

**Less than Family:  
Surrogate Birth and Legal Parent-Child Relationships in Japan**

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INTRODUCTION

A beautiful Japanese actress and her pro-wrestler husband lose a baby when the actress discovers she has uterine cancer. The actress also loses her womb to the cancer treatment and can never carry a child. Hoping to have a genetic child with her husband, she has her ova preserved. After the actress beats the cancer, the couple find a woman in the United States willing to give birth to a child for them, conceived using their ova and sperm. To their great joy twin boys are born nine months later. The United States' courts recognise the children as the couple's and they return to Japan with their twins to live happily ever after. Unfortunately, the Japanese government disagrees and refuses to register the twins as the couple's natural children. The couple fight the government's decision to Japan's highest court and lose.

This is the stuff of sensational news reporters' dreams. It is also a serious legal issue. Surrogate birth arrangements, such as the one entered into by Aki Mukai, the Japanese actress, and her husband, Nobuhiko Takada, undermine previously uncontested assumptions about the essence of parenthood.

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Surrogate birth is an arrangement where one woman agrees to carry a baby and give him or her to another person or couple to raise as their own. Advances in reproductive technology allow conception to take various forms, including using the ovum of the woman who gestates the child, fertilised with the intending father's sperm; creation of an embryo, using the intending mother's ovum and intending father's sperm, to implant in the birth mother's womb; or creation of an embryo, using ovum or sperm, or both, donated by a third party. These possibilities raise questions about whether the genetic parents, the birth mother or the intending social parents are the legal parents of children born through surrogacy.

Japan has no legislation specifically regulating surrogate birth and the legal relationships between genetic donors, birth mothers, intending social parents and children. This article evaluates the effect of Japan's lack of regulation on participants in surrogate birth, particularly the child and the intending social parents. I analyse current Japanese law on parent-child relationships to critique the ideology and assumptions underlying it. I then explore the legal and socio-legal effects of Japan's approach on participants in surrogate birth arrangements.<sup>1</sup>

I use the terms *genetic* mother and father, who donate ova and sperm; *birth* mother, who carries and gives birth to the child; and *social* mother and father, who raise the child,<sup>2</sup> to avoid value-laden terms which suggest that only certain roles, such as gestation, make a person a 'real' parent. I use 'surrogate birth' or 'surrogacy' to describe the arrangement. 'Surrogate birth' reflects the parties' purpose, that the birth mother substitutes for the social mother in giving birth, and is a direct translation of the most common Japanese term '*dairi shussan*'.

Many academics in Japan have written about whether the Japanese government should allow surrogate birth. However, surrogacy has become an international business, and the number of people travelling to countries such as the United States and India to arrange surrogacy is increasing.<sup>3</sup> Even if the Japanese government prohibits surrogate birth in Japan, couples may still travel overseas to arrange surrogate birth. Therefore, Japan must deal with the legal relationship between the intending social parents and the child.

Legislation and courts have not traditionally referred to the child's best interests explicitly as a legal standard for determining parentage. However, the child's best interests is the standard for other legal decision-making in Japan about who raises a child, such as

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1 Issues I discuss are relevant to homosexual couples and single people, but specific analysis is outside this paper's scope. In Japan, publicised cases, existing debate and legal literature relate to heterosexual couples.

2 Terms from S.S. TANGRI/J.R. KAHN, Ethical Issues in the New Reproductive Technologies: Perspectives from Feminism and the Psychology Profession, in: Professional Psychology: Research and Practice 24 (3) (1993) 272.

3 M. OGINO, *Dairi shussan no imi suru mono: 'Sakushu' to 'jiko kettei' no aida de* [Women's Exploitation or Autonomy?: Controversy over Surrogate Birth], in: Nihon Gakuhō 28 (2009) 25.

adoption and parental responsibility following divorce.<sup>4</sup> The normative assumption underlying this article is that while the child's best interests may not be the explicit standard, the legal rules on parentage should not operate against a child's best interests.

Advancements in reproductive technology are outpacing the law, and many countries are struggling to respond appropriately to surrogate birth.<sup>5</sup> The way Japan deals with surrogate birth is important to other countries as Japan provides an example of problems with determining parent-child relationships according to existing legal rules. There is almost no critical legal scholarship on any aspect of Japanese family law, including surrogate birth. This article has two aims: first, to contribute to knowledge about Japanese family law through examination of one contemporary issue; and second, to provoke critical examination of assumptions underlying legal standards for parent-child relationships and how they affect participants in surrogate birth in other countries struggling with the issue.

The methodology of this paper is to analyse the text of Japanese legislation and cases. I review English and Japanese academic literature on surrogate birth, Japanese family law, and the social context of family in Japan to obtain evidence about the legal and socio-legal effect of parentage rules. Dolgin's critique of legal responses to surrogacy in the United States provides the theoretical framework for my critique of Japanese legislation and cases.<sup>5a</sup> Feminist theory informs my argument to some extent. Most sources relating specifically to surrogate birth in Japan are Japanese and the translations are my own unless a translation is specifically cited.

Section I introduces Aki Mukai's case and Japanese laws governing parent-child relationships to provide contextual background and explain legal differences between adopted and natural children. Section II develops Dolgin's critique of the modern family to create a theoretical framework for analysing Japanese law. Then, the framework is applied to Japanese law to contend that legal standards for parenthood are inconsistent and rely on unsupported assumptions. Section III examines law relating to the Japanese family register, the *koseki*, to show the social effect of legal rules on parent-child relationships. Section IV analyses the implications of the previous three chapters to argue that Japanese law on parentage has negative consequences for participants in surrogate birth. I conclude that current Japanese law on parent-child relationships is not in the best interests of participants in surrogate birth.

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4 H. ODA, *Japanese Law* (Oxford 1999) 385, 387.

5 R. COOK / S. DAY SCLATER / F. KAGANAS, *Surrogate Motherhood: International Perspectives* (Oxford 2003) 4-5.

5a See *infra* note and text accompanying note 78.

## I. LAW ON SURROGATE BIRTH AND PARENT-CHILD RELATIONSHIPS IN JAPAN

Since 2000 the Ministry of Health, Labour and Welfare has published several reports investigating how to regulate surrogacy in Japan. In 2006 the Minister of Justice and the Minister for Health, Labour and Welfare tasked the Science Council of Japan with investigating surrogate birth. In April 2008 the Science Council of Japan recommended in principle legal prohibition of surrogate birth.<sup>6</sup> However, the Science Council acknowledged that even if law prohibits surrogacy in Japan, parents may still arrange a surrogate birth overseas, so the government needed to clarify the child's legal status.<sup>7</sup> The Science Council recommended that Japanese law should recognise the birth mother as the legal mother and establish parenthood between the social parents and child only by formal adoption.<sup>8</sup> As of 2010, the Japanese government still has not enacted any legislation regulating surrogacy.

Since the first publicised surrogate birth in Japan in 2001, there have been very few publicised births and only two court cases relating to surrogacy.<sup>9</sup> The Japan Society of Obstetrics and Gynaecology published guidelines prohibiting surrogacy, although some doctors still assist with surrogate births.<sup>10</sup> However, possibly more than 100 Japanese couples have had children through surrogate births overseas.<sup>11</sup> The Ministers requested the Science Council's report because of the public controversy about two court judgments relating to parents who wanted to register children, born through surrogate birth overseas, as their natural children. This section examines the most famous case on surrogacy, Aki Mukai's case, and elucidates current law on natural parent-child relationships and adoption.

### 1. *Aki Mukai's Case*

The introduction to this article relates the circumstances of Aki Mukai's case. Mukai and Takada concluded a surrogacy contract with a couple in Nevada in 2003. 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.<sup>12</sup> A person identi-

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6 SCIENCE COUNCIL OF JAPAN, ASSISTED REPRODUCTIVE TECHNOLOGIES REVIEW COMMITTEE, *Issues Related to the Assisted Reproductive Technologies Centered on Surrogate Pregnancy: Toward a Social Consensus* (2008) 39, available at <http://www.scj.go.jp/ja/info/kohyo/pdf/kohyo-20-t56-1e.pdf> (last retrieved on 27 March 2010).

7 *Ibid.*, 30.

8 *Ibid.*

9 H. KUMAGAI / S. KAMATA, *Gaikoku ni okeru dairi shussan to wagakuni no kōjo* [Surrogate birth overseas and public policy in Japan], in: *Okinawa Hōgaku* 38 (2009) 51.

10 SCIENCE COUNCIL OF JAPAN, *supra* note 6, 1.

11 *Ibid.*

12 Nevada Revised Statutes ch 126.045(1) (2007).

fied as an intended parent in a surrogacy contract ‘must be treated in law as a natural parent in all circumstances’.<sup>13</sup>

In November 2003 the American birth mother gave birth to twin boys conceived using Mukai’s ova and Takada’s sperm. Mukai and Takada applied to the Nevada courts for a declaration that they were the children’s legal and genetic parents. The court ruled that the surrogacy contract fulfilled the statutory conditions and ordered relevant government authorities to issue birth certificates recording Mukai and Takada as the twins’ legal and genetic parents.<sup>14</sup> Within weeks of the Nevada court’s decision, Mukai and Takada returned to Japan and submitted the birth certificates to the Office of the Mayor of Shinagawa in Tokyo to have the twins registered as their natural children on the Japanese Family Register, the *koseki*. Unlike common law countries, such as Australia, where a privately held birth certificate is the authoritative legal status document, in Japan the entry into the publicly maintained Family Register gives legal status and Japanese nationality to a person.<sup>15</sup> Shinagawa refused to register the children as Mukai and Takada’s natural children because Mukai was not the birth mother. Mukai and Takada applied to the Tokyo Family Court for an order that Shinagawa record the children as Mukai and Takada’s natural children.

The Tokyo Family Court agreed with Shinagawa in refusing registration on the grounds that Mukai had not given birth to the children.<sup>16</sup> Mukai and Takada appealed to the Tokyo High Court. The Tokyo High Court quashed the Family Court’s decision and ordered Shinagawa to register the children as Mukai and Takada’s natural children.<sup>17</sup> Shinagawa then appealed to the Supreme Court.

The High Court and the Supreme Court did not base their decisions on whether domestic Japanese law allows the establishment of a natural parent-child relationship between the social parents and the child in a surrogate birth; both courts held Japanese law does not.<sup>18</sup> Nor were the children’s best interests the explicit standard for their decisions. Rather, the courts based their decisions on a question of private international law, that is, whether Japanese courts should enforce in Japan a foreign judgment establishing

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13 Nevada Revised Statutes ch 126.045(2) (2007).

14 Nevada Revised Statutes ch 126.161 (2007).

15 S. NINOMIYA, *Kazoku to hō: Kojin-ka to tayō-ka no naka de* [Family and the Law: Between Individualisation and Diversification] (Tokyo 2007) 2.

16 Tokyo Family Court, 30 November 2005, *Minshū* 61, 658.

17 Tokyo High Court, 29 September 2006, in: *Hanrei Jihō* 1957 (2007) 20; Engl. transl.: Takada and Mukai v Office of the Mayor of Shinagawa, in: *The Japanese Annual of International Law* 50 (2007) 240.

18 Supreme Court, 23 March 2007, *Minshū* 61, 619; Engl. transl.: Office of the Mayor of Shinagawa v Takada and Mukai, in: *The Japanese Annual of International Law* 51 (2008) 554; see an extract of the Tokyo High Court decision in the full English translation of the Supreme Court decision: Office of the Mayor of Shinagawa v Takada and Mukai, 2006 (Kyo) No. 47, 5, available at <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo..No..47.html> (last retrieved on 10 July 2011).

a parent-child relationship between the social parents and the child born through surrogate birth. Article 118 of the Japanese Code of Civil Procedure<sup>19</sup> provides:

A final and binding judgment rendered by a foreign court shall be effective only where it meets all of the following requirements:

- (i) The jurisdiction of the foreign court is recognized under laws or regulations or conventions or treaties.
- (ii) The defeated defendant has received a service ... of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service.
- (iii) The content of the judgment and the court proceedings are not contrary to public policy in Japan.

The judgments in Mukai's case depended on whether the court found that recognising the Nevada court's decision violated Japanese domestic public policy under Article 118 (iii). However, assumptions about children's best interests underlie both decisions.

The Tokyo High Court determined that Mukai's surrogate birth arrangement did not violate the Ministry of Health, Labour and Welfare's six basic principles for prohibiting surrogate birth. The principles are:

1. to prioritise children's best interests;
2. not to treat people merely as a means of reproduction;
3. to consider safety carefully;
4. to eliminate eugenics;
5. to eliminate commercialism; and
6. to protect human dignity.<sup>20</sup>

The High Court also relied on the following considerations:

1. The children were genetically related to Mukai and Takada.
2. Surrogate birth was the only way for Mukai and Takada to have a genetic child.
3. It was in the children's best interests that Mukai and Takada were recognised as their legal parents because they had cared for the children since birth and desired to raise them, while the birth mother and her husband did not.

19 *Minji soshō-hō*, Law No. 109/1996 as amended by Law No. 95/2007; Engl. transl. available at <http://www.japaneselawtranslation.go.jp> (last retrieved on 10 July 2011).

20 MINISTRY OF HEALTH, LABOUR AND WELFARE, HEALTH SCIENCES COUNCIL, COMMITTEE ON ASSISTED REPRODUCTIVE TECHNOLOGY TREATMENT, *Seishi, ranshi, hai no teikyō nado ni yoru seishoku hojo iryō seido no seibi ni kansuru hōkoku-sho* [Report on the Maintenance of the System of Assisted Reproductive Treatment Using Donor Sperms, Eggs and Embryos] (2003), available at <http://www.mhlw.go.jp/shingi/2003/04/s0428-5a.html#2> (last retrieved on 3 July 2011); see also the principles listed in an earlier report published in English: MINISTRY OF HEALTH, LABOUR AND WELFARE, HEALTH SCIENCES COUNCIL, SPECIAL COMMITTEE ON MEDICAL TECHNOLOGY FOR REPRODUCTIVE TREATMENT ASSESSMENT SUBCOMMITTEE FOR ADVANCED MEDICAL CARE, Report on Ideal Reproductive Treatment Using Donor Sperms, Eggs and Embryos (2000), available at <http://www.mhlw.go.jp/english/wp/other/councils/00/2.html> (last retrieved on 3 July 2011).

Therefore, the court held that the Nevada court's judgment did not violate Japanese public policy in the particular circumstances of Mukai's case.<sup>21</sup>

The Supreme Court overturned the High Court's decision and ruled unanimously that the Nevada court's judgment breached Japanese public policy. The Supreme Court ruled that a foreign judgment contravenes Japanese public policy if the judgment involves a foreign legal system that is incompatible with the core values and fundamental principles of Japan's legal structures.<sup>22</sup> The Supreme Court held:

1. The natural parent-child relationship relates to the core values and fundamental principles of Japanese laws on personal status because it is the basis for various relationships in social life and influences the child's best interests significantly. Standards for recognising a natural parent-child relationship should be unambiguous and uniform. Therefore, foreign judgments recognising a parent-child relationship in cases not recognised by the Civil Code are contrary to public policy in Japan.<sup>23</sup>

2. The Civil Code adopts blood relationship as the standard for determining a parent-child relationship and when it was enacted a woman who gave birth was always genetically related to the child. Therefore, the Civil Code implies that birth is the basis for establishing a mother-child relationship.<sup>24</sup>

The Nevada court's judgment was incompatible with the fundamental principles or fundamental philosophy of the rules of law in Japan because the Japanese Civil Code only recognises a mother-child relationship where the woman gave birth to the child.

As a result, Mukai and Takada's children had American citizenship and passports, and lived in Japan as foreign residents in the custody of Japanese citizens, but did not have a legal parent-child relationship with Mukai and Takada. According to Aki Mukai's blog, Mukai and Takada were able to establish a parent child relationship with the child-

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21 Tokyo High Court, 29 September 2006, in: Hanrei Jihō 1957 (2007) 20; Engl. transl.: Takada and Mukai v Office of the Mayor of Shinagawa, in: The Japanese Annual of International Law 50 (2007) 239-240.

22 Supreme Court, 23 March 2007, Minshū 61, 619; Engl. transl.: Office of the Mayor of Shinagawa v Takada and Mukai, in: The Japanese Annual of International Law 51 (2008) 553.

23 Japanese scholars argue that this ruling is too broad and negates the purpose of having a law to allow enforcement of foreign judgments in Japan: see, S. HAYAKAWA, *Gaikoku hanketsu no shōnin to kōjo: Gaikoku-jin dairi-haha ga shussan shita ko o dairi shussan o irai shita nihon-jin shufu ga jisshi toshite todokederu koto no kahi* [Approval of foreign court decisions and public policy: The propriety of the commissioning parents registering a child born by a foreign surrogate mother as their natural child], in: Hōritsu No Hiroba 61 (3) (2008) 62; T. HAYASHI, *Dairi shussan ni yoru oyako kankei no seiritsu to gaikoku saiban no shōnin* [Establishment of Parent/Child Relationship in Surrogate Births and Approval of Foreign Court Decisions], in: Hanrei Taimuzu 59 (4) (2008) 42.

24 Supreme Court, 23 March 2007, Minshū 61, 619; Engl. transl.: 2006 (Kyo) No. 47, 8, available at <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo-.No.47.html> (last retrieved on 10 July 2011).

ren using special adoption a few years later.<sup>25</sup> The next section explains Japanese law on parent-child relationships.

## 2. *Natural Parent-Child Relationships*

The Civil Code establishes two types of legal parent-child relationship in the sections entitled ‘Natural Children’ and ‘Adoption’. References in this article to ‘natural child’, ‘natural parents’ or ‘natural parent-child relationship’ refer to the legal relationship under the Civil Code.

There are two methods for establishing a natural parent-child relationship, by presumption of legitimacy and by affiliation. Article 772 (1) of the Civil Code<sup>26</sup> provides that a child conceived by a wife during marriage, or born within 200 days after marriage or 300 days after divorce, shall be presumed to be a child of her husband. This presumption causes problems for divorced women who conceive children with new partners. If the child is born within 300 days of the divorce, the government will not register anyone other than the previous husband as the father.<sup>27</sup> This illuminates a difference between Japan, a civil law country, and common law countries such as Australia. In Japan, the government presumes that the information recorded on the Family Register, rather than the birth notification signed by the doctor, is authoritative. Australia also has a presumption of legitimacy,<sup>28</sup> but it is one of several presumptions relating to parentage, including a presumption that a person is a parent if their name is entered in the register of births as a child’s parent.<sup>29</sup> In Australia, more than one presumption may apply,<sup>30</sup> so the presumption of legitimacy does not exclude registration of the genetic father on a child’s birth certificate. The Japanese government is more concerned with the ‘formalistic in-

25 A. MUKAI, *Mukai Aki burogu* [Mukai Aki Blog], *Yatto, yatto iemasu* [Finally, finally I can say], 22 April 2009, available at <http://www.mukaiaki.com/akiblog/?id=1240412011> (last retrieved on 12 September 2011).

26 *Minpō*, Law No. 89/1896 as amended by Law No. 78/2006; Engl. transl. available at <http://www.japaneselawtranslation.go.jp> (last retrieved on 9 July 2011).

27 There is great public controversy over this problem, because the government’s decision means the child is not registered in the Family Register and cannot get medical, education and social welfare benefits or passports. A change to administrative rules allows registration of children conceived after divorce on the new husband’s Family Register, assisting about 10 percent of children affected by the rule, and allows issue of passports for children without a Family Register: NINOMIYA, *supra* note 15, 3-5; “Ruling Bloc Puts Antiquated – Paternity Rule on the Backburner”, *The Japan Times Online*, 14 April 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20070414a6.html> (last retrieved on 3 July 2011); “Passports Due for Kids Caught up in Japan’s 300 Day-Rule”, *The Japan Times Online*, 25 May 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20070525b1.html> (last retrieved on 3 July 2011).

28 *Family Law Act 1975* (Cth) s 69P(1).

29 *Family Law Act 1975* (Cth) s 69R.

30 The presumption that appears most likely to be correct prevails: *Family Law Act 1975* (Cth) s 69U(2).

tegrity' of the Family Register than the substance of relationships between parent and child in reality.<sup>31</sup> In Japan the only way to rebut the presumption of legitimacy is for the previous husband to obtain a court order.<sup>32</sup>

Affiliation ensures that the Family Register accurately records the parentage of certain children born out of wedlock. Article 779 states that 'a father or a mother may affiliate his/her child out of wedlock.' Parents can affiliate children by submitting a notice under the Family Registration Act, or by will.<sup>33</sup> However, affiliation does not apply if the birth mother is married.<sup>34</sup>

The Supreme Court in Mukai's case relied on the word 'conceived' (*kaitai shita*) in Article 772 (1) to hold that, although there is no specific provision establishing mother-child relationships, the Civil Code implies the birth mother is the legal mother.<sup>35</sup> Although Article 779 specifically provides that a mother may affiliate her child, the Supreme Court held in 1962 that Japanese law determines the mother of a child by birth, not affiliation.<sup>36</sup> However, the child in that case was born in 1917, well before advances in reproductive technology. The woman attempting to affiliate the child was the birth and genetic mother so the court did not need to consider whether women other than the birth mother can establish legal parenthood through affiliation.

Commentators suggested that Mukai might have relied on Article 779 and submitted an application for affiliation.<sup>37</sup> The Supreme Court did not explicitly consider whether Mukai could establish a natural parent-child relationship with the children through affiliation but did approve the 1962 decision. Therefore, it is unlikely the government would accept an affiliation notification from a social mother in surrogate births.

Establishing a natural parent-child relationship under the Civil Code gives a child registration on the parents' Family Register, a mutual duty to support their parents, inheritance rights, and Japanese nationality.<sup>38</sup> The parents have an obligation to care for and educate the child.<sup>39</sup> The legal disadvantages to Mukai's children of the court's refusal to register them as natural children include not having Japanese nationality and

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31 C.P.A. JONES, Judges Fill the Gaps in Japan's Family Law, in: The Japan Times Online, 26 January 2010, available at <http://search.japantimes.co.jp/cgi-bin/fl20100126zg.html> (last retrieved on 9 July 2011).

32 Arts. 774, 775 Civil Code; ODA, *supra* note 4, 386.

33 Art. 781 Civil Code.

34 ODA, *supra* note 4, 386.

35 Supreme Court, 23 March 2007, Minshū 61, 619; Engl. transl.: Office of the Mayor of Shinagawa v Takada and Mukai, in: The Japanese Annual of International Law 51 (2008) 554.

36 Supreme Court, 27 April 1962, Minshū 16, 1247.

37 *Jisshi hantei de dai-konran: 'Kakure dairi shussan' ga makari to'oru saishin jijō* [Great Disorder over Real Children Decisions: The Latest Situation, where 'Hidden Surrogate Birth' Goes Unchecked], in: Themis 16 (5) (2007) 105.

38 Art. 877 (1) and 887 (1) Civil Code; Art. 2 (1) *Kokuseki-hō* (Nationality Act), Law No. 147/1950 as amended by Law No. 88/2008; Engl. transl. available at <http://www.japaneselawtranslation.go.jp> (last retrieved on 9 July 2011).

39 Art. 820 Civil Code.

having no entitlement in intestacy to a share of Mukai and Takada's undoubtedly large wealth. Beyond the legal disadvantages, there are social disadvantages of non-registration, which Section III discusses.

The number of documented surrogate births is small in Japan because many Japanese couples arrange surrogate birth overseas and falsely register the child as their natural child in Japan. India and the United States allow birth certificates recording the commissioning couple as the parents, so these couples can register the child on the Family Register in Japan as their natural child, born overseas, by submitting this birth certificate and not declaring the surrogacy.<sup>40</sup>

The only Japanese judgment about surrogacy other than Mukai's case related to a couple who arranged a surrogate birth in the United States and attempted to register the child as their natural child in Japan in 2004. The wife was in her fifties, which caused the government to investigate the circumstances of birth. When the government discovered the surrogacy, it refused to register the child as the couple's natural child.<sup>41</sup> The Osaka High Court upheld the government's decision, finding that Japanese law only recognises a parent-child relationship where the mother has given birth to the child.<sup>42</sup>

Mukai publicised her cancer treatment, attempts to find a birth mother and the successful surrogate birth on television, her blog and in several books.<sup>43</sup> Her fame means she probably could not register the twins as natural children by hiding the surrogacy. Mukai and Takada attempted to establish a natural parent-child relationship rather than adopting the children. The next section explains the law governing adoptions.

### 3. Adoption

There are two types of adoption under the Civil Code: ordinary adoption and special adoption. Ordinary adoption is a private contractual arrangement between the parties.<sup>44</sup> The law merely requires the parties to apply for registration on the Family Register to create the adoption legally.<sup>45</sup> Additionally, if the adopted child is a minor, the Family

40 H. ITŌ, *Indo ni okeru dairi shussan no genjō to shusshō-ko no hōteki toriatsukai* [The status of surrogate birth in India and the child's legal treatment], in: *Koseki Jihō* 631 (2008) 29-30.

41 KUMAGAI / KAMATA, *supra* note 9, 56.

42 Osaka High Court, 20 May 2005, in: *Hanrei Jihō* 1919 (2006) 107.

43 My title, 'Less than Family' is a translation of the title of A. MUKAI's book: *Kazoku miman* (Tokyo 2007), see also: A. MUKAI, *Puropōzu: Watashitachi no kodomo o unde kudasai* [Please give birth to my child] (Tokyo 2002); *Aitakatta: Dairi shussan to iu sentaku* [The choice called surrogate birth] (Tokyo 2004); *Aitakatta: Dairi shussan e no chōsen* [The challenge of surrogate birth] (Tokyo 2007); Mukai Aki Official Website, available at <http://www.mukaiaki.com/home.html> (last retrieved on 9 July 2011); P. BRASOR, Entertaining the Idea of Surrogate Mums, in: *The Japan Times Online*, 1 February 2004, available at <http://search.japantimes.co.jp/cgi-bin/fd20040201pb.html> (last retrieved on 9 July 2011).

44 T.L. BRYANT, Sons and Lovers: Adoption in Japan, in: *American Comparative Law Journal* 38 (1990) 303.

45 Arts. 799, 739 Civil Code.

Court must approve the adoption.<sup>46</sup> The effect of ordinary adoption is that the child has a legal parent-child relationship with the adoptive parents, including mutual rights to inheritance and support.<sup>47</sup>

Importantly, ordinary adoption does not sever the legal relationship with the natural parents, because adoptees may succeed to both their adoptive parents' and their natural parents' estate.<sup>48</sup> The child's Family Register records both the natural parents' names and the adoptive parents' names.<sup>49</sup>

Ordinary adoption is a private contractual arrangement, with little court supervision and no minimum age gap between adopter and adoptee<sup>50</sup> because in Japan adoption has traditionally been used to adopt adults.<sup>51</sup> Common uses of ordinary adoption in Japan include adoption of sons-in-law to ensure succession of the family name or business; adoption of extra-marital lovers, including adoption of same-sex lovers as an alternative to marriage;<sup>52</sup> and adoption of heirs to reduce inheritance tax.<sup>53</sup> The Civil Code allows rescission and dissolution of ordinary adoption on similar grounds to rescission and dissolution of marriage because the government designed the provisions for adult adoptees capable of protecting themselves.<sup>54</sup>

In 1988 the government introduced special adoption into the Civil Code to allow legally 'a full emotional adoption'.<sup>55</sup> A factor motivating the government was the discovery that doctors were falsifying birth notifications to allow adoptive parents to register an adoptive child as their natural child on the Family Register.<sup>56</sup> This suggested the necessity of provisions for adoptive parents who wanted to adopt to 'duplicate the biologically based parent-child relationship'<sup>57</sup> rather than for the customary pragmatic reasons.

Special adoption applies to children under six and extinguishes the legal relationship with the natural parents.<sup>58</sup> Special adoption has more stringent requirements including that the adoptive parents must be a married couple, at least one of whom is 25 years or

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46 Art. 798 Civil Code.

47 Arts. 809, 820, 877, 887(1) Civil Code.

48 BRYANT, *supra* note 44, 322.

49 Art. 13 *Koseki-hō* (Family Registration Act), Law No. 224/1947 as amended by Law No. 53/2011.

50 Art. 793 Civil Code.

51 BRYANT, *supra* note 44, 303.

52 V. MACKIE, Embodiment, Citizenship and Social Policy in Contemporary Japan, in: Goodman (ed.), *Family and Social Policy in Japan: Anthropological Approaches* (Cambridge 2002) 210-211.

53 BRYANT, *supra* note 44.

54 *Ibid.*, 333.

55 P. HAYES / T. HABU, *Adoption in Japan: Comparing Policies for Children in Need* (London 2006) 3-4.

56 *Ibid.*

57 BRYANT, *supra* note 44, 301.

58 Arts. 817-2 (1), 817-5, 817-9 Civil Code.

older and the other is 20 years or older.<sup>59</sup> Adoptive parents must apply to the Family Court and the court may only order special adoption where the child's natural parents consent, and the natural parents are incapable or unfit to care for the child or there are other circumstances that make special adoption especially necessary for the child's best interests.<sup>60</sup> The adoptive parents' Family Register records the specially adopted child like a natural child with only a slight difference. Section III explains the significance of this.

The judges in Mukai's case suggested that she and Takada met the conditions for special adoption.<sup>61</sup> Mukai and Takada decided not to specially adopt because the American birth mother would have to consent and their surrogacy contract specified that she did not have any legal rights or obligations as a mother.<sup>62</sup> It is doubtful whether social parents of surrogate birth children can establish special adoption in practice because courts interpret the requirements very strictly.<sup>63</sup> The natural parents' lack of intention to raise the child is not generally enough to satisfy the requirements that the natural parents are incapable or unfit to care for the child or special adoption is especially necessary for the child's interests.<sup>64</sup> Courts tend to refuse applications for special adoption because it severs the relationship with the natural parents.<sup>65</sup> In 2009 the Japanese courts allowed special adoption of a surrogate birth child for the first time.<sup>66</sup> Umezawa argues that courts refused applications by other couples because granting special adoption amounts to encouraging surrogate birth, which the Japanese government opposes.<sup>67</sup> An added difficulty for couples arranging surrogate birth overseas is that Japanese law requires couples adopting children born overseas to adopt the child in the child's country of nationality as well as in Japan.<sup>68</sup>

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59 Arts. 817-3 (1), 817-4 Civil Code.

60 Arts. 817-6, 817-7 Civil Code.

61 Supreme Court, 23 March 2007, Minshū 61, 619; Engl. transl.: 2006 (Kyo) No. 47, 11, 14, available at <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo-.No.47.html> (last retrieved on 10 July 2011).

62 K. SAIGUSA, *Dairi shussan ni okeru boshi kankei: Iwayuru Mukai Aki kēsu no saikō-sai kettei* [Mother-Child Relationship in Surrogate Births: The Supreme Court Decision in the So-Called Mukai Aki Case], in: *Hōgaku Seminā* 52 (8) (2007) 5.

63 T. NAKAGAWA, *Tokubetsu yōshi engumi saiban-rei no kiseki* [Trend of case law on special adoption], in: *Minshō* 138 (4/5) (2008) 608-609.

64 A. UMEZAWA, *Haigū-shi o teikyō shita mōshitate ninra to dairi kaitai-shi to no tokubetsu yōshi engumi o mitometa jirei* [Judgment recognising special adoption between a surrogate birth child and the applicants who provided the gametes], in: *Geppō Shihō Shoshi* 457 (2010) 60.

65 NAKAGAWA, *supra* note 63, 608-609.

66 Kōbe Family Court Himeji Branch, 26 December 2008, Kasai Geppō 61 (10), 72; "Surrogate baby awarded normal status", *The Japan Times*, 23 April 2009, available at <http://search.japantimes.co.jp/cgi-bin/nn20090423a7.html> (last retrieved on 10 July 2011).

67 UMEZAWA, *supra* note 64, 61.

68 Art. 31 *Hō no tekiyō ni kansuru tsūsoku-hō* (Act on the General Rules for Application of Laws), Law No. 78/2006.

In recommending that social parents in surrogate births should only establish legal parenthood through adoption, the Science Council argued that apart from different registration in the Family Register, there is little difference between natural children, adopted children and specially adopted children in relation to surnames, inheritance, rights to support and parental authority.<sup>69</sup> However, this ignores other important legal differences between natural and adopted children. For instance, Article 811 of the Civil Code allows dissolution of the adoptive relationship by agreement between the parties and the person who will become the legal representative of a child under 15 years.<sup>70</sup> Although Article 811 does not apply to special adoptions,<sup>71</sup> adults can dissolve ordinary adoption, even for a child under six years, without judicial supervision of the child's best interests.<sup>72</sup> Therefore, Bryant argues that adoption law is detrimental for child adoptees.<sup>73</sup>

Adopted children from overseas, even in special adoptions, cannot become Japanese citizens automatically because the Nationality Act specifies that a child is Japanese if one of their parents is Japanese *at the time of birth*.<sup>74</sup> However, naturalisation is complicated and Okuda argues that it is no substitute for acquisition of nationality by birth.<sup>75</sup> Lack of Japanese citizenship excludes adopted children from some self-employment and public sector employment, and political rights.<sup>76</sup> Non-Japanese citizens do not have a Family Register,<sup>77</sup> and even for Japanese citizens, most agree an unconventional Family Register is not meaningful, as the Science Council suggests.

Even if Mukai and Takada chose special adoption, it creates a different legal relationship to a natural parent-child relationship. The next section critiques the assumptions about family inherent in Japanese laws on parentage.

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69 SCIENCE COUNCIL OF JAPAN, *supra* note 6, 32.

70 Art. 797 Civil Code.

71 Article 817-10 Civil Code allows dissolution of special adoption only by application to the Family Court where the adoptive parents have abused the child.

72 BRYANT, *supra* note 44, 334.

73 *Ibid.*

74 Art. 2 (1) Nationality Act.

75 Y. OKUDA, The United Nations Convention on the Rights of the Child and Japan's International Family Law including Nationality Law, in: *Journal of Japanese Law* 15 (2003) 94.

76 A. KONDO, Citizenship Rights for Aliens in Japan, in: Kondo (ed.), *Citizenship in a Global World: Comparing Citizenship Rights for Aliens* (Hampshire 2001) 21-25.

77 Y. MATSUSHIMA, *Contemporary Japanese Family Law* (Tokyo 2000) 53.

## II. ASSUMPTIONS UNDERLYING LEGAL PARENT-CHILD RELATIONSHIPS IN JAPAN

Japanese law bases legal parent-child relationships on the nuclear, biological family model. This section explains how the nuclear, biological family became the dominant family ideology in Japan. Dolgin<sup>78</sup> and many others<sup>79</sup> critique the biological, nuclear family as a standard for establishing parenthood in Western countries. This section explains Dolgin's analysis of the weaknesses of the nuclear, biological family model in the United States to create a theoretical framework for analysing Japanese law relating to parent-child relationships. This section then applies the framework to Japanese law.

### 1. *Japanese Family Ideology*

Currently, the dominant family norm in Japan is the nuclear family of a married couple living with their biological children.<sup>80</sup> In Japan, the separation of public and private spheres, strong emotional relationships among family members, the centrality of children and usually, but not necessarily, existence as a nuclear household characterise this family norm, the 'modern family'.<sup>81</sup> Following World War II, the government transformed the 'official' family ideology from the *ie* to the nuclear family.<sup>82</sup> Japan saw this as a progression to the universal, 'true' form of family.<sup>83</sup>

The *ie* signifies a patriarchal, hierarchical, extended family.<sup>84</sup> In the *ie* system, the eldest son inherited the *ie* headship and continued to live with the parents, while younger sons sets up branch households and daughters became part of their husbands' *ie*.<sup>85</sup> From 1898 the Japanese government enforced the *ie* system in all families by stipulating rights and duties of the *ie* head in the pre-war Civil Code.<sup>86</sup> The *ie* head owned all household

78 J.L. DOLGIN, *Defining the Family: Law, Technology and Reproduction in an Uneasy Age* (New York 1997).

79 See, for example, A.E. STUMPF, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, in: *Yale Law Journal* 96 (1986-1987) 187; M.M. SCHULZ, *Reproductive Technology and Intention-Based Parenthood: An Opportunity for Gender Neutrality*, in: *Wisconsin Law Review* 2 (1990) 299-300; D. MORGAN, *Surrogacy: An Introductory Essay*, in: Lee/Morgan (eds.), *Birthrights: Law and Ethics at the Beginnings of Life* (London 1989) 55.

80 M. LOCK, *Perfecting Society: Reproductive Technologies, Genetic Testing and the Planned Family in Japan*, in: Lock/Kaufert (eds.), *Pragmatic Women and Body Politics* (New York 1998) 206, 220, 230; F. KUMAGAI, *Modernization and the Family in Japan*, in: *Journal of Family History* 11 (1986) 375.

81 E. OCHIAI, *The Japanese Family System in Transition: A Sociological Analysis of Family Change in Postwar Japan* (Tokyo 1997) 76-77.

82 F. ISONO, *The Evolution of Modern Family Law in Japan*, in: *International Journal of Law and the Family* 2 (1988) 198.

83 OCHIAI, *supra* note 81, 76, 79.

84 Y. WATANABE, *The Family and the Law: The Individualistic Premise and Modern Japanese Family Law*, in: von Mehren (ed.), *Law in Japan: The Legal Order in a Changing Society* (Cambridge 1963) 364.

85 ISONO, *supra* note 82, 184.

86 WATANABE, *supra* note 84, 364.

property and was responsible for supporting his family members.<sup>87</sup> Families in Japan originally used adoption to ensure continuity of the *ie* for corporate purposes, such as continuation of a family business, and for cultural practices, such as care of graves and ancestor worship.<sup>88</sup>

After World War II, under the American occupation, the government deleted most of the legal framework supporting the *ie* system from the Civil Code, particularly the *ie* head's powers.<sup>89</sup> However, provisions on inheritance of graves and articles for ancestor worship remain in the Civil Code.<sup>90</sup> The ratio of nuclear family households did increase following the Civil Code amendments.<sup>91</sup> However, nuclear households were already the dominant household in the 1920s.<sup>92</sup> Ochiai argues that nuclear households increased after World War II due to demographic reasons rather than complete ideological change from the *ie* to the nuclear family.<sup>93</sup> The popularity of son-in-law adoptions today is one example of the *ie* system's residual legal and social significance.<sup>94</sup>

The next section discusses critiques of the modern family ideology in Western societies, which demonstrate that the modern family norm is neither universal nor 'true'. Scholars also critique the modern family ideology in Japan.<sup>95</sup> There are circumstances peculiar to Japan, including the *ie* system, to consider in applying critiques of the modern family to Japanese law because the modern family norm became dominant in Japan through a different and more recent process than in Western societies.

## 2. Critique of the Modern Family Ideology in Surrogacy

Dolgin critiques the ideology of the nuclear, biological, child-centred modern family (which Dolgin calls the 'traditional' family ideology) underpinning judges' decisions about whom the parents of a child are in surrogate birth disputes.<sup>96</sup> The modern family is a problematic standard against which to determine all family relationships, because it is not universal.<sup>97</sup> The modern family ideology contrasts family relationships in the private sphere with contract-based relationships in the public sphere because it deve-

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87 MATSUSHIMA, *supra* note 77, 22.

88 BRYANT, *supra* note 44, 302.

89 ODA, *supra* note 4, 380-381.

90 Art. 897 (1) Civil Code.

91 OCHIAI, *supra* note 81, 59-60.

92 MATSUSHIMA, *supra* note 77, 24-25.

93 OCHIAI, *supra* note 81, 61.

94 BRYANT, *supra* note 44, 303.

95 See, for example, OCHIAI, *supra* note 81; and Fuess in relation to Japan's high divorce rate during the 19<sup>th</sup> century: H. FUESS, *Divorce in Japan: Family, Gender and the State 1600-2000* (Stanford 2004) 1-3.

96 DOLGIN, *supra* note 78, 10.

97 See, for example, A. DIDUCK / F. KAGANAS, *Family Law, Gender and the State: Text, Cases and Materials* (Oxford 2006) 9, 16; M. EATON, *Documenting the Defendant: Placing Women in Social Inquiry Reports*, in: Brophy/Smart (eds.), *Women in Law: Explorations in Law, Family and Sexuality* (London 1985) 121-122.

loped in Western countries in response to the particular social circumstances of the Industrial Revolution.<sup>98</sup> Many supposed symptoms of the twentieth-century family 'crisis', such as divorce, decreasing birth rates and women working for wages, began to occur in the nineteenth century.<sup>99</sup> The modern family was institutionalised and most closely reflected in social fact in the West, as in Japan, just after World War II.<sup>100</sup>

The modern family ideology assumes that social and legal family relationships are the inevitable consequence of natural and unchanging biological processes.<sup>101</sup> However, biological procreation is no longer uniform due to advances in reproductive technology. In surrogate birth, it is possible to split the genetic and gestational aspects of conception between the gamete donors and the birth mother, so more than two people may participate in the biological process of creating a child.<sup>102</sup>

Dolgin argues that surrogacy challenges the modern family norm because it involves contracts and payment and questions the legal and social understanding of 'mother'.<sup>103</sup> While surrogacy challenges one aspect of the biological basis of family relationships – the biological process of gestation – it also supports the biological basis of family relationships by creating genetically related nuclear families that could not otherwise exist.<sup>104</sup> Furthermore, Morgan argues that the modern family ideology's emphasis on genetic parenthood created the need for surrogate birth.<sup>105</sup> For instance, Mukai and Takada could create a nuclear family with their genetic children thanks to surrogacy, and this was a relevant factor in the Tokyo High Court's judgment.

Surrogate birth arrangements may involve a contract between the parties agreeing that the social parents, who may also be the genetic parents, and not the birth mother and her husband, are the child's parents and, in commercial surrogacy, payment for the birth mother's labour.<sup>106</sup> The use of contracts and payment undermines the definition of private family relationships by contrast to relationships in the public sphere.<sup>107</sup> Dolgin argues that, while law increasingly recognises 'individualism and choice in the creation and operation of families'<sup>108</sup> with regard to relationships between adults, judges are reluctant to allow creation of parent-child relationships in contractual terms.<sup>109</sup>

Surrogacy questions the meaning of 'mother' because the birth mother agrees to gestate, but not raise, the child. This challenges society's belief that gestation inexorably

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98 DOLGIN, *supra* note 78, 24-25.

99 *Ibid.*

100 *Ibid.*, 5-6, 11-12.

101 *Ibid.*, 2.

102 SCHULZ, *supra* note 79, 299-300.

103 DOLGIN, *supra* note 78, 67.

104 *Ibid.*, 67-68.

105 MORGAN, *supra* note 79, 77-78.

106 DOLGIN, *supra* note 78, 65.

107 *Ibid.*, 67.

108 *Ibid.*, 32.

109 *Ibid.*, 35.

conditions the birth mother to be the social mother.<sup>110</sup> Morgan argues that the corollary of assuming that gestation is ‘the only fit state of preparation for the role of caring and nurturing a young child’ is that raising a child is the only fit purpose for which a woman should become pregnant.<sup>111</sup> However, law and society recognise circumstances where a pregnant woman decides not to raise her child, such as abortion, fostering and adoption, without challenging the meaning of motherhood.<sup>112</sup>

The emphasis on the physical, gestational dimension of motherhood ignores the importance of intention to create and raise a child, that is, the psychological dimension of motherhood.<sup>113</sup> Stumpf argues that motherhood is a product of both mental and physical conception and the ‘psychological dimension of procreation precedes and transcends the biology of procreation’.<sup>114</sup>

The significance of genetics and gestation – that is, biology – to legal parenthood is asymmetrical because the law gives social significance to a mother’s biological link to her children but does not give similar significance to a father’s biological link.<sup>115</sup> A genetic father may establish a legal relationship with his children either by his relationship with the children’s mother, or by establishing a social paternal relationship with his children.<sup>116</sup> However, the father must establish this social paternal relationship by having a marriage or marriage-like relationship with the mother and living with the mother and child as a family unit.<sup>117</sup> Thus a genetic father’s relationship with his children is more clearly a cultural creation and a choice.<sup>118</sup>

To summarise the key aspects of the theoretical framework under the modern family ideology: parent-child relationships are based on biology rather than contract; motherhood is based on the genetic or gestational aspect of biology; and fatherhood is based both on a genetic connection and a voluntary relationship with the birth mother or child. The next section applies this framework to Japanese law.

### 3. *Application of the Modern Family Critique to Surrogacy in Japan*

Adoption and the common use of adoption suggest that Japanese law does not reject the possibility of using contract to create parent-child relationships. Quite the opposite, ordinary adoption allows people to create family relationships by private contractual arrangements. Courts may nullify ordinary adoption on the grounds that one party had no

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110 *Ibid.*, 67.

111 MORGAN, *supra* note 79, 57.

112 *Ibid.*; L. WILLMOTT, Surrogacy: Ill-conceived Rights, in: *Journal of Law and Medicine* 10 (2002) 198, 211.

113 STUMPF, *supra* note 79, 194-195.

114 *Ibid.*

115 DOLGIN, *supra* note 78, 101.

116 *Ibid.*, 99.

117 *Ibid.*, 99, 103-4.

118 *Ibid.*, 97.

'intention'<sup>119</sup> due to mistaken identity,<sup>120</sup> or where one party obtained agreement by fraud or duress.<sup>121</sup> The parties can dissolve ordinary adoption by agreement.<sup>122</sup> Rescission due to mistake, fraud or duress, and dissolution by agreement are concepts that apply to contracts between parties at arm's length.<sup>123</sup> However, as Section I.3 shows, adoption does not have the same legal effects as the natural parent-child relationship. Not only does ordinary adoption allow nullification and dissolution, it does not sever the relationship with the natural parents and does not give Japanese citizenship to a child born overseas. Although special adoption permits severance of the natural parent-child relationship, it is still different legally to natural parent-child relationships because courts may dissolve special adoption, special adoption does not confer automatic Japanese citizenship and it has a different registration on the Family Register.

The social meaning of adoption might also suggest that Japanese people recognise the legitimacy of using contract to create parent-child relationships. Family members did not need genetic relationships under the *ie* system, and there was no clear distinction between relatives and non-relatives.<sup>124</sup> However, adoption emphasised the benefits to parents, such as having a successor to continue ancestor worship and become the *ie* head, rather than the benefits to the child.<sup>125</sup> Although children adopted for pragmatic reasons may have had an affectionate relationship with their adoptive parents, securing this was not the main purpose of adoption.<sup>126</sup> Ordinary adoption of adults for pragmatic or economic reasons is still the primary use of adoption in Japan.<sup>127</sup>

Dolgin argues that adoption is one example of law recognising 'the love and intimacy that are supposed to characterize the parent-child relationship need not be anchored in biology.'<sup>128</sup> However, in Japan a parent-child relationship defined by emotional attachment between parent and child, based on something other than biology, is only a relatively recent legal possibility with the establishment of special adoption in 1988. Bryant argues that the general image of adoption in Japan is not of an orphaned child in

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119 Literal translation of the word '*ishi*' in Art. 802 (i) Civil Code.

120 Art. 802 (i) Civil Code.

121 Arts. 806-3 (2), 808, 747 Civil Code.

122 Art. 811 (1) Civil Code.

123 These concepts also apply to marriage: Arts. 742, 747, 763 Civil Code.

124 T. KUWAYAMA, *The Discourse of Ie (Family) in Japan's Cultural Identity and Nationalism: A Critique*, in: *Japanese Review of Cultural Anthropology* 2 (2001) 9.

125 OKUDA, *supra* note 75, 103; HAYES / HABU, *supra* note 55, 11-12.

126 *Ibid.*, 12.

127 In 2008, there were 1439 applications for ordinary adoption of minor children, and 395 applications for special adoption to Family Courts: Supreme Court of Japan, *Dai-nihyō kaji shinpan chōtei jiken no jiken-betsu shinju kensū – zen-katei saiban-sho* [Table 2: The number of new cases by type of case for family court trial and conciliation – all family courts], in: Saikō-sai Shihō tōkei 20 nendo, available at <http://www.courts.go.jp/sihotokei/nenpo/pdf/B20DKAJ02.pdf> (last retrieved on 10 July 2011). In 1993 the total number of adoptions including those requiring court approval was 81,762: HAYES / HABU, *supra* note 55, 141.

128 DOLGIN, *supra* note 78, 38-39.

need of ‘parental love and guidance’.<sup>129</sup> Rather, it is an ‘agreement between adults to enter a mutually beneficial fictive kin relationship’.<sup>130</sup> Japanese people are likely to apply this image uncritically to special adoption because the basis for this image, ordinary adoption for practical purposes, has a long history and is still common. In replacing registration in the Family Register of the extended *ie* family with the nuclear family, the Japanese government strengthened the ideological difference between biological and adoptive family ties.<sup>131</sup>

While Japanese law allows people to create one type of relationship – ordinary adoption – by contract, the legal and social character of the relationship is different to a natural parent-child relationship. This suggests that in Japanese law, there is not one legal parent-child relationship that people may establish in different ways; rather there are three categories of legal parent-child relationship. Ordinary adoption makes this clear because the child has two sets of legal parents, natural and adoptive.

In surrogate birth, Japanese law allows contract to create adoption between the social parents and the child, but courts will not allow contract to create a natural parent-child relationship. Japanese law adopts ‘blood’ as the basis for natural parent-child relationships.<sup>132</sup> When the Japanese government enacted the Civil Code in 1898, the birth mother was always genetically related to the child. The government aimed to recognise the genetic father legally by enacting the affiliation and presumption of legitimacy provisions.<sup>133</sup> The separation of genetic and gestational motherhood due to alternative reproductive technology requires courts to decide which aspect of biology to privilege, genetics or gestation.

In many surrogacy cases the birth mother is also the child’s genetic mother. However, in Mukai’s case, Mukai was the genetic mother. Although the Supreme Court held that ‘blood’ is the basis of the natural parent-child relationship, they did not determine that Mukai was the children’s legal mother. The Supreme Court upheld the 1962 Supreme Court ruling that bases legal motherhood on birth. There are two interpretations of why the Supreme Court upheld this rule and did not recognise Mukai’s genetic motherhood.

First, Japanese law bases the mother-child relationship on the biology of gestation rather than the biology of genetics. The Science Council of Japan also prefers to base legal motherhood on gestation because they argue among other reasons that hormones released during pregnancy prepare women for emotional ‘motherhood’, the foundation for raising a child.<sup>134</sup> The Science Council argues that this as an ethical and social issue and gives no scientific evidence to support this contention.

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129 BRYANT, *supra* note 44, 312.

130 *Ibid.*

131 LOCK, *supra* note 80, 216.

132 Supreme Court, 23 March 2007, Minshū 61, 619; Engl. transl.: 2006 (Kyo) No. 47, 8, available at <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo-.No..47.html> (last retrieved on 10 July 2011); NINOMIYA, *supra* note 15, 106.

133 *Ibid.*, 106-107.

134 SCIENCE COUNCIL OF JAPAN, *supra* note 6, 18-19, 34.

Second, while the Tokyo High Court also held that Mukai was not the mother under Japanese law, her genetic connection to the children and the children's best interests were factors in deciding that the Nevada court's decision was not contrary to Japanese public policy. By contrast, the Supreme Court abided by the literal interpretation of natural parent-child relationships under the Civil Code. The High Court appears to take a purposive, broad policy approach to parent-child relationships that do not violate Japanese public policy, while the Supreme Court takes a legal formalistic approach. The Supreme Court's decision is similar to the refusal of Family Registries to register children born within 300 days of divorce as anyone other than the divorced husband's child, mentioned in Section I.2. In both cases, the effect of a literal interpretation of the law, which is intended to ensure the genetic parent is the legal parent, is that the government officially declares someone other than the genetic parent to be legal parent.

Another element of the Supreme Court's decision suggests that considerations apart from genetics or gestation, such as certainty, also influence legal standards of parenthood.<sup>135</sup> The Supreme Court stated that Japanese law bases motherhood on birth because it is conducive to children's best interests to recognise unequivocally a mother-child relationship with the woman who gave birth at the time of birth.<sup>136</sup> However, the desirability of certainty about legal motherhood from birth does not provide a reason why it is desirable that the *birth mother* is the legal mother.<sup>137</sup> Japanese law could ensure certainty in surrogacy by presuming from birth that the intending social parents are the legal parents.<sup>138</sup> Certainty is not a value-neutral concept and still relies on the assumption that gestation conditions a birth mother to be the appropriate legal mother.

Dogin's analysis of biology's different significance for motherhood compared to fatherhood also applies to Japanese law. In Mukai's case, Takada was the genetic father. If a genetic relationship is the standard for legal parenthood in Japan, Takada is a legal father. Yet, the Supreme Court hardly mentioned Takada's connection to the children. This suggests that since his wife was not a legal mother, and Takada had no marriage or marriage-like relationship with the birth mother, Takada was not a legal father.

The Civil Code presumption of legitimacy, which is the primary way to become a legal father, establishes legal fatherhood through marriage to the child's birth mother. The affiliation provision in the Civil Code demonstrates that for children whose mother is not married to anyone, the father can establish a legal parent-child relationship with the children by choice and intention.

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135 SAIGUSA, *supra* note 62, 5. Certainty also influenced the Science Council's recommendation that the birth mother be the legal mother: SCIENCE COUNCIL OF JAPAN, *supra* note 6, 33.

136 See full translation: Supreme Court, 23 March 2007, Minshū 61, 619; Engl. transl.: 2006 (Kyo) No. 47, 8, available at <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo-.No..47.html> (last retrieved on 10 July 2011).

137 KUMAGAI / KAMATA, *supra* note 9, 65.

138 STUMPF, *supra* note 79, 204-205.

Analysing Japanese law on parent-child relationships using Dolgin's framework shows the modern family ideology's influence on Japanese law. Japanese law allows contractually based parent-child relationships only in adoption, which has different legal and social significance to natural parent-child relationships, emphasising practical benefits rather than emotional connections between parents and child. Japanese law ostensibly bases natural parent-child relationships on genetics. However, the government and court's formalistic application of rules intended to ensure the genetic parents are the legal parents may result in the opposite of the law's intention. The basis for legal motherhood becomes gestation. The basis for legal fatherhood becomes the relationship with the child's birth mother.

In using the modern family ideology, the law assumes that gestation makes a woman a suitable social and legal mother. Yet by allowing abortion,<sup>139</sup> adoption and fostering, Japanese law recognises that the birth mother is not always suitable to be the social mother. The Science Council also demonstrates this inconsistency because they argue that gestation makes women suitable mothers but also state that it is in surrogate birth children's best interests to give parental responsibility to the intending social parents through adoption.<sup>140</sup>

Japanese legal standards for motherhood and fatherhood are inconsistent because a birth mother's gestational connection to the child makes her a legal mother, while intention, demonstrated through relationship to the birth mother and exercising the choice to affiliate, makes a genetic father a legal father. Murashige suggests that Japanese law does recognise intention in establishing legal motherhood where an intending social mother conceives a child using donated ova.<sup>141</sup> However, in those cases the intending social mother also gestates the child. The legal basis of motherhood suggests that Japanese law values a woman's role in gestating a child more than a woman's genetic contribution, intention to be a mother, or role in socialising a child. In disregarding intention to be a mother and socialisation of a child, Japanese law ignores the psychological dimension of motherhood.

In cases of artificial insemination by donor sperm in Japan, a man with no genetic connection to the child becomes a legal father solely through intention, by consenting to his wife receiving insemination.<sup>142</sup> However, Japanese law ignores both intention and the genetic connection of some men. For instance, genetic and social fathers in surrogacy arrangements, such as Takada, and fathers of children born within 300 days of the birth mother's divorce from another man, are not legal fathers. This suggests that Japa-

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139 Abortion is more socially acceptable than the contraceptive pill. While legislation is apparently strict, in practice abortion is readily available in Japan: E. HERTOOG, *Tough Choices: Bearing an Illegitimate Child in Contemporary Japan* (Stanford 2009) 36.

140 SCIENCE COUNCIL, *supra* note 6, 35.

141 K. MURASHIGE, *Dairi shussan ni yoru ko no shusshō todoke* [Birth Certificates for Children of Surrogate Birth], in: *Koseki Hanrei Nōto* 616 (2007) 65.

142 KUMAGAI / KAMATA, *supra* note 9, 69.

nese law values a man's role in socialising a child in a nuclear family with the gestational mother more than genetic contribution or intention to be a father. Therefore, Japanese law also ignores the psychological dimension of fatherhood by ignoring the intention of some men to be a father.

Japanese laws based on inconsistent standards and the unsupported assumptions of the modern family ideology prevent surrogate birth children from having natural parent-child relationships with their social parents. The next section analyses the social consequences of this for surrogate birth children.

### III. LEGAL DIFFERENCES AND SOCIAL DISCRIMINATION IN SURROGATE BIRTHS

Section I shows that in Japanese law, social parents can only become legal parents of children born through surrogacy by adoption. Sections I and II discuss the *legal* disadvantages and the different *social* significance of adoptive relationships compared to natural parent-child relationships in Japan. In Australia also, social parents can only establish legal parentage of surrogate birth children through adoption, which Wilmott argues is inadequate.<sup>143</sup> However, there is an additional facet of Japanese law that disadvantages surrogate birth children, more so than in Australian law. This section argues that records on the Family Register, the *koseki*, promote discrimination in Japan against surrogate birth children. This section explains the *social* effect of the *legal* rules in Japan.

The publicly held *koseki* does not have an exact correlate in the common law, which relies on private documentation to provide legal proof of personal status. The *koseki* is 'a combination of a birth certificate, marriage certificate and a sort family tree'.<sup>144</sup> Government offices in each town and city hold family *koseki* and are responsible for recording a person's name; birth; natural parents' names; and if the person is adopted, adopted parents' names.<sup>145</sup> Birth, adoption, marriage and divorce take legal effect through registration on the *koseki*.<sup>146</sup> The *koseki* is one document recording all the status information about each individual in a nuclear family.<sup>147</sup>

The *koseki* is the primary form of personal identification and status confirmation in Japan.<sup>148</sup> Japanese people must submit their *koseki* to government agencies to establish entitlement to social security benefits and to establish Japanese nationality, for example, to get a Japanese passport.<sup>149</sup> The *koseki* only records Japanese nationals.<sup>150</sup>

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143 WILLMOTT, *supra* note 112, 205.

144 HAYES / HABU, *supra* note 55, 24.

145 Arts. 1, 13 Family Registration Act.

146 Arts. 739 (1), 764, 781 (1), 799 Civil Code.

147 Art. 6 Family Registration Act.

148 MATSUSHIMA, *supra* note 77, 21.

149 NINOMIYA, *supra* note 15, 2, 5.

150 See Art. 6 Family Registration Act.

All family *koseki* were accessible publicly from 1878.<sup>151</sup> The government closed the *koseki* in 1976 because employers and potential spouses' families used information in the *koseki* to discriminate against *buraku-min*.<sup>152</sup> Now only family members, their legal representatives, or government officials who require access to perform their duties may view the *koseki*.<sup>153</sup> Despite the amendment, private detectives continued to access the *koseki* or its proxies illegally on behalf of employers and spouse's families.<sup>154</sup> The government introduced legislation in 2005 and 2007 to require proof that a person has legitimate reason to access the *koseki* and introduce criminal fines for unauthorised access.<sup>155</sup> However, unauthorised access by employers may still occur,<sup>156</sup> and making unauthorised access more difficult may not prevent social discrimination because marriage agencies, schools and social organisations often ask, with legitimate reason such as proof of identity, for a person to provide their *koseki*.<sup>157</sup>

The Japanese government's primary concern is that the *koseki* is 'clean' formalistically, as Section I.2 mentions. The government argues that the *koseki* is value-neutral and merely an efficient way to record legal status.<sup>158</sup> However, the information recorded on the *koseki* and who may view that information has a significant effect on individuals because value judgments about information recorded on the *koseki* restrict or exclude participation in Japanese society.<sup>159</sup> Information affecting only one individual, such as a sex change, may expose all family members to social prejudice because all nuclear family members have one *koseki*.<sup>160</sup> Many people criticise the *koseki* because of its role in discrimination of women, resident *Zainichi* Koreans, and *burakumin*.<sup>161</sup>

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151 H. IDOTA, *Koseki kōkai seido no rippō Katei ni tsuite: Meiji sanjūchūnen koseki hōtei-zen* [The Legislative Process on the Public Access of the Japanese Family Register: Before the Enactment of the Family Registration Law in 1898], in: *The Review of Legal and Political Sciences* 25 (1989) 33.

152 Descendants of people historically engaged in 'unclean' employment such as butchery and tannery: T.L. BRYANT, *For the Sake of the Country, For the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan*, in: *UCLA Law Review* 39 (1991-1992) 118, 120.

153 Art. 10 Family Registration Act.

154 NINOMIYA, *supra* note 15, 36-37.

155 Arts. 10-2, 10-3, Family Registration Act; Art. 56 *Kojin jōhō no hogo ni kansuru hōritsu* (Act on the Protection of Personal Information) Law No. 57/2003 as amended by Law No. 119/ 2003, Engl. transl. available at <http://www.japaneselawtranslation.go.jp> (last retrieved on 10 July 2011).

156 HAYES / HABU, *supra* note 55, 25.

157 D. CHAPMAN, *Tama-chan and Sealing Japanese Identity*, in: *Critical Asian Studies* 40 (2008) 433; BRYANT, *supra* note 152, 133.

158 *Ibid.*, 112.

159 *Ibid.*

160 V. MACKIE, *How to Be a Girl: Mainstream Media Portrayals of Transgendered Lives in Japan*, in: *Asian Studies Review* 32 (2008) 411-412.

161 KUWAYAMA, *supra* note 124, 26; D. CHAPMAN, *Zainichi Korean Identity and Ethnicity* (New York 2008) 75; BRYANT, *supra* note 152.

The information the *koseki* records about surrogate birth children exposes them to social discrimination against adoption and alternative reproductive technologies. The relationship between the *ie* and the *koseki* is one reason for discrimination against adopted children. The Japanese government first introduced the *ie* system by implementing the *koseki* in 1871.<sup>162</sup> However, the government did not abolish the Family Register with the *ie* after World War II, but substituted registration of the *ie* with the nuclear family by requiring each couple – including the eldest son – to create a new Family Register on marriage.<sup>163</sup> The government's failure to abolish the *koseki* encourages continued social prejudice about information in the *koseki* based on the *ie* ideology.

Japanese society stigmatises adoption of minor children unrelated to either adoptive parent because it is outside the *ie* paradigm. In the *ie* paradigm, adults are adopted more often than children because children are not old enough to have proved their character and economic worth to the *ie*, such as the ability to manage *ie* property.<sup>164</sup> Adoptive parents do not adopt unrelated children or children whose family is unknown because a 'good' genetic family background is important.<sup>165</sup> Adoption of minor children unrelated to either adoptive parent is still much less common than adoptions of adults or related children.<sup>166</sup> Many Japanese people still regard it with disfavour because the child may be illegitimate, or have a 'bad' or unknown genetic background.<sup>167</sup>

Certain stigma relate specifically to special adoption. Special adoption confirms society's suspicions that adopted children come from a 'bad' background because the court must find that the natural parents are incapable or unfit to raise the child.<sup>168</sup> Second, prejudice against illegitimacy affects specially adopted children in particular because the government introduced special adoption after controversy relating to abandonment and adoption of illegitimate children.<sup>169</sup> The very low number of illegitimate births in Japan, about 2% per year, demonstrates the continued social prejudice that illegitimacy is a family disgrace.<sup>170</sup>

Japanese society stigmatises alternative reproductive technology involving donation of genetic material. Unknown genetic heritage creates suspicion about a child's values and character.<sup>171</sup> Genetic heritage is also important to potential spouses to ensure children of the marriage will not inherit diseases or disabilities that may expose them to

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162 MATSUSHIMA, *supra* note 77, 21, 39.

163 Art. 16 Family Registration Act; ISONO, *supra* note 82, 198-199.

164 LOCK, *supra* note 80, 224-225.

165 HAYES / HABU, *supra* note 55, 14. If parents wanted to raise an unrelated baby, they usually registered the baby falsely as their natural child: NINOMIYA, *supra* note 15, 124.

166 See *supra* note 127; HERTOG, *supra* note 139, 32.

167 HAYES / HABU, *supra* note 55, 15-16, 17.

168 Art. 817-7 Civil Code; BRYANT, *supra* note 152, 139.

169 HAYES / HABU, *supra* note 55, 4; BRYANT, *supra* note 152, 137, 139.

170 HERTOG, *supra* note 139, 2, arguing that many Japanese people believe abortion is preferable to bearing an illegitimate child: 47.

171 LOCK, *supra* note 80, 225; HAYES / HABU, *supra* note 55, 14.

social discrimination.<sup>172</sup> Alternative reproductive technology may also enliven prejudice because some in Japanese society assume that non-genetic or -gestational parents do not love and raise the child adequately.<sup>173</sup>

Stigma against adoption and alternative reproductive technology relate both to prejudice about the child's upbringing and prejudice about genetic heritage. Family upbringing is important because the Japanese government linked stability of the family with the stability of the state and the emperor as an official ideology before World War II, and with Japan's economic growth following World War II.<sup>174</sup> Thus, Japan expects the family to rear and educate 'good' Japanese citizens with the values and characteristics to be productive community members.<sup>175</sup> Genetic heritage is important because Japanese society assumes it affects a child's character, values and health. Employers, schools and the families of potential spouses discriminate against adopted and illegitimate children because they may not have values, such as honesty and industriousness, to make them good students, employees or spouses.<sup>176</sup> Employers and schools also fear that the emotional bond and sense of responsibility adoptive parents have for adopted children is not strong, which is dangerous because in Japan employers and schools must be able to consult the parents if the child does something wrong.<sup>177</sup> Discrimination may not involve total exclusion from schools or employment, but rather disadvantaged treatment in the classroom and in job promotions,<sup>178</sup> or emotional and psychological harm from comments made by teachers, neighbours and peers.<sup>179</sup>

Since Japanese law assumes that the birth mother and her husband are the legal parents of surrogate birth children, the adoption of surrogate birth children appears on the *koseki* as adoption of a minor, unrelated child, exposing surrogate birth children to the same stigma and discrimination as adopted children. The prejudice that parents do not care adequately for non-biological children means surrogate birth children may suffer discrimination because of suspicion about their upbringing even if they are not adopted. Whether a particular surrogate birth actually involved donated genetic material, the mere fact of adoption or surrogacy raises suspicion that the child's genetic background is unknown. Therefore, surrogate birth children may suffer disadvantaged treat-

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172 LOCK, *supra* note 80, 227.

173 *Ibid.*, 224-225, 229.

174 ISONO, *supra* note 82, 184; R. GOODMAN, Anthropology, policy and the study of Japan, in: Goodman (ed.), *Family and Social Policy in Japan: Anthropological Approaches* (Cambridge 2002) 1, 21.

175 Arguing the ideology of meritocracy places the burden of raising good citizens on parents: HERTOG, *supra* note 139, 130-131.

176 BRYANT, *supra* note 152, 135; HERTOG, *supra* note 139, 81; MATSUHIMA, *supra* note 77, 136-7.

177 BRYANT, *supra* note 152, 135-6.

178 *Ibid.*, 133.

179 HAYES / HABU, *supra* note 55, 17-18.

ment and social prejudice because of stigma about their adoption, perceived inadequate upbringing and unknown genetic heritage.

The *koseki* law allows social discrimination against surrogate birth children because anyone who has seen a person's *koseki* will know whether that person was adopted. The *koseki* records ordinary adoption explicitly in accordance with Article 13 of the Family Registration Act, which requires a record of both birth and adoptive parents' names. The Civil Code amendments introducing special adoption aimed to give specially adopted children the same rights and obligations as natural children.<sup>180</sup> Therefore, the adoptive parents' *koseki* records a specially adopted child like a natural child, in the birth order of oldest son, second son, oldest daughter, second daughter, and so on.<sup>181</sup> However, the *koseki* only partially disguises special adoption because it records that the child's registration is in accordance with a judgment under the Civil Code Article 817-2 and the judgment date.<sup>182</sup> The *koseki* invokes prejudice about alternative reproductive technologies against surrogate birth children because officials must attach the court judgment, which is likely to describe the surrogacy, to the adoptive parents' *koseki*.<sup>183</sup>

While special adoption extinguishes the legal relationship between the birth mother and the child, the birth mother's *koseki* still records the child's birth. To register special adoption, the government first makes a new *koseki* registering only the child.<sup>184</sup> Next, the government transfers the child from that *koseki* to the adoptive parents' *koseki*.<sup>185</sup> Thus, the birth mother's *koseki*, the child's sole *koseki*, and the adoptive parents' *koseki* enable tracing of the circumstances of the child's birth and adoption. Therefore, in surrogate birth arrangements, the legal rules governing the *koseki* expose not only the child and the social parents to social prejudice, but also the birth mother, if she is Japanese.

If social parents do not adopt surrogate birth children born overseas, lack of a *koseki* may expose children to discrimination because it shows they are not Japanese. In 1970, a Korean national, who was raised and educated in Japan, won a discrimination case against Hitachi because it withdrew his employment offer after discovering he had no *koseki*.<sup>186</sup> While such explicit discrimination is unlikely to occur today, the *koseki* still marginalises foreigners in Japan because it reinforces prejudices basing Japanese iden-

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180 NINOMIYA, *supra* note 15, 126.

181 *Koseki roppō* [The Family Register and the Six Codes] (Tokyo 2004) 965.

182 Arts. 63, 68-2 Family Registration Act; *Koseki roppō*, *supra* note 181, 964; W. TOYA, *Hihaijūsha aida jinkō seishoku ni yotte umareta kodomo no shutsuji o shiru kenri to koseki seido* [The Rights of Donor Offspring to Access Identifying Information about their Genetic Parents and the Family Register], in: *Igaku Tetsugaku Igaku Ronri* 25 (2007) 56-57.

183 Arts. 63, 68-2 Family Registration Act. While it is possible to attach a summary of the court judgment, many judges and government officials do not realise this: HAYES/HABU, *supra* note 55, 26, 150 (n18).

184 Art. 20-3 (1) Family Registration Act; *Koseki roppō*, *supra* note 181, 964.

185 Arts. 20-3 (1), 18 (3) Family Registration Act.

186 CHAPMAN, *supra* note 161, 33-35; *Pak Chong-Sok v Hitachi Company*, Yokohama District Court, 19 June 1974, in: *Hanrei Jihō* 744 (1974) 29.

tity exclusively on blood.<sup>187</sup> Marginalisation due to lack of a *koseki* is particularly hurtful for surrogate birth children born overseas whose social parents are also their genetic parents, like Mukai and Takada's children, because it places them in the same stigmatised position as other non-Japanese, despite them being genetically Japanese.

The means Japanese people take to avoid or hide the record of adoption on the *koseki* demonstrate the seriousness of the possibility of discrimination. For instance, as Section I.2 mentions, Japanese social parents submit foreign birth certificates recording them as the natural parents without declaring the surrogacy. Birth mothers intending to give up their child for adoption often give birth outside their home prefecture to avoid registering the child on their *koseki*.<sup>188</sup> Both birth mothers and adoptive parents may move to a new prefecture and transfer a summary copy of their *koseki*, which does not contain the full details of the birth or adoption.<sup>189</sup> It is possible, even likely, that doctors continue to issue false birth certificates to allow adoptive parents to register adopted children as their natural children.<sup>190</sup>

The widespread use of the *koseki* in legal and social life allows access to information about surrogate birth children to which society attaches value judgments. The type of information the law requires and the form in which the government records it reinforces society's negative value judgments. The government ostensibly did not conceal special adoption on the *koseki* to prevent inadvertent incest and to enable children to investigate their genetic health.<sup>191</sup> Toya supports the *koseki* record of special adoption because it protects children's right to know their genetic parents under the *United Nations Convention on the Rights of the Child*.<sup>192</sup> The *koseki* benefits surrogate birth children if they wish to trace their birth mother. However, the Japanese government could create an adoption register separate from the *koseki*, which only the adopted child could access.<sup>193</sup> This would enable the child to investigate their own background but prevent employers, schools and spouses from learning prejudicial facts about the child's background.

#### IV. IMPLICATIONS FOR JAPANESE PARTICIPANTS IN SURROGATE BIRTH

In Japanese law, the social parents of a child born through surrogate birth cannot establish a natural parent-child relationship with the child under the Civil Code because Japanese law bases natural parent-child relationships only on birth. In Mukai's case the Supreme Court held that foreign court judgments establishing a legal natural parent-

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187 CHAPMAN, *supra* note 157, 433, 439.

188 HAYES / HABU, *supra* note 55, 26.

189 *Ibid.*

190 *Ibid.*, 3.

191 HAYES / HABU, *supra* note 55, 25, arguing that another purpose was to punish illegitimate birth.

192 TOYA, *supra* note 182, 56.

193 HAYES / HABU, *supra* note 55, 129.

child relationship between the social parents and the child in surrogate births violate Japanese public policy. Therefore, Japanese social parents cannot circumvent Japanese law by arranging surrogate births overseas and enforcing foreign judgments that recognise a legal parent-child relationship in Japan.

As highlighted above, there are a number of reasons why Japanese couples who commission surrogate births attempt to establish natural parent-child relationships rather than adopting the child. First, natural parent-child relationships receive important *legal* rights that ordinary and special adoptions do not receive, such as Japanese nationality and inability to dissolve the relationship. Given the difficulty of arranging surrogacy in Japan, many Japanese couples arrange surrogacy overseas. Therefore, many surrogate birth children cannot have Japanese nationality, and thus cannot participate fully in Japanese society, without going through the complicated naturalisation procedures, even if their genetic and social parents are Japanese.

Second, the *social* meaning of adoption, which applies to both ordinary and special adoption, emphasises adoption's practical benefits to the parties, rather than the emotional ties between parent and child. Couples who arrange surrogate births presumably wish to create a family mimicking the modern family. Therefore, the social meaning of adoption is an emotional reason not to adopt.

Third, the socio-legal role of the *koseki* in Japan cannot be underestimated as a motivation for Japanese social parents. The different registration of natural children, ordinary adopted children and specially adopted children on the *koseki*, and its widespread use, exposes surrogate birth children to social prejudice about adoption, illegitimacy and alternative reproductive technology. Thus, the *koseki* allows employers, schools and potential spouses to discriminate against surrogate birth children. Lack of a *koseki* for surrogate birth children born overseas subjects them to discrimination and marginalisation.

The key conclusion is that Japanese law gives the natural parent-child relationship a privileged moral status above the adoptive parent-child relationship because it has different legal and social significance and because the *koseki* promotes social discrimination based on these differences. Judges' reluctance to sever the natural parent-child relationship by allowing special adoption demonstrates its ideological importance. Even the name 'natural child' used in the Civil Code, which in Japanese is *jisshi*, literally meaning 'real child', suggests a superior status compared to adoptive children, who are presumably not 'real' children.

The purpose of the Civil Code provisions on natural children was to create a legal relationship between the biological parents and the child, at a time when splitting the genetic and gestational aspects of biological parenthood was impossible. Mukai's case shows that since reproductive technology has made this possible, Japanese courts have chosen to privilege the gestational aspect of biological reproduction over the genetic aspect for legal motherhood. Japanese law also privileges gestation by making the man who has a marital relationship with the birth mother the legal father.

The natural parent-child relationship matches the dominant modern family ideology in Japan because gestation determines legal motherhood and legal fatherhood ensures that children are raised in nuclear families. The natural parent-child relationship has privileged status because it matches the dominant family ideology, which emphasises affective relationships based on biological bonds. Adoption, which Japanese people perceive as a relationship based on pragmatic reasons, has lesser status because it does not fit into the modern family ideology. Therefore, Japanese law effectively prevents people from creating a parent-child relationship with the same moral value as natural parent-child relationships through contract and intention.

In surrogate births both the social mother and father suffer because the application of the law in practice devalues their intention to be parents, their role in socialising the child and, in some cases, their genetic contribution. Social parents who adopt surrogate birth children may also suffer collateral damage from the social prejudice and stigma attached to their child. The birth mother may suffer prejudice from the child's registration on her *koseki*.

While Japanese law does not value genetic contribution in establishing legal parenthood, the law on the *koseki* gives genetic connections legal significance in terms of a child's participation in Japanese society. Genetic connections are a standard for judging an adopted child's merit for employment, schools and marriage. The *koseki* reinforces the social significance of a child's genetic connection with the natural parents by recording adopted children and natural children differently.

The interaction in Japanese law between privileging of gestation and genetics causes a special disadvantage to surrogate birth children. Comparing surrogate birth children with children born to infertile couples through gamete donation demonstrates this. Since Japanese law assumes that the birth mother and her husband are the legal parents, the *koseki* records children born through gamete donation as natural children. Therefore, these children, unlike surrogate birth children, have a legally privileged natural parent-child relationship with their social parents. Their *koseki* does not show the lack of genetic connection, which shields the children from social prejudice. It is inconsistent to expose surrogate birth children to prejudice because they have no genetic connection – or the suspicion of no genetic connection – to their social parents, yet not expose other children born through alternative reproductive technology.

In suggesting special adoption for surrogate birth children, the Science Council and judges assume that special adoption is equal to a natural parent-child relationship. However, special adoption has neither the same legal rights nor the same privileged moral status as the natural parent-child relationship. This means that while the threshold for establishing a special adoption is the child's best interests, ironically, having a special adoption rather than a natural parent-child relationship with their social parents is not in a surrogate birth child's best interests. Additionally, difficulty in establishing special adoption, particularly for children born overseas, makes it impractical for surrogate birth children.

## CONCLUSION

Japan's approach to surrogate birth – leaving parent-child relationships to be determined according to existing legal rules in the Civil Code – is not in the best interests of participants in surrogate birth. Surrogate birth children suffer legal disadvantage and social prejudice because they cannot have the privileged natural parent-child relationship with their social parents. The legal disadvantages of not having Japanese nationality and social bias against foreigners are likely to affect surrogate birth children particularly because most Japanese couples arrange surrogacy overseas. The way the Japanese *koseki* registers natural and adoptive children means that surrogate birth children, social parents, and – for surrogacy arranged in Japan – birth mothers suffer prejudice relating to adoption, illegitimacy and alternative reproductive technology.

The law on the *koseki* is the primary cause of social difficulties to participants in surrogate birth. Japanese social parents do not declare surrogacy arrangements to avoid these problems. While it is important to the government that the *koseki* is 'clean' in recording accurate information, it is also important to individuals that their *koseki* is 'clean' in *not* recording information that exposes them to social discrimination. The current Japanese approach to legal parent-child relationships and the Science Council of Japan's recommendations do not address concerns about the *koseki* law's effect in Japanese society. Therefore, Japanese law encourages social parents and the birth mother not to disclose surrogacy arrangements.

The Japanese Civil Code provisions on parenthood are based on the modern family ideology, which many scholars critique. In Japan, these legal rules discriminate between men and women, and their practical application results in outcomes inconsistent with the ostensible standard for legal parent-child relationships. The law's application in surrogate birth means social parents cannot have a legal relationship with their child that acknowledges that the emotional connection between them is equivalent to natural parents and children.

Mukai's case demonstrates that Japanese law relies on one aspect of biology to define legal parentage. Japan is not alone in using biology – rather than intention or the child's best interests – as the standard of legal parenthood. Nor is Japan alone in allowing social parents to establish a legal relationship with surrogate birth children only through adoption. Dolgin's critique, which I apply to Japanese law, is based on United States case law, and scholars identify the same pattern in most Australian States.<sup>194</sup> Legal reliance on the modern family ideology – and its assumptions about genetics, gestation and intention – affects surrogate birth children, social parents and birth mothers negatively in the legal and social context of Japan. I hope this article will illuminate and stimulate consideration in other countries about how legal standards and assumptions

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194 T. JOHNSON, Queensland's Proposed Surrogacy Legislation: An Opportunity for National Reform, in: *Journal of Law and Medicine* 17 (2010) 626; WILLMOTT, *supra* note 112.

relating to parentage affect birth mothers, social parents and, especially, children in surrogate birth.

#### ABSTRACT

*Japan has no legislation regulating artificial reproductive technology. In surrogate birth, social parents may only register a legal relationship with the child in the Japanese family register, the koseki, using the three current categories of parent-child relationship in Japanese family law: natural, ordinary adoption and special adoption. In 2007, Japan's Supreme Court dashed the hopes of Japanese actress Aki Mukai and her husband, former pro-wrestler Nobuhiko Takada, of registering twins born through surrogacy as their natural children. The Supreme Court's decision means that the only option for social parents of children born through surrogate birth to establish a legal parent-child relationship is to adopt the child under the laws governing special and ordinary adoption in Japan. However, ordinary adoptive and special adoptive children have inferior legal rights compared to natural children, including in relation to their registration in the koseki and their right to Japanese nationality. Analysing Japanese law on parenthood and the Supreme Court's decision in Mukai's case using critiques of the nuclear family ideology reveals that Japanese law determines the existence of a legal parent-child relationship by birth for the mother and marriage to the birth mother for the father, reinforcing the nuclear family ideology. While parent-child relationships based on contract are possible in Japan, these relationships do not have the same legal and social character as parent-child relationships based on blood. The value attached to blood relationships in Japanese law is reflected in society. Members of Japanese society make negative value judgments about the character of adopted children, which can lead to stigma and discrimination against adopted children. The koseki registers adopted and natural children differently, and thus promotes social discrimination based on these differences. Surrogate birth children who are adopted are potentially exposed to the same social stigma and discrimination as adopted children, even if they are related to their social parents genetically. This article critiques assumptions based on the modern family ideology underlying Japanese law and evaluates the socio-legal role of the koseki in causing surrogate birth children to suffer discrimination and exclusion in Japan. The article concludes that establishing legal parent-child relationships in surrogate birth only by adoption is not in the best interests of surrogate birth children, or their birth and social parents. The article aims to stimulate consideration in other countries about the assumptions underlying the law on parent-child relationships and about how adoption law affects surrogate birth children.*

## ZUSAMMENFASSUNG

*Japan verfügt über kein Gesetz zu künstlichen Methoden der Fortpflanzung. Im Falle der Leihmutterschaft können die (lediglich) genetischen Eltern nur eine rechtliche Verwandtschaft mit dem Kind im japanischen Familienregister (koseki) eintragen lassen, indem sie eine der drei bestehenden Arten der rechtlichen Eltern-Kind-Beziehung des japanischen Familienrechts nutzen: die „natürliche“ Verwandtschaft, die Adoption und die Sonderadoption. Im Jahr 2007 enttäuschte der Oberste Gerichtshof (OGH) die Hoffnungen der japanischen Schauspielerin Aki Mukai und ihres Ehemannes, des ehemaligen Profi-Sumoringers Nobuhiko Takada, ihre aus eigenem Spermium und eigener Eizelle gezeugten und durch eine „nur biologische“ Mutter in Leihmutterschaft geborenen Zwillinge als „natürliche“ Kinder anzuerkennen. Die Entscheidung des OGH bedeutet, dass die einzige Möglichkeit der genetischen Eltern, eine rechtliche Beziehung zu ihren Kindern herzustellen, in einer Adoption oder einer Sonderadoption besteht. Allerdings haben so adoptierte Kinder weniger Rechte als „natürliche“ Kinder, u.a. in Bezug auf ihre Aufnahme in das koseki und ihre Staatsbürgerschaft. Eine Untersuchung des japanischen Familienrechts und der Entscheidung des OGH im Fall Aki Mukai unter Berücksichtigung der Kritik der „Ideologie der Kernfamilie“ zeigt, dass das japanische Recht das Vorhandensein einer rechtlichen Eltern-Kind-Beziehung bei der Mutter anhand der Geburt und beim Vater anhand einer Ehe mit der Mutter, die das Kind geboren hat, bestimmt, was die Ideologie der Kernfamilie bekräftigt. Zwar sind Eltern-Kind-Beziehungen aufgrund von Rechtsgeschäften möglich, sie haben aber nicht denselben rechtlichen und sozialen Charakter wie die auf Blutsverwandtschaft basierenden. Der Wert, der der „Blutsverwandtschaft“ im japanischen Recht zugebilligt wird, spiegelt sich auch in der Gesellschaft. In ihr wird die Persönlichkeit adoptierter Kinder negativ bewertet, was zur Stigmatisierung und Diskriminierung adoptierter Kinder führen kann. Das koseki verzeichnet adoptierte und „natürliche“ Kinder auf verschiedene Weise und fördert somit die soziale Diskriminierung. Durch Leihmutterschaft geborene adoptierte Kinder werden potenziell der gleichen Stigmatisierung ausgesetzt, obwohl sie mit ihren sozialen Eltern auch genetisch verwandt sind. Der vorliegende Aufsatz kritisiert Ansichten, die auf der „modernen“ Familienideologie des japanischen Rechts beruhen, und bewertet die gesellschaftliche und rechtliche Rolle, die das koseki für die Diskriminierung von Kindern aus Leihmutterschaft in Japan spielt. Es wird gefolgert, dass bei Leihmutterschaft die Herstellung einer rechtlichen Eltern-Kind-Beziehung lediglich auf Grundlage einer Adoption weder im Interesse der so geborenen Kinder, noch der Leihmutter, noch ihrer gesellschaftlichen Eltern liegt. Der Aufsatz will dazu anregen, in anderen Ländern dem Recht der Eltern-Kind-Beziehungen zugrundeliegende Annahmen und die Auswirkungen des Adoptionsrechts auf die durch Leihmutterschaft geborenen Kinder zu überdenken.*

*(Übers. sowie Ergänzungen durch die Red.)*