precluding Japanese citizens residing abroad from voting in national elections was inconsistent with the constitutional guarantee of voting rights. Applying the strict scrutiny standard for the very first time, the Court made an exacting inquiry into possible justifications for the exclusion and notes that, due to the advancement in communication technology on a global scale, qualified voters residing in all parts of the world can now easily familiarize themselves with the information about legislative candidates via the Internet. Accordingly, it has held that the **[*467]** need for well-informed decisions, cited by the Ministry of Justice as the reason for exclusion, cannot be a compelling government interest justifying the disenfranchisement of Japanese citizens living abroad. The number of such citizens is currently more than 1.1 million. [87] By ensuring that their voting rights are protected, the Court has included into the political process a diverse and important group of voters: those who have contacts with people of different nationalities and cultures on a daily basis. [88]

Even more significant is Anonymous v. Japan, [89] rendered in 2008. In this case, the Supreme Court declared a provision in the Nationality Act [90] unconstitutional under the Equality Clause. [91] The Japanese Nationality Act is an interesting piece of legislation in that, although technically part of public law, follows the jus sanguinis principle characteristic of continental legal systems, rather than the Anglo-American jus soli principle, as to attribution of nationality at birth. [92] There was a problem, however, because of its narrow wording: "although an illegitimate child acquired Japanese nationality by birth ipso facto when its mother [was] a Japanese national, it [did] not do so when only its father [was] a Japanese national unless the father recognized the child before its birth." [93] Explaining that nationality must be determined at the time of birth, the Ministry of Justice denied Japanese nationality to children born out of wedlock to non-Japanese mothers and Japanese fathers but **[*468]** acknowledged by the fathers after they were born. The only way for them to acquire nationality was through legitimation by subsequent marriage of the parents - which was not always available and in any event beyond the control of the children themselves. Many of these children's mothers were Philippine and other Asian women, as was the case with the plaintiffs.

In holding that such discriminatory treatment is no longer allowed, the Japanese Supreme Court placed much emphasis on the rapid progress of globalization, specifically referring to the increase in the number of international marriages and cohabitations in Japan. The majority pointed out that no fault could be attributed to the plaintiffs. Accordingly, it struck down the statutory scheme as not rationally related to the asserted government interest of limiting nationality to those with a strong connection with Japan. Following Anonymous, the legislature quickly amended the relevant provisions and the new Nationality Act [94] came into force in 2009. An illegitimate child like the plaintiffs in Anonymous can now acquire Japanese nationality ipso jure by simply filing with the Minister of Justice, stating that his or her father is a Japanese national. The Minister of Justice may make inquiries but has no discretion to reject a valid application.

Kikuya, as well as Anzai in hindsight, is a momentous decision that needs to be understood in the context of these latest developments in Japanese constitutional law. As discussed in Part II, the Supreme Court analyzed the case in a way quite different from the previous line of cases and applied Article 89, instead of Paragraph 3 of Article 20. In doing so, the Court subtly heightened the constitutional threshold the government must satisfy. Under Kikuya, the purpose and effect of governmental action are no longer decisive, particularly when activities conducted on public property are patently religious in nature. This landmark Supreme Court decision, which makes it easier for a citizen to challenge governmental action, is a reminder to public officials across Japan that they are required to live up to the constitutional commitment to separation of church and state - a commitment that is becoming increasingly important as the society matures and consideration for minorities and neighboring countries emerges as a new **[*469]** challenge. The Court's special attention to the separation of church and state seems deliberate and especially appropriate in light of the fact that conservative Japanese politicians' homage to the Yasukuni Shrine has frequently drawn harsh criticism from surrounding nations in recent years.

With a series of innovative, outward-looking decisions embodying the spirit of the Preamble to the Constitution of Japan, the Japanese Supreme Court has made clear its intention to intervene when it is necessary to enforce constitutional norms against the government. The issues dealt with in cases decided after around 1990 are more substantive than those identified in earlier cases in terms of their constitutional significance: voting rights, prohibition on discrimination based on immutable characteristics, and the separation of church and state, which is meant to solidify the protection of religious liberty, according to Kikuya.

Judicial activism in enforcing individual rights and liberties is referred to as a "worldwide movement" [95] these days. Friedman points out that "the trend toward stronger and more active courts" [96] is found on all continents including Asia. Japan is starting to join this international trend, although, admittedly, the number of powerful decisions like Kikuya is still low. It is heartening that the Japanese Supreme Court seems to be concentrating its efforts on areas that are particularly important from the perspective of redeeming the debt of imperialism and strengthening Japan's ties with its neighbors, such as the separation of church and state. The full picture of Kikuya's effects remains to be seen; one of the matters that should be looked into in the future will be judicial philosophy and voting patterns of seven new Justices [97] appointed by the Hatoyama and **[*470]** Kan cabinets consisting mostly of Democrats, [98] whose promise in the election of 2009 was to break with the old-style politics of the pro-Shinto LDP. [99]

[*471]

Appendix: Number of Japanese Supreme Court Decisions That Invalidated Statutory Provisions or Governmental Actions

	1940s	**1950s**	**1960s**	**1970s**
Number of Supreme Court Decisions That Invalidated Statutory Provisions	0	0	0	3 (Equality 2; Economic Liberty 1)
Number of Supreme Court Decisions That Invalidated Governmental Actions	1*	3*	4*	2*
Total	1	3	4	5

	1980s	**1990s**	**2000s**	**2010**
Number of Supreme Court Decisions That Invalidated Statutory Provisions	2 (Equality 2; Economic Liberty 1)	0	3 (Right to Sue for Redress 1; Voting Right 1; Equality 1)	0
Number of Supreme Court Decisions That Invalidated Governmental Actions	0	1 (Separation of Church and State)	0	1 (Separation of Church and State)
Total	2	1	3	1

* Most of the cases in these cells were about gross infringements of constitutional rights of suspects, defendants, or third parties in criminal proceedings, except that two of them involved a technical issue of whether GHQ directives and regulations remained in force after the San Francisco Peace Treaty had taken effect, and one was about the permissibility of a judge-mandated settlement in an eviction case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional Law > Equal Protection > Parentage

Governments > Local Governments > Finance

Real Property Law > Common Interest Communities > Homeowners Associations

FOOTNOTES:

n1. Mori's "Divine Nation' Remark Spurs Outrage, Japan Times, May 17, 2000, available at http://search.japantimes.co.jp/print/nn20000517a1.html.

n2. Koizumi served as Prime Minister of Japan from April 2001 to September 2006. Reiji Yoshida & Kazuaki Nagata, Koizumi To Exit Political Stage, Japan Times, Sept. 26, 2008, available at http://www.japantimes.co.jp/text/nn20080926a1.html.

n3. According to the data compiled by the Ministry of Land, Infrastructure, Transport, and Tourism, based on the Ministry of Justice's documents, the number of international visitors to Japan was 8.35 million in 2008, hitting a record high. See Number of Inbound and Outbound Travelers, Japan Tourism Agency, http://www.mlit.go.jp/kankocho/en/siryou/toukei/in_ out.html (last updated Apr. 12, 2010).

n4. See More Nurses, Caregivers Arrive from Indonesia Under Agreement, Japan Times, Aug. 8, 2010, available at http://search.japantimes.co.jp/cgi-bin/nn20100808a5.html.

n5. Saiko Saibansho [Sup. Ct.] Jan. 20, 2010, 64 Saiko Saibansho Minji Hanreishu [Minshu] 1 (Japan).

n6. 403 U.S. 602, 612 (1971).

n7. Nihonkoku KenpO [KenpO] [Constitution], pmbl. (Japan) (Gov't Printing Bureau trans.), available at http://www.ndl.go.jp/constitution/e/etc/c01.html.

n8. Of the 30% of Japanese adults who claimed to have a religion, 75% considered themselves Buddhists, 19% Shintoists, and 12% Christians, according to a recent survey. See Audrey Barrick, More People Claim Christian Faith in Japan, Christian Post (Mar. 19, 2006, 10:24 AM), http://www.christianpost.com/ news/more-people-claim-christian-faith-in-japan-1549/. The teenage population revealed somewhat different statistics; "of the 20 percent who professed to have a religion, 60 percent called themselves Buddhists, 36 percent Christians and Shintoists." Id.

n9. Vernon Valentine Palmer, Introduction to the Mixed Jurisdictions, in Mixed Jurisdictions Worldwide: The Third Legal Family 3, 7-8 (Vernon Valentine Palmer ed., 2001).

n10. See id. at 8-10.

n11. The Meiji Constitution was promulgated by the Emperor Meiji on February 11, 1889. It took effect on November 29, 1890, and continued to be in force until it was superseded by the Constitution of Japan on May 3, 1947. See infra note 12.

n12. See Nihonkoku KenpO [KenpO] [Constitution], ch. 1 (Japan) (Gov't Printing Bureau trans.), available at http://www.ndl.go.jp/constitution/e/etc/ c01.html; Dai Nihon Teikoku KenpO [Meiji KenpO] [Constitution], art. 4 (Japan) (Ito Miyoji trans.), available at http://www.ndl.go.jp/constitution/e/etc/c02.html ("The Emperor is the head of the Empire ... ."); id. art. 5 ("The Emperor exercises the legislative power with the consent of the Imperial Diet."); id. art. 6 ("The Emperor gives sanction to laws, and orders them to be promulgated and executed."); id. art. 57, para. 1 ("The Judicature shall be exercised by the Courts of Law according to law, in the name of the Emperor.").

n13. See, e.g., Dai Nihon Teikoku KenpO [Meiji KenpO] [Constitution], art. 22 (Japan) (Ito Miyoji trans.), available at http://www.ndl.go.jp/constitution/e/etc/ c02.html ("Japanese subjects shall have the liberty of abode and of changing the same within the limits of the law."); id. art. 29 ("Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings and associations.").

n14. Id. art. 28.

n15. Shintoism is the traditional Japanese religion. Marilyn Reid, Mythical Star Signs 25 (2005). Worshipping the Emperor as a descendant of the sun goddess is still an important part of its practice today. Id.

n16. See Elichiro Takahata, Religious Accommodation in Japan, 2007 BYU L. Rev. 729, 736.

n17. Law No. 24 of 1906 (Japan).

n18. Imperial Edict No. 96 of 1906 (Japan).

n19. See Takahata, supra note 16, at 736 n.64. ("Shinto priests were treated as state officials and shrines as public institutions. In schools, students were strongly encouraged to visit a shrine, even if it was against the students' beliefs. The government asserted that since Shinto was not a religion, these actions did not contradict the Constitution.").

n20. See Nihonkoku KenpO [KenpO] [Constitution], art. 81 (Japan) (Gov't Printing Bureau trans.), available at http://www.ndl.go.jp/constitution/e/etc/c01.html.

n21. See id. art. 98.

n22. See id. art. 10-40 (Chapter III of the Constitution of Japan, entitled "Rights and Duties of the People," is the Japanese Bill of Rights). There are very few provisions concerning duties. But see id. art. 26, para. 2 ("All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law."); id. art. 30 ("The people shall be liable to taxation as provided by law.").

n23. 5 U.S. 137 (1803).

n24. See Nihonkoku KenpO [KenpO] [Constitution], art. 43, para. 1 (Japan) (Gov't Printing Bureau trans.), available at http://www.ndl.go.jp/constitution/ e/etc/c01.html ("Both Houses shall consist of elected members, representative of all the people.").

n25. See id. art. 41 ("The Diet shall be the ... sole law-making organ of the State."); id. art. 65 ("Executive power shall be vested in the Cabinet."); id. art. 76 para. 1 ("The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.").

n26. The General Headquarters of the Allied Powers had issued a directive instructing the Japanese government to stop providing special support and supervision to Shintoism in 1945. See GHQ Directive of December 15, 1945 (Japan).

n27. Nihonkoku KenpO [KenpO] [Constitution], art. 20, para. 1 (Japan) (Gov't Printing Bureau trans.), available at http://www.ndl.go.jp/constitution/e/etc/c01.html.

n28. Id. art. 20, para. 3.

n29. Id. art. 89.

n30. Saiko Saibansho [Sup. Ct.] July 13, 1977 (Gyo-Tsu) no. 69, 31, Saiko Saibansho Minji Hanreishu [Minshu] 533, available at http://www.courts.go.jp/ english/judgments/text/1977.7.13-1971.-Gyo-Tsu-.No..69.html (Japan).

n31. Carpentering has been a trade with a strong connection with Shintoism in Japan. The Ise Grand Shrine, the apex of all the shrines, for example, owns two adjoining sites of identical size and rebuilds its buildings every twenty years; serving on this project is generally considered to be a high honor for a carpenter. See Shikinen Sengu Ceremony in Ise Jingu, Jingu, http://www.isejingu.or.jp/english/ sikinen/sikinen.htm (last visited Oct. 30, 2011). At present, the buildings to be used beginning in 2013 are being built. See id. The current construction work started in 2006, following the Emperor's permission in 2004 and a variety of rituals in 2005. See id. The Ise Grand Shrine is located in Mie Prefecture, the same prefecture that the City of Tsu belongs to. See id.

n32. Curtis J. Milhaupt et al., The Japanese Legal System: Cases, Codes, and Commentary 228 (Frank K. Upham trans., 2006).

n33. Id. at 230.

n34. Id.

n35. Id. Note that, under the majority's view, how the general public perceives the governmental conduct in question weighs heavily in the determination of its constitutionality. Kakunaga is thus said to have "allowed state support of religious institutions that were specifically targeted by the postwar Constitution" in effect, for "the religious institutions most likely to get state support are Shinto institutions because of the ease with which Shinto ceremonies can be considered cultural events as opposed to religious events." Keiko Yamagishi, Freedom of Religion, Religious Political Participation, and Separation of Religion and State: Legal Considerations from Japan, 2008 BYU L. Rev. 919, 932-33.

n36. Saiko Saibansho [Sup. Ct.] July 13, 1977 (Gyo-Tsu) no. 69, 31, Saiko Saibansho Minji Hanreishu [Minshu] 533, available at http://www.courts.go. jp/english/judgments/text/1977.7.13-1971.-Gyo-Tsu-.No..69.html (Japan).

n37. For an analysis of the "Japanization" of the purpose and effect test, see Hidenori Tomatsu, The Reception in Japan of the American Law and Its Transformation in the Fifty Years Since the End of World War II: Constitutional Law, 26 Law in Japan 14, 17-18 (2000).

n38. Saiko Saibansho [Sup. Ct.] June 1, 1988, 42 Saiko Saibansho Minji Hanreishu [Minshu] 277 (Japan).

n39. Milhaupt et al., supra note 32, at 234.

n40. Id. Justice Masami Ito, who was a comparative law professor at the University of Tokyo before joining the bench and was a prolific writer in the area of comparative constitutional law, wrote a passionate dissent, pointing out that the Court must look into the matter from the viewpoint of a minority member when deciding a constitutional case, and that religious minorities in Japan are often hurt because the society is indifferent to religion in general. He was the lone dissenter, however; the remaining fourteen Justices were all of the opinion that the suit should be dismissed.

n41. See Saiko Saibansho [Sup. Ct.] Feb. 16, 1993, 1987 (Gyo-Tsu) no. 148, 47 Saiko Saibansho Minji Hanreishu [Minshu] 1687, available at http://www.courts.go.jp/english/judgments/text/1993.2.16-1987-Gyo-Tsu-.No.148.html (Japan).

n42. See 1441 Hanrei Jiho 57 (Sup. Ct., Nov. 16, 1992), available at http://www.courts.go.jp/hanrei/pdf/js_20100319131444073196.pdf (Japan). This case does not appear to be good law any longer in view of Kikuya v. Taniuchi, discussed in Part II of this article. See infra Part II.

n43. Saiko Saibansho [Sup. Ct.] Feb. 16, 1993, 1987 (Gyo-Tsu) no. 148, 47 Saiko Saibansho Minji Hanreishu [Minshu] 1687, 51 Minshu 1673 (Sup. Ct,. Apr. 2, 1997), available at http://www.courts.go.jp/english/judgments/text/1997.04.02-1992-Gyo-Tsu-No.156.html (Japan). The plaintiffs in this case were a group of residents of Ehime Prefecture, whose governor was Haruki Shiraishi, the defendant. See id. The organizational head of the plaintiffs was Kenji Anzai, a Buddhist monk. See id.

n44. Justice Sonobe was appointed to fill the vacancy on the Court created by the retirement of Justice Ito in 1989.

n45. The Liberal Democratic Party, which ran the Japanese government for most of the period between 1955 and 2009, temporarily lost power to the non-LDP coalition of eight parties in 1993. Less than eleven months later, it made a comeback by driving a wedge into the coalition and allying itself with the Socialists and another smaller political group, the Sakigake, but the newly-formed government was led by Prime Minister Tomiichi Murayama, the leader of the Socialist Party, from 1994 to 1996.

n46. Saiko Saibansho [Sup. Ct.] Jan. 20, 2010, 64 Saiko Saibansho Minji Hanreishu [Minshu] 1, available at http://www.courts.go.jp/hanrei/pdf/ 20100120164304.pdf (Japan).

n47. See id.

n48. The resident invited the shrine, which needed space to rebuild its building, to move onto his land rent-free around 1948, but thereafter offered the premises gratis to the then Town of Sunagawa to avoid the continued burden of property tax. See id. The town council voted to accept his proposal and acquired the title of the land in 1953. See id.

n49. Japanese intermediate appellate courts are empowered to make additional findings of facts as they see fit in civil and administrative cases. See Minji Soshoho [Minsoho] [C. Civ. Pro.] 1996, art. 297 (Japan); Gyosei Jiken Sosho Ho [Administrative Case Litigation Law], Law No. 139 of 1962, art. 7. ("Any matters concerning administrative case litigation which are not provided for in this Act shall be governed by the provisions on civil actions.").

n50. Only fourteen Justices participated in this case, because there was an unfilled vacancy caused by the sudden death of one Justice.

n51. John Breen, "Conventional Wisdom" and the Politics of Shinto in Postwar Japan, 4 Pol. & Religion 68, 70 (2010).

n52. See Chiho Jichi Ho [Local Autonomy Law], Law No. 67 of 1947, art. 242-2.

n53. See 46 Gyoshu 250 (Osaka High Ct., Mar. 9, 1995), available at http://www.courts.go.jp/hanrei/pdf/138ECD21CF88967049256D41000A7924.pdf.

n54. Id. (author's translation).

n55. Id. (author's translation).

n56. The plaintiffs in this case presented a variety of novel claims, probably the most central of which was that they, either as taxpayers or as members of the electorate, had been indirectly compelled to attend the ritual, whose expenses had been paid from public funds and whose attendees had included the Speaker of the House of Representatives and the President of the House of Councillors. See id.

n57. Saiko Saibansho [Sup. Ct.] Apr. 14, 1976, 30 Saiko Saibansho Minji Hanreishu [Minshu] 223, available at http://www.courts.go.jp/hanrei/pdf/js_ 20100319121425398065.pdf (Japan).

n58. Nihonkoku KenpO [KenpO] [Constitution], art. 14, para. 1 (Japan) (Gov't Printing Bureau trans.), available at http://www.ndl.go.jp/constitution/ e/etc/c01.html. Following in the footsteps of its American counterpart Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court of Japan overruled its earlier precedent, under which the matter had been left to the discretion and prudence of the legislature, and struck down the relevant provisions of the Public Offices Election Law.

n59. See Hidenori Tomatsu, Kenpo Sosho 143 (2008).

n60. See Id. at 150.

n61. Yasukuni has been the "single most important issue in post war state-religion relations" in Japan. See Breen, supra note 51, at 71. The Yasukuni Shrine occupies a special place in the hierarchy of Shinto shrines in that it is above all an imperial shrine. "Its war dead died for imperial Japan; its rituals are graced by the presence of imperial emissaries. Those rituals celebrate the imperial virtues the dead exhibited in their dying: patriotism and loyalty and self-sacrifice." Id. at 79.

n62. Kokka Baisho Ho [National Compensation Law], Law No. 125 of 1947, art. 1, para. 1.

n63. Minpo [Minpo] [Civ. C.] art. 709 (Japan).

n64. Nihonkoku KenpO [KenpO] [Constitution], art. 43, para. 1 (Japan) (Gov't Printing Bureau trans.), available at http://www.ndl.go.jp/constitution/e/etc/ c01.html.

n65. Id. art. 13.

n66. Id. pmbl.

n67. E.g., 52 Shogetsu 2979 (Osaka High Ct. Sept. 30, 2005).

n68. This long-held view, unanimously espoused by those lower courts considering the controversy, has been reinforced by a 2006 decision of the Supreme Court, which has made it clear that there is no right to seek compensation for emotional distress caused by another person's visit to a particular shrine. See 1940 Hanrei Jiho 122 (Sup. Ct., June 23, 2006).

n69. See, e.g., Reiji Yoshida, Koizumi Visits Yasukuni Shrine, Japan Times, Oct. 18, 2005.

n70. See Breen, supra note 51, at 79.

n71. Nihonkoku KenpO [KenpO] [Constitution], art. 81 (Japan) (Gov't Printing Bureau trans.), available at http://www.ndl.go.jp/constitution/e/etc/c

n72. Lawrence M. Friedman, The Horizontal Society 68 (1999).

n73. See id.

n74. Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases 98 (2003).

n75. Id. at 99.

n76. Id. at 74.

n77. See, e.g., Near v. Minnesota, 283 U.S. 697 (1931); Fiske v. Kansas, 274 U.S. 380 (1927).

n78. See, e.g., Everson v. Bd. of Educ., 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296 (1940).

n79. The NAACP was founded in 1909; the NAACP Legal Defense and Education Fund, the civil and human rights law firm, was established in 1940. See NAACP v. NAACP Legal Defense & Educ. Fund, Inc., 753 F.2d 131, 132, 133 (D.C. Cir. 1985).

n80. The ACLU, the largest public interest law firm in the United States, according to its website, was founded in 1920. See ACLU History, ACLU, http://www.aclu.org/aclu-history (last visited Oct. 30, 2011).

n81. See Bruce E. Aronson, The Brave New World of Lawyers in Japan: Proceedings of a Panel Discussion on the Growth of Corporate Law Firms and the Role of Lawyers in Japan, 21 Colum. J. Asian L. 45, 47-49 (2007) ("For much of the postwar era the reality of legal practice in Japan seemed consistent with the image of a society which neither depended on nor highly valued lawyers."). As a result of the recent legal reform, the number of lawyers in Japan is expected to exceed 30,000 soon. This number is still less than that of newly qualified attorneys per year in the United States but was enough to cause political turmoil: the Japan Federation of Bar Associations is requesting the government to suspend the ongoing reform. See Number of Lawyers in Japan To Top 30,000 Soon, Japan Today (on file with author).

n82. See Friedman, supra note 72.

n83. Saiko Saibansho [Sup. Ct.] Nov. 28, 1962, 16 Saiko Saibansho Keiji Hanreishu [Keishu] 1593.

n84. Saiko Saibansho [Sup. Ct.] Dec. 20, 1972, 26 Saiko Saibansho Keiji Hanreishu [Keishu] 631.

n85. Saiko Saibansho [Sup. Ct.] Apr. 4, 1973, 27 Saiko Saibansho Keiji Hanreishu [Keishu] 265. The stipulated punishment was much more severe than that for ordinary homicide, which was imprisonment for not less than three years. The Court held that such a large difference was not rationally related to a legitimate government interest and was thus in violation of the Equality Clause. See Nihonkoku KenpO [KenpO] [Constitution], art. 14, para. 1 (Japan) (Gov't Printing Bureau trans.), available at http://www.ndl.go.jp/constitution/e/etc/ c01.html. The Public Prosecutors Office thereafter stopped using the nullified provision, instead opting to indict all patricide offenders for ordinary homicide. However, due to fierce opposition from conservative quarters, the legislature did not remove the unconstitutional provision from the Criminal Code until 1995, when the coalition government led by Socialists finally deleted it.

n86. Saiko Saibansho [Sup. Ct.] Sept. 14, 2005, 59 Saiko Saibansho Minji Hanreishu [Minshu] 2087. The law was found to be simultaneously in violation of Article 15, Paragraphs 1 (the right to choose public officials) and 3 (universal adult suffrage), Article 43, Paragraph 1 (the Diet's character as the representative of all the people), and the proviso to Article 44 (prohibition of discrimination as to the qualifications of electors of members of the Diet). See id.

n87. See Ministry of Foreign Affairs, Annual Report of Statistics on Japanese Nationals Overseas (2009), available at http://www.mofa.go.jp/ mofaj/toko/tokei/hojin/10/pdfs/1.pdf. The latest available figure is 1,131,807, calculated in October 2009. The number of Japanese people in Iraq is not publicly disclosed for security reasons and therefore not included here. Id.

n88. The legislature amended the Public Offices Election Law the following year to make sure that voters living outside of Japan could cast their ballots, either by mail or at diplomatic and consular offices abroad. See Law No. 62 of 2006.

n89. Saiko Saibansho [Sup. Ct.] June. 4, 2008, 2006 (Gyo-Tsu) 135, 62 Saiko Saibansho Minji Hanreishu [Minshu] 6 (Japan), available at http://www.courts. go.jp/english/judgments/text/2008.06.04-2006.-Gyo-Tsu-.No..135-111255.html.

n90. [Nationality Act], Law No. 147 of 1950.

n91. Nihonkoku KenpO [KenpO] [Constitution], art. 14, para. 1 (Japan) (Gov't Printing Bureau trans.), available at http://www.ndl.go.jp/constitution/e/etc/c01. html.

n92. See Hosokawa Kiyoshi, Japanese Nationality in International Perspective, in Nationality and International Law in Asian Perspective 177, 191 (Ko Swan Sik ed., 1990).

n93. Id. at 192.

n94. [Nationality Act], Law No. 88 of 2008.

n95. Friedman, supra note 72.

n96. Id.

n97. None of these Justices took office in time for participation in the consideration of the Kikuya case.

n98. Yukio Hatoyama, the former leader of the Democratic Party of Japan, was Prime Minister of Japan from September 2009 to June 2010. Profile: Yukio Hatoyama, BBC News, http://news.bbc.co.uk/2/hi/asia-pacific/8168838.stm(last updated June 2, 2010, 7:28). He was succeeded by Naoto Kan in both capacities. Naoto Kan, N.Y. Times, http://topics.nytimes.com/top/reference/timestopics/people/k/ naoto_kan/index.html (last updated Aug. 29, 2011). By coincidence five Supreme Court Justices retired because of their age and two Justices passed away in office between December 2009 and November 2010, making 2010 a year with an unusually high number of appointments of Justices. Cf. Saibansho Ho [Judiciary Act], Law No. 59 of 1947, art. 50 (Justices hold tenure until the age of mandatory retirement, age 70).

n99. "One is struck by the intimate connections between the LDP and the SAS ... . SAS debating club members are all LDP." Breen, supra note 51, at 79. SAS stands for the "Shinto Association of Spiritual Leadership," the political wing of the Shinto establishment founded in 1969. See Id. at 74.

*3 JEAIL 293, **

Copyright © 2010 YIJUN Press. All Rights Reserved.
Journal of East Asia & International Law

Autumn, 2010

Journal of East Asia & International Law

3 JEAIL 293

LENGTH: 6074 words

ISSUE FOCUS: Human Rights Protection of the Vulnerable in an Age of Globalization: Immigration Law and Policy of Japan in the Age of East Asian Community-Building *

* This paper was presented at the East Asian Legal Studies Lunchtime Talk held at Harvard Law School on March 22, 2010. The author is grateful to **Keisuke Mark Abe,** Young Hill Llew and **Mark** Ramseyer for their valuable comments.

NAME: Yoshiaki Sato **

BIO:

** Professor of Law, Seikei University, Japan; Intellectual Member, Council on East Asian Community. LL.B., LL.M., Ph.D. (Tokyo). The author may be contacted at: sato@law.seikei.ac.jp /Address: Faculty of Law, Seikei University, 3-3-1 Kichijoji-Kitamachi, Musashino, Tokyo, 180-8633, Japan.

LEXISNEXIS SUMMARY:
... Since mobility is a critical issue for establishing a transnational labor market and ultimately a regional community, this article examines the interaction between Japanese immigration law, especially that of the Industrial Training and Technical Internship Program, and the struggle to build an East Asian Community. ... Article 19 of the draft Charter stipulates that, in paragraph 1, the Member States shall "reduce barriers to the free movement of nationals of the Member States who are carrying out trade in services within the Community," and, in paragraph 2, "promote the free movement of tourists, students and other short-term visitors within the Community." ... In 2009, Japan hosted more than 500 so-called refugees from 19 countries. 470 of them were granted special permission to stay, while only 30 from 8 countries were formally recognized as refugees. ... On the contrary to the Japanese government's goal to crack down on employment of illegal immigrants in the latter half of the 1990's, small or middle-sized companies turned to accept trainees and interns as a substitute for illegal foreign labor workers. ... The revised Immigration Control Act seeks to prevent the abuse by requiring intra-industrial associations, which is empowered to supervise host companies, to submit regular reports to the Ministry of Justice. ... Other measures for protecting interns are as follows:

(1) providing lectures to interns about their legal rights; (2) inspection of contracts between the intern and agency and denying entry when the contract contains illegal clauses (e.g., penalty clauses); (3) monthly inspections of the host companies by the supervising association; (4) supervision by the supervising associations of the accepting companies once in three months; (5) providing advisors to interns; and (6) establishing and increasing penalties to host companies and supervising associations for violating the new regulations, e.g ., suspending the ability to sponsor new interns for five years. ... As long as the Japanese government cannot decide the best course of action, the Industrial Training and Internship Program seems to be the only means to meet needs of both the Japanese economy and the developing countries in East Asia which have a strong push factor for migration, redundant workers in rural part of the countries. ... In fact, the NEAT Working Group on an East Asian Cooperative Framework for Migrant Labor recommended that national laws of host countries be harmonized to ensure consistency throughout East Asia.

HIGHLIGHT:

Japanese immigration law has been amended several times since 2000. These revisions aimed at coping with globalization and regionalization in East Asia. Since mobility is a critical issue for establishing a transnational labor market and ultimately a regional community, this article examines the interaction between Japanese immigration law, especially that of the Industrial Training and Technical Internship Program, and the struggle to build an East Asian Community. This article proposes enhancing the mutual recognition of certifications of skill as a means to promote the movement of people in the region.

Keywords
Immigration law, Mobility, East Asian Community, Industrial Training and Technical Internship Program, Mutual Recognition of Certifications

TEXT:
[*293] I. Introduction

Japanese immigration law has been frequently amended since 2000. The Immigration Control and Refugee Recognition Act [1] was revised in 2001, 2004, 2005, 2006 and 2009. The overall trend has been providing immigrants with greater access to the Japanese labor market. The Tourism Nation Promotion Basic Plan [2] and the New Growth Strategy **[*294]** (Basic Policy) [3] enumerated various measures to increase visitors to Japan. For example, the latter declared an annual target of 25,000,000 visitors-tourists as well as immigrants, to Japan by 2020, [4] from 7,711,828 in 2008. [5] In particular, the Japanese government has attempted to increase the number of 'students' to 300,000 by 2020. [6] In 2008, 138,514 college students, including undergraduate and graduate, and 41,313 precollege students, vocational and language students, stayed in Japan. [7] Additionally, Japan removed a ban on Chinese group-tours in 2000 and individual-tour of Chinese in 2009. Furthermore, Japan is planning to relax the annual income requirement with regard to Chinese tourist visas, which is 250,000 Chinese Yuan.

The amendments were prompted by the needs to cope with globalization and the regionalization of East Asia. For example, the 2005 amendment was prepared for the ratification of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime. [8] The amended Article 5, paragraph 1, item 7-2 of the Immigration Control Act stipulates that "a person who has committed trafficking in person shall be denied entry to Japan." [9] "Trafficking in persons" is not specifically defined in any Japanese statute. Japanese courts refer the definition

by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, a ratified international agreement. Article 3, paragraph 1 of the abovementioned Protocol defines "trafficking in persons" **[*295]** as "the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation." [10] Exploitation includes "forced labor or services, slavery or practices similar to slavery, servitude." [11] Another amendment promulgated in 2006 aimed at fortifying the country's defenses against terrorists.

The most recent amendments, which came into force on July 1, 2010, is to prevent abuses of the Industrial Training and the Technical Internship Program. The Industrial Training and the Technical Internship Program of Japan is the largest scheme in the world for an individual country to assist capacity building of people in the neighboring countries. [12] The Industrial Training Program originated in the 1960's when the government permitted some companies to invite employees of their foreign subsidiaries to train for up to one year at the parent company in Japan. In 1993, the government allowed for intra-industrial associations of small or middle-sized companies to arrange the interns for host companies and added the Technical Internship Program, which enabled the trainees to continue learning two more years.

These flexible rules have naturally led to an increase in the number of trainees and interns. In 2008, 101,879 trainees and about 105,000 interns were residing in Japan. [13] This figure is almost the same as that of the all employment-based residents (excluding diplomats and government officials) [14] and students. More than 18,514 companies accepted trainees in 2009. [15] The overwhelming majority came from East Asian nations, nearly 80 percent of Chinese nationals. [16]

The Industrial Training Program has contributed to the development of human resources, as well as quality control and production management in participating **[*296]** countries. [17] However, serious abuses have been reported. For example, the International Covenant on Civil and Political Rights ("ICCPR") Human Rights Committee expressed concern over the exploitation and exclusion of trainees from the protection of domestic labor and social security laws. [18] The Committee recommended that the Japanese government consider replacing the current Industrial Training Program with a new scheme that adequately protects the rights of trainees and interns and focuses on capacity building rather than recruiting low-cost labor. [19] The Trafficking in Persons Report of 2010 published by the U.S. Department of State also found mistreatment of foreign workers, including fraudulent terms of employment, restrictions on movement, withholding of salary payments and debt bondage, [and] [t]rainees sometimes had their travel documents taken from them and their movement controlled to prevent escape. [20] Against these international criticisms, the Japanese government sanctioned revisions in 2009. In addition, because most interns are coming from East Asia, preparation for the integration of East Asia is another reason to amend the program.

Therefore, Japanese lawmakers should recognize the regional impact and implications of legislation than ever before. This paper focuses on the interaction between Japanese law and international law, which have traditionally been regarded as separate and distinctive systems. Section 2 overviews the recent developments that have taken place in the areas of community-building in East Asia. Finally, in section 3, the latest reform of Japanese immigration law will be considered.

II. Community-Building in East Asia and Movement of Persons

The history of diplomatic talks on regional integration and community-building in East **[*297]** Asia can be understood as having three phases. The first phase was from 1997 to 1998, when East Asian countries strived to overcome the financial crisis that originated in Thailand and overwhelmed all East Asia. Prime Minister Mahathir bin Mohamad of Malaysia proposed establishing an East Asian Economic Caucus. [21] Some nations, including Japan gave their assent to the scheme. Due to the strong opposition by the United States and the International Monetary Fund, however, this idea has never been realized. Instead, East Asian countries organized a financial dialogue leading to the Chiang Mai Initiative, a regional network of bilateral currency swap arrangements. Based on the Initiative, for the first time, the East Asian region emerged as a unit.

The second phase went from 1999 to 2002. In 1999, the Association of South-East Asian Nations ("ASEAN") plus Three ("APT") Summit issued a statement in order to strengthen their mutual cooperation for the first time. [22] Following the suggestion of President Kim Dae Jung of Korea, the summit established a track-two group named the East Asian Vision Group ("EAVG"), composed not only of governmental officials, but also of scholars and business people. The EAVG was requested to submit a report on the means for establishing an "East Asian Community," a regime for comprehensive cooperation. [23] Following the submission of the report by the EAVG, [24] a track-one group, namely an intergovernmental group named the East Asian Study Group ("EASG"), examined the report of the EAVG and assembled its own report. [25] These two reports were published in 2001 and 2002, respectively. They recommended various short-term and long-term measures, including "a comprehensive human resources development program." [26] Thereafter, the APT countries implemented these recommendations one by one.

Japan took various actions pursuant to the recommendations in the reports. For example, the Council on East Asian Community ("CEAC") was inaugurated in 2004 as a platform of representatives of the Diet, governmental agencies, business corporations and academe. CEAC was established to serve as a country coordinator for the Network of East Asian Think-tanks ("NEAT"), a platform for track-two diplomacy. [27] NEAT was **[*298]** launched in 2003 by the initiative of China in accordance with the suggestion in these reports. It organizes several working groups which are expected to prepare reports on concrete measures to be taken for implementing the reports of EAVG and EASG. For instance, a Working Group on an East Asian Cooperative Framework for Migrant Labor, sponsored by Malaysia which is one of the large migrant worker-sending countries. [28] The Working Group published a report on December 7, 2006. [29] Besides, Japanese scholars launched an international and interdisciplinary research project on East Asian Community. This research project, sponsored by the Institute of Social Sciences at the University of Tokyo, was completed in 2007 with a publication of a draft Charter of the East Asian Community. [30] Article 19 of the draft Charter stipulates that, in paragraph 1, the Member States shall "reduce barriers to the free movement of nationals of the Member States who are carrying out trade in services within the Community," and, in paragraph 2, "promote the free movement of tourists, students and other short-term visitors within the Community." The draft Charter continues to obligate the Member States to "cooperate to deal with illegal visitors in the Member States." [31]

The third phase started after the publication of the final report of the EASG. In this period, the membership of the proposed Community was at issue. China prefers the APT model, while Japan and other states were for the "ASEAN plus Six," desiring to include Australia, India and New Zealand in order to maintain the balance of power in the region. In 2005, the latter countries succeeded in establishing the East Asian Summit ("EAS") consisted of ASEAN plus Six. In 2007, the ASEAN plus Three countries called APT as the main vehicle, and recognized and supported the mutually reinforcing and complementary roles of the APT and other regional fora including the EAS to promote the East Asian Community. [32] In 2009, the EAS reached an agreement on finishing track-two **[*299]** research about the Comprehensive Economic Partnership in East Asia ("CEPEA") and proceeding to intergovernmental negotiations. [33] In 2010, however, ASEAN countries decided to invite the United States and Russia to join the EAS. If the EAS expands to include these countries, it would stay as a forum for policy dialogue and would not become a community. Therefore, the APT seems to remain as the only platform for establishing a community.

It is still difficult to predict whether the East Asian Community will be established soon. East Asian community-building depends mainly on three countries in Northeast Asia. Although China, Japan and Korea concluded Economic Partnership Agreements ("EPAs") with ASEAN separately, they had not agreed to such treaties amongst each other. While historical antagonism from colonial actions of imperial Japan has been one of the obstacles to reaching an agreement, economic and security concerns, such as the protection of agricultural industries and food security of Japan, have also precluded agreement.

Another hindrance may be found in the lack of political leadership and pressure from a country outside of the regional community. [34] The United States, by declaring to start negotiations for accession to Trans-Pacific Strategic Economic Partnership Agreement ("TPP"), puts pressure on

Japan and Korea not to build a regional Community with China because to the community would weaken the U.S. presence in the East Asian region. The TPP is one of the multilateral economic partnership agreements involving East Asian countries. Brunei, Chile, New Zealand and Singapore are member states. Australia, Peru and Vietnam already began negotiations to join the Agreement. It seems fair to say that Japan and many other countries in the region are realizing the possibility of the formation of a regional community. As such, the legal landscape of the relevant countries including Japan has undergone transformation in anticipation of a regional community, in particular with respect to immigration law.

[*300] III. Recent Changes in Japanese Immigration Law

Movement of persons is always a significant issue in regional integration, which also made recent changes in Japanese immigration law. Three particularly notable examples should be examined. First, Japan has changed its policy with regard to refugees from traditional unwillingness to accept them. [35] Japan has been passive, however, in recognizing people as refugees according to the Convention Relating to the Status of Refugees. [36]

As such, Japan accepted mere 301 refugees from 1982 to 2002. [37] Rather, Japan is accepting a substantial number of people by way of granting special permission to stay on humanitarian grounds. In 2009, Japan hosted more than 500 so-called refugees from 19 countries. 470 of them were granted special permission to stay, while only 30 from 8 countries were formally recognized as refugees. The number of people recognized as refugees is growing due to a 2005 amendment to the Japanese Immigration Control Act, which stipulates that the Ministry of Justice shall appoint about 20 refugee examination counselors who are to render an opinion when a claimant raises an objection to the denial of their refugee petition. [38] Another policy change, perhaps even more significant, is to accept refugees for resettlement. From 2010 to 2012, Japan plans for the first time to accommodate 90 people who have escaped from Myanmar and living in Thailand. As these displaced persons have come to attract much attention in Japan, the Japanese government seems to take further responsibilities for helping resettlement for refugees from East Asia.

Second, Japan has concluded economic partnership agreements with the Philippines and Indonesia to accept a number of workers from those countries for nurses or caregivers. Such workers will be allowed to stay in Japan for a period of three to four years. Upon passing the professional examination, which leads to the issuance of nurse or caregiver licenses for practicing in Japan, an applicant will be even eligible to apply for permanent resident status. [39] In accordance with the Economic Partnership **[*301]** Agreement between Japan and the Philippines, 310 candidates were admitted to Japan in 2009 out of the maximum number of 500. [40]

A big policy change is that a nonimmigrant foreigner is generally permitted to stay and work in Japan in the following employment categories under the Immigration Control Act:

> diplomats, government officials, professors, artists, religious workers, journalists, investors, business managers,legal and accounting professionals, medical service providers, researchers, instructors, engineers, specialists in the humanities/international services, intra-company transferees, entertainers, skilled laborers, [41] and designated activities under which the technical interns are permitted to work. [42]

In principle, Japan maintains a policy to accept only highly-skilled workers in one of the above categories. The Fourth Basic Program continues this policy and sketches out a plan for establishing a point-based system for highly skilled foreign workers in order to promote their immigration. [43] Since unlicensed foreign nurses and caregivers are classified as semi-skilled, they were not permitted to immigrate prior to the Economic Partnership Agreement between Japan and the Indonesia. These kinds of agreements are significant steps to liberalize Japan's labor market, to bring in semi-skilled workers, and to further facilitate the movement of such workers within East Asia.

Finally, Japan has reformed its Industrial Training and Technical Internship Program in order to prevent its misuse. Trainees and interns are expected to learn skills that are difficult to acquire in their home countries. On the contrary to the Japanese government's goal to crack down on employment of illegal immigrants in the latter half of the 1990's, [44] small or middle-sized companies turned to accept trainees and interns as **[*302]** a substitute for illegal foreign labor workers. In other words, they utilized the Industrial Training and Internship Program as 'backdoor methods' of employing unskilled foreign workers. [45] The number of violations of relevant statutes and regulations by hosting companies increased from 92 to 452 between 2003 and 2008. [46] The examples of mistreating foreign workers are included as follows: (1) double contracts, including secret clauses which stipulate penalties on interns for certain acts which cause inconvenience to the employee's agent or host company; (2) lending of name; (3) lack of overtime pay; (4) negligence in training employees; (5) disguised applications or inspection reports; (6) breach of labor laws; (7) confiscation of travel documents, including passports, to limit the employee's movement; and (8) forced deposit of the employee's wages. These mistreatments were mainly due to the law requiring the employee to be tied to a particular employer. Additionally, the inherently temporary nature of internships makes it difficult for an intern to enforce his or her legal rights after returning home. As noted above, the Industrial Training and Internship Program was severely criticized for these abuses; some even accused of being a tool for human trafficking. [47]

The revised Immigration Control Act seeks to prevent the abuse by requiring intra-industrial associations, which is empowered to supervise host companies, to submit regular reports to the Ministry of Justice. Before the amendment, trainees were not covered by labor laws because they were not deemed 'employees.' [48] Since the new law has taken effect, interns should be recognized as employees from the beginning of the **[*303]** practical training, called on the job training, and all labor laws, including the Labor Standard Law and the Minimum Wage Act, shall apply to interns. In other words, the Labor Standard Inspection Office will have all the powers necessary to investigate and sanction violations of the laws, although the problem of enforcement remains an issue due to a shortage of workers at the Immigration and Labor Standard Inspection Department. [49] Other measures for protecting interns are as follows:

> (1) providing lectures to interns about their legal rights;
> (2) inspection of contracts between the intern and agency and denying entry when the contract contains illegal clauses (e.g., penalty clauses);
> (3) monthly inspections of the host companies by the supervising association;
> (4) supervision by the supervising associations of the accepting companies once in three months;
> (5) providing advisors to interns; and
> (6) establishing and increasing penalties to host companies and supervising associations for violating the new regulations, *e.g.*, suspending the ability to sponsor new interns for five years. [50]

Due to the escalation of aging population, the number of work force of Japan is decreasing fast. This process would be accelerated as a result of the declining birth rate. In 2006, there were 66,570,000 workers, and total labor population is estimated to go down to 61,800,000 by 2030. [51] On a way to solve this problem, there is a continuing controversy over immigration policies. Liberal Democratic Party recently suggested that the Industrial Training and Internship Program be abolished, as Korea had done. Instead, a 'guest worker' system, under which non-skilled foreign workers would be allowed to stay for three years, should be introduced. [52] The proponents for the 'guest worker' program are anxious that the social costs necessary for protecting and integrating migrant workers, especially for family reunification, would be too high. [53] In addition, they are concerned about the wage decline for Japanese workers. [54] The **[*304]** Japanese Chamber of Commerce and Industry has not only proposed replacing the Industrial Training and Internship Program with a guest worker system, but also, in the long run, is considering a managed migration system under which Japan would be able to accept qualified non-skilled workers as permanent residents. [55] The proponents for opening Japan's borders point out the need to reform the Japanese industrial structure. However, increasing the number of unskilled foreign workers may help to preserve less productive sectors, i.e. labor-intensive and less competitive industries, while impeding the development of the industrial structure. [56]

Ultimately, human rights pressure and demographic realities will probably prevent Japan from taking this course. [57] It may be that Japan has little choice but to admit more permanent residents. [58] The Fourth Basic Plan does not set concrete measures and postpones the decision by saying that "discussion should be promoted regarding whether Japan should accept non-skilled migrant workers or not." [59]

As long as the Japanese government cannot decide the best course of action, the Industrial Training and Internship Program seems to be the only means to meet needs of both the Japanese economy and the developing countries in East Asia which have a strong push factor for migration, redundant workers in rural part of the countries. The redundant workers seek their jobs not only in the cities of their own countries, but also in neighboring countries which are prosperous and have availability. [60] The demand for cheap, flexible workers who are willing to do even so-called 'Three-D' (Dirty, Degrading and Dangerous) jobs is a crucial pull factor in Japan since most Japanese are reluctant to engage in such.

The Industrial Training and Internship Program would establish a transnational labor market in East Asia, in which member States shall mutually recognize technical qualifications such as the APEC engineer system, etc. [61] In fact, the NEAT Working **[*305]** Group on an East Asian Cooperative Framework for Migrant Labor recommended that national laws of host countries be harmonized to ensure consistency throughout East Asia. [62] At the end of the first year, interns are obligated to take a certificate examination of basic grade 2 of the National Trade Skill Testing and Certification System. They may continue their internship only after passing the examination. [63] As of July 1, 2009, examinations for 120 operations in 64 fields are identified for interns. [64] If these certifications are accepted by the countries sending workers, the existing Certification System may be a basis for a system of mutual recognition of certifications. In the end, a regional system of skills certification would be established.

IV. Conclusion

It is hard to say when the idea of the East Asian Community would be materialized. [65] The amendment of Japanese immigration law, however, is trying to build an integrated labor market in East Asia through the Industrial Training and Technical Internship Program. This development is indicative. The movement of people is a most significant means for fermenting regional identity and integration that might lower the country barriers. It is of course true that the free movement in the global community causes a lot of complicated social, economic and political problems. However, as the process started by the Schengen Treaty shows, [66] these problems can be resolved effectively as long as member states are prepared to share the respective burdens. Already, potential member states of the East Asian Community have begun opening their borders gradually by changing their relevant domestic laws. Here, the author would suggest more researches to find ways of the interaction between municipal and international law towards regional integration.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law > Types of Contracts > Partnership Agreements

Copyright Law > Foreign & International Protections > Protected Rights

International Trade Law > Trade Agreements > Intellectual Property Provisions

FOOTNOTES:

n1 *Available at* http://www.moj.go.jp/ENGLISH/information/icm-01.html (last visited on Oct. 4, 2010).

n2 *Available at* http://www.mlit.go.jp/kankocho/en/vision/plan.html (last visited on Oct. 4, 2010).

n3 This is the cabinet decision made on December 30, 2009, *available at* http://www.kantei.go.jp/foreign/topics/2009/1230strategy_image_e.pdf (last visited on Oct. 4, 2010).

n4 *Supra* note 2, at 5.

n5 IMMIGRATION BUREAU, MINISTRY OF JUSTICE OF JAPAN, 2009 IMMIGRATION CONTROL 2 (2009).

n6 Monbukagakusyo et al., *Ryugakusei 30 Man-Nin Keikaku, Kosshi* (July 29, 2008), http://www.kantei.go.jp/jp/tyoukanpress/rireki/2008/07/29kossi.pdf (last visited on Oct. 4, 2010; available only in Japanese). The 2009 reform of the Immigration Control Act created a resident status of 'student' consisted of the former 'college student' and 'pre-college student.'

n7 *Supra* note 5, at 24.

n8 G.A. Res. 55/25, annex II, U.N.GAOR 55th Sess., Supp. No. 49, at 60, U.N. Doc. A45/49 (vol. I) (2001), *available at* http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf (last visited on Oct. 1, 2010). Japan has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990,.

n9 Other revisions concerning the prevention of trafficking in persons can be found in Article 5, paragraph 1, item 7-2 concerning the prevention of the trafficking in persons and Article 50, paragraph 1, item 3 concerning the special permission to stay for victims of trafficking in persons. Japan also revised its Penal Code, Law for Punishment of Organized Crimes, Control of Crime Proceeds and Other Matters. The National Police University started to give lectures on trafficking in persons. These measures were taken in accordance with Japan's Action Plan of Measures to Combat Trafficking in Persons, released on December 7, 2004, *available at* http://www.mofa.go.jp/policy/i_crime/people/action.pdf (last visited on Oct. 5, 2010). It is pointed out that 'significant improvements' in the prosecution of trafficking offenders can be observed. *See* U.S. Department of States, *2007 Country Reports on Human Rights Practices, available at* http://www.state.gov/g/drl/rls/hrrpt/2007/100522.htm (last visited on Oct. 5, 2010). Fordetails on human trafficking in Japan, *see* Yasuzo Kitamura, *Evolution of Antitrafficking in Persons Law and Practice in Japan: A Historical Perspective*, 14 TUL. J. INT'L & COMP. L. 331 (2006).

n10 Article 226-2, paragraph 5 of the Penal Code stipulated: "[a] person who sells or buys another for the purpose of transporting him/her from one country to another country shall be punished by imprisonment with work for not less than 2 years," *available at* http://www.cas.go.jp/jp/seisaku/hourei/data/PC_2.pdf (last visited on Oct. 4, 2010).

n11 *Id.*

n12 Yoshiaki Sato, *The Industrial Training Program and the Technical Internship Program of Japan: A Means for Transferring Technology or a Disguised Guest Worker Program?*, 68-69 SEIKEI HOGAKU 21, 28-36 (2008).

n13 *See e.g.* JAPAN INTERNATIONAL TRAINING COOPERATION ORGANIZATION, INDUSTRIAL TRAINING AND TECHNICAL INTERNSHIP PROGRAM IMPLEMENTATION REPORT: JITCO WHITE PAPER FY 88, 128 (2009).

n14 In 2008, 214,230 foreigners were eligible to work in Japan as highly skilled workers with permission of specified occupations, except diplomats and government officials. *See supra* note 5, at 24. If long-term residents, such as 'Nikkei-jin,' and permanent residents, such as spouses of Japanese nationals and former nationals were included, the figure would be 562,818 workers in 95,294 places of employment. *See* Masahiko Yamada, *The Current Issues on Foreign Workers in Japan*, 7-3 JAPAN LABOR REV. 5, 9 (2010).

n15 *Supra* note 14, at 97 (this number stands for the number of accepting companies supported by the Japan International Training Cooperation Organization, "JITCO").

[n16] *Id.* at 85, 114.

[n17] Hiroaki Watanabe, *Concerning revisions in the Foreign Trainee and Technical Intern System*, 7-3 JAPAN LABOR REV. 43, 48 (2010).

[n18] *See Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Japan*, U.N. Doc. CCPR/C/JPN/CO/5, 7-8 (2008) (pointing out that these workers "are often exploited in unskilled labour without paid leave, receive training allowances below the legal minimum wage, are forced to work overtime without compensation and are often deprived of their passports by their employers.")

[n19] *Id.*

[n20] U.S. Department of State, *Trafficking in Persons Report 2010*, 189-90 (noting that "the government did not exhibit efforts to adequately monitor and regulate its foreign trainee program, and has never criminally investigated, prosecuted, or convicted offenders of labor trafficking in the program"). In the Human Rights Reports of 2002, the U.S. Department of State considered the Industrial Training and Technical Internship Program as an 'exploitative practice.' *See* U.S. Department of State, *2002 Human Rights Report: Japan, available at* http://www.state.gov/g/drl/rls/hrrpt/2002/18246.htm (last visited on Oct. 5, 2010). *See also infra* note 50.

[n21] In 1990, Prime Minister Mahathir suggested this idea for the first time. *See Yong Deng, Headless Dragons: The Problem of Leadership in APEC*, 22 FLETCHER F. WORLD AFF. 65, 72 (1998).

[n22] The summit was a top-level meeting of ten member states of the ASEAN, including: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar (Burma), the Philippines, Singapore, Thailand, Vietnam, plus China, Japan and Korea,

[n23] While a track-one process is a means for traditional international law-making, a track-two process might be evaluated as a way of cosmopolitan law-making. *See* Yoshiaki Sato, *Towards the Institutionalization of Cosmopolitan Lawmaking*, 46 ALBERTA L. REV. 1141, 1150-51 (2009).

[n24] THE EAST ASIAN VISION GROUP ("EAVG"), REPORT: TOWARDS EAST ASIAN COMMUNITY (2001).

[n25] *Final Report of the East Asian Study Group*, Nov. 4, 2002, *available at* http://www.mofa.go.jp/region/asiapaci/asean/pmv0211/report.pdf (last visited on Oct. 1, 2010).

[n26] *Supra* note 26, at 33-34. (recommending that the "comprehensive human resources development program" should focus on the improvement of ... skills training and capacity-building, including the establishment of a regional labor market information system).

[n27] Besides NEAT, Korea took initiative to dispatch the East Asian Forum ("EAF"). While NEAT aims at promoting research, the EAF assembles representatives of various social sectors to have policy dialogues. A representative of ASEAN as a juridical person, usually the Deputy Secretary-General, also participates in the EAF.

[n28] Another East Asian country which is known for sending a lot of migrants is the Philippines. The inward remittance to the Philippines was $ 15,250,000,000 in 2006, which corresponds to 13% of the GDP. *See* The World *Bank, Migration and Remittances Factbook 2008: Philippines, available at* http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1199807908806/Philippines.pdf (last visited on Oct. 5, 2010).

[n29] Network of East Asia Think Tanks, *Regional Cooperation Framework for Migrant Labour*, (Aug. 22, 2007), *available at* http://www.ceac.jp/e/pdf/neat_05wg05.pdf (last visited on Oct. 5, 2010). It is noted that much of the recommendations in the report were drawn from the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, adopted on Jan. 13, 2007, *available at* http://www.aseansec.org/19264.htm (last visited on Oct. 5, 2010).

[n30] TAMIO NAKAMURA (ED.), EAST ASIAN REGIONALISM FROM A LEGAL PERSPECTIVE 256 (2009). The author was one of the four drafters mainly working out the chapters on institutional structures.

[n31] *Id.* at 263.

[n32] ASEAN plus Three Summit, *Second Joint Statement on East Asia Cooperation Building on the Foundations of ASEAN Plus Three Cooperation, Nov. 20, 2007, available at* http://www.aseansec.org/21099.htm (last visited on Sept. 28, 2010).

[n33] *See Chairman's Statement of the 4th East Asian Summit, Oct. 25, 2009*, para. 19. In November 2009, Cambodia, Japan, Laos, Myanmar, Thailand and Vietnam launched the Japan-Mekong Summit. The participating countries declared that they would contribute to the establishment of the East Asian Community, as a long-term vision. *See* Tokyo Declaration of the First Meeting between the Heads of the Governments of Japan and the Mekong Region Countries, Nov. 7, 2009, *available at* http://www.mofa.go.jp/region/asia-paci/mekong/summit0911/declaration.html (last visited on Oct. 5, 2010).

[n34] Juliana W. Chen, *Achieving Supreme Excellence: How China Is Using Agreements with ASEAN to Overcome Obstacles to Its Leadership in Asian Regional Integration*, 7 CHI. J. INT'L L. 655, 656 (2007). In 2009, the Liberal Democratic Party, which was in power for about half a century in Japan, abruptly stepped down and the Democratic Party took control of the government. The new Prime Minister Hatoyama declared that he would promote a policy of establishment of the East Asian Community. However, Prime Minister Hatoyama resigned in June 2010, and his 'initiative' vanished. The disorders and lack of political leadership in Japan might be one of the reasons for China to emasculate the EAS.

[n35] Japan has funded the International Organization for Migration ("IOM") Voluntary Return and Reintegration Assistance Program which has been available since 2005. *See* U.N. Doc. A/Res/45/158 (Dec. 8, 1990).

[n36] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

[n37] It is noted that, from 1978 to 2005, Japan received 11,319 people from Cambodia, Laos and Vietnam by special permission.

[n38] Some points remain to be improved. For example, the panel has to rely on data that was collected by refugee inquirers in the first screening process. Otherwise each counselor needs to make a judgment based on his knowledge. *See* Hiroshi Honma, *Japan's Refugee Policy: From Post-World War II to Present Day*, 18 WOMEN'S ASIA 21: VOICE FROM JAPAN 22, 24-25 (2007).

[n39] Although the Ministry of Justice retains discretion to deny the issuance of the permission, in normal case, the applicant would be granted permission. The Fourth Basic Program of Immigration Control, published in March of 2010, suggests the need to abolish the restriction for how long a nurse may stay. *See* Homusyo, *Dai Yoji Syutsunyukoku Kanri Kihon Keikaku* [The Fourth Basic Program of Immigration Control], Mar. 2010, at 18-19. The preceding Basic Plans were published in 1992, 2000 and 2005. The Fourth Basic Program is expected to be valid for five years. *See id.* at 2.

[n40] According to the Economic Partnership Agreement between Japan and the Philippines, Japan would liberalize intra-corporate transferees and short-term business visitors. Besides the EPAs, the Japan-China Junior Training Association commences to accept 200 Chinese nurses per year for training to get licensed in Japan. This project utilizes the framework of the Industrial Training and Technical Internship Program. *See* Japan-China Junior Training Association, Heisei 22 Nendo Jigyo-Keikaku, *available at* http://www.jpn-chn.or.jp/keikaku.html (last visited on Oct. 5, 2010).

n41 For example, Thai cooks and artisans processing gems or fur are permitted to work under this category.

n42 *See* Ministry of Justice Ordinance No. 16 (May 24, 1990) (as amended in 2010), *available at* http://www.cas.go.jp/jp/seisaku/hourei/data/mopcp.pdf (last visited on Oct. 5, 2010).

n43 *Supra* note 39, at 17-18. Highly-skilled migrants had increased gradually from 2002 to 2007, but decreased in 2008.

n44 Undocumented migration is a criminal act in Japan. See Immigration Control and Refugee Recognition Act, art. 70. In 1993, it is estimated that 298,646 illegal foreigners were living in Japan. *See* supra note 5, at 37. The government has instituted tighter entertainer visa issuance for protecting migrant women from being forced to work in the sex industry. The government published the Action Plan for Achieving a Crime-Resistant Society in December 2003. *See* Ministerial Meeting Concerning Measures against Crime, *Action Plan for Achieving a Crime-Resistant Society, available at* http://www.npa.go.jp/english/seisaku8/action_plan.pdf (last visited on Oct. 5, 2010). The law proceeded to strengthen the control of immigration. As a result, the number of illegal foreign workers decreased to about 113,072 in 2008, almost one third of that of 15 years ago. *See supra* note 5, at 37. As of January 1, 2009, 2,561 extrainees had overstayed and become "illegal" immigrants. *See supra* note 5, at 38. In addition, 1,627 interns have absconded from their host companies. *See supra* note 14, at 130.

n45 The Program is said to be one of the 'backdoor methods' in order to alleviate shortages of home helpers. *See* Kazutoshi Koshiro, *Does Japan Need Immigrants?, in* TEMPORARY WORKERS OR FUTURE CITIZENS? 151, 159 (MYRON WEINER & TADASHI HANAMI EDS., 1998).

n46 Nyukoku-Kanrikyoku, *Heisei 21 Nen No 'Fusei-Koui' Nintei Ni Tsuite* (available only in Japanese), March, 2010, *available at* http://www.moj.go.jp/content/000033384.pdf (last visited on Oct. 5, 2010). On January 29, 2010, the Kumamoto District Court delivered a judgment, which required the accepting association and the host company to pay 17,250,000 yen to four interns. *See* ASAHI SIMBUN 38 (Jan. 30, 2010) (available only in Japanese).

n47 U.S. Department of State, *2008 Human Rights Report: Japan* (pointing out that human trafficking in Japan remained a 'significant problem') *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119041.htm (last visited on Oct. 5, 2010). *See also* Akira Hatate, *The Distortion of the Foreign Trainee Program*, 20 WOMEN'S ASIA 21: VOICES FROM JAPAN 11 (2008) (asserting that "[i]t is no longer an exaggeration to say that the program has failed.").

n48 A trainee could be recognized as a worker only when the trainee could succeed in proving that he or she had been working under the command of the host company. It is quite difficult to discharge the burden of proof.

n49 The Immigration Office had only 3,413 inspectors as of 2008. *See* Houmusyo, *Houmu-Nenkan Heisei 20 Nen 282* (2009). For details on the problem of enforcement, *see* Sumi Shin, *Global Migration: The Impact of 'Newcomers' on Japanese Immigration and Labor Systems*, 19 BERKELEY J. INT'L L. 265, 283-88 (2001).

n50 Houmusyo Nyukoku-Kanrikyoku, *Ginou Jisyusei No Nyukoku . Zairyu-Kanri Ni Kansuru Shishin* [Guideline on the Control of Entry and Stay of the Technical Interns], Dec. 2009, at 31-32, 37.

n51 NATIONAL INSTITUTE OF POPULATION AND SOCIAL SECURITY RESEARCH, POPULATION STATISTICS OF JAPAN 101 (2008).

n52 *See Jiyu-Minsyu-To Kokka-Senryaku Honbu Gaikokujin Roudousya Mondai PT, "Gaikokujin-Roudousya Tanki-Syurou-Seido" No Sousetsu No Teigen* [A Proposal for Establishing a Legal Framework to Accept Short-Term Foreign Workers], July 22, 2008, at 5-15.

n53 Jiro Nakamura, *Impacts of InternationalMigration on the Labor Market in Japan*, 7-3 JAPAN LABOR REV. 68, 74 (2010).

n54 *Id.* (pointing out that, when 'Nikkei-jin,' foreign workers of Japanese ancestry, entered into a labor market, the wages of the Japanese male high school graduates working at the same place tend to decrease).

n55 Nihon Syoko-Kaigisyo, *Gaikokujin Roudousya No Ukeire No Arikata Ni Kansuru Yobo* [A Request Concerning the Reception of the Foreign Labor], June 19, 2008, at 2.

n56 *Supra* note 56, at 84.

n57 DEMETRIOS G. PAPADEMETRIOU & KIMBERLY A. HAMILTON, REINVENTING JAPAN: IMMIGRATION'S ROLE IN SHAPING JAPAN'S FUTURE 63 (2000).

n58 Carmel A. Morgan, *Demographic Crisis in Japan: Why Japan Might Open Its Doors to Foreign Home Health-Care Aides*, 10 PAC. RIM L. & POL'Y J. 749, 779 (2001).

n59 *Supra* note 39, at 22-23.

n60 The applicant for the internship is required to show that he or she is expected to engage in services that require the skills obtained in Japan after returning to his or her home country. See Ordinance of the Ministry of Justice No. 16 (May 24, 1990), as amended by Ordinance of the Ministry of Justice No. 43 (June 18, 2008).

n61 APEC ENGINEER COORDINATING COMMITTEE, THE APEC ENGINEER MANUAL, July 2009. Japan has already recognized certain qualifications on information processing technology certified by East Asian countries. *See* Public Notice of the Ministry of Justice No. 579 of 2001, as amended by Public Notice of the Ministry of Justice No. 30 (Jan. 25, 2008). The Fourth Basic Plan suggested that Japan should promote the mutual recognition of the qualifications of engineers in not only the information processing technologies, but also other areas. *See supra* note 39, at 18.

n62 Network of East Asia Think Tanks, *supra* note 30, at 3.

n63 National Trade Skills Test system is based on the Human Resources Development Promotion Act. Most of the tests are classified into four grades, i.e. special, 1, 2, and 3, and others have a single grade. Basic Grade 1 and Basic Grade 2 are prepared specifically for foreign interns. *See generally Japan Vocational Ability Development Association, Vocational Ability Evaluation System and Development and Implementation of Tests: National Trade Skill Testing & Certification, available at* http://www.javada.or.jp/english/pdf/e2_1.pdf (last visited on Oct. 5, 2010).

n64 *Supra* note 14, at 25-29.

n65 As an example of the pessimistic view, *see* Tom Ginsburg, *Eastphalia as the Perfection of Westphalia*, 17 IND. J. GLOBAL LEG. STUD. 27, 37-38 (2010) (arguing that such a dynamic as promoted the grand bargain between France and Germany to launch the community-building in Europe is, at present, unthinkable between China and Japan).

n66 Schengen Agreement 1990, 30 I.L.M. 68(1991).

The Japan NEWS

NATIONAL / MEDIA| MEDIA MIX

Entertaining the idea of surrogate mums

BY PHILIP BRASOR

ARTICLE HISTORY | FEB 1, 2004

Last week, the health ministry decided not to recommend revisions to current guidelines regarding fertility treatments. This disappointed the ruling Liberal Democratic Party, which has been advocating the legalization of such controversial procedures as the use of surrogate mothers because they say they don't believe the government can restrict people's "right" to reproduce.

Coincidentally, Fuji TV aired a two-hour documentary on its Feb. 23 "Friday Entertainment" program about the saga of Aki Mukai, who last November became the mother of twin boys thanks to a surrogate mother in the United States.

More than 100 Japanese couples have so far used surrogate mothers in the States, though almost none have come forward publicly. Mukai would have found it difficult to hide what happened because she is a TV personality. In fact, she has encouraged coverage, with press conferences, a Web diary and three books chronicling her three-year ordeal. And as the Fuji program showed, Mukai has allowed cameras into her home and hospital rooms over the past two years to record the most intimate details of her quest to become a mother.

"Dramatic" is the only word to describe this quest. The program, after all, is called "Friday Entertainment," and while it explained the procedure the show's priorities emphasized heartbreak, suspense and joy.

In 2000, Mukai learned that she was pregnant, but followup tests revealed she also had cancer of the uterus. At first, the doctors removed only part of her uterus, but soon discovered that the cancer had spread.

Mukai asked that the operation to remove the rest of her uterus be postponed until after the baby was born. The doctors said that would be risky and Mukai indicated she was willing to take that risk, but was talked out of it by her husband, the professional wrestler Nobuhiko Takada.

She lost her uterus and the baby, but kept her ovaries. Followup radiation treatment would have made her sterile, but she underwent a 10-hour operation to push her ovaries up into her chest cavity, where they could avoid radiation.

173

The program was clear about the difficulties of using surrogate mothers. Mukai and Takada had to fly back-and-forth between Tokyo and Reno, Nev., where Mukai went through the painful process of having her ova removed. In one long scene, she is shown downing liters of laxative because her system must be cleaned out prior to the procedure.

She suffers many disappointments: conception fails twice, then succeeds but the fertilized eggs don't take in the uterus of the surrogate mother, an American woman named Sandra Johnson. Meanwhile, Mukai continues to receive cancer treatments that weaken her system.

Last May, Mukai finally announced that a 31-year-old mother of four named Cindy Van Reed would give birth to twins for her and Takada. The babies were delivered by cesarean section in November with the Japanese parents in attendance.

Mukai has been careful to characterize her relations with Johnson and Van Reed as "partnerships," and the program played up how close she was to the two women. However, because of the program's dramatic priorities it glossed over issues that a real documentary would have addressed. In a recent interview with the women's weekly Josei Seven, Van Reed revealed that only women who had given birth to at least two children are considered as surrogates, since such women are judged less likely to want to keep the child they are carrying for someone else.

She also said that when she learned she was carrying twins, she became worried and asked the doctor if he could abort one of the fetuses. The doctor and Mukai, who said she already felt guilty about "aborting" a child (the fetus that was removed when she had her cancer operation), convinced her not to.

"Friday Entertainment" stressed that the $20,000 Van Reed received was for "expenses" and that all surrogate mothers are essentially "volunteers." The Josei Seven article provided background that placed the money in perspective. Van Reed is a housewife with four kids (the oldest is her auto-mechanic husband's child from a previous marriage), and the money was used to pay off the loan on their $55,000 house.

Last week's issue of another women's weekly, Shukan Josei, carried an article that surveyed some prominent media people about Mukai. Though everyone admires her determination, some tend to question her willingness to lay her life open. Women's magazines tend to be catty with female celebrities, and Josei implies that Mukai wants too much by demanding satisfaction with her career, her husband, and now her babies.

It's an unfair implication, but one that Mukai inadvertently encourages. One tabloid said she is "commercializing" her ordeal, and considering that her latest book about it was published two days before the TV show, it's obvious that her PR machine is very well-coordinated.

Mukai brushes aside the criticism and says her purpose is to make people understand the use of surrogate mothers, but she never really discusses anything beyond her own wants. Her new book is titled "Aitakatta (I Wanted to See You)," which is addressed to her babies. Apparently, Mukai expects them someday to read it and understand just what she went through to bring them into the world. That's a pretty heavy burden to lay on anyone.

the japan times

OPINION

EDITORIALS

Surrogate births raise complex issues

ARTICLE HISTORY | OCT 21, 2006

News that a woman in her 50s has acted as a surrogate mother for her daughter and her daughter's husband underscores the need to enact a law governing how to legally treat children born in this way. The guidelines of the Japan Society of Obstetrics and Gynecology prohibit doctors from engaging in surrogacy-related procedures.

But reality is leaping ahead of the guidelines. Advances in fertility medicine are likely to lead to an increase in the number of surrogate births. Legislation is necessary not only to avoid legal troubles but also to protect the welfare of children.

More than 100 Japanese couples are believed to have had children through surrogate mothers in the United States and other countries. Among them are TV personality Aki Mukai and her husband Nobuhiko Takada, a former professional wrestler, whose case has gained public attention because the case involving their twin boys is now before the Supreme Court.

Most couples who have had children via a surrogate procedure have reportedly registered them in Japan by telling the local governments concerned that the wives went abroad while pregnant and gave birth there. But in the case of Ms. Mukai and Mr. Takada, Tokyo's Shinagawa Ward did not accept their request to register their twin boys because it knew the true circumstances surrounding their births. The couple had made public their use of an American surrogate mother. Through books, TV and a blog, the couple described their struggle to have children through a surrogate mother, including Ms. Mukai's loss of her womb and baby because of uterus cancer and the painful process of having her eggs extracted.

The Tokyo High Court recently ruled in favor of the couple, scrapping a family court decision that sided with Shinagawa Ward. Noting that if the twins were not recognized as the couple's children in Japan, the children's stateless status would continue, the high court ruling said that priority must be put on the welfare of the children. But Shinagawa Ward has appealed the ruling to the Supreme Court.

The news about the woman in her 50s serving as a surrogate mother for her married daughter came from a maternity clinic in Shimo Suwa, Nagano Prefecture. The daughter and her husband, both in their 30s, sent an e-mail to the clinic that said the daughter's mother had offered to give birth for the daughter, who had had her cancerous womb removed. The clinic performed in vitro fertilization using the daughter's eggs and her husband's sperm and implanted the fertilized eggs in

the womb of the daughter's mother. Because the mother had reached menopause and had uterine atrophy, she was given hormone injections before the implantation. She gave birth in the spring of 2005. The baby's gender was not announced.

The child was first registered as the birth mother's child and later was adopted by the daughter and her husband — like other cases of births using surrogate mothers in Japan. Biologically, the child is the offspring of the daughter and her husband. But the facts surrounding its birth may cause some people to view it as both the daughter's child and sibling.

The Nagano clinic has been involved in five surrogate births. The first birth — also the nation's first — was disclosed in May 2001. In two cases, sisters became surrogate mothers.

Some states in the U.S. accept births through surrogate mothers even if fees are paid. But European countries such as France and Germany prohibit births through surrogacy while Britain accepts them if no payments are involved.

The April 2003 guidelines of the Japan Society of Obstetrics and Gynecology prohibit doctors from taking part in procedures for births through surrogacy whether they use the eggs and sperm of married couples or the eggs of surrogate mothers and the sperm of husbands. Around the same time, a health ministry panel issued a report that prohibits such births but calls for the enactment of a related law.

Reasons for the prohibition cited by the medical society include: Surrogacy ignores natural ties between mother and children that are naturally formed through pregnancy and birth and runs counter to the welfare of children; surrogate mothers may undergo unbearable physical and psychological burdens; surrogate mothers may refuse to hand over children; married couples may refuse to accept children if they differ from their expectations (deformity, diseases, etc.); and surrogacy may turn surrogate mothers and children into commodities if payments are involved.

Enacting an optimum law in a short time to solve the problem may not be easy. As a first step, public debate is needed to help people understand what problems surrogacy poses in terms of bioethics, social values and family ties.

LATEST EDITORIALS STORIES

jt Keep North Korea process on track
(https://www.japantimes.co.jp/opinion/2018/05/25/editorials/keep-north-korea-process-track/)
U.S. President Donald Trump's decision to cancel the historic summit with North Korean leader Kim Jong Un next month in Singapore was, oddly, no great surprise. The entire process, beginning with T...

jt Japan's daunting long-term social welfare costs
(https://www.japantimes.co.jp/opinion/2018/05/24/editorials/japans-daunting-long-term-social-welfare-costs/)
The government's latest estimate that the annual cost of social welfare benefits will reach ¥190 trillion — 1½ times the current level — in 2040 should prompt broad public ...

Date of the decision	2007.03.23
Case number	2006 (Kyo) No. 47
Reporter	Minshu Vol. 61, No. 2
Title	Decision concerning a judicial decision rendered by a foreign court acknowledging the establishment of a natural parent-child relationship between persons who are not eligible for such relationship under the Civil Code, and public policy as prescribed in Article 118, item 3 of the Code of Civil Procedure
Case name	Case of appeal with permission against the decision of the court of second instance to change the determination to dismiss the appeal against the deposition made by the municipal mayor
Result	Decision of the Second Petty Bench, quashed and decided by the Supreme Court
Court of the Second Instance	Tokyo High Court, Decision of September 29, 2006
Summary of the decision	1. A judicial decision rendered by a foreign court acknowledging the establishment of a natural parent-child relationship between persons who are not eligible for such relationship under the Civil Code is contrary to public policy as prescribed in Article 118, item 3 of the Code of Civil Procedure and therefore not effective in Japan. 2. In the case where a woman has conceived and delivered a child by way of assisted reproduction technology using another woman's egg, the mother of the child is the woman who has conceived and delivered the child, and a mother-child relationship cannot be established between the child and the woman who has not conceived and delivered the child, even where the child is born using the egg donated by that woman. (There are concurring opinions concerning 2).
References	(Concerning 1) Article 118, item 3 of the Code of Civil Procedure, Part IV, Chapter 3, Section 1 of the Civil Code (Natural Children); (Concerning 2) Article 772, para.1 of the Civil Code Article 118, item 3 of the Code of Civil Procedure (Effect of Final and Binding Judgment by Foreign Court) A final and binding judgment rendered by a foreign court shall be effective only if it satisfies all of the following requirements: (iii) The contents of the judgment and the court proceedings in which it has been rendered are not contrary to public policy in Japan. Article 772, para.1 of the Civil Code (Presumption of Child in Wedlock) A child conceived by a wife during marriage shall be presumed to be a child of her husband.
Main text of the decision	The decision of prior instance is quashed, and the appeal filed by the appellees against the decision of the first instance is dismissed. The appellees shall bear the cost of the appeal to this court.
Reasons	Concerning the reasons for the appeal argued by the appeal counsel, TSUZUKI Masanori, et al. 1. The appellees, a Japanese married couple, submitted to the appellant birth notifications of the twins conceived and delivered by a woman, who is a citizen of the United States and lives in the State of Nevada, by way of assisted reproduction technology (ART) using Appellee X1's sperm and Appellee X2's eggs (the twins shall hereinafter be referred to as the "Children"). The birth notifications indicated the appellees as the father and mother of the Children (these notifications shall hereinafter be referred to as the "Birth Notifications"). The appellant made a disposition to refuse to accept the Birth Notifications on the grounds that the fact of delivery of the Children by Appellee X2 cannot be found, and therefore a legitimate parent-child relationship cannot be found between the appellees and the Children. Against this disposition, the appellees filed an appeal for an order to accept the Birth Notifications pursuant to Article 118 of the Family Registration Act (this appeal shall hereinafter be referred to as the "Appeal"). 2. According to the records, the history of this case is as follows: (1) Appellee X1 and Appellee X2 are a couple who married in 1994. (2) In 2000, Appellee X2 had a hysterectomy and pelvic lymphadenectomy to treat her cervical cancer. On this occasion, Appellee X2 had the ovaries moved outside the pelvis and preserved them so as to prevent them from being damaged by the radiation therapy to be performed after the operation. She did this because she thought that it might be possible, in the future, to have a child with the appellees' genes by having another woman conceive and deliver a child by way of ART using her own egg. This arrangement is generally called surrogate birth. In 2002, the appellees concluded a surrogacy contract with a couple who lived in the United States, and attempted to arrange a surrogate birth on two occasions at a hospital in that country, but their attempts failed on both occasions. (3) In 2003, the appellees decided to attempt a surrogate birth arrangement with the help of A, a women living in the State of Nevada, the United States. At C Center, on a certain day in 2003, Appellee X2's eggs taken from her ovaries were artificially inseminated with Appellee X1's sperm, and on a later day in 2003, two of the fertilized eggs obtained through this procedure were transplanted into A's uterus. On May 6, 2003, the appellees concluded a surrogacy contract for value with A and her husband, B (hereinafter collectively referred to as "Couple A-B"). The contract provides as follows: A shall, through the procedures performed by a doctor designated by the appellees and recognized by A, take the fertilized eggs donated by the appellees in her own uterus, and if the transplantation of either of the fertilized eggs is successful, A shall carry the child until delivery; the appellees shall be the legal father and mother of the child to be born through the surrogate birth arrangement, and Couple A-B shall not have any legal rights

for the child, such as the right of custody or right of visit, nor shall they have any responsibilities for the child (this contract shall hereinafter be referred to as the "Surrogacy Contract").
(4) In November 2003, A gave birth to twins, the Children, at D Center located in the State of Nevada.
(5) Article 45 of Chapter 126 of the Nevada Revised Statutes (NRS) provides as follows: Two persons in marriage may enter into a surrogacy contract. Any such contract must contain provisions on (a) the parentage of the child; (b) custody of the child in the event of a change of circumstances; and (c) the respective responsibilities and liabilities of the contracting parties (para.1). A person identified as an intended parent in a contract that satisfies these requirements must be treated in law as a natural parent under all circumstances (para.2). It is unlawful to pay or offer to pay money or anything of value to the surrogate except for the medical and necessary living expenses related to the birth of the child as specified in the contract (para.3). The same Chapter of the NRS also provides for the court procedures for determining the parent-child relationship.
Article 161 of the same Chapter of the NRS further provides that a judgment or order determining the existence or nonexistence of the relationship of parent and child is determinative for all purposes (para.1), and that if such a judgment or order is at variance with the child's birth certificate, the judgment or order must direct that a new birth certificate be issued (para.2).
(6) In late November 2003, the appellees filed an application with the Family Division of the Second Judicial District Court, State of Nevada, Washoe County (hereinafter referred to as the "Nevada State Court"), for the determination of a parent-child relationship. The court confirmed that (i) the appellees and Couple A-B acknowledged that the matters stated in the written application for the determination of parent-child relationship were true, and that (ii) Couple A-B desired that the Children would be determined as the appellees' children, while closely examining the relevant documents including the document for the Surrogacy Contract. Subsequently, on December 1, 2003, the court issued a judicial decision (i) declaring the appellees to be the natural father and mother by blood and by law of the children who were to be delivered by A in or around January 2004 (the Children) (para.1 of the main text), (ii) ordering the hospital where the children were to be delivered as well as the relevant authorities responsible for preparing their birth certificates to prepare and issue birth certificates identifying the appellees as their father and mother (para.2), and (iii) ordering the relevant State and County registrars to accept birth certificates thus issued and retain relevant records in accordance with law (para.3)(hereinafter this judicial decision is referred to as the "Judicial Decision")
(7) The appellees started to take care of the Children immediately after their birth. The government of the State of Nevada issued birth certificates for the Children, as of December 31, 2003, identifying Appellee A1 as their father and Appellee X2 as their mother.
(8) In January 2004, the appellees came back to Japan with the Children, and on January 22, they submitted to the appellant birth notifications of the Children, indicating Appellee X1 as their father and Appellee X2 as their mother (the Birth Notifications).
On May 28, 2004, the appellant notified the appellees of the disposition to refuse to accept the Birth Notifications on the grounds that the fact of delivery of the Children by Appellee X2 cannot be found, and therefore a legitimate parent-child relationship cannot be found between the appellees and the Children.

3. The court of the first instance dismissed the appeal against this disposition, whereas the court of second instance quashed the decision of the first instance and ordered the Birth Notifications to be accepted, on the following grounds.
(1) A final and binding judgment rendered by a foreign court prescribed in Article 118 of the Code of Civil Procedure can be construed to refer to a final judicial decision rendered by a foreign court, irrespective of the title, procedure or type of the decision, with regard to a legal relationship under private law, while guaranteeing due process for both parties (See 1994 (O) No. 1838, judgment of the Third Petty Bench of the Supreme Court of April 28, 1998, Minshu Vol. 52, No. 3, at 853). The Judicial decision rendered by the Nevada State Court, which declared that the appellees were to be legally regarded as the natural father and mother of the Children, determined a parent-child relationship, and in light of the categorization of judicial decisions in Japan, it is similar to a judgment on a suit of personal status or a determination set forth in Article 23 of the Act for Determination of Domestic Relations, and falls within the category of a final and binding judgment rendered by a foreign court.
(2) Concerning the requirement set forth in Article 118, item 3 of the Code of Civil Procedure
If the effect of the Judicial Decision is to be denied under Article 118 of the Code of Civil Procedure, the governing law for deciding whether or not a legitimate parent-child relationship can be found between the appellees and the Children would be the law of Japan, which is the appellees' national law. Since the provisions of the Civil Code of Japan concerning a legal mother-child relationship can be construed to mean that a woman who has delivered a child shall be the mother of the child, the appellees cannot be legally regarded as the parents of the Children. On the other hand, with regard to a parent-child relationship between Couple A-B and the Children, the governing law shall be the Nevada Revised Statutes (NRS), which is Couple A-B's national law, and according to the NRS, the Surrogacy Contract is valid, and this means that the appellees, not Couple A-B, are to be legally regarded as the parents of the Children. As a result, trapped between the legal system of Japan and that of the United States, the Children would be forced to resign themselves to the state of having no legal parents.
The requirement set forth in Article 118, item 3 of the Code of Civil Procedure, "the contents of the judgment and the court proceedings in which it has been rendered are not contrary to public policy in Japan," means the absence of any confusion in public policy in Japan (fundamental value or order in Japan that cannot be relinquished even when taking

into account the international nature of the issue) that might arise from recognizing a judgment rendered by a foreign court as being also effective in Japan and integrating it in the rules of law of Japan. When determining whether or not this requirement is satisfied, we should, in light of the background circumstances described above, first examine the contents of the Judicial Decision individually and specifically, and then consider whether or not the recognition of the effect of the Judicial Decision substantially runs contrary to public policy in Japan. Having made such examination and consideration, we conclude that the recognition of the effect of the Judicial Decision does not substantially run contrary to public policy in Japan, on the following grounds.

(a) The Civil Code and the relevant legal systems in Japan were established in the age when ART had yet to be developed and conception occurred only naturally. As a result, the current legal system in Japan has not contemplated situations where conception or delivery of a child may be achieved also by way of artificial manipulation. However, this cannot be a reason to preclude any artificial conception or delivery of a child from the rules of law of Japan. Although it might be impossible under the Civil Code for a parent-child relationship to be determined based on a surrogacy contract, there is yet room to accept a judicial decision rendered by a foreign country determining the parentage for a child conceived or delivered by way of artificial manipulation in a foreign country, if it satisfies some rigid requirements.

(b) The Children were born using Appellee X2's eggs and Appellee X1's sperm, and therefore the appellees and the Children have relationships by blood.

(c) The Surrogacy Contract was concluded because, since Appellee X2 became incapable of conceiving a child due to receiving hysterectomy, etc. to treat her cervical cancer, the appellees had no option but to arrange a surrogate birth in order to have a child with their genes.

(d) As well, A offered to be a surrogate mother out of her spirit of volunteerism, and we cannot find any unjust aspect in her motive or intention. The Surrogacy Contract is a contract for value whereby the appellees shall pay a charge for A. However, the charge payable thereunder is the minimum payment for the labor provided by A and expenses incurred therefor (as allowed under the NRS), and it is not consideration for the Children. Nothing in the contents of the Surrogacy Contract can be prejudicial to A's dignity; the contract gives top priority to A's safety and life in all stages of the process of her conception and delivery, and guarantees A's right to abort or not to abort an embryo, denying the binding force of any contradictory promise.

(e) In this case, Couple A-B do not hope to be the parents of the Children, nor do they hope to take care of them. Further, the appellees have been taking care of the Children since immediately after their birth, and strongly desire to continue to take care of them in the future. The Children's welfare would not be harmed by identifying the appellees as their legal parents; rather, for their welfare, it would be best for them to be taken care of by the appellees.

(f) In discussions in the Committee on Assisted Reproductive Technology Treatment of the Health Science Council of the Ministry of Health, Labour and Welfare, it has been concluded that a surrogate birth arrangement should generally be prohibited. The surrogate birth arrangement disputed in this case, however, is not contrary to the six basic principles advocated by the committee as the reasons for prohibition: (1) Priority shall be given to the welfare of the children to be born; (2) The human body shall not be treated merely as the means of reproduction; (3) Careful consideration shall be given to safety; (4) The concept of eugenics shall be eliminated; (5) Commercialism in reproduction shall be eliminated; (6) Human dignity shall be respected. Currently, there is no legal provision that expressly prohibits a surrogacy contract, and therefore we cannot go so far as to say that any reasoning sufficient for precluding a surrogate birth arrangement has been established and accepted in Japanese society to date.

(g) In the discussions at the Committee on Legislation for Parent-Child Relationship Relating to Assisted Reproductive Technology Treatment of the Legislative Council, there was no objection to the idea that where a surrogate birth arrangement was performed in a foreign country and a decision was made to identify the clients as the natural parents of the child born through such arrangement, the surrogacy contract would run contrary to public policy in Japan and therefore the effect of that decision should not be recognized in Japan. The Judicial Decision, however, did not determine the parent-child relationship only based on the Surrogacy Contract, but rather determined it by also taking into consideration the fact that the Children had a parent-child relationship with the appellees by blood as well as the circumstances where Couple A-B hoped that the Children would be determined as the appellees' children and there was no dispute among the parties concerned over the parentage for the Children. Consequently, the Judicial Decision does not run contrary to public policy in Japan.

(h) With regard to the issue in bioethics as disputed in this case, we cannot deny that it seems somewhat odd that although the appellees can never be identified as the legal parents of the Children under the Civil Code of Japan, they could be the legal parents of the Children in Japan as a result of the recognition of the effect of the judicial decision rendered by the foreign court. However, according to many lower court judgments rendered to date as well as the practices in family registration (See the Directive Min-Ni No. 280 of January 14, 1976, issued by the Director-General of the Civil Affairs Bureau of the Ministry of Justice), a foreign judgment concerning personal status does not need to satisfy the requirements under the governing law but it should be recognized as being effective if it only satisfies the requirements set forth in Article 118 of the Code of Civil Procedure. This theory is conducive to stable international rules of justice, and we cannot find any reason to go against this theory only in this case.

(3) Consequently, the Judicial Decision is effective through application or analogical application of Article 118 of the Code of Civil Procedure, and the Children are the appellee's children in wedlock. Therefore, the Birth Notifications should be accepted.

4. However, the determination of the court of second instance mentioned in (2) and (3) above cannot be affirmed, on the following grounds.

(1) In order for a judgment rendered by a foreign court to be recognized as being effective in Japan, the contents of the judgment must not be contrary to public policy in Japan. Although it is inappropriate to deny the satisfaction of this requirement only because the judgment rendered by a foreign court involves a foreign system that is not adopted in Japan, if such foreign system is found to be incompatible with the fundamental principle or fundamental philosophy of the rules of law of Japan, the foreign judgment should be deemed to be contrary to public policy as prescribed in the said Article (See 1993 (O) No. 1762, judgment of the Second Petty Bench of the Supreme Court of July 11, 1997, Minshu Vol. 51, No. 6, at 2573).

A natural parent-child relationship is the most fundamental relationship concerning a person's status. It is the foundation for various relationships in social life, and in this respect, it does not only concern matters between private persons but is also deeply involved in the public interest, and it has a material impact on child welfare. The eligibility for a natural parent-child relationship is an issue concerning the fundamental principle or fundamental philosophy that serves as the basis of the rules of law on personal status in each country. Therefore, the criteria for the eligibility for a natural parent-child relationship should be definite and clear, and the existence or nonexistence of a natural parent-child relationship should be determined uniformly according to such criteria. Consequently, it should be construed that the Civil Code, which forms the rules of law on personal statuses in Japan, will acknowledge a natural parent-child relationship only in the cases set forth therein, while denying the establishment of a natural parent-child relationship in other cases. In conclusion, a judgment rendered by a foreign court acknowledging the establishment of a natural parent-child relationship between the persons who are not eligible for such relationship under the Civil Code, is incompatible with the fundamental principle or fundamental philosophy of the rules of law in Japan, and therefore it should be deemed to be contrary to public policy as prescribed in Article 118, item 3 of the Code of Civil Procedure. This conclusion would not be affected even if there is room, as a matter of legislative policy, to acknowledge the establishment of a natural parent-child relationship in cases other than those prescribed in the Civil Code.

(2) Although there is no provision in the Civil Code of Japan that directly stipulates the establishment of a mother-child relationship between a woman and her child born in wedlock, the Civil Code has a provision that seems to presuppose that the mother of a child is the woman who has conceived and delivered the child, and that a mother-child relationship shall be established immediately by the objective fact of conception and delivery of the child (see Article 772, para.1 of the Civil Code). It is also regarded that a mother-child relationship between a woman and her child born out of wedlock shall be established immediately by the objective fact of delivery of the child (See 1960 (O) No. 1189, judgment of the Second Petty Bench of the Supreme Court of April 27, 1962, Minshu Vol. 16, No. 7, at 1247).

The existing legal system of the Civil Code concerning a natural parent-child relationship is based on a parent-child relationship by blood. The reason why the Civil Code presupposes as the basis for such a system that a legal mother-child relationship shall be established immediately by the fact of delivery of the child may be that at the time of the enactment of the Civil Code, every woman who conceived and delivered a child had a genetic relationship with the child, and based on such a fact, the Civil Code was intended to acknowledge the establishment of a mother-child relationship between them by focusing the objective and apparent fact of delivery of the child. Another reason may be that it would be conducive to the child's welfare to definitely determine a mother-child relationship between a woman and the child delivered by her as soon as the child was born.

In light of when the Civil Code was enacted and when the aforementioned judicial precedent was rendered, it is obvious that the provisions under the Civil Code concerning the establishment of a mother-child relationship and the aforementioned judicial precedent undoubtedly presuppose that a woman should conceive and deliver a child using her own egg. However, today, artificial reproduction by ART does not only serve as a substitute for part of the process of natural reproduction but has made it possible to realize a form of conception that can never be achieved by natural reproduction. It is now possible for a woman to conceive and deliver a child by way of ART using another woman's egg. Under these circumstances, a question is posed regarding, in the case where the woman who has conceived and delivered a child and the woman who has donated her egg for the child are not the same, whether or not the existing Civil Code can be construed to also acknowledge the establishment of a mother-child relationship between the child and the woman who has conceived and delivered the child immediately by the fact of delivery of the child. In this respect, no provision of the Civil Code seems to be intended to acknowledge the maternity of the child for a woman who has not conceived or delivered the child. The absence of a provision specifying the legal relationship in such case is due to the fact that such situation was not anticipated at the time of the enactment of the Civil Code. However, considering that, as explained above, a natural parent-child relationship is deeply involved in the public interest as well as child welfare, and therefore it should be uniformly determined according to definite and clear criteria, there is no choice but to construe the existing Civil Code to require that a woman who has conceived and delivered a child shall be the mother of the child, and that a mother-child relationship cannot be deemed to be established between the child and the woman who has not conceived or delivered the child, even where the child is born using the egg donated by that woman.

It may be a publicly known fact, however, that some women, because of their strong desire to have children genetically related to them by using their eggs, ask other women to conceive and deliver children by way of ART using their own eggs, and children are actually born through such arrangements generally called surrogate birth. Since surrogate birth, which was not anticipated under the Civil Code, actually occurs and is expected to continue to occur in the future, it is necessary to start discussion about how to treat surrogate birth under the existing legal system. This issue should be considered in terms of both the legal system for medical services and the legal system for parent-child

relationship, focusing on various possible problems such as the problems in terms of medical aspects, the problems expected to occur between the parties concerned, and the problems involving the welfare of a child to be born, while also taking into consideration the sincere desire of women to have children genetically related to them as well as the sense of ethics generally accepted in society regarding a woman's decision to ask another woman to deliver her child. In this area, there is strong demand that legislative measures should be taken promptly.
(3) According to the reasons explained above, it should inevitably be deemed that the Judicial Decision is incompatible with the fundamental principle or fundamental philosophy of the rules of law on personal status in Japan, and contrary to public policy as prescribed in Article 118, item 3 of the Code of Civil Procedure, because the Judicial Decision acknowledges the establishment of a natural parent-child relationship between persons who are not eligible for such relationship under the Civil Code, which forms the rules of law on personal status in Japan. Therefore, we should deny the effect of the Judicial Decision in Japan.
Accordingly, whether or not a legitimate parent-child relationship can be found between the appellees and the Children shall be decided by using the appellee's national law, i.e. the law of Japan, as the governing law (Article 28, para.1 of the Act on General Rules on Application of Laws). Since the Civil Code of Japan cannot be construed to acknowledge a mother-child relationship between Appellee X2 and the Children, we cannot find a legitimate parent-child relationship between the appellees and the Children.
(4) The determination of the court of second instance mentioned above contains an apparent violation of laws that has affected its judgment, and the decision of prior instance should inevitably be quashed. The appellant's argument is well-grounded. In addition, since the decision of the first instance dismissing the appellees' appeal is justifiable, the appeal filed by the appellees against the decision of the first instance shall be dismissed.

Therefore, the decision has been rendered in the form of the main text by the unanimous consent of the Justices. In addition to the court opinion, there is a concurring opinion by Justice TSUNO Osamu and Justice FURUTA Yuki and a concurring opinion by Justice IMAI Isao.

The concurring opinion by Justice TSUNO Osamu and Justice FURUTA Yuki is as follows.
There is no doubt that the appellees have been taking care of the Children, who were delivered by A (surrogate mother), and devoting their affection to them.
However, when construing the Civil Code and other relevant provisions in this case, it is necessary to consider the issue of parent-child relationship, not focusing on this case only but giving consideration to all possible cases where the woman who has donated an egg (egg donor) and the woman who has conceived and delivered a child using the egg (surrogate mother) are not the same.
A mother-child relationship is one of the most fundamental relationships of persons, and it is also an essential matter that affects a child's identity. Under the existing Civil Code, there is no special provision on a legal relationship between a child born through a surrogate birth arrangement, the surrogate mother, and the egg donor.
In countries where surrogate birth arrangements are performed, various problems have actually occurred, such as the surrogate mother feeling affection for the child she conceived and delivered and refusing to give the child to the clients, or the clients changing their mind and refusing to accept the child. When such a problem occurs, if the relationship between the surrogate mother, the egg donor, and the child is not clearly defined by law, the child's status would be insecure, and furthermore, a conflict would be caused between the parties concerned. This would be significantly prejudicial to the child's welfare.
If a surrogate birth arrangement is to be allowed in certain cases, from the perspective of the welfare of children to be born and the public interest of a parent-child relationship as well as protection of surrogate mothers, it is necessary to set clear requirements for recognizing the validity of a surrogacy contract. Furthermore, if the satisfaction of these requirements is to be the condition for acknowledging a natural parent-child relationship between a child born through a surrogate birth arrangement and the woman who requested the surrogate birth, the existence or nonexistence of a natural parent-child relationship would be decided based on the determination of the validity of the surrogacy contract, which will be made on a case-by-case basis. This would not only make a natural parent-child relationship unstable but also lead to a situation where some children are acknowledged as natural children while others are not, despite the fact that they are born through objectively the same process.
It is well understandable that there are special circumstances, as in this case, where a surrogate birth arrangement is the only way for a woman to have a child genetically related to her by using her own egg. Also, it is significantly important to ensure the welfare of a child born through such arrangement, and due consideration should be given to it. Nevertheless, under the present situation where there is no legal system for dealing with various problems that might arise from a surrogate birth arrangement, we cannot but hesitate to acknowledge the maternity of a child as the woman who has donated the egg, by changing the principle of acknowledging the maternity of a child as the woman who has conceived and delivered the child, thereby actually bringing a new life into existence.
Since the same or similar problems are expected to be raised in the future due to the progress in ART, we strongly hope that legislative measures will be taken as soon as possible to solve the issues of surrogacy and parent-child relationships involving the persons concerned, while taking into consideration the various problems suggested in the court opinion.
Viewing the circumstances in other countries, surrogate birth arrangements are allowed in some states of the United States as well as the United Kingdom, but there is difference in terms of how to handle such arrangements; in some places, the surrogate mother is provisionally identified as the mother of the child, and then the procedure to identify the clients as the parents of the child shall be taken after birth; in other places, the clients shall be identified as

the parents of the child upon birth. The requirements for the validity of a surrogacy contract also differ from place to place. On the other hand, in Germany, France, and other states of the United States, surrogacy is prohibited completely, and if a child is born through a surrogate birth arrangement, the surrogate mother shall be identified as the mother of the child. In such case, an adoption between the child and the clients is allowed in some places and is not allowed in other places. Thus, there are diverse legal systems regarding surrogacy depending on the circumstances in individual countries or regions. This fact suggests that opinions would necessarily be divided regarding surrogacy in various aspects, and for this reason, legislative measures are strongly demanded in this area.
In this case, due consideration should be given to the appellees' desire to take care of the Children as their own children, and to fulfill their desire, a legal parent-child relationship should be established between them. Given the fact that A and B manifested to a court, although it is a foreign court, the intention to agree to identify the appellees as the Children's parents because they do not desire to take care of the Children by themselves, we find enough room, even under the existing Civil Code, to establish a special adoption between the appellees and the Children.

The concurring opinion by Justice IMAI Isao is as follows.
I am in agreement with the court opinion that a legitimate parent-child relationship cannot be established between the appellees and the Children. However, I would like to state my opinion regarding how to solve the issue of parent-child relationship in a situation that is not anticipated by the Civil Code, as is the situation in this case.
The issue directly questioned in this case is whether a foreign judicial decision acknowledging a natural parent-child relationship between the appellees and the Children is effective in Japan. As the court opinion indicates, however, if the contents of a foreign judgment addressing an issue concerning the fundamental principle or fundamental philosophy that serves as the basis of the rules of law on personal status in Japan, the issue of parent-child relationship, are unacceptable based on the construction of the Civil Code of Japan, such decision will not be deemed to be effective in Japan on the grounds that it is contrary to public policy as prescribed in Article 118, item 3 of the Code of Civil Procedure. Therefore, in the end, it is a question of how to construe the maternity of the child who is born through a surrogate birth arrangement within the framework of the Civil Code of Japan.
Along with the rapid progress in medicine, various new technologies are being developed and put into practice in the field of ART. Such advance in technology has made it possible for men and women, married or not, who are otherwise incapable of having their own children, to fulfill their wish. However, this has also caused various legal problems that have never been anticipated before. One of such problems is the issue of whether or not a father-child relationship can be established between a child born as a result of in vitro fertilization using a frozen egg and the man who has donated the egg (See 2004 (Ju) No. 1748, judgment of the Second Petty Bench of the Supreme Court of September 4, 2006, Minshu Vol. 60, No. 7, at 2563). The issue of surrogacy disputed in this case is also included in these problems. Since these problems concerning the law of personal status that occur along with the advance in technology were not anticipated when the Civil Code was enacted, it is no wonder that the Civil Code does not have any provisions addressing these problems. It is not appropriate to immediately deny a legal parent-child relationship only because it is not provided for in the Civil Code. It is the duty of the court to examine the contents of the legal relationship in dispute and acknowledge the relationship if it is acceptable based on the construction of the existing Civil Code.
However, as the court opinion states, the establishment of a personal relationship, especially a natural parent-child relationship, is the foundation for various relationships in social life, and it is an issue concerning the fundamental principle or fundamental philosophy that serves as the basis of the rules of law on personal status. Therefore, we should consider it not only from the perspective of whether or not to protect the rights and interest of the parties concerned in specific cases, but also from the perspective of what would become of the rules of law on personal status in Japan if the relationship in dispute is legally acknowledged.
In this case, the court of second instance determined the following facts: (i) The appellees and the Children have relationships by blood; (ii) The appellees had no option but to arrange a surrogate birth in order to have a child with their genes; (iii) The Surrogacy Contract cannot be found to contain any unjust aspect regarding the motive or intention of concluding it, nor can it be found to have any aspect that is prejudicial to the surrogate mother's dignity; (iv) The surrogate mother and her husband do not hope to accept the Children as their children whereas the appellees strongly desire to take care of the Children as their natural children.
In order to ensure the welfare of the Children, it might be desirable to acknowledge a legal natural parent-child relationship between the appellees and the Children. However, the situation is not so simple. We should consider this issue by also taking into consideration any possible influence on the rules of law on personal status in Japan that would occur if a natural parent-child relationship is legally acknowledged between the parties of this case. There are diverse opinions on surrogacy, regarding whether or not it is allowable from the perspective of bioethics or medical ethics, and if it is allowable at all, what conditions should be imposed. In addition, how to coordinate legal relationships between the child born through a surrogate birth arrangement, the surrogate mother, the egg donor, and other parties concerned is also a controversial issue. If the existing Civil Code of Japan is construed in the direction toward legally acknowledging a natural parent-child relationship between the appellees and the Children in this case, it would result in ratifying a surrogate birth arrangement for which, at present, there is a controversy regarding the appropriateness of its implementation and negative views are frequently heard in medical circles, while leaving legal issues affecting the parties concerned unsolved. In my opinion, such a situation should be avoided.
In order to solve this problem, it is necessary to develop a legal system for surrogacy by considering the various matters concerned from the perspective of medical services