimate, but the eventual form of the family under the Meiji Civil Code was a monogamous stem family, with even the imperial family eventually conforming to the strictures of monogamy.² As noted above, the current legal system, under the revised Civil Code (1947) assumes a
heteronormative two-generation monogamous nuclear family with children. These two periods of the *koseki* system have thus spanned the period from 1872 to the present (around 140 years). As we shall see below, the family is currently undergoing further transformations due to international marriages and other relationships that cross the boundaries of nationality. Assisted reproductive technologies have also brought new challenges, so that there is an ever-increasing gap between the legal conventions of the *koseki* system and the lived practices of family relationships in twenty-first-century Japan.

In this chapter, I will first of all set out the procedures for registration of births under the current system and then explore some situations where the family does not conform to the expectation of a heterosexual couple of Japanese nationality who produce children by biological reproduction of children genetically related to two parents. Situations that do not conform to this pattern include children born outside of wedlock (who are still categorized as ‘illegitimate’ in the Japanese system), children born after a divorce or bereavement, individuals who are adopted, children of international marriages, children whose parents are unknown, and children who are born through the use of assisted reproductive technologies. Where an individual – particularly a parent – undertakes gender reassignment surgery and applies to change their gender on their family register, this also affects family relationships, and the conditions for such changes are strictly regulated. Indeed, because any change to the family register affects all family members and not just the individual, there is strong normative pressure against anything that is seen to ‘sully’ the family register, such as registering a divorce or a child born out of wedlock. In many cases, an individual is registered on a particular family register some time after birth. Where a child can not be registered, this can have deleterious consequences for the child, including illegitimacy or even statelessness (see Chen, Chapter 13 in this volume). Such cases are in contravention of the United Nations Convention on the Rights of the Child (CRC), which states in article 7 that the child ‘shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents’ (Ishii 2009: 179).

In the 1990s controversies around birth registration often concerned children born of mixed parentage and whether they would be able to have a family register entry and thus Japanese nationality. With the development of assisted reproductive technologies, the very definition of ‘mother’ and ‘father’ has come under question, particularly in cases of surrogate birth. In recent years, all of these issues have come together in cases where couples enter into surrogacy contracts overseas.

**Making families in the *koseki***

**Birth registration**

In the family register, one person takes the position of the indexical ‘head’ (*hitto-sha*). This need not be a man in the postwar system, but in most families
it is still a man who takes this position. All family members in the same koseki have the same surname. It need not be the father’s, but in the majority of cases the husband/father’s family name is used, for it is usually the man who is registered as the hittōsha. When a couple marry, they leave their natal family registers and set up a new family register. It is also possible for an individual to set up a new register.

When a child is born, the doctor who delivered the baby issues a document of proof of birth (shusshō shōmei sho), which records the date and place of birth and the name of the attending physician. This certificate can then be taken to the local government office and a notification of birth (shusshō todoke) form will be completed in order to enter the child’s details into the parents’ family register. The official seal (hanko) of each parent is necessary (equivalent to the function of a signature in Anglophone countries), as it is for other changes to the family register. Where the father and mother of a child are a married couple, the child will be assumed to be the child of the husband if born 200 days or more after the marriage. If a husband wishes to challenge paternity, he needs to make an application to the Family Court. Where a woman has been divorced or widowed, any child born within 300 days of the divorce or bereavement will be deemed to be the child of her former husband.

Where a father and mother are not married, it is necessary for the father to provide recognition (ninchi) of his paternity. Even if the father provides recognition of paternity, however, the child will be registered as illegitimate (hi-chakushutsu-shi) if the parents are not married. Many people nowadays prefer the term kongaishi (child born outside marriage), which avoids the stigma associated with the term hi-chakushutsu-shi (illegitimate) (Shimazu 1994: 109). A father or mother may enter an illegitimate child in their family register by ‘affiliation’ (ninchi), but not if the birth mother is married (article 779 of the Civil Code; see Ahlefeldt 2012: 73). Where the father is unknown, the child of an unmarried Japanese woman will be registered in the mother’s koseki, and will take her surname, but will be registered as illegitimate (hi-chakushutsu-shi).

Where the mother of a child is not Japanese, if the father is Japanese and recognizes paternity the child may be registered in the father’s koseki, but will be illegitimate if the parents are not married to each other. Where the mother is Japanese and the father is not Japanese, the child can only be entered in the mother’s koseki, and will take the mother’s surname unless she has officially changed her family name to that of the father. When a baby is born in Japan of non-Japanese parents, submitting the shusshō todoke will result in the issuing of a zairyū card (residence card, which replaces the former alien registration card [gaikokujin tōroku-sho]) rather than a koseki entry. Where both parents are unknown (for example, where the baby has been abandoned, or has been left with a welfare agency that has a ‘baby hatch’ [akachan posuto]), the child can become eligible for special adoption (for more on special adoption, see below).
Where a child is born to one or more Japanese parents overseas, the parents can take the local birth certificate and a copy of their Japanese family register to a Japanese consulate or embassy in order to register the birth.

Children born out of wedlock

Children born out of wedlock are treated differently from legitimate children (chakushutsu-shi) in the family register. Until 2004 legitimate children were listed according to birth order (oldest son, eldest daughter, second son, second daughter, etc.), but illegitimate (hi-chakushutsu-shi) children were only listed according to gender (and it would thus be clear that they were illegitimate). In 2004 the Tokyo District Court ruled that this was discriminatory (King 2009: 210; on the background to this ruling, see White, Chapter 14 in this volume). Since 2004 a child's status as legitimate or illegitimate is not apparent from the brief extract of the koseki that is used for some public purposes, but their status would be apparent from perusing the full family register. Although the Civil Code prescribes that in the case of an intestate death all of the children of the deceased will receive equal portions, an illegitimate child will only receive half of the portion of the legitimate children (Fukushima 1997: 13–27). As we shall see below, difficulties in handling children born through new reproductive technologies, and issues involving international partnerships and paternal recognition (ninchi) sometimes result in children being registered as illegitimate (if at all) when they can not be handled under the existing family registration system.

Divorce, widowhood and paternity

There are gendered differences in the date at which a divorce can become effective for male and female partners, in order to avoid indeterminacy in the paternity of any child born to a recently divorced woman. This demonstrates the primacy of the patriarchal family system, and the reliance of the Japanese legal system on formal rules in such matters as determining paternity. According to article 772 of the Civil Code, where a baby is born within 300 days of the end of a marriage it will be deemed to be the child of the former husband. Conversely, if the child is born more than 300 days after the end of a marriage (or the death of the husband) it will not be recognized as the child of the former husband or deceased husband (Bryant 1998: 221–41).

There have been moves to change this provision, but this has met with opposition from conservative forces. One divorced woman received different treatment from two different ward offices and different judgments from the Tokyo Family Court's Hachioji Branch and the Yokohama Family Court's Sagamihara Branch over whether she could register her baby as the child of her new partner (‘Courts divided over paternity’ 2009; Ito 2007).

Where a child has been born to a couple with one Japanese parent and one non-Japanese parent, if they divorce and the non-Japanese parent retains custody of the child, in order for the child to retain Japanese nationality it
will be necessary to create a new *koseki* for the child, for a non-Japanese person cannot be the head of a family register.

**Adoption**

Adoption (*yōshi engumi*) is regulated in the Civil Code. There are two kinds of adoption: ordinary adoption (*futsū yōshi engumi*) (often involving adult adoptees) and special adoption (*tōkubetsu yōshi engumi*). The names of the two kinds of adoption might be surprising to readers from Anglophone societies, where the adoption of children is seen as the usual form of adoption, with adult adoption being less prevalent. The converse is the case in Japan, where adult adoption is more usual. In 2006, 89,597 ‘ordinary adoptions’ were registered, and 27,884 adoptions were dissolved. Only 311 ‘special adoptions’ were registered (Ishii 2009: 180).

Ordinary adoption creates a legal relationship between the adoptee and the new family, but the legal ties and responsibilities of the birth parents remain in place so that, for example, the adoptee can still inherit property from the birth parents. If the adoptee is a minor, then the Family Court must approve the adoption. The adoptee’s family register will record both the adoptee’s birth parents and the adoptive parent(s).

Special adoption transfers all the rights and duties of parenthood from the birth parents to the adoptive parents. It is more restrictive than ordinary adoption in the categories of people who can adopt: they must be a married couple and both partners must adopt (unless one of them is a parent of the child); at least one of the adoptive parents must be over 25 and the other over 20; the child must be under six (except that foster parents may adopt a child up to the age of eight if they cared for the child before the age of six). Special adoption is specifically designed for the case of a child who does not have the care of a family (Bryant 1990; Hayes and Habu 2006: 3–5). This system was introduced in 1988 (Civil Code amended 1987, effective 1988). Before the introduction of special adoption, birth records were being falsified in some cases where an informal adoption would be achieved by registering a child who was born to someone other than the parents who registered the birth (Ahlefeldt 2012: 75), possibly in some cases to disguise an illegitimate birth. Ishii refers to such adoptions as ‘de facto adoptions’. Where the parent–child relationship has been challenged in such cases of ‘de facto adoption’, courts have tended to uphold the relationship, placing emphasis on the social relationship that has been built up between the parents and child (Ishii 2009: 190–91). Special adoption needs to be approved by the Family Court and the child’s birth parents must consent, except where they are deemed to be incapable or unfit to care for the child, or where the adoption is seen to be in the child’s best interests. The family register will record the decision of the Family Court to allow the special adoption to take place.

Under Japanese family law, marriage between those who have a sibling relationship through adoption is not legally prohibited. A brother and sister may be husband and wife as long as they do not share a birth parent, as in
the case when a son-in-law is adopted into the family (*muko-yōshi*) to carry on the family name and line. By contrast, marriage between an adoptive parent and child is prohibited, even if the adoptive relationship has been terminated (see articles 734 and 736 of the Civil Code and the explanation in Bryant 1990: 310–11). Reasons that have been advanced for clearly indicating special adoption on the family register are to prevent incestuous marriages by making it possible to keep track of birth parents and to make it possible to track genetic heritage for medical purposes.

**Adoption as a strategy in same-sex partnerships**

There is no recognition of same-sex partnerships, and no category of civil partnership in Japan, as has recently developed in various parts of the world. Nevertheless, many people in same-sex relationships have used the adoption system in order to create legal recognition for their partnerships (see Maree, Chapter 11 in this volume). (There is no way of tracking statistics of how many adult adoptions are undertaken for this purpose.) This strategy of adoption of same-sex partners (*yōshi engumi*) was also deployed under the pre-1945 family system in some well-known cases (Bryant 1990; Izumo and Maree 2000; Maree 2004). Adult adoption is not unusual in Japan, as noted above, for the adoption of an adult into a family as heir is a common way of perpetuating the family, its name and its property according to patriarchal and patrilineal principles. The adoption of adult heirs may facilitate carrying on a family business, or ensure that there will be family members to take responsibility for the care of aging relatives. This system of adult adoption has been adapted by some in same-sex relationships in Japan.

According to article 727 of the Civil Code, the relationship between an adopting parent and an adoptee ‘is the same relationship as between relatives by blood as from the day of the adoption’. According to article 792, ‘any person who has attained majority may adopt another’. The only restriction is stated in article 793, whereby ‘no ascendant or person of older age may be adopted’. The adoption system has allowed some same-sex partners to ensure that their partners (now adoptees) will have visiting rights when the partner is sick, will be able to make decisions concerning medical treatment and will be able to inherit property (see Maree, Chapter 11). The process of adoption is similar to that of marriage: the submission of documents to a local government office. The documents need to be stamped with the two parties’ official seals (*hanko*) in the presence of two witnesses. The adoptee will then be entered in the family register of the adopter. The dissolution of an adoptive relationship is administered in a similar fashion to divorce by mutual agreement. Only in the case of a dispute will this become a matter for the Family Court.

**Transgender parents**

Since the practice of sex change/gender reassignment operations has become prevalent, the logic of the family system has been revealed through the struggles
of transgendered individuals. These individuals came up against the family registration system and struggled to have their family register entry changed to fit their new societal identity (from male to female or female to male). This was first prohibited, then decided on a case-by-case basis, and finally resulted in the enactment of the *Sei Dōitsu Seijōgaisha Seibetsu Toriatsukai Tokurei Ho* (Law Concerning Special Rules Regarding the Sex of Individuals with Gender Identity Disorder, promulgated 2003, effective 2004). Article 3 of this Act allowed individuals who were recognized as suffering from gender identity disorder (GID) to change their gender in the family register, but only where they were unmarried and had no children. This also led to an amendment of the Family Register Law so that a new family register could be created for the individual to reflect their changed gender under the provisions of the Act. The original form of the Act revealed the primacy of the heteronormative family system. Only those who were not married and who did not have children could have their gender changed on the family register entry. The logic of these prohibitions is that allowing a married person to change their sex would result in a same-sex marriage, and that allowing a parent to change their sex would mean that a child might end up with two male parents or two female parents. The Act has recently been amended so that those who have children may change their gender on the family register after their children have reached adulthood (that is, twenty years old).

In recent developments, where a woman has married someone who has become male through gender reassignment, the Japan Society of Obstetrics and Gynecology (*Nihon Sanka Fujinka Gakkai*, hereafter JSOG) has stated that it will allow artificial insemination by donor sperm in the same way as other married couples. The Ministry of Justice then stated that it would not recognize such children as legitimate, even though in other cases the legal system recognizes the birth mother as mother and the mother’s husband as father, with no questions asked about genetic heritage (Brasor 2011). This has been tested in a recent legal case. A woman married someone who had undergone gender reassignment and changed their *koseki* entry to male. She became pregnant through artificial insemination by donor. When they tried to register the child in November 2009, two different ward offices refused to register the transgendered husband as father. They would have known that the husband had changed gender because such a change always leaves a record on the *koseki*. As of late 2012 the Tokyo Family Court upheld the decision of the local ward offices, and the child was still registered as illegitimate. This case reveals that the medical and legal establishments can sometimes be out of step, and that decisions within the legal system can be contradictory. The plaintiff in this case had been able to change gender on the *koseki* and to register a marriage but, in the case of a baby born through artificial insemination by donor, the marriage was treated differently from heteronormative marriages, where genetics is not brought into play (‘Court rejects family registry’ 2012; ‘Sei dōitsu shōgai’ 2012).
Adoption and surrogacy by same-sex partners

The legal treatment of those who have undergone gender reassignment in Japan suggests that it would be unlikely that the government or the courts would allow a baby to be registered as having two parents of the same sex. This means that the kinds of adoption arrangements, use of assisted reproductive technologies or surrogacy arrangements entered into by partners in same-sex relationships in other countries would be unlikely to be recognized in Japan at this stage. Special adoption is specifically restricted to adoption by married couples, and adoption of a non-Japanese child is a complicated process. A single person may adopt another adult but not undertake special adoption. In the hypothetical case where, for example, a woman had adopted her same-sex partner, that woman would be her daughter as far as the koseki is concerned. If the adoptive partner were then to bear a child, the child would be her partner’s sibling; if the adoptee were to bear a child, then the child would be the adoptive partner’s grandchild.

Adoption of children of non-Japanese nationality

Article 31 of the Act on the General Rules of Application of Laws (1898, revised 2006, effective 2007) states that ‘[w]here the national law of the child to be adopted requires as a condition for establishing the adoption the agreement or consent of the child or a third party, or the approval or any other decision by a public authority, this requirement must also be satisfied’ (translated in Anderson and Okuda 2006: 156). That is, the adopting parents will need to satisfy the requirements of both jurisdictions. When a child from overseas is adopted by a Japanese couple, the child does not automatically obtain Japanese nationality, but will carry a residence card (zairyū card) of their original nationality until they can be naturalized. (See below for some cases where children are effectively stateless because of this provision.) According to the Nationality Law, a child is Japanese if one of their parents is Japanese at the time of the child’s birth (article 2). Therefore the adopted child would need to undergo naturalization. Under an amendment to the Nationality Law in 1985, the spouse or child of a Japanese national can apply for naturalization after three years’ residence in Japan. The period of residency is five years in other cases (Ahlefeldt 2012: 77). In terms of international adoptions, Japan has moved from a ‘sending’ country in the immediate postwar period to a ‘receiving’ country in recent years, largely where the Japanese partner in an international marriage adopts the non-Japanese partner’s child (Tokotani, Kiyosue and Umezawa 2011: 19).

Children conceived through artificial insemination of donor sperm

It is estimated that more than 10,000 children have been born by means of artificial insemination of donor sperm in Japan since the first case in 1949.
The first child born in Japan through in-vitro fertilization (IVF) was in 1983. A total of 174,456 children were born through IVF between 1989 and 2006 (Ishii 2009: 181). The use of assisted reproductive technologies is not regulated through legislation but through the professional guidelines of the Japan Society of Obstetrics and Gynecology (JSOG). Issues to do with birth registration arise when parents go to the local ward office to register a birth. There is a small number of cases where issues concerning the registration of births achieved through artificial reproductive technologies have ended up in the courts, as we shall see below.

Where a child is born through the artificial insemination of donor sperm (or through in-vitro fertilization with donor sperm and the mother’s ovum), the child can be registered as the child of these parents with few problems. The legal system recognizes the birth mother as mother for the purposes of family registration and recognizes the birth mother’s husband as father. The JSOG does not recognize the use of in-vitro fertilization of an embryo using third-party donated ova. A Special Committee of the Health Science Council in 1998 recommended that a ‘child who is conceived and born to a woman as a result of reproductive treatment using donor sperm or embryos performed with the consent of that woman’s husband shall be deemed the husband’s child’ (translated in Ishii 2009: 181). Furthermore, the Ministry of Justice’s Committee on Legislation of the Parent–Child Relationship recommended that a ‘woman who gives birth to a child by means of medically assisted reproduction [MAR] shall be the mother of that child’ and that her husband ‘having consented to the MAR procedures, legally shall be the father of the child’ (translated in Ishii 2009: 186), but no legislation has been enacted on this issue, so birth registration will depend on the interpretation of the local ward office.

If a mother were to conceive using a donated ovum, she would probably be able to register the child as her own because the legal system recognizes the birth mother as mother. The law privileges the status of the birth mother over genetic inheritance, because the koseki law was framed at a time before the development of artificial reproductive technologies, when the birth mother was always self-evidently the mother of any child. The Japanese legal system values clarity and formal procedures, so that the husband is deemed to be the father of his wife’s children.

*Children conceived through artificial insemination of frozen sperm of a deceased father*

There have been cases where women have used the frozen sperm of a deceased husband in order to become pregnant. In several controversial cases it has not been possible to register these children as legitimate children of deceased fathers because the child was born more than 300 days after the death of the husband (Brasor 2006). Ishii reports on three cases: one where a wife in a common law marriage had a child after her husband’s death; one where three years had passed since the death of the parent; and one where the husband...
had agreed that the woman should give birth to his child after his death. In this last case the husband died in September 1999 and his wife gave birth to a son conceived through IVF with his frozen sperm in May 2001. She was unable to register the child as her husband’s son because more than 300 days had passed since his death. She then registered the child as her illegitimate son and sought posthumous affiliation. The Takamatsu High Court was willing to recognize the affiliation of the son, but this was quashed by the Supreme Court (Ishii 2009: 195).

**Children with a non-Japanese parent**

In the case of a child born from a relationship between a Japanese national and a non-Japanese national, the law is superficially gender-neutral (since its amendment in 1985) in terms of passing on nationality. Until the 1980s the provisions of the Nationality Law (kokusekihō) were explicitly patriarchal. Only men had the right to pass on Japanese blood through the *jus sanguinis* principle. In preparation for the ratification of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in 1985, the Nationality Law was revised so that both men and women could pass on nationality to their children. Nevertheless, there are still gendered aspects to the operation of this law. The necessity for the father to provide explicit recognition (*ninchi*) of his parentage has meant that it has been difficult for some non-Japanese mothers to claim Japanese nationality for their children. Furthermore, a child born out of wedlock between a Japanese father and a non-Japanese mother could, until recently, acquire Japanese nationality only if the father admitted paternity during the mother’s pregnancy, or if the couple married before the child turned twenty. Several court cases have revolved around children of Japanese fathers and non-Japanese mothers who have been left without Japanese citizenship, and the Nationality Law has been amended in order to deal with such situations. The Nationality Law has been revised so that a father can now recognize paternity even after the birth of the child. This is the consequence of a Supreme Court ruling of 4 June 2008 that the provision of the law on children born outside marriage was unconstitutional (‘Ruling slams unequal bias’ 2006; Kamiya and Matsutani 2008; ‘No paternity pranks’ 2009).

**Children born through surrogacy**

Surrogacy is not legally prohibited, but the JSOG has guidelines that advise medical practitioners against facilitating such procedures. Doctors who perform procedures banned by the JSOG risk losing their licence to practise medicine, and some physicians have lost their registration after undertaking such procedures. The Japanese Institution for Standardizing Assisted Reproductive Technology permits IVF with donated eggs from a friend or sister (Ishii 2009: 183). The Science Council of Japan (2008) has recommended legislating to prevent surrogacy where profit is involved, but as yet no legislation has been enacted.
In June 1998 it was announced that a member of the JSOG had facilitated a woman to give birth to a child conceived using her sister’s egg. In the same doctor’s practice 111 women conceived children through IVF with donor eggs, and 53 children had been born by September 2007. In four cases in the same practice, grandmothers (all over 55 years old) acted as surrogate mothers for their daughter’s children (Ishii 2009: 181). In 2009 King (2009: 190) reported that there had been ten documented cases of mothers carrying babies for daughters who had been unable to carry their own children. In such cases, the child would first be registered as the baby of its birth mother rather than its genetic mother, and the genetic mother would then need to adopt the child. The basis for legal motherhood is gestation, and the basis for legal fatherhood is the relationship with the child’s birth mother (Ahlefeldt 2012: 85). In 2009 the Himeji Branch of the Kōbe Family Court recognized special adoption of a child born through a surrogacy arrangement for the first time (‘awarded normal status’ 2009; Ahlefeldt 2012: 76).

Because surrogacy is not officially recognized and regulated in Japan, an increasing number of couples are going overseas to enter into surrogacy arrangements. Some states of the USA have chosen to regulate rather than prohibit surrogacy arrangements. Ishii (2009: 181) estimates that 100 Japanese children had been born by surrogate motherhood in the US by 2007. Others go to India or other places seeking to enter into surrogacy agreements. Birth registration is particularly difficult in these cases because of the Japanese legal convention that the birth mother will be registered as the mother on the koseki. These difficulties are then overlaid with the complications of determining nationality. Below I will consider some selected cases concerning issues with birth registration and their implications in more detail.

The Baby Andrew case

Article 2(iii) of the Nationality Law states that a child born in Japan with both parents unknown or both parents without nationality shall be a Japanese national. This principle was tested in the case of ‘Baby Andrew’ (also known as ‘Baby Andre’), who was born in 1991 of a woman (possibly Filipino) who disappeared without registering the baby’s birth and whose identity could not be determined. Andrew was adopted by a married couple of US nationality who were in Japan as missionaries. They tried to claim Japanese nationality for Andrew on the basis that both his birth parents were unknown. The Ministry of Justice refused to register Andrew as Japanese on the basis that his mother was not unknown, even though she had provided no identification papers at the hospital. Andrew was given an alien registration card as a Filipino citizen. The Philippine embassy, however, could not issue Andrew with a Filipino passport as they did not have any record of a passport for his mother. Andrew was thereby stateless. This eventually reached the Supreme Court where Andrew was granted Japanese nationality in 1995 (Taylor 1995; Curtin 2002; Steele 2004; Murphy-Shigematsu 2006: 88). Baby Andrew was
able to obtain Japanese nationality because the missionary couple were willing to take this all the way to the Supreme Court, with the support of Japanese lawyers. For most other such children, though, there may not be the same resources available, and few non-specialists have the necessary understanding of procedures for registration, acknowledgement of paternity, determination of nationality, naturalization and adoption.\(^7\)

The issue of nationality has taken on a further transnational dimension in campaigns for the recognition of the nationality of children of Japanese fathers and non-Japanese mothers born in other countries. One such group are children born of Japanese fathers during the Second World War. Others are the offspring of temporary liaisons between Japanese tourists or sojourners and local women. A small number of the offspring of Japanese soldiers have been successful in claiming Japanese nationality (Agnote 2008, 2009).

**The Mukai/Takada case**

It has been suggested that perhaps 100 or so couples have entered into surrogacy arrangements overseas. When the child is born, the parents are likely to have first obtained a birth certificate overseas in a jurisdiction that allows the genetic mother to be listed as the mother, even where the child has been born to a surrogate mother. They would then register the child on their return to Japan as their own child, in the hope that they would not be challenged to provide proof of birth (King 2009: 205).

One case involving overseas surrogacy has received extensive media attention, largely due to the celebrity status of the parents (the mother is actor Mukai Aki and the father is pro-wrestler Takada Nobuhiko). They are a married couple who had twins through surrogacy in the US state of Nevada in 2003, after Mukai was diagnosed with cancer and unable to bear her own children.\(^8\) The twins were born of a surrogate mother from fertilized eggs from the sperm and ova of Mukai and Takada. Nevada issued birth certificates that recognized the couple as the parents of the children. When they returned to Japan they tried to register the twins as their own children at the Shinagawa Ward Office, but Shinagawa took the position that a child could only be registered as the child of its birth mother. Because the couple were famous and Mukai’s medical condition had received publicity, there was no way that the couple could have pretended that Mukai had been the birth mother.\(^9\)

The couple took this to the Tokyo Family Court, which ordered Shinagawa to register the children, but Shinagawa appealed. The Supreme Court in March 2007 overruled the Tokyo decision which would have allowed the children to be registered. The Supreme Court’s decision hinged on the relationship between decisions in foreign jurisdictions and Japanese courts, and on the definition of the parent and child relationship in the Japanese Civil Code. Japanese courts will not recognize a decision in a foreign jurisdiction that is contrary to public policy in Japan (article 118 of the Japanese Code of Civil Procedure; Ahlefeldt 2012: 70). The Civil Code was, of course, framed
before the possibility of medically assisted surrogacy, and there was no precedent for dealing with a case where the birth mother was not the genetic mother. Because of the inability to register the children in the family register, they did not have Japanese nationality. As they were not registered as Mukai and Takada’s children they would not have been able to inherit property from Mukai and Takada.

The parents were later able to undertake special adoption so that the children would be included in their family register. This was complex, however. In the case of special adoption, the birth mother needs to agree to give up the child for adoption (unless the court decides that the child has not been cared for). The Nevada mother, however, had already relinquished all claims over the child in the surrogacy contract. Furthermore, in the case of adopting a non-Japanese child, the parents also need to meet the requirements of the overseas jurisdiction (Anderson and Okuda 2006: 156; ‘Top court: no registry’ 2007; Ahlefedlt 2012).

The case of Mukai and Takada, while difficult and complicated on their return to Japan, was relatively simple in terms of the surrogacy contract and the issuing of a birth certificate in the US because the State of Nevada has clear guidelines for surrogacy contracts. In another case, that of ‘Baby Manji’ who was born in India, there were problems on both the Indian and Japanese sides, compounded by the divorce of the Japanese couple just before the birth of ‘Baby Manji’. There were three ‘mothers’: the wife who entered into the initial surrogacy contract with her husband, the donor of the ovum which was fertilized with the father’s sperm, and the gestating mother.

The Baby Manji case

Yamada Ikufumi and Yamada Yuki travelled to India in late 2007. They entered into a surrogacy contract with Pritiben Mehta, who carried an embryo created from an ovum harvested from an anonymous Indian woman and the sperm of Yamada Ikufumi. In June 2008 the Yamadas divorced, and Manji was born to the surrogate mother on 25 July 2008. Yamada Ikufumi travelled to India alone. Because the Japanese system recognizes the birth mother as mother, and the birth mother’s husband as father, Yamada was unable to register Manji as his daughter with Japanese nationality. The Indian legal system does not recognize or regulate surrogacy, and contracting parents will usually adopt children born to surrogates. However, the Guardians and Wards Act of 1890 does not allow single men to adopt baby girls. This precluded the divorced Yamada Ikufumi from adopting baby Manji. Yamada then tried to obtain an Indian passport for Manji. The clinic was willing to certify that Yamada was the genetic father, but it was unclear who should be registered as mother, so Manji was without a birth certificate or a passport. With the support of lawyer Indira Jaisingh, Yamada appealed to the Indian government to allow documents to be issued, and Anand City issued a birth certificate which just showed Yamada as the father. When Yamada Ikufumi’s
visa expired, he returned to Japan and his mother, Yamada Emiko, travelled to India to look after Manji. She filed to be recognized as Manji’s grandmother and closest relative in India and requested custody of Manji to take her to Japan. A non-governmental organization then challenged the Yamadas’ claim, accusing the clinic of engaging in a ‘child trafficking racket’. The Indian Supreme Court granted temporary custody to the grandmother Yamada Emiko (Points, no date: 6). On 15 September the Solicitor-General advised the Supreme Court that the decision on Manji’s passport was up to the Union government, and the Rajasthan regional passport office issued an identity document, enabling Manji to travel to Japan. The document did not mention nationality, mother’s name or religion, and was good for just one trip to Japan. On 27 October of that year, the Japanese Embassy issued a one-year visa for Manji on humanitarian grounds.

Conclusions

The family in Japan is constantly changing. The legal system, however, attempts to codify the ideal family form through the Civil Code and the koseki system. The modern koseki system has a relatively short history, which can be split into two main periods: from 1872 to 1947, and from 1947 to the present. Before the codification of the Meiji Civil Code (completed after decades of controversy in 1898), there were diverse family forms in Japan, and considerable flexibility in the inclusion of (for example) illegitimate children. Where an heir could not be produced by a married couple, a husband might divorce his childless wife and remarry, or might include the child of a concubine in the family. In earlier historical times there was a phrase (now seen as objectionable and discriminatory) ‘hara wa karimono’ (the womb is borrowed), whereby women’s bodies were simply seen as vessels that carried babies for the purposes of the patriarchal and patrilineal family.

The Family Registration Law and the Meiji Civil Code attempted to fix a standardized family form for the whole nation. This was a monogamous stem family with inheritance based on the principles of patriarchy, patrilineality and primogeniture. This ideal form persisted until the revision of the Civil Code in 1947. The new family form was a relatively egalitarian nuclear family based on the model of a married couple with children. The features and limitations of this particular model of the family can be seen through mapping the system of birth registration, and paying particular attention to those situations where the system ‘fails’ to provide some children with birth registration, legitimate status or even nationality.

At the beginning of the twenty-first century, the family in Japan is in another stage of transformation. While most people still spend some stage of their life in a nuclear family (during their childhood or when they form their own family), the nuclear family with two parents and one or two children is no longer the prevalent form of household. The most prevalent form is actually the single person household (32.4 per cent of all households in 2010 according
to the Statistical Bureau of Japan 2012: 21–22), with increasing numbers of elderly single person households.

In this chapter I have looked at two kinds of situation where the current system of birth registration has come under strain: where children are born from relationships between parents of different nationalities and where children are born through assisted reproductive technologies. These case studies reveal that the assumptions behind the modern koseki system no longer accord with the diversity of current family forms. The inflexibility of the current koseki system and the reluctance of the Japanese government to regulate these new family forms results in some children not having the rights that should be guaranteed them under Japan’s obligations as a signatory to the UN Convention on the Rights of the Child. Current situations concerning surrogate birth, however, have uncomfortable echoes of earlier ways of ensuring the continuation of family lines. In feudal times, the continuation of the family line would be achieved through divorce and remarriage, concubinage and extramarital liaisons. Nowadays assisted reproductive technologies, surrogacy and fertility tourism are being resorted to, but without a legal framework to mediate the claims of children, parents, gestating mothers and donors of genetic material. One of the colloquial terms used to describe gestational surrogacy is karibara (literally ‘borrowed womb’), although the more neutral terms are dairi haha (surrogate mother) or dairi shussan (surrogate birth). The term karibara, with its echoes of earlier family practices, reminds us that the family is constantly being transformed, but legal change works on a much longer and slower temporal cycle.

Notes
1 For the major changes to the Civil Code and family law after the Second World War, see Mackie (2007, 2009).
2 Between the years of 1870 and 1882, the child of a concubine was recognized as a legitimate heir (Shimazu 1994: 87).
3 This would allow a father to enter a child born to a woman other than his wife in his family register, but the child would be illegitimate and only entitled to half the inheritance allocated to legitimate siblings. The Supreme Court ruled in September 2013 that it was discriminatory to provide different inheritance portions to legitimate and illegitimate children, but the Civil Code had not yet been amended at the time of writing.
4 Only in the case of an international marriage is it possible for the husband and wife to have different family names.
5 Jikei Hospital in Kumamoto City set up a so-called ‘baby hatch’ (akachan posuto) in 2006 where a mother can leave a newborn child anonymously to be cared for by the organization. Since then a total of 83 babies have been deposited there (‘Up from the “baby post”’ 2012).
6 The Japan Society of Obstetrics and Gynecology maintains a register of IVF procedures. It reported that 19,587 babies were born as a result of IVF in 2006, and a total of 174,456 such babies were born between 1989 and 2006 (Ishii 2009: 175).
7 At the time that the Baby Andrew case was being argued, the problem of stateless children was increasingly being recognized. In 1990 there were 74 children in Japan under the age of four who were known to be stateless; by 1992 there were 138 (Steele 2004: 189).
Ahlefeldt explains that ‘Nevada allows a married couple to enter a surrogacy contract, provided the contract specifies the rights of each party, including parentage of the child, custody of the child if circumstances change, and the responsibilities and liabilities of each party’ (2012: 68).

It is tempting to speculate that if a birth certificate had been issued in Nevada with Takada as father and the gestating mother as mother, then Takada could have registered the children as his own in his koseki, and passed on his nationality, but they would have been illegitimate, for Takada was not married to the birth mother.

In another case involving surrogacy, a couple entered into a surrogacy arrangement overseas, and returned in 2004 with a birth certificate listing them as the parents. However, because the woman attempting to register as the baby’s mother was in her fifties, the local government became suspicious and refused to register her as the child’s mother. This was upheld by the Osaka High Court in 2005, which affirmed that only the birth mother could be registered as the mother (Ahlefeldt 2012: 74).

Apparently the wife had included a clause that the husband would care for the child if the couple were to separate (Points, no date: 4).

**References**


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