

Is the best interest of the child a distinctive criterion?

— A Comparative Analysis of
Iranian and Japanese Legal Systems —

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I . INTRODUCTION

The term “best interest of the child” (BIC) emerged from the evolving conceptions of childhood in the 20th century. Considering a child’s best interest means viewing the child as autonomous rather than a part of his or her father’s assets.⁽³⁾ The BIC standard is prominently highlighted in Article 3 of the Convention on the Rights of the Child 1989 (CRC) and because worldwide acceptance was included in the domestic laws of

many countries and Two-thirds of countries have incorporated the CRC into their domestic law.⁽⁴⁾ This means that primary consideration of the child's best interest is a notable issue in these countries.

One of the most important issues surrounding the BIC is its ambiguity, which seems to have been intentional at the time of drafting.⁽⁵⁾ Moreover, an accurate definition of the term will probably provide some grounds for bias and may lead to highlight special conception.⁽⁶⁾ However, different cultures require different interpretations of BIC; so, it is put into practice in various ways.⁽⁷⁾ This runs counter to the view that the delegates were not aware of these controversial outcomes and therefore felt no need for further clarification of the term.⁽⁸⁾

However, this negligence had two side effects. While courts could assume that the decisions made by each country are more compatible with the reality on the ground, this lack of regulatory boundaries has led to arbitrary decisions and unpredictable results, even though some countries had developed special BIC guidelines for different issues.

This essay is a comparative analysis of the BIC position in two legal systems, those of Iran and Japan. Both these countries have agreed to and signed the CRC, which is now part of their domestic law. Moreover, our survey will show the relationship of the BIC to other laws and will also evaluate the impact rate of BIC on these legal systems.

II . AN OVERVIEW OF THE ROLE OF CHILDREN IN IRANIAN AND JAPANESE LEGAL SYSTEMS

A. *Iran*

In the East, especially in Iran, the notion of childhood is deeply related to religious beliefs, which consider a child to be a creature of God who is innocent with divine spirit.⁽⁹⁾ In the Sasanian Dynasty era (226-650), in which Zoroastrianism was proclaimed as the official religion, children were respected and had a pivotal status. According to Zoroastrian beliefs, a child was like a bridge that would allow a man to pass to heaven after his death. Thus, if a man did not have any children, he would fail to go to heaven. Therefore, survivors would adopt⁽¹⁰⁾ a child for him⁽¹¹⁾; hence, adoption was prevalent at that time. After the institutionalisation of Islam in Iran, childhood took on wider dimensions of meaning. In Islamic training, children were God's bestowal⁽¹²⁾ and parents were responsible for them and for developing their capacities.⁽¹³⁾ Islamic jurisprudence, which has been implemented as Iranian Law for several centuries, has addressed children and their interests in different ways. The term *Ghebtā* refers to the child's 'interest' and is used in different contexts, such as marriage, divorce, custody, social punishments and financial affairs. Moreover, there is a chapter in the Holy Quran that articulates the importance of caring for orphans and also explains the various rights of orphans and a government's responsibility for them.

If the enactment of laws is considered as one of the hallmarks of modernism⁽¹⁴⁾ one could say that Iran entered to the modern world about one century ago, when its first laws were ratified in parliament.⁽¹⁵⁾ Due to Iranian religious orientation, an Islamic influence was clearly visible in

most of the legal texts. The Civil Code (1935), Compulsory and Free Education and Training Act (1943) and Providing Educational Facilities for Iranian Children and Adolescents (1974) are some examples of these laws.

After the Iranian Revolution in 1979 and the ratification of the CRC in 1993, BIC became more recognised and valued more, which led to the generation of new laws focusing on children. For example, Iranian constitutional law (1979) states in Principle 21 that ‘the government is obliged to protect orphans and mothers during pregnancy and during custody cases, granting guardianship of children to their mothers in the absence of other legal guardians’.

B. Japan

In Japan, the legal status of the child has been heavily influenced by the traditional family (ie) system. This system dates back through centuries of history and has been observed by most people in Japan, especially people of the soldier or the merchant class. In this system, *koshu* (householder) holds a position of leadership within the family and also has a duty to support all members of the family. Other members of the family have a position to obey the householder’s orders as if the householder were the *emperor of the family*.⁽¹⁶⁾ Moreover, the householder is the sole owner of all family assets, except those assets which belong respectively to other members of the family. When the householder retires or dies, the next householder inherits these assets as a whole.⁽¹⁷⁾

In the middle of Meiji Era (1867–1912), some decades after the Meiji Restoration (1867), the Japanese government enacted a Civil Code

following that of France, but it was never put into force.⁽¹⁸⁾ Soon after, the Civil Code was revised and drafted by three Japanese scholars according to the traditional family system described above. These provisions became the latter half of the Japanese Civil Code, part IV and V, enacted in 1898.⁽¹⁹⁾

After World War II (1941–1945), under the influence of the General Headquarters of the Allied Powers, mainly consisting of officers of the army of the United States of America (GHQ), the new Constitution was enacted in 1947. It provided that laws relating to family must be enacted on the basis of personal dignity and the fundamental equality of both sexes.⁽²⁰⁾ Consequently, some important laws, including part IV and V of the Civil Code, were amended in accordance with these changes.⁽²¹⁾ As a result, the traditional family system seemed to have disappeared from the articles of the Civil Code. However, these changes were made so quickly that the government didn't have sufficient time to fully review the family law. As a result, further amendment was postponed. Therefore, some concepts and rules corresponding to the traditional family system were acknowledged in the new Civil Code along with related laws, such as banning of remarriage of divorced wives for 6 months,⁽²²⁾ which was judged unconstitutional by the Supreme Court in December 2015, the rule for the surnames of spouses after marriage,⁽²³⁾ which was judged constitutional by the Supreme Court in December 2015, the concept of legitimate children,⁽²⁴⁾ and discrimination against children born out of wedlock in succession cases,⁽²⁵⁾ which was judged unconstitutional by the Supreme Court in September 2013 and Article 900, item 4 of Civil Code, which was amended in December of that year to eliminate such discrimination.

With regard to the rights and best interest of the child, after the ratification of the CRC by Japan in 1994, certain progress was made in the legal system and efforts were made to improve the legal status of children, although these efforts have not gone far enough.

III. WHO IS A CHILD IN A LEGAL PERSPECTIVE?

A prerequisite for legal decisions related to BIC is a conceptual understanding of the child. In the CRC, 1989, *child* was defined as any human being under the age of eighteen, unless such a person was considered mature under domestic law.⁽²⁶⁾ For defining the concept of the child, we should refer to the following three points: the beginning of childhood, the end of childhood and the classification of the child.

A. *The Beginning of Childhood*

The beginning of childhood has neither been specified in the Iranian legal system nor in the CRC,⁽²⁷⁾ but a child is defined as a human being who has not reached Sharia maturity.⁽²⁸⁾ Meanwhile, some scholars believe that according to Article 956⁽²⁹⁾ and Article 957 of the Civil Code,⁽³⁰⁾ which gives the child some rights before birth, one can infer that childhood begins at the moment of conception.⁽³¹⁾ Moreover, according to criminal law, a pregnant woman who is condemned to retaliation should not be punished until she delivers her baby. And even after birth, if the child's life is in danger, the punishment will be postponed until the child is stable.⁽³²⁾ This article shows that an embryo's life is as important as a child's life after birth. The proponents of this view also use Article 850 and 875 of the Civil Code,⁽³³⁾ which outlines a child's rights in inheritance and testation, to reinforce their arguments.

In contrast, other scholars believe that childhood begins at birth because an embryo does not lead an independent life and is completely connected to its mother.⁽³⁴⁾ Embryos cannot be considered human beings until they are born alive and child's rights are subject to *be borne alive*. Therefore, real life commences by birth. Before that moment, the use of the *child* term is meaningless.

If the main purpose of defining a concept such as childhood is to build awareness of the rights of and duties towards the child, as the Civil Code and Criminal Law have explained, we can conclude that the beginning of childhood is not defined by birth but by prenatal time.

The Japanese Civil Code specifies, as a general rule, which one becomes subject to rights and duties upon birth⁽³⁵⁾ and the majority of scholars of civil law support the interpretation that the time of birth is when the child's entire body emerges from the mother. However, there are three exceptions to this in the Civil Code: the rights to damages,⁽³⁶⁾ succession⁽³⁷⁾ and testamentary gifts.⁽³⁸⁾ In these cases, the embryo or foetus shall be considered already born and the majority of scholars support the view that embryo or foetus can claim their rights through their parents or guardians only after they are born alive.⁽³⁹⁾

B. The End of Childhood

The end of childhood is usually defined as *maturity*, which means achieving a specified level of physical, mental, emotional and social development. At this level, human beings are independent, do not need others' guardianship and can be recognised as responsible for all their activities.⁽⁴⁰⁾ In the CRC, 18 years is the presumed age of maturity (the

first Article), while in Iranian and Japanese legal systems, maturity ages differ in different situations.⁽⁴¹⁾

1. Maturity in Non-Monetary Fields

According to Iranian legal system, which emphasises the physical aspects of human development, boys are considered mature after age 15, while girls are considered mature after age 9.⁽⁴²⁾ These two limits are used for marriage,⁽⁴³⁾ divorce⁽⁴⁴⁾ and other activities that do not involve monetary decisions.⁽⁴⁵⁾ Moreover, members of minority religions can adhere to their own laws and regulations.⁽⁴⁶⁾

In Japanese family law, especially the Civil Code, those aged 15 and over have the following rights: to change their surnames to that of a parent whose surname is different from theirs⁽⁴⁷⁾; to agree to be adopted⁽⁴⁸⁾; to accept the dissolution of adoption⁽⁴⁹⁾ and to write a will.⁽⁵⁰⁾ Lawmakers recognise the right of those 15 and over to control their own actions relating to non-monetary matters. For marriage, however, girls can only marry after reaching age 16 and boys after reaching 18. These age restrictions came about as a result of the Civil Code amendment in 1947 to reflect changes in the social environment.⁽⁵¹⁾ Nevertheless, it is believed to be appropriate to require 20 years old to get married and build a new and separate family from both parents.

In other areas, various age limitations are provided within respective laws for different purposes. There are many examples, including the following: children under 15 years old cannot in principle be used as workers⁽⁵²⁾ and those who commit crimes cannot be punished if under 14 years old at the time of committing the crime⁽⁵³⁾; obtaining a driver's

licence is possible from age 16, 18, 19, 20 or 21, depending on the kind of licence.⁽⁵⁴⁾ In addition, those under 15 cannot obtain a passport⁽⁵⁵⁾; participate in elections⁽⁵⁶⁾; change their names⁽⁵⁷⁾ or acquire a new nationality.⁽⁵⁸⁾ They also enjoy protection through some child-related acts in accordance with the CRC, in which maturity is 18 years of age e.g. the Japan Child Welfare Act, etc.

2. *Maturity for Financial Transactions*

Financial transactions in Iranian legal system require, along with maturity, an extra element labelled *Growth*.⁽⁵⁹⁾ This type of maturity emphasises mental and social maturity. The legal presumption for this kind of maturity is identified as 18 years of age. The Act on Contract Parties' Growth (1935) is the main law specifying financial maturity.

In Japan, those who reach the age of 20 are deemed to be mature and able to sign any kind of contract without the consent of their parents.⁽⁶⁰⁾

3. *The Classification of Children*

Japanese family law identifies four kinds of children, namely, *legitimate children (children born in marriage)*, *illegitimate children (children born out of marriage)*, *children by normal adoption (adoption other than special adoption)* and *children by special adoption*. We will discuss adopted children later. A similar classification can be inferred from Iranian legal system to some extent, as Iranian legal system does not have different kinds of adoption.

Legitimate children are those born within wedlock, which includes children by marriage acknowledged by the father.⁽⁶¹⁾ The majority of

people in Japan believe these children to represent the standard meaning of 'children' in a social sense. However, children born out of wedlock are classified as illegitimate children for example, an unmarried woman and an unmarried man conceiving a child, or a married woman or a man conceiving a child with a partner other than a spouse.

Under Japanese law, one can easily distinguish illegitimate children from legitimate children by checking the family relationship with the parents on the *koseki* (family registration). This allows others to easily identify such children within the family. On the other hand, rules concerning expression of the family relationship between illegitimate children and their parents on the family registration have been amended, so that it is possible to classify a family relationship with an illegitimate child similarly to that of a legitimate child.

In succession rights, illegitimate children were clearly discriminated against under the Civil Code,⁽⁶²⁾ according to which, if two children of the same father, one of whom is legitimate and the other illegitimate, succeeded to the father's assets, the former would obtain double the assets of the latter, simply by virtue of being legitimate.⁽⁶³⁾ The Grand Bench of the Supreme Court of Japan once judged in 1995 that this provision was constitutional (not violating the Constitution), but in 2013 the same bench judged it to violate Article 14⁽⁶⁴⁾ of the Constitution.⁽⁶⁵⁾ As a result, Item 4 of Article 900 was amended soon after the judgment and succession rights became equalised. However, the fundamental problem remains that the notion of a child's *legitimacy* is still present. Moreover, the word *legitimacy* is used to justify discrimination between two kinds of children, although they bear no responsibility for their own

status.

In Iran, like Japan, children who are born within marriage are considered legitimate; otherwise, they are illegitimate. Before a religious scholar's fatwa about equalising natural and legal fathers⁽⁶⁶⁾ and the Supreme Court's opinion for uniform procedure 1997/617, illegitimate children enjoyed no rights and parents, especially fathers, had no responsibility for them. But as a result of these religious and legal perspectives, there is now no discrimination between legitimate and illegitimate children except for succession rights; the Civil Code still states that an illegitimate child shall not succeed his/her natural parents.⁽⁶⁷⁾

III. BIC IN THE FAMILY FRAMEWORK

Undoubtedly, the first and most important ground for consideration and application of the best interest of the child is the family. Normally, a child is born and raised in the family and nurtured by his/her parents. At a primary level, the parents have a responsibility to develop the child's capacities in a manner consistent with his or her interests and in the absence of such family support, other relatives or related institutions will take their place. Here we examine some of the controversial areas in which BIC is relevant.

A. Child Custody

Custody is the right and duty of the parents⁽⁶⁸⁾ and usually becomes an issue when the parents are divorced and live separately. In other words, custody, on the one hand, is a right that cannot be denied except

for a legal reason. On the other hand, it is a duty, even though parents cannot reject it in any way.⁽⁶⁹⁾ The parent-child relationship in Japanese Civil Code, including custody, is encoded under the title of 'parental rights', but recently there has been a certain tendency to emphasise children's rights and parents' duties in this area.⁽⁷⁰⁾

In Japan, during cases of separation between spouses, the spouse who does not live with the children may not be satisfied with this situation and sometimes may try to bring the children to his or her own (or her/his parents') home without the other parent's consent. Conversely, a spouse who suffers domestic violence may also try to bring his or her children to his or her own (or her/his parents') home without the other parent's consent. These cases are called *child abduction*. Such cases had been handled by family courts under the Civil Code and Habeas Corpus Act,⁽⁷¹⁾ but because Japan has ratified the Hague Convention on the Civil Aspects of International Child Abduction in 2014,⁽⁷²⁾ the new convention and related laws of Japan are now applicable. The basic idea of the Hague Convention is that cases concerning child abductions shall be heard in the court of the habitual residence of the children just before the abduction.

Iranian Civil Code presumes that a mother shall care for a child until he or she is 7 years of age, after which child care is the father's responsibility. If, after the child turns 7, a disagreement emerges over this arrangement, the court will decide according to the BIC.⁽⁷³⁾ Besides, according to many judgments in divorce cases in Japan, mothers tend to be considered better caretakers when the children are in their pre-school years. These two attitudes correspond to the *Tender years*

doctrine, which was the prevalent idea in the US and other Western countries in the 20th century.⁽⁷⁴⁾ According to this doctrine, mothers are presumed to be better caretakers than fathers in the early years of the child's life. However, Iranian Civil Code has not considered this as an absolute priority and states that mothers' authority can be impaired by insanity or remarriage.⁽⁷⁵⁾ Moreover, there are some legal examples where parental authority is rescinded because of parents acting against the child's best interest.⁽⁷⁶⁾ These cases include the following:

- a) Drug and alcohol addiction, gambling.
- b) Notorious morality and prostitution.
- c) Mental disease confirmed by forensic examination.
- d) Child abuse or compulsion to immoral jobs such as child prostitution, begging or gambling.
- e) Frequent and unreasonable child battery.⁽⁷⁷⁾

It should be mentioned that in both Iran and Japan,⁽⁷⁸⁾ joint custody⁽⁷⁹⁾ is not possible, but visitation rights of the non-custodial parent are strongly supported by the law.⁽⁸⁰⁾ In the case of prevention, the court will determine any change in the primary caretaker or appoint a supervisor for the appropriate application of the court's decision. All of these decisions should be subject to the child's best interest.⁽⁸¹⁾ As it is probable, in sole custody, for a primary caretaker to move in or out of the country and use this as leverage, all changes should be made with the court's

permission and not violate visitation rights. If the court decides to allow the child's departure, a proper guarantee should be taken for the child's return.⁽⁸²⁾ In Japan, after the amendment of 2011, the interests of the child must take precedence in child custody.⁽⁸³⁾

As put forth here, the child's best interest is a distinctive criterion in child custody, but the factors surrounding it are rather vague and depend on the judge's discretion. This dependence on the court's discretion means that recognition of the child's best interest is not an ex-ante prediction issue in Iranian and Japanese law system.

B. Adoption

1. Adoption in Iran

Iranian legal system is based on Islamic law and does not recognise adoption⁽⁸⁴⁾ in the same way as international documents.⁽⁸⁵⁾ In other words, the adoptee cannot be treated as a biological child, especially in the matters of inheritance. However, arrangements for orphans and children with non-fit parents or guardians required special methods to be put in place. This is now evident in the Protection of Orphans, Children and Adolescents with Unsuitable Guardians Law (POCAUG). Its enactment seems to be motivated by BIC, since the law has a child-centred approach that focuses on the best interest. According to this law,⁽⁸⁶⁾ adoptive parents should have specific qualities that support the adoptee's physical, mental and spiritual development:

Enjoying some of these characteristics is compulsory: having religious belief, financial resources, lack of a criminal record, maturity, the physical and mental health for a child's training and upbringing, not being addicted

to drugs or alcohol, moral competence, a lack of incurable or epidemic disease and adherence to one of the official religions mentioned in the Constitutional Law.⁽⁸⁷⁾

This law also sheds light on the issue of family integrity. Hence, if a person applies to adopt a child with the claim that the child does not have a suitable caretaker and his/her parents or parental grandfather then request guardianship, the court will determine guardianship by evaluating the situation and considering the BIC.⁽⁸⁸⁾ Moreover, the child's competent relatives have priority over strangers and can be exempt from some administrative requirements.⁽⁸⁹⁾ For guaranteeing a child's financial support, the law asks the adopting parents to give part of their property to the child officially, the type and the level of the properties are determined by the court. If the court recognises that it is in the best interest of the child to be adopted without such financial support, a decree will be issued.⁽⁹⁰⁾

The divorce or death of the adopting party is also addressed in this law. If the adopting party or parties get divorced, or if one or both of them die, the court can give guardianship to the survivor in the case of divorce or find a new guardian for the child. If the child is mature enough, his or her opinions should be considered.⁽⁹¹⁾ The age of maturity is not specified in this law, so referring to civil law is vital, as it assumes ages 9 and 15 as the minimum age for maturity and the opinions of female children under 9 and male children under 15 years old should not be heard. However, according to the Convention on the Rights of the Child, children's views should be valued, depending on their maturity at each age. On these grounds, these laws do not seem compatible with the

CRC.

One of the challenging issues in this law is the child's right of identity.⁽⁹²⁾ The Article states that, after the adoption decree, the National Registration Organ is obliged to include the child's name and the adoption decree on the adopting parents' birth certificates. Furthermore, the new certificate for the child would include the names of the adopting parties as his or her parents, the content of the court's decision and the names of the child's real parents, if they are known. The child can change this certificate when he or she reaches 18 years of age.⁽⁹³⁾ Some psychologists believe that including the child's biological parents' names may hurt the child, as the child may face dual identities and become unable to experience a normal life, because he or she would not know to whom he or she belongs and would not trust his or her adoptive parents either. However, others believe that it is the child's right to know his or her biological roots and many have cited the advantages of *Open Adoption*.⁽⁹⁴⁾ This issue is still under debate and with no definitive solution.

Because the separation of children from their biological parents is not recommended by psychologists,⁽⁹⁵⁾ biological parents may obtain guardianship of a child as soon as they become competent if it is in the best interest of the child. In other words, biological parents who become competent with the help of the court's appointed guardian are always preferable in terms of the BIC.⁽⁹⁶⁾ It is obvious that natural ties are more important than psychological bonds, according to the law,⁽⁹⁷⁾ which runs counter to the theory of the psychological parent, which places more importance on psychological rather than biological parents.⁽⁹⁸⁾

2. *Adoption in Japan*

Japanese legal system allows two kinds of adoption.⁽⁹⁹⁾ The name of the first type is not mentioned explicitly in the Civil Code, but is usually called *ordinal adoption*, which is adoption by agreement between the adoptive parents and the adoptee; if the adoptee is under 15 years old, the responsibility falls on his/her biological parents.⁽¹⁰⁰⁾ In this type of adoption, the adoptee on the one hand remains the child of the real parents and on the other hand obtains the legal status of a child of the adoptive parents.⁽¹⁰¹⁾ This type of adoption has been recognised as benefiting the family, rather than the adoptee and has been inscribed in the Civil Code since 1898. Even now, most adoptions belong to this type.⁽¹⁰²⁾ The only requirement for the interest of the adoptee is provided in Article 798, which requires permission from the family court before adoption if the adoptee is a minor (under 20 years old).⁽¹⁰³⁾ However, such permission is not required if the adoptee is a child, grandchild, etc. of the adoptive parents or a spouse of one of these, which seems to be in conflict with Article 21a of the CRC.

The second type of adoption in Japan is 'special adoption' in the Civil Code, which is adoption by judgment of the family court (Article 817-2, Paragraph 1). This type of adoption was enacted in 1987 in order to protect the interest and improve the welfare of the adoptee,⁽¹⁰⁴⁾ which is reflected in the requirements for such adoptions. For example, the adoptive parents must be husband and wife⁽¹⁰⁵⁾; they must be 25 years old or over. If one spouse is 20, then the other must be 25 or over⁽¹⁰⁶⁾; the adoptee must be under 6 years old, or in exceptional cases, under 8 years old⁽¹⁰⁷⁾; there must be a special need for the adoption in terms of the interest of the adoptee⁽¹⁰⁸⁾ and there must be a six-month trial period

of guardianship before the adoption. After adoption, the adoptee becomes the child of the adoptive parents only and the legal relationship between the biological parents and their relatives ends.⁽¹⁰⁹⁾

In conclusion, these two types of adoption are quite different from each other. Ordinal adoption can be dissolved by an agreement between the adoptive parents and the adoptee and if the adoptee is under 15 years old, responsibility for doing so is placed on the biological parents.⁽¹¹⁰⁾ It can also be dissolved by a judgment of the family court for one of the reasons stipulated in the Civil Code.⁽¹¹¹⁾ If one of the parties dies, the surviving party can dissolve the adoption after obtaining permission from the family court.⁽¹¹²⁾ On the other hand, special adoption can only be dissolved by a judgment of family court for the reason provided for in Article 817-10, especially when it is necessary for the interest of the adoptee.

Additionally, the Japanese family registration system seems to ensure adoptees' rights to know the identities of their biological parents. For instance, consider a case in which A, a child of B (real mother) and C (real father), is adopted by D (adoptive mother) and E (adoptive father). In this case, at first A is registered on the family register of B and C as their child. When A is adopted by D and E, A is removed from the family register of B and C (this does not mean A's relationship is completely removed, only marked as deleted) and entered into the family register of D and E. However, A can obtain a certificate of her/his family register before adoption to confirm the identities of her or his real mother and father. In this case, it becomes more difficult for children conceived through Artificial Insemination by Donors (AID) cases to

determine their roots, because family registers do not include data about donors.

V. FAMILY PROCEDURES AND APPLICABLE LAW IN PRIVATE INTERNATIONAL LAW

According to the Japanese Family Proceedings Act, the family court shall make efforts to understand and take into consideration the will of the child concerned.⁽¹¹³⁾ On the other hand, a child may also join the family proceedings without the support of his/her parents in the case of a custody dispute.⁽¹¹⁴⁾ Iran accepted the CRC and has incorporated it into its domestic legal system and considered the child's best interest in procedural affairs. However, there is no specific law for family procedures and in many cases it depends on the court's discretion to pay attention to the child's views in related decisions.

Applicable law is the main issue of private international law, especially for transnational legal relationships such as international contracts or marriages between parties of different nationalities. In Japan, parent and child relationships outside of marriage or child legitimation can be established according to the Application of Law (General) Act⁽¹¹⁵⁾ if all the legal requirements of the parent(s)/child's nation of origin are fulfilled. This is because the law of the parent(s)/child's nation of origin is closely tied to the parent(s)/child and applying such laws is believed to be in the best interest of the child. Cases in Iran are treated on the basis of general rules, which are incorporated into the Civil Code⁽¹¹⁶⁾ and state that every child who is born in Iranian territory is presumed Iranian and acquires Iranian nationality, even if the identity of the child's

parents is unknown. This article is exactly in accordance with the BIC, as it ensures the child has a nationality regardless of the identity of the parents, which is referred to in Article 7 of the CRC.

Iranian legal system has no law specifically addressing international adoption. On the other hand, Japanese law applies to adoptive parents and governs international adoptions as well.⁽¹¹⁷⁾ However, there are certain requirements that need to be fulfilled, such as the consent of the biological parents or the child herself or himself and/or approval or judgment of related national organs such as family courts. This rule was enacted in order to respect the policies of the child's nation of origin and to protect the child's interest in the process of transnational adoptions.⁽¹¹⁸⁾ There is no specific law for family procedures and in many cases the court must use its discretion in considering the child's views about decisions in this area.

VI. BIC IN OTHER DOMAINS

The family is not the only domain in which the child's best interest is considered. There are other fields in which the BIC is also relevant; these will be discussed below.

A. Financial Activities

Although the best interest of the child is a primary consideration in all related areas, the significant status of financial matters has made legislators pay particular attention to this area. Therefore, Iranian Civil Code has stated explicitly that the father or paternal grandfather of the child is responsible for managing the child's financial affairs and should

serve as the child's legal agent⁽¹¹⁹⁾ with the legal responsibility to consider the child's best interest in their decisions. If there is proof that the child's interest is not being reflected in the parent's decisions, the court will terminate their responsibility and appoint a guardian.⁽¹²⁰⁾ Moreover, some scholars believe that the child can reject the unfit contract which is against his/her BIC after reaching maturity.⁽¹²¹⁾ The only problem is the vague definition of *best interest*, which in some cases may lead to misunderstandings. For example, should the agent consider the child's interest at the moment of transaction or should it be considered from a long-term perspective? Should the best interest be defined according to custom and whose custom should be respected? Is it those of merchants, non-merchants or the free market? These are questions that the law still has no answer.⁽¹²²⁾

In Japanese Civil Code, it is the parents' responsibility to manage the child's assets and they also serve as the legal agents if the child agrees to the contract, etc. If the contract is for activity done by the child herself or himself, the approval of the child shall be necessary.⁽¹²³⁾ It seems without question that such management or agency represents the interest of the child, but this is not clearly stated in that article. However, it clearly states that the family court can deprive the parents of the authority of financial management if their management is inadequate and thus threatens the interests of the child.⁽¹²⁴⁾

B. Punishment and Rehabilitation

Iranian new criminal law was ratified in April 2013. This law has many innovations related to children, such as graduated ages for criminal responsibility. It is notable that in the previous Criminal Code

(1991), the child did not bear any responsibility until maturity (9 or 15 years old). However, the child would automatically be recognised as mature when he/she reached the age of 18 or above. This legislation (previous Code) caused many problems and seemed incompatible with the child's best interest. The new law, which conforms to international documents, especially the CRC, has considered divisions between 9- and 18-year-old children and adolescents, which *per se* can be regarded as in the best interest of the child. Requirements to consult with psychiatrists and psychologists to find the roots of child delinquency and to design appropriate penalties that promote a child's capacities and different methods of correction have been integrated in the law as well.⁽¹²⁵⁾ The flexibility of the decrees on children and adolescents under 18 years is also helpful for their development.⁽¹²⁶⁾ Furthermore, Article 95 states that the conviction of a child is not recognised as part of their criminal record, so the child will not face any future problems, especially in future employment prospects that require a clear criminal record.

In Japan, children under 14 do not hold any criminal responsibility and are treated on the basis of *protection procedure*, which implies that the nation must treat the child not as a criminal but as a victim of the society as a whole.

In Iranian Criminal Procedural Law, criminal proceedings can be partially or completely held in the absence of the child⁽¹²⁷⁾ depending on the child's best interest, since the child's involvement in criminal procedures may affect his mental health. Article 523 of this law also states that children under 2 years old should not be separated from their imprisoned mothers, unless another important interest of the child requires such separation.

In Japanese Criminal Procedural Law, there also are facilities for children because of special statutes such as Article 157-2, which allows the attendance of child witnesses; Article 157-3, which allow child witnesses to be made invisible to the accused; Article 157-4, which allows examination of the child witness through television; Article 281-2, which allows the accused leave the courtroom during the examination of a child witness and Article 290-2, which allows the personal information of victims, including children, to remain confidential.

C. Nationality

According to the Japanese Nationality Law revised in 1950, a child born of a wife and a husband, one of whom had Japanese nationality, was considered Japanese from the time of birth. However, a child born to an unmarried woman who was not of Japanese nationality and an unmarried man of Japanese nationality was not a Japanese national if the child was not recognised by the father before its birth. If the child was recognised after birth, it was possible for her or him to become a Japanese national only if the parents married before or after recognition. Such situations discriminated against biological children and thus needed to be amended. Amendments of this law were made after the judgment of the Supreme Court in 2008. Therefore, there is currently no such discrimination.⁽¹²⁸⁾

According to Iranian law, all people, including children, who reside in Iran and/or are born in Iran and/or their fathers are Iranian and/or one parent is foreign but the other born in Iran, are considered Iranian.⁽¹²⁹⁾ Therefore, there are no differences between natural and legitimate children in this case.

D. Work Conditions

As previously noted, the legal age for employment in Iran and Japan is 15 years old and the employment of children below this age is legally forbidden.⁽¹³⁰⁾ As the child's physical health is an important aspect of the child's best interest, as mentioned in Article 80 of Iranian Labour Law, employers are obliged to take medical examination from their teenage employees. In these examinations, the balance of their duties and their abilities are evaluated. Moreover, hard labour, extra labour, night labour and carrying heavy loads without mechanical instruments and by hand is forbidden. Additional work conditions are also in place to protect the interests of Japanese workers under the age of 18.⁽¹³¹⁾

It is of the utmost importance to note that in Iranian Labour Law, not enough is being done to address the mental aspects of work, even though this would play a significant role in providing for the child's best interest. There are also no educational services for teenage workers to improve their skills and efficiency. Hence, the law in this area needs some amendments.

VII. CONCLUSION

The impact of the Convention on the Rights of the Child on the legislation of the signed countries is undeniable, and Iran and Japan are good examples of this. Japanese legal system, since 1980, has gradually changed to take BIC into consideration, which is a distinctive trend. Also, Iran has significantly embraced the notion of BIC and legislation has been interpreted and ratified on this basis. However, it seems that the interest of the child is considered mainly from the perspective of adults,

rather than that of the child. This means that legislators are identifying the interests of the child as important but not the rights of the child. The difference between these two concepts is quite significant, because the child is the subject in the latter but the object in the former. Lawmakers should be concerned that children may not have the ability to exercise their rights properly; so, adults will always be the ones guiding them to take the right path. In order to solve this problem, it seems that presenting different guidelines for various grounds, such as custody, adoption, marriage and divorce, etc., may be helpful and may limit the court's vast discretion. These guidelines should be designed in accordance with the child's actual needs and capacities during their life so as to be effective for their development.

Moreover, another important point that needs to be raised is the ability to 'hear the voices' of children and to consider their ability to understand matters that concern them. For instance, this could involve explaining to them what is right⁽¹³²⁾ and what is wrong according to their level of maturity and understanding. It is acceptable that the rights and interests of children are not exclusive from, but consistent with, each other. The lawmaker must incorporate the idea of 'the rights of the child' into the provisions of laws according to the correct understanding of the concept.

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- (20) Principle 24.
- (21) Above note 17.
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- (23) Japanese Civil Code, Article 750.
- (24) Japanese Civil Code, Article 772.
- (25) Japanese Civil Code, item 4, Article 900.
- (26) Article 1: 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.
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- (53) Japanese Penal Code, 1907, Article 41.
- (54) Japanese Road Traffic Act, Article 88.
- (55) Iranian Passport Law, 1981, Article 18.
- (56) Iranian Parliament's Election Law, 1999, Article 27
- (57) Iranian Civil Registration Law, 1977, Article 41(1).
- (58) Iranian Civil Code, Articles 976(5), 977(a, b), 985.
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- (60) Japanese Civil Code, Article 4, provided that there is an exception when she/he has a mental disease and is incapable of controlling herself/himself.

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- (63) Above note 17.
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【論文要旨】

「子の最善の利益」は明確な基準か？

—— イラン法と日本法の比較法的分析 ——

マリアム・ガニザード・バフジ
大村 芳 昭

「子の最善の利益 (BIC)」とは、20世紀の世界で広まってきた、子を親の財産としてではなく独立の人格として認める考え方に端を発する概念である。1989年の子の権利条約第3条はこの概念に光を当て、多くの国々がこの概念を認め、また世界の国の3分の2が子の権利条約をその国内法に組み込んだ。

BICについて最も重要な問題はその曖昧性だが、それは意図的なものともいえる。そもそも、厳密な定義は別の問題を生みかねない。異なる文化のもとでは、「BIC」に対しても異なる解釈が必要となる。その一方、代表団たちはこのような議論をもたらす可能性を意識しておらず、よって用語の意味をこれ以上明確にする必要性を感じていなかった、との見方もある。このような怠惰は、一方では現実との両立性と、他方では予測不可能性という両面の副次的効果を生じている。

本稿は、イランと日本という2つの法制度におけるBICの比較法的分析である。

イランでは、子の存在は宗教的な意味で重要であった。なぜなら、例えば

ゾロアスター教の教えによれば、子は親が現世から来世に渡る際の橋のような役割を果たすと信じられてきたからである。ということは、子のない者は救われなくなってしまう。また、イスラムの教えでは（おそらく戦争の続く状況で大量の孤児が発生したことを受けて）孤児の救済を重視してきた。その後、20世紀になって、1979年のイラン革命と1993年の子の権利条約批准により、BICはイランにおいてより認知され重視された。

他方、日本では、子の地位は伝統的な「家制度」の影響を色濃く反映していた。家制度においては、戸主が一家の統率者であり、家の財産すべては戸主のものであり、戸主がなくなるとその承継者が家産をすべて承継した。しかしその反面、戸主は家族全員を養う義務があった。第二次世界大戦で日本が敗戦し、その後制定された新憲法のもとで家族制度は大きく変わった。ただ、改正スケジュールがきつくて根本的な改革が不十分な箇所もまだ残っている。最近では、家族法上の制度が憲法違反である旨の訴訟も少なからず提起されており、中には法律の規定を違

憲であると判断した事案も登場している。

ところで、法的な意味での「子」を検討する場合に避けて通れないのは、いつから（始期）いつまで（終期）が「子」なのか、という点である。始期については胎児との関係が、終期については成年の時期が問題となる。他方、子については、イランでも日本でも「婚内子」と「婚外子」とに法律上区別され、その法的地位には差異が設けられてきた。しかし、その後の展開の中で地位の平等化が進みつつある。

BIC の最も重要な適用場面といえ、やはり家族である。子を産み育て、その能力を開花させる重要な役割を負う場が家族であり、特に両親が離婚ないし別居する場合の子の監護権をめぐる問題は重要である。他方、養子縁組の問題も重要である。イランはイスラム法国のため西洋的な意味での養子縁組は認められないが、孤児などを養育する手段としての制度を設けている。日本には普通と特別の二種類の養子縁組制度があり、要件や効果が異なる。

その他、家事事件の手続や国際私法の面でも、BIC が意識されている。また、他の分野、例えば子の財産の管理や法律行為の代理、刑事責任能力、国籍取得、労働条件などの面でも BIC は念頭に置かれている。

全体的に見て、イランでも日本でも BIC は立法及び法解釈の中で重視されつつあることがわかる。ただし、子の

主体性や権利性の観点が十分に踏まえられているとはいえない面もあり、それが今後の課題と言えよう。