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## Adoption and Child Welfare in Japanese Law: Has the Special Adoption Law failed?\*

Fumio Tokotani\*\*

In Japan there has been wide use of adoption of children as a social and legal parenthood. In the traditional Japanese law of adoption the interests of adoptive parents with no biological children was the most important consideration. The adoptive parents wanted an adoptive child as a successor to their house, family property and family name. Children whose parents were unknown or children born out of wedlock were not candidates for adoption by such people. Such adoption of children (Ordinary Adoption) is now contrasted to a second type of adoption, namely Special Adoption of children in need of special protection, a system which was introduced in 1988. This paper deals with the historical background and the current situation of Japanese Special Adoption and makes some proposals in order to make more use of Special Adoption of children.

Keywords : the Japanese Special Adoption Law, the welfare of children, the eligibility of children for adoption, adoption via adoption agency

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## 1. Introduction

Older people consider that Japanese society has been thoroughly corrupted as it has become a rich country; younger people have lost traditional morals, and they don't respect elder people. Sometimes young girls are tempted to make money by exploiting their sexuality. If they become pregnant they go to a doctor to procure an abortion. From the point of view of older people even the provisions for special adoption of children (referred to as "Special Adoption" in the rest of this paper) which were introduced in 1988 for children in need of protection reflect the immorality of modern Japanese society, because this law makes it legally possible to cut the relationship between parents and their unwanted children. However, in fact, Special Adoption was introduced in order to save children in a special category and to place them under strong judicial control. Immediately after introduction of the law there were about one thousand Special Adoptions in 1988 and 1989, but after 9 years the number of special adoption had already decreased to 479 in 1995. Has the reform of Japanese adoption law as a system for securing the welfare of children failed?

In Japan there has always been wide use of adoption of children. The institution has been one of the most important social parent and child relationships in the Japanese patri-

archal family system. In the traditional Japanese law of adoption the interests of adoptive parents with no biological children was the most important consideration. The adoptive parents wanted an adoptive child as a successor to their house, property and family name. So an adoptive child had to be a healthy boy from a good family. In those days children whose parents were unknown or children born out of wedlock were not candidates for adoption by people in the upper and middle classes. However many children born in poor families were adopted by farmers or fishermen and used to provide hard labor.

After World War II, in accordance with the completely reformed new Japanese Constitution the part of the Civil Code concerning family and succession law was revised in 1947. Some elements of the patriarchal family system were eliminated<sup>1)</sup> and a system for permission of the Family Court for an adoption of minors was introduced as a safeguard for the welfare of children when the adoptive child was not a descendant of the adoptive parent or his or her spouse (Japanese Civil Code [Hereinafter JCC] Art.798). The institution of adoption was used in those days to save many orphans or children born in poor families. In 1950 there were about 40,000 adoptions carried out with the permission of a Family Court - 40 percent of all (100,000) adoptions, which included the adoptions of adults.

Such adoption of children is now called

1) For example, restrictions on the adoption of a man by a person with a male successor, posthumous adoption by testament, and the institution of the adoption of a daughter's husband were abolished.

"Ordinary Adoption",<sup>2)</sup> because it is applicable to all people. It is contrasted to a second type of adoption, namely, "Special Adoption" of children in need of special protection, a system which was introduced in 1988 after long and controversial discussion.<sup>3)</sup>

## 2. The Special Adoption Law and the Welfare of the Child

In many respects the Japanese Special Adoption System was established under the strong influence of the adoption law reforms in many European countries, which were based on the European Convention on the Adoption of Children (Council of Europe, 24.4.1967).<sup>4)</sup> That is, full adoption. However, unlike that in many Western countries Japanese Special Adoption is designed to be an exceptional type of adoption especially for younger children in need of special protection and care.

### 2.1 Conditions and Effects of "Special Adoption"

#### (a) Requirements concerning the adoptive parent and child

The prospective adopter must have a spouse and neither husband or wife may become an adopter unless the spouse also becomes an adopter. However, this does not apply when

either husband or wife becomes the adopter of a legitimate child of his or her spouse (this excludes a child adopted as an ordinary adoptive relation) (JCC Art.817-3). There are also age restrictions on adopter and adoptee. A person who has not attained the age of twenty five may not become an adopter. However, this does not apply when one of the prospective adoptive spouses of a married couple has not attained the age of twenty five, providing he or she has attained the age of twenty (JCC Art. 817-4).

A child who has attained the age of six at the time of the application may not become an adopted child. However, this does not apply in cases where the child is under the age of eight and was placed under the continuous care or custody of the prospective adopter before the age of six,<sup>5)</sup> for example in the case of a foster child or an "ordinary" adopted child of the adopters (JCC Art. 817-5). The reason for this age restriction is, according to the legislature's comment, to create the same situation as if there were a biological child -and -parent relationship between the adoptive child and adopters. Also, it is not good for a child of school age to have the relationship with the biological parent cut.

Other proposals concerning the age of adoptees were made at the time. These were

2) An ordinary adoptive relationship is established by a mutual agreement between the adopters and the adoptive child and its registration at a family register office. This is a simple adoption which does not terminate the legal relationship between the adopted child and his or her original parents. Any person who has attained majority in law (20 if not married) may adopt a younger person (JCC Art.792).

3) In 1950s there was discussion about the necessity of a new type of adoption of children as Special Adoption.

4) European Treaties Series No.58.

5) In one case where a child was already eight years and two months old when the Special Adoption law was enacted, an application for Special Adoption was rejected (decision of the Family Court, Hiroshima, Mar. 12, 1988, Kateisaibangeppou (FLR) vol.40, p.192.). However, every year there are still six or eight applications for Special Adoption which have been rejected because of the age restrictions.

based on the opinion, which I share, that from the viewpoint of the interests of children in need of protection, it should also be possible for elder children, twelve or fifteen years to be adopted. However, this proposal was not accepted, because, since the Special Adoption was already going to make drastic changes in Japanese adoption law, it was felt this would be too extreme.

(b) Consent of Parents

In a Special Adoption, the consent of the legal father and mother of a child to be adopted must in principle be obtained. However, this does not apply in cases where the father or mother are unable to declare their intention or where there is cruel treatment, malicious desertion by father or mother, or any other cause seriously harmful to the interests of the child to be adopted (JCC Art. 817-6).<sup>6)</sup>

The consent of the parent is revocable until the adoption decree comes into effect. In practice there have been some cases, in which the adoption was ultimately rejected because of revocation of such parental consent.<sup>7)</sup>

(c) Procedure

To protect and promote the best interests of the child, a special adoptive relationship is established by a declaratory decision of the Family Court after careful examination of

the necessity of that adoption (JCC Art. 817-2). In establishing a special adoptive relationship, the attitudes and behaviour of the prospective parents towards the prospective adoptee over a period of six months or more are taken into account (JCC Art. 817-8). In many cases, caseworkers of the Child Guidance Center or licensed adoption agencies supervise and assess the relationship during that period.

(d) Effects

In case of a Special Adoption, the adoptive child obtains the status of legitimate child of the adoptive parents; and the legal relationship between the child and its original parents and their blood relatives is terminated (JCC Art.817-9).

For Japanese people, who have a strong consciousness of blood relationships, to cut off the parent-child relationship is a drastic measure, and some people were against the Special Adoption because they considered it to be unnatural.

(e) Registration of a Special Adoption

A child adopted under Special Adoption is registered in the Family Register of the adoptive parents almost as if he or she were a biological child of the adopters.<sup>8)</sup> This is because the adoption must be protected against third parties by a special method of registration in the Japanese Family Register,

6) See High Court of Fukuoka, Decision on 27.Dec.1991, Hanreitaimuzu No.786,253.

7) See High Court of Tokyo, Decision on 27.Mar.1989, Kateisaibangeppou vol.41,110 and High Court of Tokyo, Decision on 30.Jan.1990, Kateisaibangeppou vol.42,47.

8) A child adopted by Special Adoption is registered as "first son" or "second daughter" of "father and mother", while a child adopted by Ordinary Adoption is registered as "adopted son" or "adopted daughter" of "adoptive father and/or mother". The Japanese Family Registry system is a complicated and characteristic system recording all Japanese people and is used to certify a person's capacity or civil status. Therefore anybody can in principle obtain a certified copy of the Family Register of anybody else, though there are now some restrictions on access made from the viewpoint of the right to privacy, introduced since 1976.

with restrictions on access to the register of the adoptive child. In many cases, adopters make applications for a Special Adoption mainly in order to obtain this special kind of family registration, but such applications have to be rejected, because in such cases the child is not in need of special protective care.

## 2.2 Historical Background of Special Adoption

Besides the influence of the European law of adoption already mentioned, there are some other background aspects to the Japanese Special Adoption Law.

### (a) Social Usage of False Birth Registration of the Child

In the past, there was a social usage in Japan that a new-born baby could be given away to a childless person and the baby treated as if he or she were a biological child of the recipient. The child thus had a parent-child relationship as a biological and legitimate child in spite of the lack of a real biological relationship with the formal parents. For adopters, such a child was their legal child and the child would obtain the family name and right of succession. A child born out of wedlock was also sometimes adopted in this manner. In this case, the most important thing was not the happiness of the child, but the interests of the adoptive parents, and in many cases, also the interests of the biological parents.

However, after many years, there were sometimes disputes between parents and the

child or between relatives of parents and the child, and then the parents or their relatives might institute a suit to ascertain that the child is not biological child and therefore had no succession rights. The child might assert that he or she had the status of an adoptive child at least and that the parental attempts to disinherit were invalid because they themselves had registered him as their biological child following traditional Japanese social usage. The Supreme Court of Japan has decided in such cases in favor of parents, for there were no legal formalities, i.e. registration of the adoptive relationship. Many scholars oppose this Supreme Court precedent and would recognize the child as a legally adopted child.

In 1973 a gynecologist made a big national sensation by revealing that he had arranged more than one hundred adoptions of babies over fifteen years and made false registration of babies as biological children of adopters by using false birth certificates, because he wanted to stop illegal abortions and to make all parties happy, including both birth mother and her legitimate family. He was very critical about the Japanese adoption law of those days. In his opinion, couples who had an earnest desire for a child could find a child to be adopted if they could register the child as their legitimate biological child ("illegal adoption" instead of "illegal abortion").

### (b) Frequency of Adoption of foster children

Foster care<sup>9)</sup> is an alternative method of

9) See, Tokotani, "The Triangle of biological, social and legal Parenthood in Japan" in Choo Soo Kim (ed.), *The Legal Relationship between Parents and Children*, 1997 Seoul, pp.178-182.

child raising in addition to children's and infant's Homes for children without family care.<sup>10)</sup> However, in this case there is no legal parent-child relationship between foster parent and foster child. While foster parents can use routine factual custodial rights in connection with the foster child, the legal representative rights of the foster child, the right of consent to legal transactions of minors, and the right of management of money, remain with the biological and legal parents, even if the child was placed with the foster parent with the permission of a Family Court. As a result, many foster parents have a desire to adopt their foster children, to avoid intrusions by the original parent and to establish stronger relationships with their children. In 1985 there were 352 adoptions of foster children arranged by the Public Child Guidance Center.<sup>11)</sup>

In 1995, there were 409 applications for Special Adoptions of foster children, 67% of all (607) applications, and of these, 392 were approved, 81.8% of all (479) Special Adoptions. Foster care has now become a preliminary stage in a Special Adoption.

### 2.3 The Current Situation: Special Adoption compared with Ordinary Adoption

#### (a) The number of adoptions of children in Japan

In Japan, there were about 100,000 adoptions of children a year in the 1950s. Though the number of adoptions is decreasing, there are still about 80,000 adoptions in a year. However, two thirds of them are adoptions of adults in order to obtain a family successor. On the other hand, the number of Ordinary Adoptions of minors with permission of a Family Court has decreased strikingly. There were only 956 Ordinary Adoptions with permission of a Family Court in 1995 (1,074 adoptions in 1994), whereas there were 43,849 adoptions with permission of a Family Court in 1949, 29,619 adoptions in 1953 (about 30% of all adoptions) and 2,614 adoptions in 1985 (only 3% of all adoptions).

On the other hand, the number of intercountry adoption cases has increased to 273 cases in 1995 (28% of Ordinary Adoptions). Before the Adoption Law Reform there were 146 intercountry adoptions in 1982 (4.6% of 3150 adoptions with permission of a Family Court) and 301 intercountry adoptions in 1985 (11% of 2,614 adoptions with permission).

The number of Special Adoptions is smaller because it is permitted only under much judicial restriction. There were about one thousand Special Adoptions in 1988 and 1989, but after 9 years the number of Special Adoptions decreased to 479 in 1995 (includ-

10) In Japan 90 percent or more of children without biological family care live in homes for children or babies. In 1995, there were about 29,700 children in need of protective care placed in the 529 Children's or 117 Infant's Homes, while only 2,029 foster parents had charge of 2,566 children. In the same year there were 479 Special Adoptions and 950 Ordinary Adoptions of minors.

11) It was about 13.4% of 2,614 adoptions of children with permission of a Family Court in 1985. In 1984, 305 of 866 foster relations (35%) were dissolved because the foster parents adopted their foster children. On the other hand, there were 1,170 adoptions by uncles or aunts, and 386 by other relatives, in 1985.

ing 25 intercountry Special Adoptions).

(b) Personal Status of Children to be adopted

It is estimated that three fourths or more of adoptions of minors are now adoptions of stepchildren. A frequent motive for a stepchild adoption may be stabilization of the custodial relationship of stepparent with stepchild by acquisition of parental authority and rights in maintenance and succession on the basis of legal parenthood. Also, it is sometimes used to change the family name of a stepchild<sup>12)</sup> or to prevent access of another parent to the stepchild.<sup>13)</sup>

A Special Adoption of a stepchild is not prohibited (JCC Art.817-3). However, in practice it is still rare,<sup>14)</sup> because in formation of a Special Adoptive relationship, the consent of another parent of the child has to be obtained, and there must be special circumstances, in which a Special Adoption of the stepchild seems to be particularly necessary, in the interests of stepchild (JCC Art.817-7). For instance, when his or her

biological father tends to make intolerably harmful intrusions upon the child and stepparent family, a Special Adoption of stepchild can be established.

If a stepchild was born out of wedlock, Special Adoption is easier, because the consent of the biological father would not be necessary, when he has not acknowledged his paternity.<sup>15)</sup> In practice, in 80% (382 adoptions) of all Special Adoption cases in 1995, the adoptive children were born out of wedlock, and in most cases the father had not acknowledged his paternity (358 adoptions). On the other hand, with Ordinary Adoptions only 30% of the adoptive children were born out of wedlock (299 out of 956 cases).

(c) Ages of adopted children

In almost 80% of Special Adoption cases, the children were under 4 years old (383 out of 479 adoptions) and only in 30 cases (6%) were children 6 or 7 years old in 1995, whereas in 1989 in 26% (316 out of 1205 adoptions) of Special Adoptions children were 6 or 7 years old. On the other

12) If a stepchild wants to take the familyname of his or her mother, which is at the same time the name of his or her stepfather, he or she can change his or her name by registration at the family register office with permission of a Family Court (JCC Art.791). However, an easier and more usual way of changing his or her name is by Ordinary Adoption. In this case, there is no control by a Family Court.

13) However, an adoptive relation with a stepchild can be easily dissolved, when the marriage of the stepparent (father) and biological parent (mother in most cases) is dissolved, because an ordinary adoptive relationship can be dissolved simply by registration of mutual agreement for its dissolution at the family register office, without permission of a Family Court (JCC Art. 811, 812). It is said that about 43% of about 17,000 dissolved adoptions a year are those of adoptions of minors. This also emphasises the frequency of stepchild adoption.

14) See Family Court Miyazaki, Decision on 30. Nov.1990, Kateisaibangeppo vol.43,35, and High Court of Tokyo, Decision on 20.Nov.1996, Kateisaibangeppo vol.49,78. There were only 3 Special Adoptions of children by biological parents or their spouses in 1995. Considering the fact that dissolution of Special Adoption is strictly restricted and not easily approved, even if the marriage of biological parent and stepparent breaks down, the necessity for stepchild Special Adoption has to be examined very carefully.

15) However, if a biological father asserts his paternity in a civil suit, a Family Court is not permitted to establish a Special Adoption in spite of the possibility of his paternity, the Supreme Court of Japan, Decision on July 14, 1995, Minshu vol.49, 2674.



hand, in the case of Ordinary Adoptions with permission of a Family Court, 200 children (21%) were under 4 years old, 81 children (8%) were 4 or 5 years old, 102 children (10.6%) were 6 or 7 years old and 265 children (27.7%) were under 15 years old (and older than 8) and 302 children (31.6%) were under 20 years old (and older than 15).

#### (d) Adoption via Adoption Agency

After the introduction of the Special Adoption Law, the Public Child Guidance Center could work more effectively in arranging the adoption of children in need of protective care, and in keeping contact with related public organizations and private adoption agencies. Though in 381 Special Adoptions in 1995 (out of 479) there were arrangements of adoption by the Child Guidance Centers (322 cases) or other adoption agencies (59 cases), there were still 98 cases without any arrangement by adoption agency, in other words independent adoptions or adoptions by other private arrangement. However, more than half of the applications for Special Adoption without public arrangement were not approved. Independent adoption or adoption by private arrangement was not prohibited, because it seemed that there would be many such adoptions. In fact, in 1989 there were still 823 adoption without arrangement, while there were 382 adoptions with arrangement by agency.

### 3. Conclusion

Japanese Adoption Law should be considered anew in order to make more use of Special Adoption of children. Though our

dual system of Ordinary Adoption and Special Adoption has some problems, in principle I accept this system. However, in my opinion, Special Adoption would be more useful with abolition or mitigation of restrictions on the eligibility of children for adoption and also with introduction of compulsory official arrangement by adoption agency. Therefore, the conditions for Special Adoption should be changed as follows;

- a) Age restrictions for Special Adoption should be raised to fifteen and consent of children aged of 12 or over should be obtained.
- b) However, it should be possible for de facto adoptions to be acknowledged legally as Special Adoptions by order of a Family Court in spite of such age restrictions.
- c) With Special Adoptions the Child Guidance Center and other certified adoption agencies should have exclusive authority to arrange adoptions and should be given the powers to do it more actively. It should be made easier for children in children's homes to be adopted by mitigating the requirement for consent of the biological parents.
- d) Special Adoptions should be granted more generously even in the case of stepchildren or ordinarily adopted children when there is or would be maltreatment by the biological parents.
- e) In intercountry adoptions the child should automatically gain Japanese nationality, if the Child Guidance Center has lawfully arranged the adoption.

Special adoption should no longer be considered exceptional and the mistaken belief that children adopted under Special Adoption are always illegitimate should be eliminated.

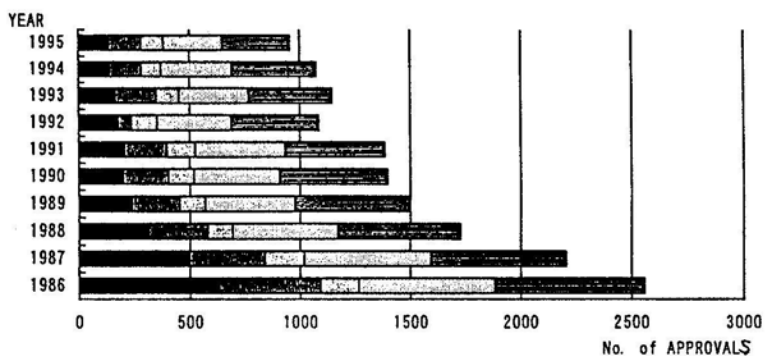


Figure 1: Number of Approved Adoptions (Ordinary Adoptions)

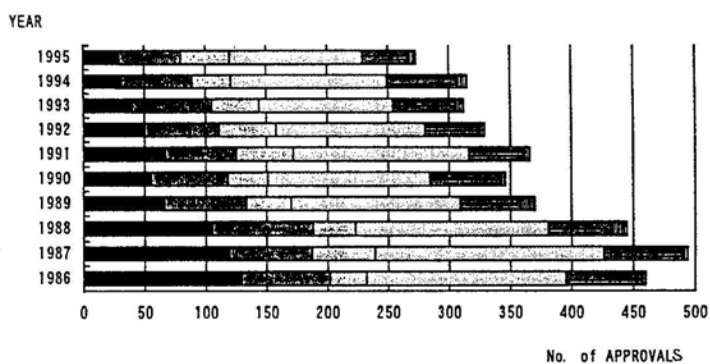


Figure 2: Number of Approved Adoptions (Ordinary Adoptions, Inter-country)

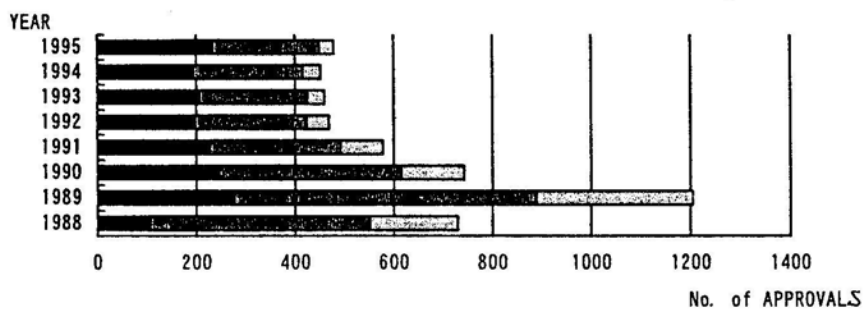


Figure 3: Number of Approved Adoptions (Special Adoptions)

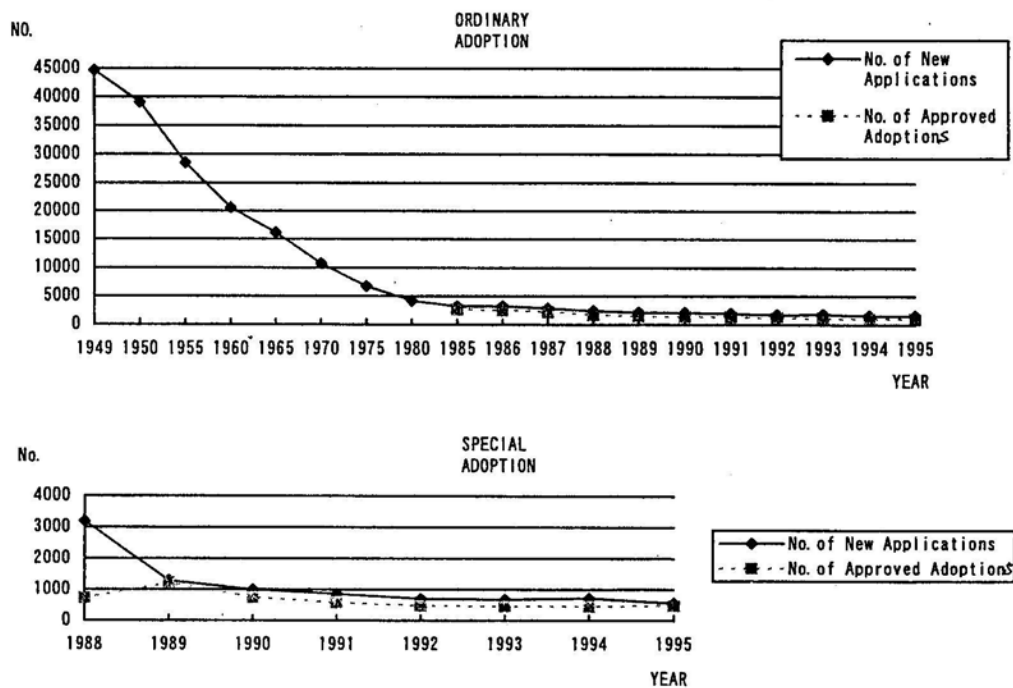


Figure 4: Number of New Applications and Approved Adoptions