Recent Development of the Japanese Nationality Act
――Acquisition of Japanese Nationality through Acknowledgement after Birth――

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I. Introduction

This article will focus on recent developments in the Japanese Nationality Act from the viewpoint of fundamental rights,[1)] mainly analyzing a recent Supreme Court decision dealing with the acquisition of Japanese nationality

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1) In this paper, the question as to the relation between “human rights” and “fundamental rights” will not be dealt with.

through acknowledgment after birth for children born out of wedlock.

Nationality is defined as the legal relationship between an individual and a state[2] or the qualification for being a member of a particular state.[3] On the one hand, nationality concerns state policy since it defines the population of a state, which is a constitutive element of a state. On the other hand, it also concerns private interests since it constitutes an important presupposition for an individual to enjoy fundamental rights in a state. The concept of nationality is thus a quite complicated one and the interpretation of the term under the law has changed over time according to the balance between state policy and private interest which was struck in each epoch.

There has been an increasing tendency since the Second World War for nationality to be understood from the viewpoint of fundamental rights or human rights, and the Japanese Nationality Act has also been influenced by that tendency. Recently, the Supreme Court declared Article 3, paragraph 1[4] of the Nationality Act relating to the acquisition of nationality by legitimation to be unconstitutional.[5] As a result, Article 3 was amended and the new provision has been effective since January 1, 2009. The decision can be appreciated as an important step towards an understanding of nationality from the viewpoint of fundamental rights. It has also, however, brought some difficulties for the Japanese Nationality Act.

2）H. Egawa/R. Yamada/Y. Hayata, *Kokuseki-Hô* [Nationality Law] (3rd. ed., Yûhikaku, 1997), p. 3.

3）Supreme Court, Judgment, June 4, 2008, *Minshû* Vol. 62, No. 6, p. 1367, 1371. English translation is available at〈http://www.courts.go.jp/english/judgments/text/2008.06.04-2006.-Gyo-Tsu-.No..135-111255.html〉(last visited on February 7, 2013). The other version is available in *Japanese Yearbook of International Law* [JYIL], Vol. 52 (2009), p. 648.

4）"A child who has acquired the status of a child born in wedlock as a result of the marriage of the parents and the acknowledgment by either parent and who is aged under 20 (excluding those who have been Japanese citizens) may acquire Japanese nationality by making a notification to the Minister of Justice, if the father or mother who has acknowledged the child was a Japanese citizen at the time of the child's birth, and such father or mother is currently a Japanese citizen or was a Japanese citizen at the time of his/her death." This translation is based on the English translation provided by the Supreme Court's website (*supra* note (3)). The other version is available in *The Japanese Annual of International Law* [JAIL], No. 28 (1985), p. 22.

5）Supreme Court, Judgment, June 4, 2008, *supra* note (3).

In the following sections this paper will first describe the basic features of the Japanese Nationality Act and its development generally (II), followed by a discussion of the possibility of acquisition of Japanese nationality for a child who is acknowledged after birth, analyzing the above-mentioned Supreme Court decision (III).

II. General Features of the Japanese Nationality Act

Article 10 of the Japanese Constitution provides that "[t]he conditions necessary for being a Japanese national shall be determined by law". In accordance with this provision, the Nationality Act provides the requirements for acquisition and loss of Japanese nationality.

The Nationality Act was enacted in 1899, and amended in 1950 and in 1984. The latter amendment gave rise to the question of the constitutionality of the provision which the Supreme Court decided on in 2008, as will be discussed in the following section.

1. From the Nationality Act of 1899 to the Nationality Act of 1950

The Japanese Nationality Act of 1899 adopted the principle of *jus sanguinis a patre* which gives priority to the male line of descent with respect to the acquisition of Japanese nationality by birth,[6] presupposing the principle that the nationality of a married woman follows that of her husband.[7] This principle was abandoned in the amendment of the Nationality Act in 1950 in accordance with the new postwar Constitution: Article 14 of the Constitution prohibits discrimination on the grounds of sex and other attributes by declaring the equality of the people under the law,

6) Article 1: "A child shall be a Japanese national when, at the time of its birth, the father is a Japanese national."

7) Article 2−4. See, R. Yamada/Y. Hayata/T. Sawaki, "The Acquisition of Japanese Nationality: *Jus Sanguinis* and the Constitution", *JAIL*, No. 24 (1981), p. 12, pp. 13−14.

and Article 24, paragraph 2 guarantees individual dignity and the essential equality of the sexes especially with respect to family life. However, the principle of *jus sanguinis a patre* was left untouched, mainly for the purpose of preventing dual nationality at birth.[8)]

As a result, as the number of marriages between Japanese and foreign nationals has increased, the number of Japanese mothers' children who do not possess Japanese nationality has increased in Japan.[9)] This fact gradually gave rise to opinions favoring the amendment of the Nationality Act of 1950.[10)] In addition, more than a few scholars claimed that the principle of *jus sanguinis a patre* is not in conformity with the principle of equality between the sexes guaranteed by Article 14 of the Constitution.[11)] Furthermore, the Japanese government signed the Convention on the Elimination of All Forms of Discrimination Against Women in July 1980 and announced its intention to ratify it in the future.[12)]

2. Amendment of the Nationality Act in 1984

Under these circumstances, the Nationality Act was amended in 1984. The Nationality Act of 1984 abandoned the principle of *jus sanguinis a patre* and put the female line of descent on an equal footing with the male line of descent, maintaining the principle of *jus sanguinis.* Article 2, item 1 of the Nationality Act of 1984 provides that a child shall be a Japanese national "when, at the time of its birth, the father or the mother is a Japanese national".

8）K. Hosokawa, "Amendment of the Nationality Law", *JAIL*, No. 28 (1985), p. 11, 13.

9）*Id*., p. 12. In particular, in areas near American military bases, there have been cases of *de facto* statelessness among children of Japanese mothers and American fathers, due to the disappearance of their fathers.

10）*Ibid.*

11）See, for example, R. Yamada/Y. Hayata/T. Sawaki, *supra* note (7).

12）Hosokawa, *supra* note (8), p. 12. Japan adopted it in 1985. Art. 9, para. 2 provides that "States Parties shall grant women equal rights with men with respect to the nationality of their children".

Among other amendments,[13] the introduction of Article 3 relating to the acquisition of nationality by legitimation[14] should be mentioned here. Under this provision, a child born to a Japanese father and a non-Japanese mother having no legal marital relationship may acquire Japanese nationality by making a notification to the Minister of Justice if the child satisfies the requirements prescribed in paragraph 1.[15] This provision was introduced for the purpose of supplementing the principle of *jus sanguinis*, by achieving a balance in treatment with a child born in wedlock to a Japanese father and a non-Japanese mother, who may acquire Japanese nationality by birth.[16]

With regard to the possibility of the acquisition of Japanese nationality through acknowledgment after the birth of a child, the constitutionality of these above-mentioned two provisions was discussed and judged before the Supreme Court successively, as will be seen in the next section.

III. Possibility of Acquisition of Japanese Nationality through Acknowledgement after Birth

1. Introduction

As for a child born to a Japanese father and a non-Japanese mother having no legal marital relationship, if he or she is acknowledged by the father before his or her birth, the child acquires Japanese nationality by birth under Article 2, item 1 of the Nationality Act. However, if he or she is acknowledged after his or her birth, it has been interpreted by lower courts and academic opinions that the child cannot acquire Japanese nationality since in this case it cannot be said that the father was a Japanese national

13）As for the amendments of the Nationality Act in 1984, see generally, Hosokawa, *supra* note (8).
14）See, *supra* note (4).
15）Cf. *Minshû* Vol. 62, No. 6, p. 1372.
16）*Ibid.*

at the time of his or her birth.[17] Thus, first, a question arose as to the constitutionality of Article 2, item 1.

2. Constitutionality of Article 2

The Supreme Court examined the constitutionality of Article 2, item 1 in a case where a child was born to a non-married Japanese father and Philippine mother and she was acknowledged by the father two years and nine month after her birth. The Supreme Court declared this provision does not go against Article 14, paragraph 1 of the Constitution, holding as follows:[18]

> "Article 2 item 1 of the Nationality Act adopts the principle of *jus sanguinis* for the acquisition of Japanese nationality by birth. This provision emphasizes not the blood, which only indicates biological birth, but the parental relationship between the Japanese parent(s) and his or her (their) child at the time of birth, and gives Japanese nationality to the child because of the close relationship to Japan. It is desirable to determine definitely the acquisition of nationality by birth at the time of birth of a child, but it is not definite whether a child would be acknowledged at this time. Accordingly it is reasonable that Article 2, item 1 does not recognize the parental relationship between a Japanese father and his child by the acknowledgment of fatherhood after the birth of the child, and that it does not permit the acquisition of Japanese nationality by birth only by the acknowledgement of fatherhood after the birth of the child."

17）The retroactive effect of acknowledgment to the time of a child's birth under Article 784 of the Civil Code is excluded under the Nationality Act. See, Y. Okuda, "Nationality of Children Born out of Wedlock under Japanese Law −Recent Development in the Case Law−", *JAIL*, No. 48 (2005), p. 26, 27; F. Sato, "Acquiring Japanese Nationality through Recognition", *JYIL*, Vol. 54 (2011), p. 443, pp. 449−450.

18）See, Okuda, *ibid*, p. 36. The other translation is available in *JAIL*, No. 46 (2003), p. 180.

In this decision,[19] two judges showed in their concurring opinions their doubt about the constitutionality of Article 3 of the Nationality Act.[20] Also, more than a few academic opinions have claimed that Article 3 violates Article 14 of the Constitution.[21] Thus, this time a question arose as to the constitutionality of Article 3, paragraph 1.

3. Constitutionality of Article 3

In a case where a child was born in Japan to a Japanese father and a Philippine mother who were not married and she was acknowledged by the father after birth, the Supreme Court declared that Article 3 was unconstitutional.[22]

First, the Supreme Court held with regard to the purpose of Article 3, paragraph 1 as follows:

> "It is construed that Article 3, para. 1 of the Nationality Act, while keeping the basic principle of the Act, the principle of *jus sanguinis*, provides for certain requirements that can be the indexes by which to measure the closeness of the tie between the child and Japan, in addition to the existence of a legal parent-child relationship with a Japanese citizen."

However, the Supreme Court mentioned changes in the socially accepted views regarding family lifestyles and social circumstances regarding family life and parent-child relationships, and the fact that the increase in the number of children born to Japanese fathers and non-Japanese mothers had made the realities of their family lifestyles more complicated and

19）As for the criticism against this decision, see Okuda, *ibid*, pp. 38−39.
20）However, this opinion was just *obiter dictum*. See, Okuda, *ibid*, p. 37.
21）As for the details, see, Dai Yokomizo, Case Note, *Koseki Jihô* [Family Register Reporter], No. 684 (2012), p. 16, pp. 20−21.
22）Six judges wrote concurring opinions, one judge wrote an opinion and five judges wrote dissenting opinions.

diverse. Taking these into consideration, the court held that "it does not always match up to the realities of family life of today to determine that a child born to a Japanese father and a non-Japanese mother has a close tie with Japan to a sufficient extent for granting him/her Japanese nationality only after the Japanese father became legally married to the non-Japanese mother".

In addition, the Court mentioned the fact that other states are moving toward scrapping discriminatory treatment by law against children born out of wedlock, the fact that Japan has ratified the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child and also the fact that many states that had previously required legitimation for granting nationality to children born out of wedlock to fathers who are their citizens have revised their laws in order to grant nationality if, and without any other requirement, it is found that the father-child relationship with their citizens is established as a result of acknowledgement.

Then, the Supreme Court held as follows:

> "In light of these changes in social and other circumstances at home and abroad, we should say that it is now difficult to find any reasonable relevance between the policy of maintaining legitimation as a requirement to be satisfied when acquiring Japanese nationality by making a notification after birth, and the aforementioned legislative purpose."
>
> "Only a child born out of wedlock who is acknowledged by a Japanese father but has not acquired the status of a child born in wedlock as a result of legitimation, although such a child is also born to a Japanese citizen as his/her parent by blood and has a legal parent-child relationship with a Japanese citizen, is unable to acquire Japanese nationality by birth or even by making a notification under Article 3, para. 1 of said Act. We should say that due to such distinction, a child born out of wedlock who satisfies only the requirement of being acknowledged by a Japanese father after birth, alone, is subject

to considerable discriminatory treatment in acquiring Japanese nationality."

"In particular, between children acknowledged by Japanese fathers before birth and those acknowledged after birth, it is difficult to find a difference in general in terms of the level of the tie with Japanese society developed through their family life with Japanese fathers, and it is also difficult to explain the reasonableness of the policy of applying the above-mentioned distinction when granting Japanese nationality from the perspective of the level of the tie with Japanese society. In addition, under the Nationality Act that adopts the principle of *jus sanguinis*, if, despite the fact that children born out of wedlock to Japanese mothers can acquire Japanese nationality by birth, children born out of wedlock who satisfy only the requirement of being acknowledged by Japanese fathers after birth are not allowed to acquire Japanese nationality even by making a notification, we should say that such a situation is somewhat inconsistent with the basic stance of the Act from the perspective of gender equality."

At the time of her making a notification to the Minister of Justice, "the Distinction amounted to unreasonable discrimination, and the provision of Article 3, para. 1 of the Nationality Act was in violation of Article 14, para. 1 of the Constitution in that the provision caused the Distinction."

As for the remedy of the case in question, the Supreme Court took a reasonable construction as follows:

From the viewpoint of giving "relief to people who are subject to unreasonable discriminatory treatment due to the Distinction", "we examine how this problem can be corrected. In light of the demand of equal treatment under Article 14, para. 1 of the Constitution and the basic principle under the Nationality Act, the principle of *jus sanguinis*, there is no choice but to enforce the provision of Article 3, para. 1 of

> said Act which allows acquisition of Japanese nationality after birth while keeping the principle of *jus sanguinis*, in terms of its purpose and content, upon a child born out of wedlock to a Japanese father and a non-Japanese mother who satisfies only the requirement of being acknowledged by the father after birth. In other words, by considering that even such a child is allowed to acquire Japanese nationality by making a notification if he/she satisfies the requirements prescribed in said paragraph except for the requirement of acquiring the status of a child born in wedlock as a result of the marriage of the parents, it may be possible to put a constitutional and reasonable construction on the provision of said paragraph as well as the provisions of said Act, and we should say that such construction is also appropriate from the perspective of opening a path to direct relief for people subject to unreasonable discriminatory treatment due to the Distinction."

In sum, the Supreme Court determined that Article 3, paragraph 1 is unconstitutional from the fact that, by the change of domestic and international social circumstances after the introduction of Article 3, unreasonable discrimination existed between children whose parents get married after their birth and children whose parents do not get married. In order to correct the unconstitutional situation arising out of this provision, the Supreme Court then took a reasonable construction and interpreted this provision by excluding the requirement of legitimation[23]: a child who was acknowledged by the father after his or her birth may acquire Japanese nationality based on this provision, when the requirements prescribed in the provision are met.

23）The Supreme Court interpreted Article 3 as follows (the part excluded by the Supreme Court is crossed out): "A child who ~~has acquired the status of a child born in wedlock as a result of the marriage of the parents and the acknowledgment~~ [was acknowledged] by either parent and who is aged under 20 (excluding those who have been Japanese citizens) may acquire Japanese nationality by making a notification to the Minister of Justice, if the father or mother who has acknowledged the child was a Japanese citizen at the time of the child's birth, and such father or mother is currently a Japanese citizen or was a Japanese citizen at the time of his/her death."

4. Analysis

As has been mentioned earlier, this decision can be appreciated as an important step towards an understanding of nationality from the viewpoint of fundamental rights. Although the main issues in this decision concern the constitutionality of Article 3, paragraph 1 and the method of remedy in cases where a provision was regarded as unconstitutional,[24] there was one key concept which the Supreme Court used many times in the decision that will be examined here from the viewpoint of the Nationality Act: a close tie.

The Supreme Court attached great importance to a "close tie" the child has with Japan. For example, when the Court acknowledged the rationality of the legislative purpose of Article 3 at the time of the legislation, it referred to the fact that it was considered that by way of the requirement of the legitimation "the child's life is united with the life of the Japanese father" and "the child obtains a close tie with Japanese society through his/her family life".[25] Also, when the Court regarded the distinction by the existence of the legitimation as unconstitutional, it held that "it does not always match up to the realities of family life of today to determine that a child born to a Japanese father and a non-Japanese mother has a close tie with Japan to a sufficient extent for granting him/her Japanese nationality only after the Japanese father became legally married to the non-Japanese mother", due to the change of the social circumstances in Japan.[26] Furthermore, "a close tie" is an important factor in correcting the unconstitutional situation. When the Supreme Court gave the relief to a child of a non-married couple who was not acknowledged by the father after his or her birth by way of the reasonable construction of Article 3, paragraph 1 by excluding the requirement of the legitimation, it held that "this construction is in line with the purpose and objective of the provision of said paragraph in that it... satisfies other requirements that are the indexes

24）As for these issues, see Sato, *supra* note (17), pp. 450−455.
25）*Minshû* Vol. 62, No. 6, p. 1372.
26）*Minshû* Vol. 62, No. 6, p. 1374.

by which to measure the child's close tie with Japan (e.g. the father is currently a Japanese citizen)".[27)]

However, this term seems to have been used ambiguously in this decision, in two points.

a) Close tie and the principle of *jus sanguinis*

First, it is not clear from the decision whether a close tie the child has with Japan means a close tie with his or her family including (at least) a Japanese parent, or a close tie directly related with Japanese society. The term "a close tie" is used with both meanings in this decision.[28)] Even so, from the conclusion that the distinction by the existence of the legitimation constitutes unreasonable discrimination, it can be understood that the Supreme Court used this term as a close tie directly related with Japanese society and not with the family, including a Japanese parent.

However, considering a close tie to be directly related with Japanese society would make the principle of *jus sanguinis* hardly justifiable. This principle is based on the idea that the cultural tradition of a society is succeeded through the family life from parents to children.[29)] Thus, if a state adopts this principle for the purpose of the succession of its own culture, it is necessarily important that a child has a close tie with his or her family including a Japanese parent (or Japanese parents).[30)] If a direct close tie between a child and Japanese society is to be considered for the acquisition of nationality without the intermediary of the family, the principle of *jus sanguinis* loses its base. Thus, in this case, in order to

27）*Minshû* Vol. 62, No. 6, p. 1379.
28）As for the examples, see, Yokomizo, *supra* note (21), p. 22.
29）Egawa/Yamada/Hayata, *supra* note (2), p. 59; Amélie Dionisi-Peyrusse, *Essai sur une nouvelle conception de la nationalité* (Defrénois, 2008), p. 284.
30）It can be said that this viewpoint was maintained at the time of the amendment of the Nationality Act in 1984. Article 3 was introduced to prevent a great difference in the acquisition of Japanese nationality between cases where parents get married before the birth of their child and cases where they get married after the birth of their child, since in both cases the child enjoys his or her family life with the parents. This provision could be said to complement the principle of *jus sanguinis* in that it aimed for the succession of the culture of a state through the family life.

argue, with regard to the principle of *jus sanguinis*, that "the existence of a legal parent-child relationship with the father or mother who is a Japanese citizen indicates that the child has a close tie with Japan",[31] it is necessary to find a new justification for this principle.[32]

b) Close tie: *de jure* or *de facto*?

Second, it is not clear from the decision whether a close tie the child has with Japan means a *de jure* close tie or a *de facto* close tie. Here again, the term "close tie" is used with both meanings in this decision.[33] Even so, from the fact that when the Supreme Court concluded that Article 3, paragraph 1 was unconstitutional it referred to changes in the reality of family life, it can be understood that the Court used this term to mean a *de facto* close tie between a child and Japanese society, at least in relation to Article 3.

The consideration of a *de facto* close tie between a child and Japanese society should have necessarily made it difficult to argue that it was only with the existence of a legal parent-child relationship with a father or mother who is a Japanese citizen that the child has a close tie with Japan. This should have led to an examination of the possibility of introducing the requirement of a *de facto* close tie such as a birth in Japan or the residence of the parents in Japan for the acquisition of Japanese nationality by birth provided by Article 2.

However, the reasonable construction of Article 3, paragraph 1 which the Supreme Court adopted for the correction of the unconstitutional situation was, on the contrary, based on the idea of a *de jure* close tie: the fact that the father is currently a Japanese national is sufficient to indicate the child's

31）*Minshû* Vol. 62, No. 6, p. 1374.

32）Under the decision of the Supreme Court which considers a direct close tie to be between a child and Japanese society, it seems more reasonable to give nationality based on birth in Japan or residence in Japan for a certain period. Considering that the exercise of a state's jurisdiction is limited to its own territory, it can be said that the relation between a state and a person residing for a certain period in its territory is very close. Cf. Dionisi-Peyrusse, *supra* note (29), p. 293.

33）As for the examples, see, Yokomizo, *supra* note (21), p. 22.

close tie with Japan. Thus, as the dissenting opinions critically took note of, it can be said that this decision eventually decreased the level of "a close tie" (in the *de facto* sense) with Japan for the acquisition of Japanese nationality in the sense that even a child who lives abroad and has no real connection with Japanese society could acquire Japanese nationality if he or she is acknowledged by the father. However, it is hardly justifiable from a legal viewpoint that the Supreme Court would attach more importance to the principle of *jus sanguinis*, whereas, as has been mentioned above, the Court's consideration of a direct close tie between a child and Japanese society makes this principle hardly justifiable.

IV. Concluding Remarks

In spite of the above-mentioned problems, the decision of the Supreme Court was respected by the legislative body, which amended Article 3, paragraph 1 so that a child of a non-married couple who was acknowledged by the father after birth could acquire Japanese nationality with notification, without adding any other requirement.[34] The Diet got embroiled in debate over the risk of the acquirement of Japanese nationality by means of fraudulent acknowledgment and eventually Article 20, relating to sanctions against fraudulent notification for the acquisition of nationality, was introduced.[35] Furthermore, it was established by the administrative regulations that the relevant administrative office should investigate notifications in order to prevent fraudulent notifications for the

34）Amended Article 3, paragraph 1 is as follows: "In cases where a child acknowledged by the father or mother is under twenty years of age (excluding a child who was once a Japanese citizen) and the acknowledging father or mother was a Japanese citizen at the time of the birth of the child, Japanese nationality may be acquired through notification to the Minister of Justice if that father or mother is currently a Japanese citizen or was so at the time of death."

One commentator criticizes the legislative process by indicating that it "was done quickly and the proper discussion needed in the Diet for legislative reform was not seen to have taken place". Sato, *supra* note (17), p. 454.

35）"In cases of notification provided for in the provisions of Article 3, paragraph (1), a person making a false notification shall be punished by not more than one year of imprisonment with work or a fine of not more than two hundred thousand yen."

acquisition of Japanese nationality.[36] As a result, the practice regarding the acquisition of Japanese nationality has become somewhat confused and has encountered long delays.[37]

Such a problem seems to have occurred, fundamentally, from the fact that the Nationality Act maintains the principle of *jus sanguinis* without any limitation whereas it places more and more emphasis on the individual's independence and the direct relation between an individual and Japanese society. The introduction of some limitations to the principle of *jus sanguinis* should be examined, even if this principle might be maintained in Japan.[38],[39]

36）See, Yokomizo, *supra* note (21), p. 27.
37）*Ibid.*
38）Cf. Sato, *supra* note (17), p. 454 (the author reflects on the possibility of introducing "a close relationship" between a child and Japan as a requirement, but eventually denies this possibility because of its vagueness).
39）This requirement should be examined not only in the context of Article 3 but also in the context of Article 2.