

The Past and the Present of the Applicable Law to Child's Legitimacy

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Abstract

On the applicable law to child's legitimacy, Article 51 (or Article 16 before the reform in 2010) of "Act Governing the Choice of Law in Civil Matters Involving Foreign Elements" provides choice of law rule. Before the reform in 2010, there was a dispute on the normative intent of this article. This dispute had already existed prior to the enactment of the Act in 1953. Furthermore, in the drafting process of the reform in 2010, each different draft had shown different understanding on the normative intent of the applicable law to child's legitimacy. In order to understand the fundamental difference between the past and present law, this study will first analyze the normative intent of the past law from the comparative perspective with Japanese law. On this basis, the drafting process in the reform will be further examined.

In order to protect the child's legitimacy as broadly as possible, the new Article 51 adopted the alternative application method among the national law of child, its mother and husband of child's mother. This choice of law method is much more complicated than that of the past, which would arise more difficulties in its interpretation. Therefore, this study will further analyze the concrete choice of law process under the new provision, focusing on following issues: how to apply this provision to the impugnation of legitimacy; how to determine the national law of child; the characteristics of the national law of child; the order in applying the related provisions. Through this concrete examination, this study will clarify merits and demerits of the present law.

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