

Comment

**THE UNITED NATIONS CONVENTION ON
THE RIGHTS OF THE CHILD
AND ITS IMPLEMENTATION IN JAPAN AND SWEDEN**

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INTRODUCTION

The United Nations Convention on the Rights of the Child (the “Convention”),¹ adopted by the General Assembly of the United Nations on

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¹ U. N. Convention on the Rights of the Child, G.A. Res. 44/25, at 44, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC] (entered into force Sept. 2, 1990).

November 20, 1989, is the “most widely accepted human rights treaty ever.”² An unprecedented sixty-one states signed the Convention on January 26, 1990, the day it opened for signatures, and 191 countries have currently ratified it.³ The Convention addresses children’s rights with respect to a vast array of issues from infant mortality and sexual exploitation to freedom of association and religion. The Convention was not meant to be merely a toothless statement of idealistic but unrealistic goals. It is legally binding on the nations that sign it and, like other human rights treaties, provides for monitoring of the signatories’ compliance. Articles 43 through 45 of the Convention require that each ratifying country must provide reports on their adherence to it (two years after ratification, and every five years after that) to a committee of children’s rights experts, who may then make recommendations and suggestions to the state and to the UN General Assembly.

The fact that virtually every country has agreed to provide a seemingly exhaustive list of rights to its children might lead one to believe that children’s rights are fairly similar throughout the world (with the possible exception of the countries that have not ratified the Convention). The reality, however, is that children’s rights differ significantly from one nation to another, even among civil law countries, where judges have far less latitude to interpret laws and treaties in light of policy and other considerations, and among developed countries, whose adult citizens enjoy relatively high standards of living, and who ostensibly have the means to provide for the well-being of their children. Many states entered reservations and declarations before signing the Convention, which, unfortunately, limits its ability to standardize child rights among the parties. In

² GÖRAN MELANDER, *Preface* to CONCLUDING OBSERVATIONS OF THE UN COMMITTEE ON THE RIGHTS OF THE CHILD: THIRD TO SEVENTEENTH SESSION (1993-1998) xiii (Leif Holmström ed., 2000).

³ *Id.* at xv. Somalia and the United States are the only countries that have not ratified the Convention. See Ann Marie Pennegard & Anne Franzen, *The Convention on the Rights of the Child From Swedish Perspective*, 25 INT’L J. LEGAL INFO. 105, 106 (1997) (discussing the drafting and adoption of the CRC in the United Nations).

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addition, some countries may interpret some of the Convention's key provisions differently,⁴ and others may not have a stable enough economy or government to comply with certain requirements.⁵

This Comment will compare children's rights in Japan and Sweden in light of the obligations they undertook by ratifying the Convention. As relatively wealthy, industrialized nations, both countries have the resources to provide the rights guaranteed by the Convention, yet there are still several important differences in the status of children in these countries. This Comment is not an exhaustive comparison of all child-related laws in Japan and Sweden, but rather uses the Convention, and the standards it sets, as a framework for discussing the legal status of children's rights in these countries.

I. RATIFICATION OF THE CONVENTION

Sweden played an important role with respect to the development of the Convention, and was one of its earliest signatories. In January 1990, Sweden along with five other countries and the United Nations Children's Fund (UNICEF) held the World Summit for Children in New York, which ardently urged ratification of the Convention by all nations, an effort that contributed to the enormous success of the Convention.⁶ Sweden ratified the Convention in 1990, after only fifteen minutes of discussion in Parliament, and was one of the first

⁴ Jonathan Todres gives as an example the CRC requirement that legal decisions be made with the "best interests of the child" as a major factor: In some countries this has been interpreted to include only those decisions that are solely related to the child, while other countries consider it to apply in any decision that would *affect* a child, such as decisions made about imprisonment or deportation of parents. Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 171-72, 194-96 (1998).

⁵ For example, Article 24 guarantees "the highest attainable standard of health," but a wealthy country with advanced medicine can obviously provide a better level of health than one where most citizens are desperately poor. Jaap E. Doek, *The U.N. Convention on the Rights of the Child: Some Observations on the Monitoring and the Social Context of Its Implementation*, 14 U. FLA. J.L. & PUB. POL'Y 125, 131-32 (2003).

⁶ Pennegard & Franzen, *supra* note 3, at 107.

countries to do so.⁷ Sweden ratified with no reservations, although it did enter objections to the reservations entered by some other countries.⁸

Japan's history with regard to the Convention provides an interesting contrast. Japan did not ratify the Convention until April 22, 1994, after extensive debate in Parliament.⁹ Japan also entered reservations or declarations to three of the Convention's provisions.¹⁰ Japan's less enthusiastic response to the Convention is evident in its laws regarding children's rights. As discussed in greater detail below, children's rights are much broader in Sweden than Japan, and while Sweden's laws mainly comply with the letter and the spirit of the Convention, Japan's laws and policies in several areas fall short in both regards.

II. BRIEF OVERVIEW OF THE LEGAL SYSTEMS OF JAPAN AND SWEDEN

A. Historical Background

In the late nineteenth century, Japan started to modify its legal system to emulate the European civil law model, in an effort to reduce the Western presence that had resulted from the "unequal treaties" signed earlier in the century.¹¹ A French legal scholar drafted codes of commercial and criminal law, and civil

⁷ Simone Ek, *Building Political Support for the Convention on the Rights of the Child in Sweden*, 4 LOY. POVERTY L.J. 263, 266 (1998).

⁸ Pennegard & Franzen, *supra* note 3, at 109; *see also* Todres, *supra* note 4, at 190 n.140. For example, Sweden felt that the reservations entered by several Islamic countries, which stated that they would not comply with provisions of the Convention that conflicted with Muslim law, were "overbroad." *Id.*

⁹ Yukiko Matsushima, *Controversies and Dilemmas: Japan Confronts the Convention*, in CHILDREN'S RIGHTS: A COMPARATIVE PERSPECTIVE 126 (Michael Freeman ed., 1996); Comm. on the Rights of the Child, *Initial Reports of States parties due in 1996: Japan*, U.N. Doc. CRC/C/41/Add.1 (Aug. 5, 1996) [hereinafter *Initial Reports: Japan*].

¹⁰ *See* Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Japan*, ¶ 6, U.N. Doc. CRC/C/15/Add.90 (June 5, 1998) [hereinafter *Concluding Observations: Japan*] (noting Japan's reservation to Article 37(c) on confining juvenile offenders separately from adults and declarations relating to Articles 9 and 10 giving children's interests priority in decisions regarding family re-unification or separation of children from their parents).

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procedure, and a German scholar wrote a commercial code, each based largely on the laws of the author's own country.¹² Some members of the Japanese parliament disapproved of the codes, however, and ultimately a larger disagreement arose, with competing groups espousing different systems.¹³ The progressives favored the French model, while conservatives endorsed the German system.¹⁴ In the end, civil and commercial codes were drafted by Japanese scholars, chiefly based on the Bürgerliches Gesetzbuch (BGB), the German Civil Code, but with some elements of French law.¹⁵ Some Japanese traditions were retained in the succession and family laws, but these largely disappeared after World War II, when additional legal reforms were enacted based largely on American law.¹⁶ These changes, including the ratification of a new U.S.-influenced constitution in 1946, impacted other areas as well, including court procedures and constitutional rights.¹⁷

As a result of these influences, Japan's current legal system is a unique mix of European and American law. The family court system is based on the United States model, with family courts hearing both traditional matters, such as divorces, and cases involving juveniles alleged to be delinquent or otherwise in need of supervision.¹⁸ It is important to note that although individuals in Japan have the right to settle family law disputes in the courts, most family matters are actually settled informally and without lawyers, through professional mediation or

¹¹ See generally H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 328 (2d ed. 2004). Under these "unequal treaties" Japanese courts could not have jurisdiction over foreign nationals, while the treaties also afforded foreigners certain benefits in trade and consular relations. *Id.*

¹² See generally K. ZWEIGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 297 (3d ed. 1998).

¹³ GLENN, *supra* note 11, at 328.

¹⁴ *Id.*

¹⁵ ZWEIGERT & KOTZ, *supra* note 12, at 298.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ HIROSHI ODA, JAPANESE LAW 69-71 (2d ed. 1999). However, juveniles age 16 and older may be transferred out of family court at the judge's discretion. *Id.* at 71.

by friends or acquaintances who act as unofficial arbitrators.¹⁹ This is true even of matters that are often considered among the most contentious issues in other countries, such as child support, division of property, and child custody.²⁰

In comparison, Sweden is a civil law country, although its legal traditions have been far less influenced by Roman law than many other European nations, such as Germany.²¹ The Swedish Code has existed since 1734, but has been changed and supplemented by the *Riksdag*, the Swedish Parliament, many times since then.²² As in many other civil law countries, the Parliament is by far the most powerful branch of government, and Swedish citizens do not consider the courts to be very influential.²³ Sweden's Constitution has existed since 1809 (although it has also been added to and modified), but it had very little force until recently.²⁴

The Swedish Code is divided into sections based on subject matter, and much of the law regarding children is contained in the Parent and Guardianship Code. Family law cases are heard in Sweden's general court system, usually by three lay judges and one professional judge.²⁵ Like the Japanese, Swedes are more likely to settle family matters privately, rather than through the courts: Swedish courts handle only about 30,000 family law cases in an average year.²⁶

B. *Legal Position of Treaties Within Domestic Law*

When Sweden signs a treaty it is not automatically considered to be national law; instead, legislation must be enacted or amended to bring Swedish

¹⁹ ZWEIGERT & KOTZ, *supra* note 12, at 300-301.

²⁰ *Id.*

²¹ *Id.* at 277.

²² Bernard Michael Ortwein II, *The Swedish Legal System: An Introduction*, 13 IND. INT'L & COMP. L. REV. 405, 411 (2003).

²³ *Id.* at 405-06.

²⁴ *Id.* at 413.

²⁵ *Id.* at 421.

²⁶ *Id.* at 405.

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law in line with Sweden's obligations under the treaty.²⁷ Swedish judges are required to "interpret legislation in light of" treaty obligations, however.²⁸

In Japan, treaties are generally considered to be superior to national laws. Japan's constitution dictates that international treaties must be obeyed, and all treaties must be approved by the Diet, the Japanese Parliament, before they are ratified.²⁹ Before ratifying a treaty, the government reviews any applicable national laws and modifies them as needed.³⁰

III. IMPLEMENTATION OF THE CONVENTION AND REPORTS TO THE COMMITTEE ON THE RIGHTS OF THE CHILD

The Japanese government's first report to the Committee on the Rights of the Child (the Committee) asserted that its ratification "did not require any amendments to Japanese legislation nor any new enactments of law, since most of those matters have been stipulated by [previous treaties] and are guaranteed under the existing legal framework of Japan, including the Constitution."³¹ Throughout the report, sections of the Japanese constitution, civil and penal codes, and other laws are quoted to show how Japanese law guarantees various rights covered by the Convention.³² However, several NGOs have argued that Japanese law does not adequately comply with the Convention, and at least three independent reports have been submitted to the Committee outlining the ways in which Japan is not in compliance with the Convention.³³ The Committee itself expressed several concerns about Japanese laws and policies that either conflict with the Convention

²⁷ *Id.* at 408 n.17.

²⁸ Pennegard & Franzen, *supra* note 3, at 109.

²⁹ Matsushima, *supra* note 9, at 126.

³⁰ *Id.*

³¹ *Initial Reports: Japan*, *supra* note 9, ¶ 12.

³² *Id.*

(e.g. laws discriminating against illegitimate children) or do not go far enough in ensuring its enforceability.³⁴ The Committee also complained that “although [the Convention] has precedence over domestic legislation and can be invoked before domestic courts, in practice courts in their rulings usually do not directly apply . . . the Convention.”³⁵

Sweden was the first country to submit an initial report to the Committee, a report that was praised for its thoroughness.³⁶ Sweden’s government, like Japan’s, took the position that no amendments to existing Swedish law were necessary, but did acknowledge that there were some problems with “the practical implementation of laws and statutory instruments.”³⁷ The Committee’s recommendations, however, showed that there were some conflicts between Swedish law and the Convention. For example, Article 37 of the Convention explicitly states “every child deprived of liberty should be separated from adults unless it is considered in the child’s best interests not to do so.”³⁸ At the time of Sweden’s initial report, however, there was no legal provision requiring that juvenile offenders be held in custody separately from adults.³⁹

³³ See IAN NEARY, HUMAN RIGHTS IN JAPAN, SOUTH KOREA, AND TAIWAN 222 (2002) (summarizing key points from the reports submitted by the national bar association, a children’s rights organization and a coalition group with interests in children’s rights).

³⁴ *Concluding Observations: Japan*, *supra* note 10, ¶ 7.

³⁵ *Id.*

³⁶ Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Sweden*, ¶ 2, U.N. Doc. CRC/C/15/Add.2 (Feb. 18, 1993) [hereinafter *Concluding Observations: Sweden*].

³⁷ Comm. on the Rights of the Child, *Initial Reports of States parties due in 1992: Sweden*, ¶ 11, U.N. Doc. CRC/C/3/Add.1 (Sept. 23, 1992) [hereinafter *Initial Reports: Sweden*].

³⁸ CRC, *supra* note 1, art. 37, at 171.

³⁹ See *Concluding Observations: Sweden*, *supra* note 36, ¶ 12. As of 1998, Sweden still had not separated all confined minors from other inmates, finding it highly impractical to do so because such a small number of Swedish juveniles are in prisons or jails. Göran Håkansson, *The Swedish Experience Before the Committee on the Rights of the Child and its Effects on Child Rights in Sweden*, 4 LOY. POVERTY L.J. 211, 213 (1998).

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**IV. THE PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE
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The Convention, in Article 1, defines a child as any person under the age of 18, unless the age of majority is lower in his or her country. It also requires in Article 4 all state parties to enact legislation and take other action “to the maximum extent of their available resources” to ensure that the rights promised by the Convention become a reality. This can be seen as setting a higher standard (or a heavier burden) for countries with greater resources, such as Japan and Sweden.

Neither Sweden nor Japan has a unified set of laws addressing children’s rights. Instead, the legal rights of children are found at various places in their constitutions, civil codes, and local laws.⁴⁰ Comparing the Convention’s key requirements with domestic family and penal laws as well as government practices (e.g. choosing to fund a specific program or failing to enforce a particular law) reveals that children’s rights are treated quite differently in Japan and Sweden.

A. *Non-Discrimination*

Article 2 of the Convention asserts that states may not discriminate on the basis of “the race, colour, sex, language, political or other opinion, national, ethnic or social origin, property, disability, birth or other status” of a child or his or her parents with regard to the rights guaranteed by the Convention.⁴¹ It also requires states to “take all appropriate measures” to protect children from discrimination by others.⁴² Japan’s Constitution forbids discrimination, but in more limited terms, saying “[a]ll of the people . . . are equal under the law and

⁴⁰ NEARY, *supra* note 33, at 223-24; Pennegard & Franzen, *supra* note 3, at 111.

⁴¹ CRC, *supra* note 1, art. 2, at 167.

⁴² *Id.*

there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.”⁴³ Sweden’s Instrument of Government (which has constitutional status in Sweden) is even more succinct, prohibiting any statute or ordinance from discriminating based on race, ethnicity or gender (except for gender-related rules concerning affirmative action or military or national service).⁴⁴

The issue of discrimination often arises in the context of children born out of wedlock. Article 900(4) of Japan’s Civil Code states that illegitimate children may inherit only half of the amount legitimate children do,⁴⁵ a rule upheld as constitutional by Japan’s Supreme Court.⁴⁶ This decision may have been, in part, a response to an earlier decision by a lower Japanese court holding another discriminatory law invalid because it violated the Japanese Constitution, interpreted in light of treaties including the Convention.⁴⁷ The law that was struck down by the lower court addressed a provision of the Child Welfare Act that prevented illegitimate children who had been recognized by their fathers from receiving public assistance until one year after the failure of the father to provide support payments; legitimate children could receive support immediately upon the divorce of their parents.⁴⁸ Another lower court case, however, upheld a city ordinance which provided that illegitimate and legitimate children to be listed differently in its register, on the grounds that preservation of the family is an adequate objective to warrant the rule.⁴⁹ Although Supreme Court decisions in Japan do not have the same precedential weight as in common law countries, the

⁴³ Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415, 437 (1999) (quoting Kenpo, the Japanese Constitution, article 14(1)).

⁴⁴ SWEDISH LAW IN THE NEW MILLENNIUM 70 (Michael Bogdan ed., 2000).

⁴⁵ *Concluding Observations: Japan* *supra* note 10, ¶ 160.

⁴⁶ Hamano, *supra* note 43, at 477.

⁴⁷ *Id.* at 476.

⁴⁸ *Id.*

⁴⁹ *Id.* at 474-75.

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Article 900(4) decision can still be seen as a response to the lower court decisions discussed above.⁵⁰ Japan's Supreme Court ruling could be interpreted as an indication to its lower courts and the world that discrimination is acceptable under Japanese law, regardless of Japan's treaty obligations to the contrary.⁵¹

Swedish law has guaranteed equal inheritance rights for children born to married and unmarried parents since 1970.⁵² Swedish legislation no longer even uses the terms "illegitimate children," "children of marriage," or "children outside marriage."⁵³ Sweden's legal treatment of children born out of wedlock provides equality so effectively that their legal concepts on the subject were used as a model by other European nations.⁵⁴ It is important to note that Sweden and Japan have extremely different illegitimacy rates: only one percent of children in Japan are born out of wedlock compared to fifty percent of Swedish children.⁵⁵ The differing legal situations of children born out of wedlock in Japan and Sweden may be a reflection of their very different cultures and their citizens' views on unmarried couples having children.

The Japanese Civil Code has also been criticized for gender-based discrimination because it sets the minimum age for marriage at eighteen years of age for males and sixteen years of age for females.⁵⁶ In Sweden there is no differentiation by gender: marriage is permissible once both the man and woman

⁵⁰ *Id.* at 477.

⁵¹ *Id.* (claiming that in upholding this discriminatory law, "the Japanese Supreme Court may have signaled its displeasure with [the] developing line of case law" which found differentiation based on illegitimacy to be problematic.)

⁵² SWEDISH LAW IN THE NEW MILLENNIUM, *supra* note 44, at 270.

⁵³ SWEDISH LAW 375 (Hugo Tiberg et al. eds., 1994).

⁵⁴ Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT'L L.J. 331, 388 (1998).

⁵⁵ Kevin Kendrick, *In Re Cager and The Commission To Study Problems of Illegitimacy*, 27 U. BALT. L. REV. 129, 218 (1997).

⁵⁶ *Concluding Observations: Japan*, *supra* note 10, ¶ 14.

are eighteen, or by special consent from a County Administrative Board if either are younger.⁵⁷

B. *Expression, Independence and Basic Freedoms*

In Article 12, the Convention asserts that children who are developmentally able must be allowed to express their views, and have their opinions taken into account in situations that affect them, especially in judicial or administrative proceedings. Articles 13 through 16 guarantee children the right to freedom of expression, thought, conscience, religion, association, and peaceful assembly, while allowing these rights to be restricted only in very limited circumstances (such as to ensure public safety or other people's freedom).

Children are not allowed to speak for themselves in Japanese civil court proceedings.⁵⁸ In family court, children must be heard in custody matters (this is mandatory for children who are age fifteen years and older, and often happens in practice for younger children).⁵⁹ However, ninety percent of Japanese divorces are "divorce by consent," which do not require the intervention of the family court, because they are accomplished simply by agreement of both parties and registration in the *koseki*, a national registry.⁶⁰ This means that children have the opportunity to be heard in only ten percent of divorce cases, despite the huge impact that the resulting custody decisions will have on their lives. There are also many policies and practices of Japan's Ministry of Education and many individual school districts that significantly deprive children of their rights: students, even those in high school, are forbidden to attend political meetings, rock concerts, and other events; textbooks are screened; and children are forced to recite Japan's

⁵⁷ SWEDISH LAW IN THE NEW MILLENNIUM, *supra* note 44, at 250.

⁵⁸ NEARY, *supra* note 33, at 224-25.

⁵⁹ Matsushima, *supra* note 9, at 137.

⁶⁰ *Id.* at 137-38.

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national anthem.⁶¹ These rules interfere with Japanese children's freedom of association, assembly, and expression. Japanese lawyers have been investigating and litigating overly strict public school rules (such as one which required all boys to have "crew cut" haircuts), as well as many areas relating to children's rights, including corporal punishment in schools (which is technically illegal, but commonly practiced), and the rights of juveniles accused of crimes, and have made some progress.⁶²

In Sweden, Chapter 6, Section 2 of the Parent and Guardianship Code ("PGC") requires caretakers to take children's "views and wishes" into account "in pace with the child's increasing years and development."⁶³ Courts must also consider what children want in making custody decisions (taking the child's age and maturity into account as well), under Chapter 6 Section 1 of the PGC.⁶⁴ In addition, children twelve years or older may not be adopted or have their names changed if they do not consent.⁶⁵ Children fifteen years or older must also be heard in judicial or administrative proceedings, and in interactions with social service agencies, and younger children are sometimes also given the opportunity to speak in these contexts.⁶⁶ In at least one instance the Committee on the Rights of the Child has even suggested that Sweden may give its children too much autonomy, suggesting in its 1993 Concluding Observations that "the Government may also wish to reassess the advisability of permitting a child of seven years or older to accept legal or medical counseling without parental consent."⁶⁷

⁶¹ NEARY, *supra* note 33, at 225.

⁶² *Id.* at 216-218.

⁶³ Parent and Guardianship Code, Chapter 6, Article 2, *quoted in* SWEDISH LAW, *supra* note 53, at 381.

⁶⁴ SWEDISH LAW IN THE NEW MILLENNIUM, *supra* note 44, at 266; SWEDISH LAW, *supra* note 53, at 381.

⁶⁵ *Initial Reports: Sweden*, *supra* note 37, ¶ 55.

⁶⁶ *Id.* ¶ 58.

⁶⁷ *Concluding Observations: Sweden*, *supra* note 33, ¶ 11.

One of the most frequent criticisms of children's rights efforts has always been the fear of giving too much autonomy to children who, because of their developmental state, lack of experience, and intelligence levels, are not truly equipped to make decisions for themselves. Every society has different views on the capabilities and needs of children and adolescents, and these views may be reflected in their laws. To some degree, the differences in children's rights in Sweden and Japan is not simply a matter of how many rights are enumerated or restricted by their laws, but rather a reflection of which rights they choose to prioritize over others. Sweden could arguably be granting children a right to expression or information by allowing them to seek out medical advice without their parents; but if they are not truly capable of dealing with advice, then it comes at the expense of their well-being. Japan's overly strict rules regarding school children, on the other hand, may curtail some of their freedoms, but could arguably protect them from physical or mental harm.

C. Best Interests of the Child

Under Article 3 of the Convention, the best interests of the child must be the primary consideration in all decisions that will affect her. Although the best interests principle "is not explicitly stated anywhere in Japanese law," in practice the family courts do generally consider the child's best interests in some types of decisions.⁶⁸ For example, when deciding whether or not to allow an adoption to proceed, the court will look at the reasons for the adoption, the person or people who want to adopt, and other factors, and decide if the adoption would be good for the child.⁶⁹ Some adoptions have, in fact, been stopped because of the adoptive parents' ill motives.⁷⁰

⁶⁸ NEARY, *supra* note 33, at 224; ODA, *supra* note 18, at 387.

⁶⁹ *Id.*

⁷⁰ *Id.*

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In Sweden, the “best interests” principle was part of the Parent and Guardianship Code even before the Convention.⁷¹ For example, family courts must make decisions regarding custody and rights of access to children in light of the child’s interests.⁷² The principle of best interests has also been added to the Aliens Act as a result of recommendations from an inter-party committee on the Convention established by Sweden’s Parliament, meaning that children’s welfare must be taken into account when making various decisions, such as those regarding deportation.⁷³

D. Health and Welfare of the Child

In Article 6, the Convention provides that all parties “recognize that every child has the inherent right to life,” and must “ensure to the maximum extent possible the survival and development of the child.”⁷⁴ There are also several specific protections with regard to the health and welfare of children. Articles 24, 27, and 28 of the Convention assert children’s rights to education, health care (including the right to “the highest attainable standard of health”),⁷⁵ and an adequate standard of living. The provisions list many specific steps that countries must take. These include working to lower infant mortality rates; making pre-natal maternal care available; educating parents about hygiene, nutrition, breastfeeding and accident prevention; fighting malnutrition and disease; making free primary education mandatory (and working to reduce absenteeism and drop out rates); and assisting caretakers who cannot otherwise provide for their children’s nutrition and housing needs.

⁷¹ LISA WOLL, THE CONVENTION ON THE RIGHTS OF THE CHILD IMPACT STUDY 58 (2000).

⁷² *Id.*

⁷³ *Id.* at 59.

⁷⁴ CRC, *supra* note 1, art. 6, at 167.

⁷⁵ CRC, *supra* note 1, art. 24, at 169-70.

Sweden offers universal health insurance and child and housing allowances,⁷⁶ and has a low infant mortality rate and high life expectancy.⁷⁷ In addition, Sweden provides a “maintenance advance” on child support payments that have been defaulted on (the government then sues the defaulting parent to recover that money).⁷⁸

Japan offers universal health care, and Japanese children can also receive preventative care at little or no cost at local government-run clinics.⁷⁹ As a result, Japan has one of the lowest infant mortality rates and one of the longest life expectancies in the world.⁸⁰ Japan, like Sweden, also gives parents child allowances,⁸¹ decreasing the risk of children starving or becoming sick. However, Japan is significantly less progressive than Sweden regarding child support: ninety percent of divorces in Japan are “by consent” and child support payments cannot be enforced by the courts in those cases.⁸² Even in non-consent divorces, the mechanisms for enforcement of payments are often ineffective.⁸³ Child support payments may be a single parent’s only source of income (apart from government assistance, which may be calculated on the assumption that the parent is actually receiving the support payments that they are entitled to), so children raised in homes with inadequate incomes are not having their welfare protected, and may face malnutrition or other health risks when their parents have a hard time making ends meet.

⁷⁶ MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 227 (1989).

⁷⁷ Timothy Stoltzfus Jost, *Why Can't We Do What They Do? National Health Care Reform Abroad*, 32 J.L. MED. & ETHICS 433, 435 (2004).

⁷⁸ *Id.*

⁷⁹ Dana Derham-Aoyama, *U.S. Health Care Reform: Some Lessons From Japanese Health Care Law and Practice*, 9 TEMP. INT'L & COMP. L.J. 365, 374-75 (1995).

⁸⁰ Robert B. Leflar, *Informed Consent and Patients' Rights in Japan*, 33 HOUS. L. REV. 1, 5 (1996).

⁸¹ *Initial Reports: Japan*, *supra* note 9, at 4.

⁸² NEARY, *supra* note 33, at 138-39.

⁸³ *Id.* at 139.

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**E. Freedom from Physical Harm
(Child Abuse and Corporal Punishment)**

Physical harm to children is impermissible under Article 19 of the Convention, which requires parties to safeguard children from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse” by parents or other caretakers.⁸⁴ The Committee has stated that corporal punishment is impermissible under Article 19, and has also said that other provisions of the Convention should be read to prohibit physical discipline, including the nondiscrimination guarantee, the requirements regarding the best interests of children, and the right to dignity.⁸⁵ Critics of physical punishment argue that spanking and other forms of physical punishment violate children’s dignity because they are so demeaning.⁸⁶ The Committee has used its Concluding Observations to encourage many parties to the Convention, including Japan, to pass legislation outlawing all forms of corporal punishment; however, as of 1998, only six countries had such laws.⁸⁷ The Convention also makes special mention of school discipline in Article 28, paragraph 2, asserting that it must be “administered in a manner consistent with the child's human dignity and in conformity with the present Convention.”⁸⁸

In Sweden, corporal punishment in all childcare institutions has been illegal since 1960, and in 1979 Sweden became the first country to forbid physical punishment by parents.⁸⁹ The relevant section of the Parenthood and

⁸⁴ CRC, *supra* note 1, art. 19, at 169.

⁸⁵ Susan H. Bitensky, *The United Nations Convention on the Rights of the Child and Corporal Punishment: Ramifications for the United States*, 5 GEO. J. ON FIGHTING POVERTY 225, 228 (1998).

⁸⁶ *Id.*

⁸⁷ *Id.*; *Concluding Observations: Japan*, *supra* note 10, ¶45.

⁸⁸ CRC, *supra* note 1, art. 28, at 170.

⁸⁹ Peter Newell, *Giving Up the Habit of Hitting Children*, in THE NEW HANDBOOK OF CHILDREN’S RIGHTS 382-83 (Bob Franklin ed., 2002).

Guardianship Code states: “Children are to be treated with respect for their person and individuality and may not be subjected to physical punishment or any other humiliating treatment.”⁹⁰ After passage of this law, the Swedish government undertook a major education effort to increase awareness of, and compliance with, the new law, by distributing pamphlets in ten languages aimed at adults, and targeting children through the school curriculum and even through cartoons explaining the law that appeared on milk cartons.⁹¹ Although the “anti-spanking law” does not set a particular punishment (e.g., a fine for parents who spank), any pain or injury of “more than very temporary duration” is considered assault under the Criminal Code,⁹² and lesser uses of corporal punishment may be held against the offending parent in custody disputes.⁹³ Sweden’s absolute legal ban on physical punishment, and its attempts to support the law with awareness and enforcement, appear to have been very successful in protecting its children from physical harm: studies show that while before the ban most Swedes supported physical punishment, today as few as six percent may, and from 1976 to 1990 not a single child died from physical abuse.⁹⁴ Also, the absence of this method of discipline does not seem to have negatively affected the incidence of youth delinquency: unlike many other developed nations, Sweden’s juvenile crime rates have not increased in the last two decades.⁹⁵

Japan has not outlawed corporal punishment by parents, but does have a law forbidding it in schools.⁹⁶ Unfortunately, even the law regarding physical punishment in educational settings is not well enforced, and the practice is still

⁹⁰ Parenthood and Guardianship Code, Amended 1983, Chapter 6, Section 1, *quoted in* Newell, *supra* note 89, at 393.

⁹¹ Newell, *supra* note 89, at 383.

⁹² *Id.* (quoting a publication from the Swedish Ministry of Justice).

⁹³ Bitensky, *supra* note 85, at 230.

⁹⁴ Newell, *supra* note 89, at 384.

⁹⁵ *Id.* at 385.

⁹⁶ *Concluding Observations: Japan*, *supra* note 10, ¶ 24.

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“widespread” in Japanese schools.⁹⁷ Japan is making some progress in this area, however: the passage of the Child Abuse Prevention Law in 2000 marked the first time child abuse and sexual abuse of children were legally defined in Japan.⁹⁸ The law requires educational, medical, and law enforcement professionals to investigate suspected child abuse early on, requires abusive parents to undergo counseling, and provides for parental access to children to be temporarily suspended in suspected child abuse cases.⁹⁹ Although the new child abuse law is a huge step in the right direction for Japan, it must be vigorously enforced if children are to have the rights owed to them through Japan’s ratification of the Convention.

Japan, like most other countries that have ratified the Convention, probably doesn’t read Article 19’s prohibition of violence (or any of the other provisions mentioned above) as implicating “spanking” or other forms of mild physical discipline. Sweden, and the other countries with “anti-spanking laws” probably would read those provisions the same way the Committee does - as forbidding *all* forms of physical violence, including corporal punishment. Such interpretive differences are one reason why there is such a variation in children’s rights among signatories to the Convention. The Japanese and Swedish governments’ policies regarding child abuse and discipline illustrate a more influential reason behind these differences as well: the degree to which states ensure compliance with laws that are designed to safeguard children by enforcing and raising awareness of them. The right not to be hit by teachers is not much of a right if children don’t know they have it, and couldn’t enforce it anyway.

F. *Juvenile Offenders/Children in Court Proceedings*

⁹⁷ *Id.*

⁹⁸ JENNIFER CHAN-TIBERGHIE, GENDER AND HUMAN RIGHTS POLITICS IN JAPAN 51 (2004).

⁹⁹ *Id.*

Articles 37 and 40 of the Convention, which deal with juvenile justice, are among the most detailed provisions of the Convention. Article 37 prohibits “torture or other cruel, inhuman or degrading treatment or punishment . . . capital punishment [and] life imprisonment without possibility of release” for crimes committed while the offender is under eighteen.¹⁰⁰ Article 37 also says that juvenile prisoners and detainees have a right to counsel and should be housed separately from adults, and that the “arrest, detention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time.”¹⁰¹ Article 40 requires countries to set specific rules and procedures for children who are accused or convicted of crimes, including setting a “minimum age below which children shall be presumed not to have the capacity to infringe the penal law.”¹⁰² (The Convention gives no guidelines as to what the minimum age should be, however). Article 40 also states that children must be considered innocent until their guilt is proven, and requires that children be given many due process rights including the right to: not incriminate themselves; be told of the charges against them; have a prompt hearing or trial; and cross-examine adverse witnesses. There are many other requirements regarding juvenile offenders, but the overall thrust of the Convention is that children who get into trouble with the law should be rehabilitated, rather than criminalized. The concept of “best interests” still applies to these young people, and decisions made in response to their offenses should have the ultimate goal of “reintegration and . . . assuming a constructive role in society” after their sentence; as part of that requirement, young offenders’ privacy must also be respected.¹⁰³

Sweden’s Penal Code states that no one may be sentenced for a crime committed before the age of fifteen, and the Act on Special Provisions for Young

¹⁰⁰ CRC, *supra* note 1, art. 37, at 171.

¹⁰¹ *Id.*

¹⁰² CRC, *supra* note 1, art. 40, at 171.

¹⁰³ *Id.*

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Offenders gives prosecutors additional discretion not to prosecute individuals for crimes committed before the age of eighteen.¹⁰⁴ (In some cases, the guilt or innocence of a child under fifteen may be determined by a court in order to convict a person over fifteen as an accomplice, but the child in that scenario would still not be punished).¹⁰⁵ Also, the Swedish legal system does not have status offenses, because although there are some rules that apply only to children, juveniles do not get referred to court for breaking them.¹⁰⁶ (For example, if a child attended a movie that was restricted to adult viewers, she may be made to leave and returned to her parents, but she would not be made to pay a fine or required to go to court. An adult who sold her a ticket to the movie could be punished in that situation, however.) If law enforcement personnel suspect that a child under fifteen has broken a law, committed a crime, or endangered herself or others, the juvenile's parents and/or a social worker may be contacted.¹⁰⁷ A local social welfare department may then become further involved in the child's life, providing anything from counseling to residential care.¹⁰⁸

Section 30(5) of Sweden's Penal Code says that children under the age of eighteen may only be sentenced to prison after the court has considered and rejected all of its other options (e.g. fines, probation, community service, care and supervision through Social Services), and when specific reasons exist to incarcerate the juvenile.¹⁰⁹ The severity of the crime, the age of the juvenile (how close to eighteen she is), and the existence of additional crimes committed by the young person after she turned eighteen are potential reasons why imprisonment

¹⁰⁴ SWEDISH LAW IN THE NEW MILLENNIUM, *supra* note 44, at 160-61.

¹⁰⁵ Karolin Johansson & Therese Palm, *Children in Trouble with the Law: Child Justice in Sweden and South Africa*, 17 INT'L J.L. & POL'Y & FAM. 308, 311 (2003).

¹⁰⁶ Carl-Gunnar Janson, *Youth Justice in Sweden*, 31 CRIME & JUST. 391, 414 (2004).

¹⁰⁷ *Id.* at 414-15.

¹⁰⁸ *Id.*

¹⁰⁹ Johansson & Palm, *supra* note 105, at 314-15.

might be considered appropriate.¹¹⁰ Most young offenders are dealt with through social services, however, and imprisonment of juveniles is extremely rare in Sweden.¹¹¹ Youth offenders whose sentences involve incarceration serve only half of the time that an adult would serve for the same crime.¹¹² Sweden does not allow a sentence of life in prison for any crime(s) committed before the offender turns twenty-one years old.¹¹³

Under Japan's 1948 Juvenile Act, all cases of individuals younger than age twenty fall under the jurisdiction of the family courts, which must decide all juvenile cases based on the goal of rehabilitating, rather than punishing, young offenders.¹¹⁴ Juveniles who are considered likely to commit a crime in the future may also be sent to family court.¹¹⁵ Juvenile delinquency proceedings are fairly informal, and public prosecutors may not participate.¹¹⁶ Young people have the right to an attorney in family court, but less than twenty percent of "serious" cases in 1995 included an attorney.¹¹⁷ Japan also protects the privacy of juvenile offenders by making it illegal to publish any identifying information about children who have committed crimes, and by keeping juvenile hearings closed.¹¹⁸ Japanese law also includes strict rules regarding how long juveniles can be detained and questioned before they must be released or appear in family court.¹¹⁹ The family court has great discretion in deciding juvenile cases: they may decide no action is needed, or require counseling or more intensive "protection" (e.g.

¹¹⁰ *Id.* at 315.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ SWEDISH LAW, *supra* note 53, at 453.

¹¹⁴ Matsushima, *supra* note 9, at 139.

¹¹⁵ *Id.* at 140.

¹¹⁶ ODA, *supra* note 18, at 71.

¹¹⁷ NEARY, *supra* note 33, at 224.

¹¹⁸ Masami Izumida Tyson, Note, *Revising Shonenho: A Call to Reform That Makes the Already Effective Japanese Juvenile System Even More Effective*, 33 VAND. J. TRANSNAT'L L. 739, 741, 748 (2000).

¹¹⁹ *Id.* at 747-48.

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reform school or a correctional institution for juveniles).¹²⁰ Children who must be placed in residential programs receive educational and vocational training, and may receive diplomas from their normal school, in order to facilitate their life after they return to society and protect their privacy.¹²¹ In the case of serious crimes, a family court may also decide to transfer someone age sixteen or older to a regular criminal court.¹²² Family court decisions may be appealed to the Japanese Supreme Court.¹²³

As a result of increasing juvenile crime, including violent offenses, Japanese lawmakers have proposed several changes to juvenile justice policy.¹²⁴ Changes that have been suggested include: involving public prosecutors in certain cases; having a three-judge panel rather than a single judge decide juvenile cases, lowering the age that children may be transferred out of family court, increasing the length of time that juveniles can be detained for questioning, and allowing some identifying information to be released about juvenile criminals.¹²⁵ Although none of these revisions would change the rehabilitative goals of the Japanese juvenile system, they are not necessarily in the best interests of children. Also, the release of identifying information would go against the Convention's requirement that privacy be respected, and lengthening the detention period could prevent juveniles from receiving a prompt adjudication. It would be unfortunate if Japan undertook many of these reforms, as juvenile justice is one of the few areas where Japanese children actually have more rights than adults. It is important to keep in mind, however, that the victims of juvenile crime are often other juveniles, so the right of innocent children to be protected from harm needs

¹²⁰ *Id.* at 749-50.

¹²¹ *Id.* at 752.

¹²² ODA, *supra* note 18, at 71.

¹²³ Tyson, *supra* note 118, at 751.

¹²⁴ Jessica Hardung, Comment, *The Proposed Revisions to Japan's Juvenile Law: If Punishment is Their Answer, They Are Asking the Wrong Question* 9 PAC. RIM L. & POL'Y J. 139 (2000).

¹²⁵ ODA, *supra* note 18, at 71; Hardung, *supra* note 124, at 140; Tyson, *supra* note 118, at 760.

to be balanced with the rights of young offenders, and if current laws are not protecting children adequately, they may need to be improved.

G. Exploitation

Exploitation of children is a major concern of the Convention, and it is addressed by three separate provisions: Article 34 forbids sexual exploitation, Article 35 bars abduction, sale or trafficking of children, and Article 36 is a catch-all prohibition of any other type of exploitation that might harm the child.

Under Japanese law, the age of sexual consent is thirteen; an age the Committee finds to be “low.”¹²⁶ Despite this, exploitation is another area of children’s rights in which Japan is making progress: in 1998, the Committee criticized Japan for its lack of “a comprehensive plan of action to prevent and combat child prostitution, child pornography, and trafficking of children,” but noted that legislation on the issue was being considered.¹²⁷ The following year, the Child Prostitution and Pornography Prohibition Law was passed.¹²⁸ The law prohibited child prostitution, pornography, and trafficking, and applied to actions taking place in Japan and also to those of Japanese citizens while they were overseas.¹²⁹ The Japanese organization Lawyers for Victims of Child Prosecution have requested investigations into Japanese “sex tourists” for several years, and has even filed a complaint against one specific Japanese citizen who escaped trial in Thailand for sexually molesting a child, but met with limited success.¹³⁰ One Japanese citizen, a former high school teacher, was charged with having sex with

¹²⁶ Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Japan*, Committee on the Rights of the Child, U.N. Doc. CRC/C/15/Add.231 (Feb. 26, 2004) ¶ 22.

¹²⁷ *Concluding Observations: Japan*, *supra* note 10, ¶ 25.

¹²⁸ CHAN-TIBERGHIE, *supra* note 98, at 2.

¹²⁹ *Id.*

¹³⁰ Daniel Edelson, Note, *The Prosecution of Persons Who Sexually Exploit Children in Countries Other Than Their Own: A Model for Amending Existing Legislation*, 25 FORDHAM INT’L L.J. 483, 522-24 (2001).

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an underage girl in Cambodia, but received only a suspended sentence because the judge found him to be “repentant.”¹³¹ Japanese police have also arrested other Japanese nationals for allegedly producing child pornography overseas.¹³²

Sweden’s Penal Code forbids sexual intercourse with minors under fifteen, and the age of the victim is also considered to be an aggravating factor in rape and sexual coercion or exploitation cases.¹³³ Although prostitution is not a crime in Sweden, the Penal Code does say that “a person obtaining, or attempting to obtain, sexual intercourse with a person under 18 by making or promising payment” can be punished for “seduction of youth.”¹³⁴ Making or distributing pornography depicting children is a criminal act, and Social Services must intervene to protect children involved in pornography or prostitution and those who have been sexually exploited by their parents.¹³⁵ Swedish law also allows for prosecution of citizens who commit sex crimes abroad, and at least one citizen has been convicted of sexual exploitation for acts committed outside Sweden.¹³⁶

CONCLUSION

A child in Japan may not have the right to attend a political meeting or wear his hair long, and can be legally discriminated against if his parents were not married when he was born. A Japanese student whose teacher hits her at school has very little recourse. In Sweden, however, even a child’s parents are not allowed to spank him, and children in primary school may receive medical counseling without their parents’ consent. Both countries ratified the Convention, which contains fifty-four Articles defining rights that parties agree to guarantee to

¹³¹ *Ex-teacher gets suspended term for child prostitution in Cambodia*, JAPAN ECON. NEWSWIRE PLUS, May 21, 2004, at 1.

¹³² Edelson, *supra* note 130, at 524.

¹³³ *Initial Reports: Sweden*, *supra* note 37, ¶ 252.

¹³⁴ *Id.* ¶ 253.

¹³⁵ *Id.* ¶ 254-55.

¹³⁶ Edelson, *supra* note 130, at 504-06.

children, over a decade ago and yet major variations in the status of children's rights still exist. Children in both Japan and Sweden are certainly better off than children in many other places, but it is interesting how many factors – differing interpretations of the Convention's provisions, extension of rights beyond even what the Convention discusses, blatant failure to comply with elements of the Convention, and reservations to it, as well as government policies which help or hinder enforcement of rights which exist legally – lead to such an unequal legal position of children in these countries. Still, Japan has made tremendous progress, leading some scholars to call recent years “exceptional . . . for the advancement of . . . children's human rights in Japan.”¹³⁷ Japanese lawyers continue to work to increase Japan's adherence to the Convention, and the Committee on the Rights of the Child persists in urging compliance as well. Hopefully, these efforts will help Japan keep moving forward, and Sweden and Japan will one day both provide children with the important rights described in the Convention equally well.

¹³⁷ CHAN-TIBERGHIEEN, *supra* note 98, at 51.