The Resolution of Child-related Disputes after the Dissolution of Parents' Relationship

A Comparative Study in Japan and England and Wales; Lessons for Myanmar

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Graduate School of Modern Society and Culture

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ABSTRACT

Ensuring and protecting the rights of children is an important matter across the world. It is said that the progress of a State may be measured by the extent to which it safeguards the right of its children. Myanmar, one of the developing countries, is still in a struggle to protect its children's rights fully.

For that reason, this thesis was carried out with two purposes:

1. to explore the practicing laws and the means of resolution of child-related disputes after the dissolution of parents' relationship in Japan, England and Wales and Myanmar, and
2. to find out an appropriate way to improve the current practice in Myanmar by reference to the experiences of Japan and England and Wales.

The above-mentioned three countries, Myanmar, Japan and England and Wales (one of the three separate jurisdictions of the UK) are the State parties to the United Nations Convention on the Rights of the Child 1989: Myanmar and the UK ratified the Convention in 1991 and Japan in 1994. Article 3(1) of the Convention provides the general principle that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. This is an international obligation to apply the best interest principle to all children below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.

Article 3(2) of the Convention provides that 'State parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures'. Accordingly, Myanmar, Japan and England and Wales are obliged to secure the conventional rights of children by providing adequate legal and administrative instruments and whether they meet their obligations was examined in the thesis.

Moreover, for the purpose of finding an appropriate way to improve the current practice relating to children, especially contact and maintenance issues, in Myanmar, a

comparative study is crucial for obtaining relevant information on how national legislation works to secure the conventional rights of children. Therefore a comparative study of Japan and England and Wales was carried out.

In Japan, there was a recent legal development to abolish the discrimination against illegitimate children regarding the inheritance rights although the terms ‘legitimate’ and ‘illegitimate’ are still applied. The matters of contact and child maintenance are inserted in the Civil Code as the matters to be considered at the time of parents’ divorce. In England and Wales, all forms of discrimination against illegitimate children had eliminated in 1987. The conventional rights of children to contact with non-resident parent and to have the financial support from both parents are secure by the national legislation with the sufficient external assistance from a number of voluntary organizations. Accordingly, it could be pointed out that children in England and Wales are well provided their conventional rights whilst those in Japan are fairly protected.

In Myanmar, however, some practices regarding the resolution of child-related disputes at the time of marital dissolution seem not to comply with the Convention. There is no legislation to provide children with their conventional rights of contact with his noncustodial parent after parents’ divorce or separation. Regarding child maintenance, the general law for all religions and the respective family law of each religion group allow the child claiming a financial support from their noncustodial father. In case the noncustodial parent is the child’s mother, she is not legally obliged to provide a financial support with her child. Furthermore, under the Guardians and Wards Act 1890, a father will be given a priority to be appointed as a person of caring the child although ‘the best interest principle’ is applicable to the court proceedings in which the welfare of the child may be affected. In addition, discrimination against illegitimate children still exists.

Unlike Japan and England and Wales, in Myanmar, the majority of statutory laws relating to children were based on the old principles and were enacted in many years ago. They are still effective without major changes. It is in fact that some provisions in these laws are outdated and fail to provide the conventional rights of children fully. Therefore, it is necessary that the laws relating to children shall be revised or reformed in order to comply with the Convention as well as to promote the welfare of children in Myanmar.

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LIST OF ABBREVIATIONS

UNCRC	United Nations Convention on the Rights of the Child 1989

JAPAN

AID	Artificial Insemination by Donor
AIH	Artificial Insemination by Husband
FAPA	Family Affairs Proceedings Act 2011
FPIC	Family Problems Information Center
JSOG	Japan Society of Obstetrics and Gynecology
PALA	Personal Affairs Litigation Act 2003

ENGLAND AND WALES

AI	Artificial Insemination
ART	Assistant Reproduction Technology
CA	Children Act 1989
CAA	Children and Adoption Act 2002
CAFACASS	Children and Family Court Advisory and Support Service
CMEC	Child Maintenance and Enforcement Commission
CMO	Child Maintenance Options service
CMS	Child Maintenance Service
CPA	Civil Partnership Act 2004
CSA	Child Support Agency
FHDRA	First Hearing Dispute Resolution Appointment
FPR	Family Procedures Rule 2010
HEFA	Human Fertilization and Embryology Act
IVF	In-Vitro Fertilization
MCA	Matrimonial Causes Act

MIAM	Mediation Information and Assessment Meting
NACCC	National Association of Child Contact Centres
SAA	Surrogacy Arrangements Act 1985
UK	the United Kingdom

MYANMAR

A.I.R	All Indian Reports
B.L.R	Burma Law Reports
C.C	Chief Court
L.B.R	Lower Burma Rulings
P.C	Privy Council
R.L.R	Rangoon Law Reports
S.C	Supreme Court
U.B.R	Upper Burma Rulings

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CHAPTER (1)

INTRODUCTION

1.1 Objectives of the Study

This thesis has two objectives:

1. to explore the practicing laws and the means of resolution of child-related disputes after the dissolution of parents' relationship in Japan, England and Wales[1] and Myanmar, and
2. to find out an appropriate way to improve the current practice in Myanmar by reference to the experiences of Japan and England and Wales.

In this thesis topics on parent's relationship dissolution, divorce matter, judicial separation and dissolution of civil partnership are discussed. The scope of child-related disputes upon parents' relationship dissolution includes the following issues;

- taking responsibility for caring of the person and the property of the child,
- maintaining contact between the child and his/her non-resident parent, friends, family members, etc.,
- payment of child maintenance by his non-resident parent, and
- abduction of a child by a parent.

In Myanmar, no uniform family law is provided. The applicable law to the dissolution of a marriage is differed according to the parties' religious affiliation. Currently, four main religions are practiced in Myanmar: Buddhism, Christianity, Islam and Hinduism.[2] Buddhists are bound by the Myanmar Customary Law, Christians are bound by the Burma Divorce Act 1869, whereas Muslims are bound by the Islamic Law as well as the Muslim Divorce Act 1953. With regard to Hindu couples, since they are governed by the Hindu Customary Law of which has been enforced in Myanmar, a marriage is for life and a divorce is not possible for them accordingly.[3]

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[1] England and Wales is one of the three jurisdictions in the United Kingdom (hereinafter this thesis the UK). The other jurisdictions of the UK are Scotland and Northern Ireland each of which has a separate legal system. In this thesis, dissolution of parents' relationship and resolution of child-related disputes mainly in England and Wales are discussed.

[2] "*Myanmar Facts and Figures, 2002"*, Ministry of Information, 2002, p.5.

[3] The Hindu Marriage Act 1955 (The Indian Act) grants legal divorce for Hindus people in India, but its enforceability is not extended to Myanmar yet.

Regarding a legal intermarried couple of a Buddhist woman and a non-Buddhist man, they are bound by the Myanmar Customary Law irrespective of the husband's religion.[4] For other intermarried couple, either of a Christian and a non-Christian which is formed by the Christian Marriage Act 1872, or of a Hindu and a Buddhist which is formed by the Special Marriage Act 1872, they are bound by the Burma Divorce Act 1869. Although divorce is a common way of a couple to dissolve the legal marriage, those legal unions where either or both parties are Christians may be allowed a decree of judicial separation.[5]

As mentioned above, each religion in Myanmar is bound by their particular family law to dissolve a marriage. However, regarding the resolution of child-related disputes after the dissolution of a marriage, all religions are bound by the general laws inclusive of the Guardians and Wards Act 1890, the Penal Code 1868, the Code of Criminal Procedure 1898 and the Code of Civil Procedure 1909, regardless of the religion. In the above mentioned laws, no provision or rule is found to determine contact matter between the child and his non-resident parent, friends, family members, etc. after parents' divorce or judicial separation.

Although Myanmar has been a State Party to the United Nations Convention on the Rights of the Child 1989 (hereinafter this thesis the UNCRC) since 1991, some practices in the resolution of child-related disputes after the dissolution of parents' relationship do not comply with the Convention. For instance, no law provides to determine the child's conventional rights of contact with his noncustodial parent. The law allows the child to claim a financial support from the noncustodial father only. Moreover, regarding determination of taking care of the person of the child, the Guardians and Wards Act 1890 provides the superior rights to father to be the guardian of the child. It may be a kind of unfairness to the child's mother.

In accordance with the Guardians and Wards Act 1890 and the applicable judicial precedents, two types of guardians are found in Myanmar: the natural guardian who is the child's father and is regarded as the natural guardian of his minor children (both male and female offspring), and the appointed guardian who may be either the minor's parent or non-parent and is appointed, where the court is satisfied that it is for the welfare of a minor, as the guardian of the minor through a court order.

[4] Section 25&26 of the Buddhist Women's Special Marriage and Succession Act 1954.
[5] Section 22 of the Burma Divorce Act 1869.

In case there is a disagreement on taking care of the child after parents' divorce or judicial separation, one who wants to be appointed as the guardian of the child may apply to the court. There is no differentiation of the applicable law and the legal procedure between the appointment of a non-parent as the guardian of a ward and the appointment of a parent as the guardian of his/her own child. Both matters are governed by the Guardianship and Wards Act 1890.

Another problem is that to prevent a child from abduction domestically by anyone (including their own parents) from their legal guardianship, Section 361 of the Penal Code gives a legal protection to those children under 14 years of age in male and under 16 years of age in female only.[6] Such criterion on age limit is not in conformity with the provision of UNCRC and the Guardian and Wards Act 1890 either. As a consequence, those children between 14 and 18 years of age in male and between 16 and 18 years of age in female are not covered under the legal protection provided by Section 361 of the Penal Code, although a return order of the abducted child is available according to Section 25 of the Guardians and Wards Act 1890.

Therefore, this thesis firstly aims at studying the current practices of Japan and England and Wales and learning from their experiences. Same as Myanmar, both Japan and England and Wales are the State Parties to the UNCRC since years ago. Unlike Myanmar, they have succeeded a number of legal reforms with respect to child-related matters. After studying their past and present experiences, an ideal solution will be considered to improve the current practice in Myanmar.

1.2 Reasoning for Choosing the Topic

The breakdown of parents' relationship makes much loss and pain to a family, especially when a child is involved there. Although the diverse forms of parents' relationships can be terminated in a variety of ways; either by divorce or by separation or by dissolution civil partnership, the parents' rights and obligations towards their child cannot be extinguished even for the adult child in some exceptional cases. Therefore, every country established their own legal framework how to exercise parental rights properly and how to perform parental obligations adequately even after

[6] Section 359-374 of the Penal Code 1868 deals with the crime of kidnapping, abduction, slavery and forced labor of children. The victims of these crimes are defined by age and the limitation of age varies from Section to Section. There is no relationship between the age limits defined by these Sections and by the Majority Act 1875.

the dissolution of parents' relationship. Although the practices may vary from one country to another, the fundamental principle in deciding any matters relating to the child may be the same since there is a general recognition of the fact that children are the most valuable asset of the State.

The common principle is that 'the best interest of the child must be the primary concern in making decisions that may affect him'.[7] The said principle has also been practiced in Myanmar for many years. In reality, however, the existing system may be inadequate to protect and safeguard the children's rights laid down by the UNCRC. As a consequence, it may be a necessity for Myanmar to have its legal reform in part or as a whole in order to abolish the inappropriate parts, to replace with the appropriate provisions, and to add some necessary regulations. This is one of the reasons for choosing the theme.

The UNCRC is a global Convention in protecting the fundamental rights of all children regardless of their nationality, races and religions.[8] Myanmar, the UK and Japan have been the State Parties to the Convention over the years: Myanmar and the UK ratified the Convention in 1991 and Japan in 1994. By Article 4 of the Convention, all State Parties are legally bound to take necessary measures to be implemented the children's rights recognized by the Convention. Accordingly, Myanmar, the UK and Japan are bound by the same obligation of providing adequate legal system for the protection of children's rights guaranteed by the UNCRC.

Nowadays, both Japan and England and Wales have the fairly appropriate legal framework[9] to implement the children's conventional rights although some unsolved problems are still remained there. As for Myanmar, the practicing laws are outdated and need an appropriate legal reform to be compliant with the Convention. Therefore, by comparing the systems in Japan and England and Wales, it may be understandable how their laws are developed through history and how they perform differently for the best interest of the child under their different legal systems. After that it may be found out the new approach which will be intractable the existing problems in Myanmar. This is another reason for choosing the theme.

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[7] Article 3 of the UNCRC.
[8] Article 2 of the UNCRC.
[9] Both countries had successfully eliminated discrimination on the child's inheritance rights based on legitimacy, provides the contact rights between the child and his non-resident parent after the dissolution of parents' relationship and impose a legal obligation of child maintenance to either of the parents (non-resident parent) when they are living separately due to the dissolution of their relationship.

1.3 Terminology

a. Parent

In contemporary society, 'what is a parent?' is a contested question and the answers may be emerged from various perspectives.[10] Parents in these days may be classified as biological, non-biological, psychological, adoptive, social parents and step-parents. However, in this thesis, parent means a legal parent who has already established the legal parent-child relationship according to the respective national law. Such parents may be married or in civil partnership or cohabiting. These legal parents may be applied to either category of the following two:

i. those who automatically become legal parents, and
ii. those who has gone through the judicial procedure (court order) to gain the legal parenthood.

Regarding the natural child, the married parents become his legal parents automatically unless the father denies paternity. However, for unmarried parents and those who are in a civil partnership, only the birth mother becomes the legal mother automatically; the mother's male or female partner needs to take some necessary steps to acquire the legal parenthood. With respect to the child born through the assistance reproduction technology, the birth mother becomes the legal mother of the child automatically; the mother's husband or male partner or female partner may become the legal parent of the child conditionally. Concerning the child born through a surrogacy arrangement, the intending parents, either married or unmarried or civil partnered parents, may become the legal parents of the child by the court order only. With regard to the adopted child, the adoptive parent/s become the legal parent/s of the child after the adoption has taken effect legally.

b. Child

By the definition of Article 1 of the UNCRC, a child means every human being below the age of 18 unless under the applicable law to the child, majority is attained earlier.

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[10] Shelley Day Sclater, Andrew Bainham and Martin Richards, "Introduction*",* in *What is a Parent? A Socio Legal Analysis*, Edited by Andrew Bainham, Shelley Day Sclater, and Martin Richards, Hart Publishing, 1999, pp.1-2.

In Japan, by applying Section 4 of the Civil Code, a child means an unmarried minor who is under 20 years of age regarding the above-mentioned child-related matters.[11] However, only for the purpose of child maintenance payment, parents are obliged to support financially to those children over 20 years of age under some exceptional circumstances.

In England and Wales[12], according to Section 105(1) of the Children Act 1989, a child generally means a person under the age of 18. However, residence and contact order will end when the child turns 16 unless there are exceptional circumstances.[13] Even though the duration may extend in some cases, the orders will be terminated automatically when the child reaches the age of 18.[14] For the purpose of child maintenance payment, Section 55(1) & (2) of the Child Support Act 1991 defines a child as an unmarried person under 16 who has left full time education or under 19 who is still in full time education. Regarding child abduction cases, a child should be under 18 for domestic abduction and under 16 for international abduction[15].

In Myanmar, according to Section 2(a) of the Child Law 1993, a child means a person who has not attained the age of 16. However, under the Majority Act 1875, a minor means a person under 18 years of age in case he/she has no legal guardian or under 21 years of age in case he/she has been being under the legal guardianship before the age of 18. Accordingly, in order to be appointed as a legal guardian of a child, a subjected child should be below 18 years of age. Such a kind of criteria is applicable for all children regardless of their religions. However, for domestic child abduction cases, according to Section 361 of the Penal Code, a child should be under 14 years of age in male and under 16 years of age in female.[16]

Concerning the child maintenance payment, the definition of child should be divided into two because two different ways are available for claiming it: filing a

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[11] For the Juvenile offences, Article 2(1) of the Juvenile Act 1948 defines *the Juvenile as a person under 20 years of age*. Relating to child prostitution and child pornography, Article 2(1) of the Act on Punishment of Activities Relating to Child Prostitution and Child Pornography, and the Protection of the Children 1999 defines *the child as a person under 18 years of age*. With respect to promote the welfare of the child, Article 4 of the Child Welfare Act 1947 defines *the child as a person under 18 years of age*.

[12] English law does consider a child's maturity (therefore not always necessarily respective to his/her age) when deciding any of issues relating to children and parents.

[13] Section 9(7) of the Children Act 1989.

[14] Section 9(6) the Children Act 1989.

[15] Section 1(1) of the Child Abduction Act 1984.

[16] This age limitation may not affect the legal rights of a custodial parent to claim for the recovery of the abducted children under Section 25 of the Guardians and Wards Act 1890.

miscellaneous case under the Code of Criminal Procedure 1898 and suing a civil suit following the Code of Civil Procedure 1909. According to Section 488(1) of the Code of Criminal Procedure 1898, fathers from all religions are obliged to pay financial support his legitimate or illegitimate children until children are able to maintain itself. Such concept of the definition of child is also applicable for Buddhists in civil litigation of child maintenance payment. However, under the Islamic Law, the Islamic father is obliged to support only his legitimate son who is under 15 or who has not attained his puberty and his legitimate daughter who has not been married.

As described above, how to define a child is largely depending on the context. In this thesis, a child may be defined as mentioned above unless otherwise stated. However, add to this, one should be noted that these children may be legitimate or illegitimate children to their parents although the legal parent-child relationship has been being existed.

c. Parental Rights and Duties (親権), Custody (監護権) and Custodian (監護者) in Japan

Parental rights and duties (親権) means the responsibilities of a parent for taking care and controlling over the person and the property of the child. In this regard, the parent who has parental rights and duties must provide the daily care of the child with an appropriate control and has to administer the child's property with a sufficient care as that which the parents would exercise over their own property. During the existence of a marriage, parental rights and duties is jointly exercised by both parents. After the dissolution of a marriage, only one of the parents can exercise parental rights and duties solely.[17]

The term 'custody (監護権)' means a part of these parental rights and duties. It particular concerns with the duty of taking day-to-day care of the person of the child. After the dissolution of a marriage, one of the parents exercises the custody of the child solely.[18] In this regard, it is possible to be exercised both the parental rights and duties by the same parent solely. Otherwise, parental rights and duties and custody are separately exercised by each parent.

[17] Section 818 (1-3) of the Civil Code 1947.
[18] Section 766 (1) of the Civil Code 1947.

That parent who has custody of the child is called the 'custodian (監護者)' and is allowed to make certain decisions over child-related matters as long as it is not contrary to the best interest of the child. However, if the custodian is lack of parental rights and duties, he/she cannot make the decisions which may change the legal status of the child without the consent of other parent who is holding sole parental rights and duties. Furthermore, such a custodian cannot represent the child in the legal proceedings.

d. Parental Responsibility and Residence Order in England and Wales

The term 'parental responsibility' means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.[19] During the existence of a marriage, both parents have joint parental responsibility.[20] The dissolution of a marriage is not a sufficient cause to lose one's parental responsibility and therefore, even after the dissolution of a marriage, parental responsibility can be shared between both parents. The same is applicable to those couples in civil partnership where both parents have already acquired parental responsibility before the dissolution of their relationship. The Act does not limit the number of person or body for sharing parental responsibility. Therefore more than one persons or bodies may have parental responsibility over the same child at the same time.

The term 'residence order' refers to the fact of living together with the child by a court order.[21] Following the dissolution of a marriage or civil partnership, if parents are disputed over the child's place of living, the court may make a residence order to decide the person with whom the child is to live. In this regard, the court may render a sole or a shared residence order. The person who has granted the residence order acquires parental responsibility automatically but it will last for so long as the order is in force.[22] Moreover, the person who obtains parental responsibility in this way has two limitations: he shall not have -

- the right to agree or to refuse to agree to the making of an adoption order being made, and

[19] Section 3(1) of the Children Act 1989.
[20] Section 2(1) of the Children Act 1989.
[21] Section 8 of the Children Act 1989.
[22] Section 12(2) of the Children Act 1989.

- the right to appoint a guardian of the child.[23]

e. Guardianship, Guardian and Ward in Myanmar

The term 'guardianship' means a fiduciary relationship between the guardian and a ward whereby 'the guardian' means a person having the duty of taking care of the person of a ward or of his property, or of both his person and property[24] and 'a ward' means a minor[25] for whose person or property, or both, there is a guardian[26]. These guardians may be appointed by the will or by other instruments or by a court order. However, in case the matter of guardianship is disputed between divorced parents, appointing a parent/parents as a guardian/guardians of the child can only be done by a court order.

If a parent is appointed as a guardian of the person of the child, he/she is charged with the custody of the child and must look to the child's support, health, education, and other necessary matters.[27] In case a parent is appointed as a guardian of the property of the child, he/she is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, may do all acts which are reasonable and proper for the realization, protection or benefit of the property.[28] The guardian of the person of the child may be appointed solely or jointly subject to certain conditions and the same is applicable to the appointment of guardian of the property of the child.

1.4 Research Methodology

The main focus of the research is to investigate the existing situations and problems in Japan, England and Wales and Myanmar regarding the resolution system of child-related disputes for parents after dissolution of their relationship. The research is primarily based on the facts which have already existed.

Therefore, the study is mainly based on the analytical research. The data collection has been carried out through both primary and secondary sources. The enacted laws, rules, regulations, court precedents, applicable customary laws and the

[23] Section 12(3) of the Children Act 1989.
[24] Section 1(2) of the Guardian and Wards Act 1890.
[25] The definition of a minor under the Majority Act 1875 in Myanmar has already mentioned in 1.3 (b).
[26] Section 1(3) of the Guardian and Wards Act 1890.
[27] Section 24 of the Guardians and Wards Act 1890.
[28] Section 27 of the Guardians and Wards Act 1890.

international treaty are included as primary sources whilst the published articles, books, journals and governmental data are included as secondary sources. Some official websites are also used to collect the judicial precedents and some governmental published data. Some information are gathered through semi-structured interviews with legal professionals including a judge of the Inner London Family Proceedings Court, the UK and some practicing lawyers from the Niigata Bar Association and a member from the Niigata Family Problems Information Center (hereinafter Niigata FPIC), Japan.

After gathering the necessary information as stated, the data analysis is made to draw a conclusion on the existing systems. Then a solution for Myanmar will be considered.

1.5 Limitations of the Study

This thesis is focused specifically on the child-related disputes after dissolution of parents' relationship. Although resolution system of all disputes under both private and public law areas are important for the best interest of children, this thesis is unable to cope with both areas. The majority of discussion in the paper belongs to the private law area except child abduction by a parent which is a consequence of family breakdown process. With respect to the issue of child abduction by a parent, only domestic laws are discussed. It is in fact that international child abduction by a parent is a globally interested topic and it is also a 'hot' issue in Japan currently. It is, however, excluded from this thesis in order to avoid complicated discussion.

This thesis is focused on the existing system of three different countries which are the State Parties to the UNCRC. The evaluation on their existing practices is based on the provisions of the UNCRC. Although England and Wales is a State Party to the European Convention on Human Rights which is also an important convention in relation to the rights' of the children in Europe, the discussion will not be based on it because it is not applicable to other two countries.

Another limitation is concerned with collecting materials and data of these three countries. In Myanmar, it is a difficult work to find the required statistics such as the number of children involved in parents' divorce or separation, the number of children who are living with mother/father after the dissolution of a marriage, the

number of non-resident fathers who pay child maintenance and so on. The lack of previous research on the resolution system of child-related disputes for parents after the dissolution of a marriage is one of the limitations to collect the related information and to study other's view.

In Japan, it is also difficult in finding the necessary reading materials and reliable data which is published in English. The official translation of Japanese laws from Japanese to English language is not found too. Although some official websites provides an English version for publishing the data, the required data is not sufficiently included in them. Such a kind of problem was not applicable to the collection of materials and data for England and Wales. However, the language barrier is a prominent limitation throughout the research because English is not my mother tongue.

Another limitation is that during the research, there was no opportunity to hear the voices from the users of legal services. Therefore, this thesis will only reflect the views of particular legal professionals and some scholars. Accordingly, this thesis will be a kind of introductory research and it remains to be solved in the future study to make an in-depth personal interview with the users of legal services in order to get the story behind their experiences.

1.6 Organization of the Study

This thesis is organized with six chapters. The first chapter is an introduction. As an introduction, what purpose the author has on the study and the reasons for choosing the topic is explained first. The discussion is mainly concerned with child-related disputes for parents. Therefore, the particular meanings of parent, child and certain child-related matters will be given under the terminology. Research methodology, limitation of the study and literature review are also some component parts of the introduction chapter.

The focus of chapters two and three is the resolution system of Japan and England and Wales regarding child-related disputes for parents after the dissolution of their relationship. At the beginning of these chapters, the historical background of laws on the dissolution of parents' relationship and resolution of child-related disputes will be presented first in order to trace back the legal development in these areas. Then,

different types of parents' relationship are explained because the relationship of parents is playing an important role in defining the child's legal status.

Afterwards, the number of children involved in the dissolution of parents' relationship will be investigated in order to understand the real situation of children affected by family breakdown process. The important part is the explanation of respective legal provisions and the practicing system in each country. In this explanation, special attention is given to some topics relating to private law; child abduction by a parent is an exception. Lastly, the recent legal development for the resolution of child-related disputes, current situation of the resolution of child-related disputes and existing problems in the resolution of the child-related disputes are also discussed.

In chapter four, a comparison with regard to the involvement of children in family breakdown and resolution system of child-related disputes will be made between Japan and England and Wales in order to identify the distinctive features of these two countries. The prominent feature of differences between the two countries is the implementation system in terms of the government's involvement and willingness to support to parents and children whose family is broken down.

In the following chapter, the practicing system of Myanmar is presented to point out the existing problems.

In the last part, since the ultimate goal of this study is to find out a solution for Myanmar, the needs for Myanmar will be recommended in considering to be comply with the provisions of the UNCRC. These may include –

1. providing an equal treatment to parents regarding the determination of guardianship of the child,
2. imposing an equal obligation to parents regarding the child maintenance,
3. considering a child contact matter as a necessity for the welfare of the child, and
4. providing an equal legal protection to the children who are abducted.

1.7 Literature Review

Matthew J. McCauley (2011) argued that the Japanese Legal System was unfit for resolving child-related problems and needed a reform for allowing joint custody

and for reasonable visitation. It may not be acceptable from the terminology point of view. In order to explain the reason, it should be defined the meaning of custody and visitation first.

As it was explained in 1.3 (c), custody in Japanese family law is a part of parental rights and duties which cannot be shared between divorced parents. The position of the parent who has mere custody over the person of the child is inferior to the parent who has parental rights and duties. The parent with custody cannot make certain important decisions in relation to the child without the consent of the other parent with parental rights and duties. It should be said that the rights of a parent with custody but without parental rights and duties is restricted. Therefore, even custody is shared between parents, both parents may not obtain an equal opportunity to participate in the child upbringing process. One parent will be in the superior position than the other accordingly. The main cause of such a problem is that the Japanese law vests parental rights and duties to one parent solely. Therefore, if it is a desire to vest equal rights to both divorced parents, it should be considered for sharing parental rights and duties rather than for sharing mere custody between divorced parents.

Regarding the usage of 'visitation', it is a misnomer from the practical point of view. According to the Japanese practice, maintaining the relationship between the child and noncustodial parent is included meeting each other and contact through medium. In other words, it may be called as direct and indirect contact. For that reason, the word 'visitation' is not a correct expression to cope with the real meaning of 'maintaining relationship between the child and noncustodial parent' in Japanese context. The word 'contact' can encompass its meaning completely though.

Concerning the matter of contact between the child and his noncustodial parent, Takao Tanase (2010) also complained that visitation rights under the Japanese law were too weak and inadequate.

However, to date, a legal reform on this matter has succeeded by revising Section 766(1) of the Civil Code 1947. Soon after the revision was taken effect, the Supreme Court rendered a prominent judgment in which the court imposed the certain amount of pecuniary fine on non-compliant parent who has failed to cooperate with the noncustodial parent in the implementation of child contact agreement. This

showed the tendency of the judicial sector to promote the regular contact between the child and noncustodial parent in parallel with the legal development.

In England and Wales, with respect to the recent increasing number of shared residence order, Rebacca Probert (2012) argued that the shift from sole residence to shared residence today is only the terminology rather than the substance. The author mainly pointed out unequal division of children's time between two parents' household. That may be true from the time-sharing point of view.

However, from the legal point of view, sharing residence means sharing parents' rights towards the child. For instance, according to Section 13 (2) of the Children Act 1989, a parent who is favored the residence order can take out the child from the UK jurisdiction for a period not exceeding one month. A parent who is lack of residence order does not have such a right. In case he/she wants to take the child out of the UK jurisdiction, he/she has to be fulfilled either of the following conditions according to Section 13 (1) of the said Act.

- Everyone who has parental responsibility over that child must agree on it and expresses their consent in the written document.
- The court allows him/her of taking the child out of UK.

Accordingly, if a sole residence order is in force, sharing parents' rights between resident parent and non-resident parent is unequal. In case a shared residence order is granted, both parents enjoy equal rights to children. Therefore the current shift from sole residence to shared residence order is not only the terminology but also the legal rights of parents.

In Myanmar, the previous research on the resolution of child-related disputes after the dissolution of parents' relationship does not exist and the research in this thesis may contribute to the investigation of the current system.

CHAPTER 2

THE RESOLUTION OF CHILD-RELATED DISPUTES AFTER A DIVORCE OR SEPARATION IN JAPAN

2.1 Introduction

The purpose of the chapter is to analyze the text of Japanese legislation and certain judicial precedents relating to two issues: the first is determination of legal parent-child relationship during the existence of married or cohabiting relationship between parents, and another is determination of child-related matters for these parents after dissolution of their relationship. For this purpose, Japanese and foreign academic literatures on Japanese family law, particularly dealing with parent-child-related matters will be reviewed.

Regarding matters relating to parent-child relationship, some serious legal issues are still existed in Japan although a number of legal reforms have developed from time to time. These issues may be included the limitation of holding parental rights and duties over an illegitimate child, lack of legislation for surrogacy, and the lack of effective enforcement system on collecting child maintenance payment and on arranging child contact. These issues are connected with the interest and welfare of children because they may be negatively affected where the operation system is not well equipped. Therefore, many academics had criticized on current system based upon certain provisions of the UNCRC.

In this chapter, specifically at the last part, it is intended to examine how Japanese law resolves such problems effectively. In order to do such an examination, the past and present Japanese family law is firstly discussed to understand how it has been developed along with changes in society's attitude towards democratization. By using the relevant provisions from the present family law, the establishment of parent-child relationship is explained. Then, the trends of children involvement in the dissolution of parents' relationship is investigated. Dealing with these children, how to determine parental rights and duties, custody, maintenance and contact is described in detail.

Accordingly, the late part of the chapter will mainly be dealt with certain child-related disputes. In addition to this, the matter of child abduction by a parent is also discussed as an important part of child-related matters because it is somehow related

to the previous issues. Recently, a partial legal reform was completed and it is worth to investigate how the effect of the reform is. To conclude the chapter, it is considered what will be the main concern in the future to promote the welfare of children from divorced family.

2.2 Background of Divorce Law and Child-related Disputes

Throughout history, Japanese family law was free from the influence of religion, however was under the influence of peculiar traditional custom. During the Tokugawa (Edo) period (1600-1868), there was no uniform nationwide divorce law but divorce procedure was under the rule of Tokugawa government. Different rules were applied to different social classes which is composed of aristocrat, samurai, ordinary people inclusive of farmer, artisan and merchant and the clergy in a descending order.[29] For instance, in a samurai family, whether to get a divorce was decided by the heads of two respective households with the approval of their superiors, while in farmer and other commoner classes, a divorce was concluded by merely issuing a divorce writ know as a *mikudarihan* (three and half lines)[30] from the husband arbitrarily.[31] The only obligation for those husbands who wanted to get divorce against his wife without any misconduct or blaming reason on the wife was to return the dowry to his divorced wife.

As a salient feature of the male-dominated society[32] at that moment, it was difficult for a wife to initiate a divorce against the husband[33] although temple

[29] Harald Fuess, "*Divorce in Japan: Family, Gender and the State, 1600-2000*", Stanford Ford University Press, 2004, p.19.
[30] In the divorce letter, the husband simply wrote that he divorced his wife and she was able to remarry anyone. The reason for divorce was not necessary to mention. The length of statement in the letter was exactly three and half lines.
[31] Kazuyasu Sakamoto and Yukinobu Kitamura, "*Marriage Behavior from the Perspective of Intergenerational Relationships*", The Japanese Economy, Volume 34, Number 4, pp.76-122, 2007-8, p.79.
[32] According to Kawashima, women in those days were placed in a low social status in every family. The main duty of a married woman was to serve his parents-in-law and to bear heirs to continue the succession of her husband's household. Consequently, a proverb of 'the womb is only borrowed' was come out to demonstrate the real situation of a married woman in her marriage life.
[33] Masayuki Murayama, "Convergence from Opposite Directions? Characteristics of Japanese Divorce Law in Comparative Perspective", in *Japanese Family Law in Comparative Perspective*, Edited by Harry N. Scheiber and Laurent Mayali, Robbins Collection Publications, 2009, p.65.

divorce[34] was available for divorce-hungry wives.[35] Generally, official involvement was not a necessary requirement to complete a divorce unless the spouses were disputed over the condition of divorce.[36] Dealing with child custodial issue after a divorce, in a samurai class, father usually took the custody of all children. In other classes, both split custody[37] and whole custody[38] system were utilized throughout country, however, the practices were different from region to region.[39] The custodians were responsible for the maintenance of the children who lived with them and contact between children and non-resident was not an issue at that time.[40]

After 1868, in the early Meiji period, some significant changes was introduced to the practice of divorce: the social class system which played an important role in the Tokugawa period was abolished; mutual consent divorce and judicial divorce system were established for both spouses in 1873[41]; and compulsory registration system to be legalized a divorce was started in 1875.[42] A couple of years later, in 1898, the Meiji Civil Code in which the divorce law is embedded as a component was enforced with the introduction of traditional 'household' system (*ie seido*) to the general public.[43] Actually, the concept of household system was based on the traditional family system of the Tokugawa samurai class and under this system the head of household (*koshu*) had a vast power and authority over all other family members legally.[44]

Under this Code, same as to the former practice, divorce could get either by mutual consent or judicial decision.[45] Regarding the ground for divorce, unequal standardization of adulterous behavior to husband and wife made controversies among legal scholars.[46] After getting a divorce, custody over the children was granted

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[34] If the wife sheltered at a temple with the intention of severing her marital tie, she had to serve as a nun for a certain period and afterwards she would obtain a letter of divorce form from her husband with the assistance of the officials from the temple.
[35] *Supra Note 29*, p.39.
[36] *Supra Note 29*, p.29.
[37] Parents were allowed to take same-sex children to them.
[38] All children were brought by one parent without regarding to the sex of the children.
[39] *Supra Note 29*, pp.91-93.
[40] *Ibid*, p.94-95, 98.
[41] *Ibid*, p.100.
[42] Hdo, "*History of Law in Japan since 1868*", Edited by Wilhelm Rohl, Brill, 2005, p.271.
[43] Shigenori Matsui, "The Constitution and the Family Law in Japan", in *Japanese Family Law in Comparative Perspective*, Edited by Harry N. Scheiber and Laurent Mayali, Robbins Collection Publications, 2009, p.34.
[44] *Supra Note 42*, pp.268-269.
[45] Section 808 & 813 of Meiji Civil Code 1898.
[46] If a wife commits adultery with a man other than her husband, it is immediately a sufficient ground for divorce. For the husband side, only if he commits adultery with a married woman and punishes by

to the father only.[47] The noncustodial mother was imposed no obligation to support those children who were placing under the father's custody, and also had no legal right to claim for contact with her children. This system was in effect until 1947 when the part 4 and 5 (family law part) of the Civil Code were totally revised under the influence of the new Constitution 1946.

In 1947, the revised family law was enacted with the extensive revision and massive reform. Under the revised law, the former traditional household system was abolished, the exclusive authority of the head of the household was destroyed and equal treatment to all persons irrespective of gender was provided.[48] The vast changes in the revised family law was structured on a democratic basic plus the Japanese value system.[49] With regard to divorce procedure, same as before, two different procedures are available: divorce by mutual consent[50] and divorce by a court degree[51].

In addition, the Family Affairs Proceedings Act (hereinafter FAPA) was enacted as a procedural law for resolution of family disputes in the same year, by revising the Personal Affairs Conciliation Act 1939. It added two more procedures to get a divorce; divorce by court mediation[52] and divorce by court determination. Accordingly, four different divorce procedures were available since 1947. In parallel with the revision of family-matters-related laws, a separate legal institution for resolving family- and child-related matters exclusively was established in 1949 with the purpose of maintaining the welfare of families and fostering the sound upbringing of juvenile.[53]. It operates the limited functions under the jurisdiction of the Supreme Court and was named as the Family Court.

Figure 2.1: The Structure of the Japanese Courts

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the criminal court on his adultery, it will be a ground for divorce. Therefore, husbands are free to make the adulterous relationship with any non-married woman.

[47] Section 812 of Meiji Civil Code 1898.

[48] Yayohi Satoh, "*Current Issues Regarding the Japanese Civil Law Pertaining to Family Law*", Ankara Law Review, Volume 5, Number 2, pp.129-152, 2008, p.132.

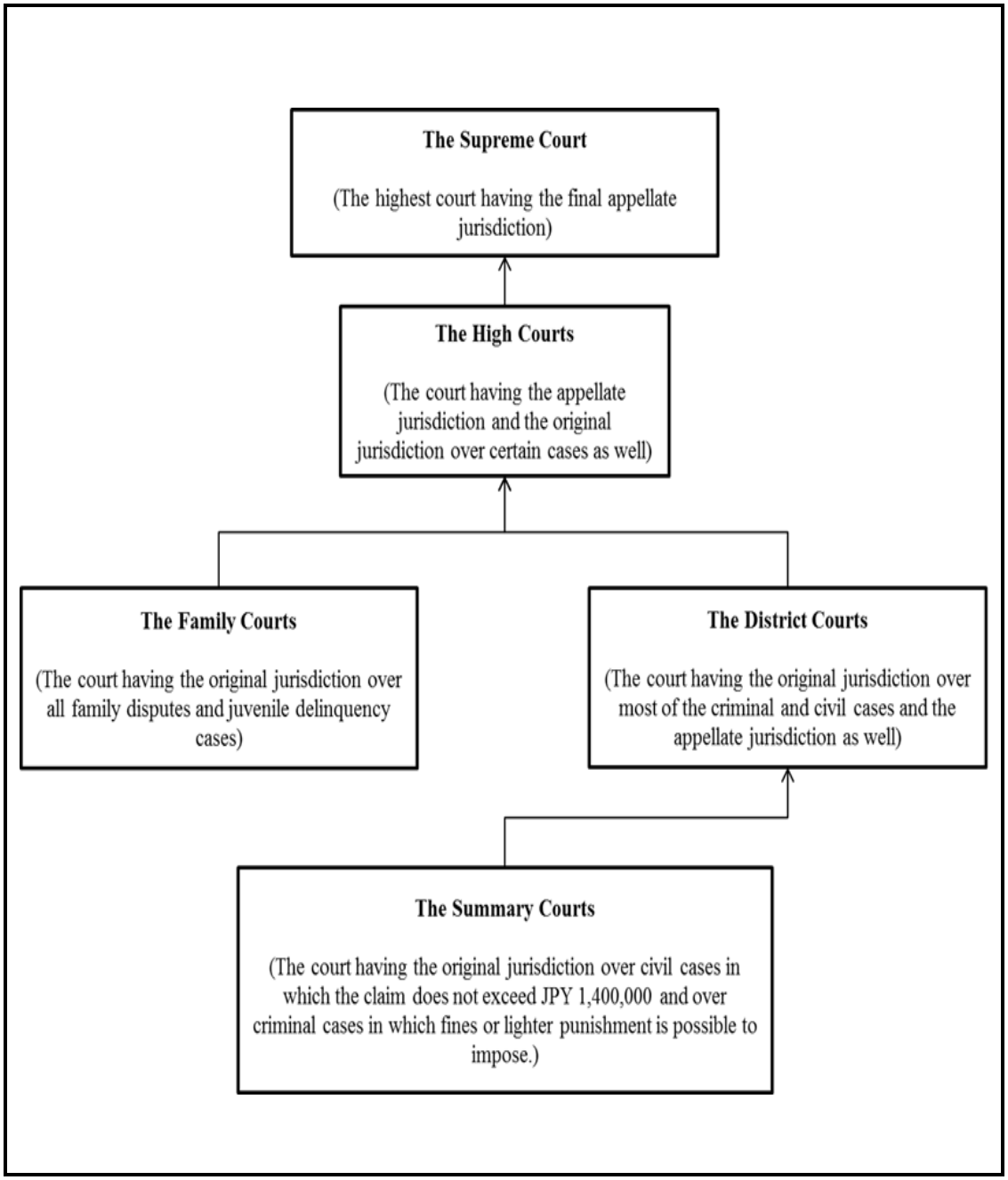
[49] Joy Larsen Paulson, "*Family Law Reform in Postwar Japan*", Joy Larsen Paulson, 2010, pp.65-69.

[50] Section 763 of the Civil Code 1947.

[51] Section 770 of the Civil Code 1947.

[52] Section 18 of FAPA 1947.

[53] "*Guide to the Family Court of Japan"*, The Supreme Court of Japan, 2010, p.4.



Source: http://www.courts.go.jp

After its establishment, all contested divorce cases are initiated at the Family Court under the mediation prior to litigation principle.[54] If the partiers were not able to reach a conclusion through the mediation procedure at the Family Court, the case was brought before the District Court by divorce-wanted party because of the lack of jurisdictional power of the Family Court to commence divorce litigation procedure. Such an inconvenient practice was terminated in 2003 with the enactment of the

[54] Section 18 of FAPA 1947.

Personal Affairs Litigation Act. The Act provides an additional jurisdictional power to the Family Court to try the family-related cases through a litigation process.[55] Since then the Family Court possesses an exclusive jurisdictional power over divorce dispute and its related matters.

Dealing with divorce principle, Japan is practicing no-fault principle for judicial divorce which is provided by the Section 770 (1) (e) of the Civil Code 1947. Accordingly, if it is proved that a marriage tie is irretrievably broken down between two parties, the court may grant a divorce decree. In 1987, a new practice was introduced to judicial divorce by a significant judicial precedent. Before that time, the court refused to grant a divorce claimed by the guilty person against the innocent spouse. However, after 1987, a guilty party is allowed to initiate a divorce under certain circumstances. In 2011, the fundamental procedural law of family matters, FAPA 1947 was revised, however, the procedure for a divorce and its related matters was not much changed.

Concerning child-related matters for parents after divorce, the Civil Code 1947 provides sole parental rights and duties[56]; one of the parents is granted to take parental rights and duties over the child solely. In case they have more than one child, these children may theoretically be allocated to both parents. However in practice, it is still uncommon and probably one parent may take parental rights and duties over all children. Until 2011, the specific provisions for child maintenance and contact were not inclusive in the Civil Code 1947 although they were recognized as the necessary matters regarding custody by Section 766 (1). Nonetheless, the necessary legal reform was completed recently and nowadays, under the revised version of Section 766(1) of the Civil Code 1947, child maintenance and contact are added as the necessary matters to discuss between parents at the time of their divorce.

All in All, as mentioned earlier, Japanese family law has changed from time to time from strict patriarchal system to democratic one. The family law nowadays reflects the individual dignity, equality between genders, liberalized and relaxed principle in divorce matters, protection to children's rights and the non-litigious culture of the society. Moreover, the recent development in Section 766 of the Civil Code 1947 proves that Japan is moving forward to promote the welfare of children

[55] Section 4 of the Personal Affairs Litigation Act 2003.
[56] Section 819 (1), (2) of the Civil Code 1947.

progressively. However, some controversial issues, as it is mentioned in the previous part, are still existed.

The below part is a collection of the current legislations governing over divorce and child-related matters.

2.3 The Laws Governing on Determination of Child-related Disputes after the Dissolution of Parents' Relationship

The fundamental legal sources, particularly to domestic private laws, relating to the resolution of child-related matters for parents after the dissolution of their relationship may be organized as follows.

- Part four of the Civil Code 1947

  - *The basic substantive law which provides basic principles for family matters*.

- The Family Affairs Proceedings Act 2011

  - *The fundamental procedural law which regulates rules to govern the court procedures in the resolution of family disputes*;

- The Personal Affairs Litigation Act 2003

  - *Another procedural law for the resolution of family disputes and*

- The Non-litigious Proceedings Act 2011

  - *The partially-related procedural law to family cases.*

The Civil Code 1947 is one of the major legal codes[57] that form the foundation of Japanese law. The Civil Code is composed of five parts General Provision, Property Law, Law of Obligations, Family Law and Law of Succession. The family law is entitled as 'Relatives' in part Four.

The Family Affairs Proceedings Act 2011 (hereinafter FAPA 2011) is the major procedural law which instructs the guidelines to the Family Court and all parties concerned how to proceed a family law case correctly. The former legislations, both the Family Affairs Proceedings Act 1947 and the Family Affairs Proceedings Rule 1947, were abolished after its enactment.

The Personal Affairs Litigation Act 2003 (hereinafter PALA 2003) is a revised law and it provides relevant procedures for family dispute litigation at a Family Court.

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[57] The Major Legal Codes consist of Constitution (*kenpou*), Civil Code (*minpou*), Civil Procedure Code (*minji soshou*), Penal Code (*keiho*), Criminal Procedure Code (*keiji soshouhou*) and Commercial Code *(shouhou*).

In case a family dispute cannot reach a conclusion through various proceedings provided by FAPA, such a case may be brought before the court to be handled by the litigation procedure as provided in PALA. Furthermore, some family disputes which are not appropriate to dissolve through procedures provided by FAPA should be commenced directly through the litigation procedure provided by PALA.

The Non-litigious Proceedings Act 2011 is a revised law and its role is not as significant as the previous-mentioned laws in resolving family disputes.

As described above, Japan nowadays has a fairly well-equipped statutory legal framework in the resolution of family disputes inclusive of divorce and its related problems. In addition to this, there are other related legislations for abduction of a child by a parent: the Penal Code 1907 and the Habeas Corpus Act 1948. It is noted that not all cases of abduction are dealt with by those Acts.

Based upon some relevant provisions provided by aforementioned legislations, the detailed discussion of the establishment of parent-child relationship will be presented in the following part. The current hot issues of parent-child relationship are associated with the existence of the terminology, 'legitimate and illegitimate child', and the needs of legislation for surrogacy arrangement. Although surrogacy is a new developed medical technology, the history of illegitimate child is so long in Japan.

Since the enactment of the Meiji Civil Code, children are divided into two groups based upon their parents' marital relationship: legitimate and illegitimate child. Such a concept was inherited from the Civil Code of French and German which were modelled at the time of drafting the Meiji Civil Code.[58] Although the modelled French Civil Code had already abolished the provisions relating to the distinctions of legitimate and illegitimate children in 2001 [59] and the discriminated terms of 'legitimate' and 'illegitimate' in 2005[60], the modelled Germany Civil Code and the Japanese Civil Code only abolished the distinctions between legitimate and illegitimate children in 1997[61] and 2013 respectively. The discriminated terms of 'legitimate' and 'illegitimate' are still attaching to the children in Japan accordingly.

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[58] Noriko Mizuno, "*Parent-child Relationship in the Japanese Civil Code: Regarding Medical Technology for Reproductive Treatment*", GEMC journal, No. 2, 16-35, Tohoku University Global COE Program, 2010, p.18.
[59] Jens Beckert, "*Inherited Wealth*", Campus Verlag GmbH, 2004, p.105.
[60] Masha Belenky, "The Anxiety of Dispossession; Jealous in Nineteenth-Century French Culture", Rosemont Publishing Corp., 2008, p.142.
[61] *Supra Note 59*.

2.3.1 Different Types of Parent-child Relationship

The different types of parents' relationship put their natural children into different legal status and also determine how parents should exercise parental rights and duties to their children. By using the interpretation of Section 772 and 774 of the Civil Code 1947, if a child is born to a married couple, he is recognized as the legitimate child to both parents unless father deny his paternity. However, if a child is born to an unmarried couple, he is categorized as the illegitimate child to his birth mother. Moreover, such a child has a legal mother only until his father acknowledges paternity to the child. From the legal point of view, the classification of a child's status at the time of birth is completely depending on the relationship status of the respective parents. Without the existence of marital relationship between parents, the child can never be a legitimate child even after the acknowledgment of paternity by his biological father.[62]

Over these legitimate and illegitimate children, way to exercise parental rights and duties is different. Under Section 818 (3) of the Civil Code 1947, married couples exercise parental rights and duties jointly to their legitimate child during the existence of their marital relationship. However, non-married couples cannot exercise parental rights and duties jointly to their illegitimate child and the child's mother in this case has to exercise sole parental rights and duties to her illegitimate child.

In Japan, according to the vital statistics 2011[63], 1,027,452 children (97.8% of total live births) were born as legitimate children whilst 23,354 children (2.2% of total live births) were born as illegitimate children. Therefore, it may be noted that although two different types of parents' relationship, married and unmarried parents, are found in Japan, the latter is not so significant currently in terms of the proportion of child birth rate. However, the number of children born to unmarried parents is not a small number. It clearly shows that the number of cohabiting couples without marriage is not a small number too.

Under the current Civil Code 1947, although cohabiting couples (of opposite-sex) are partially treated in equal position with married couples in terms of marital obligation during the existence of relationship, and matrimonial property distribution

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[62] Section 789 of the Civil Code 1947.

[63] http://www.mhlw.go.jp/english/database/db.hw/ (visited on December 5th, 2013)

after the dissolution of relationship[64], it is possible for those children born to these cohabiting parents to be unfairly treated regarding the rights of to be cared for by both parents[65], in comparison with other children born to married parents.

Moreover, those children born to cohabiting parents are not registered with the same description in their mother's family registration book (*koseki*) as other children born by married parents. For instance, the child of married parents is registered as 'first born son' whilst the child of cohabiting parents is registered only as 'son' in *koseki*.[66] Therefore, whether a particular person is a legitimate child or not may be found out easily when the respective *koseki* is seen although *koseki* is not open to the public.[67] This may be an unreasonable discrimination practice from the standing point of equal treatment to all children irrespective of their parents' relationship status.[68]

2.3.2 Married Parents with Children

The Civil Code 1947 provides that two persons of opposite genders who are eligible and have a voluntary consent to get marriage are able to constitute a legal marriage by submitting a marriage notification form to the relevant local office.[69] Without doing it, the law recognizes no couple as a legal union. These legal married couples may own children in different ways; by giving birth their biological child naturally, or by adoption a child of their spouse or non-biological child to them, or through the assistance of medical technology treatment[70]. Depending on the way how to own their child, the way how to establish the legal relationship between them and their child may be different.

When a natural child is born to a married couple, it is not difficult to establish the parent-child relationship. The legal mother-child relationship can be obviously

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[64] Teiko Tamaki, "*Distribution of Matrimonial Property of Married, Cohabiting and Same-sex Couples in Japan*", Housei Riron, The Journal of Law and Politics, Volume 42, No. 1, 21-36, Law and Political Science Association, Niigata University, 2009, p.23.
[65] Both parents hold the joint parental rights and duties on their legitimate children whilst only one parent can take parental rights and duties on the illegitimate child.
[66] *Supra Note 43*, p.42.
[67] *Koseki* is confidential and kept by the local government. Only the respective family members and those with sufficient reason are available to apply for its certificate under the revised Family Registration Act 2008.
[68] Equal treatment rule under Article 14 of the Constitution of Japan.
[69] Section 739 of the Civil Code 1947.
[70] Although no law in Japan supports the medical technology for reproductive treatment, in reality, a number of children are born to Japanese married parents through such a technology.

proved by the fact of birth,[71] whilst the legal father-child relationship is partially proved by the fact of the existence of legal marriage between the child's mother and him because if a child is born during the existence of a marriage, the mother's husband is presumed to be a legal father of the child born. Add to this, the child needs to be born after 200 days of the marriage between the child's mother and her husband, or during 300 days after their divorce.[72]

In this circumstances, if the husband of the child's mother wants to challenge the existence of paternity to the child born, he may bring the case before the Family Court within one year after his awareness of the child's birth.[73] However, the starting point of the one-year limitation period has changed recently by a judicial precedent. The precedent broadened the interpretation of Section 777 and set up a new time frame. Consequently, such a case today may be brought before the Family Court within a year after the husband has noticed that the child is not biologically related to him.[74] Otherwise, the child will be recognized as the legitimate child to both parents.

When a minor child is jointly adopted by a married couple either through the ordinary[75] or the special adoption procedure[76], the adoptive parents become the legal parents of the child and the adopted child becomes the legitimate child to his adoptive parents.[77] Subsequently, the adoptive parents have to exercise parental rights and duties jointly on the child.[78] After the adoption has taken effect, both the child and the adoptive parents will be vested mutual rights of cared for, financial support and succession as long as the adoption is legally existed.[79]

It should be here noted that regarding with an ordinary adoption, although married couples have to adopt a minor child jointly and exercise parental rights and duties jointly too, the legal relationship between each adoptive parent and the child is built in separately.[80] In case one of the adoptive parents wants to terminate the adoptive relationship to the child, he/she can do it without any effect to the existence

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[71] Satoshi Minamikata, "*Family and Succession Law in Japan*", Kluwer Law International, 2013, p.104.
[72] Section 772(1) & (2) of the Civil Code 1947.
[73] Section 773-7 of the Civil Code 1947.
[74] *Supra Note 71*, p.106.
[75] The legal relationship between the adopted child and his/her natural parents is still maintained for a certain purposes.
[76] The legal relationship between the adopted child and his/her natural parents is terminated subject to the prohibition of marriage with blood relatives.
[77] Section 809 of the Civil Code 1947.
[78] *Supra note 71*, p.145.
[79] Section 809, 820, 877 and 877(1) of the Civil Code 1947.
[80] *Supra note 71*, p.124.

of another adoptive parent-child relationship between his/her spouse and the child.[81] This cannot be happened to a special adoption because the dissolution of a special adoption by a court order will terminate the legal relationship between both of the adopters and the adoptee.

If a legitimate child of one parent is adopted by the parent's spouse, jointly adoption is not necessary to do and the adoptive relationship will be affected only between the child and his adoptive (step) parent.[82] In this case, the natural parent-child relationship and the adoptive parent-child relationship will be established independently between each parent and the child. However parental rights and duties have to be exercised jointly by both parents. This may be one of the complex natures of Japanese family law in relation to the parent-child relationship.

In case a married woman who gives birth to a child with the help of medical technology for reproductive treatment, either through the Artificial Insemination by Husband (hereinafter AIH) or through the Artificial Insemination by Donor (hereinafter AID), the legal mother-child relationship may not be disputed whatever method it is used in the process. Regarding the AIH, the legal father-child relationship may not also be problematic because the husband's sperm was used during the process in order to produce a child. In such circumstances, the resulting child is presumed as the legitimate child to both parents.

With respect to AID, according to the judicial precedents,[83] the husband's prior consent to be treated AID to his wife is necessary in order to be able to establish the undeniable legal father-child relationship between the husband and the resulting child. If there is a lack of the husband's consent prior to the treatment, the husband, if he wishes to do so, may bring the case before the Family Court to refuse or challenge the existence of paternity to the child.[84]

If a child is born through a surrogacy arrangement with the fertilization utilizing egg and sperm from a married couple concern, or by the fertilization of donor egg and sperm from the husband of a married couple concerned, or by the fertilization of egg from the wife of a married couple concerned and donor sperm, no legal relationship is existed between that married couple and the resulting child even though

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[81] *Supra note 71*, p.145.
[82] Section 817(3) of the Civil Code 1947.
[83] *Supra note 71*, p.108.
[84] *Ibid*.

each or both of the married couple are genetically related to the resulting child.[85] If the married couple wants to establish the legal relationship between them and the resulting child, only adoptive parent-child relationship is possible to be.[86]

In this case, a married couple has to take the special adoption procedure to adopt the surrogate child. Article 817(6) of the Civil Code 1947 provides that '*both parents (birth parents) of a person to be adopted need to give a consent to the special adoption*'. With respect of that requirement, it was argued that as the consent of birth mother is essential to be a successful adoption, establishing (special) adoptive parent-child relationship in Japan is impractical for those surrogate children who were born by foreign surrogate mother in foreign countries.

As described above, under the Japanese practice, a woman who is unable to conceive and deliver a child can never be a legal mother of her genetic child without following the adoption procedure. On the other hand, a man who cannot even provide any sperm to the production of a child is able to be a legal father of a child by merely showing his consent at the time of AID treatment. Therefore, the current Japanese system is criticized as a discriminatory treatment system against the basic rules of gender-equal society.[87]

2.3.3 Unmarried Parents with Children

Despite the fact that Japanese family law recognizes the opposite-sex cohabiting couple as a *de facto* married couple and grants some legal rights,[88] it never recognize the existence of same-sex couple both in the past and present legislation.[89] It is in fact that cohabitation is not a new phenomenon to Japan since it has a long

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[85] *Supra note 71*, p.108
2006 (Kyo) No. 47, March 23, 2007, Minshu Vol. 61, No. 2.
http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo-.No..47.html (Visited on June 20th, 2013).
2004 (Ju) No. 1748, September 4, 2006, Minshu Vol. 60, No. 7.
http://www.courts.go.jp/english/judgments/text/2006.09.04-2004.-Ju-.No..1748.html (Visited on June 20th, 2013).
Rachel Brehm King, "*Redefining Motherhood: Discrimination in Legal Parenthood in Japan*", Pacific Rim Law & Policy Journal Association, Volume 18, Number 1, 189-216, 2009.
[86] *Ibid*.
[87] Rachel Brehm King, "*Redefining Motherhood: Discrimination in Legal Parenthood in Japan*", Pacific Rim Law & Policy Journal Association, Volume 18, Number 1, 189-216, 2009, p.216.
[88] *Supra Note 64*.
[89] Teiko Tamaki, "*National Report: Japan*", American University Journal of Gender, Social Policy & the Law, Volume 19, Issue 1, The Berkeley Electronic Press, 251-264, 2011, p.258.

history for several reasons.[90] The characteristics of current cohabitation opposite-sex unions may be viewed as a premarital stage or stepping stone for marriage because the duration of cohabitation is not so long, most of cohabitation unions are temporary state, the relationship between cohabitation and marriage is strong and the marital outcome of these cohabiting union is also high.[91]

When a natural child is born to a cohabiting opposite-sex couple, the child will be categorized as an illegitimate child to the birth mother because of the lack of parents' marital relationship.[92] Although the legal maternal relationship is existed between the child and his gestational mother, the legal paternal relationship is uncertain until paternity is acknowledged by the mother's partner as provided in Section 779 and 781 of the Civil Code 1947. If a cohabiting couple wants their child to become a legitimate child to them, two options are available for them; either by entering into a legal marriage or through the adoption procedure.

For the first option, whether an illegitimate child may become a legitimate child immediately after parents' marriage is substantially depending on the acknowledgement of paternity by the mother's partner. Without acknowledging paternity on the child, the child can never be a legitimate child even after parents' marriage; in this case, if the mother's partner wants to acknowledge paternity to the child after their marriage, he is able to do so. Only if these two requirements (acknowledging paternity and forming parents' legal marriage) are fulfilled completely, an illegitimate child is able to become a legitimate child to his biological parents. Then, these parents have to exercise parental rights and duties to the child jointly. For the second option, an illegitimate child may become a legitimate child to his adoptive (biological) parents immediately after the adoption has taken effect legally. In such a case, only one of the adoptive (cohabiting) parents may hold parental rights and duties to their adopted child solely.

If a legitimate child of one spouse is adopted by his/her parent's cohabitee, the child will be a legitimate child to both of them however the relationship status to each

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[90] *Supra Note 64*, p.24.
Supra Note 29, pp.48-54.
[91] James M.Raymo, Miho Iwasawa and Larry Bumpass, "*Cohabitation and Family Formation in Japan*", GCOE Discussion Paper Series, Global COE Program, 2008, p.8.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1144442 (Visited on June 20th, 2013)
Miho Iwasawa, "*Partnership Transition in Contemporary Japan: Prevalence of Childless Non-Cohabiting Couples*", The Japanese Journal of population, Volume 2, Number 1, 76-92, 2004, p.80.
[92] Section 772 of the Civil Code 1947.

parent is separately existed. In such a case, only one of the cohabited parents may exercise parental rights and duties to the child because joint parental rights and duties is not allowed to them because of the lack of marital relationship between them.

Regarding to use medical technology for reproductive treatment by the cohabited couples within Japan, although there is neither regulation nor law to decide the medical-technology-related-matters, the general guidelines of Japan Society of Obstetrics and Gynecology (hereinafter JSOG) allows only to legal married couple to be treated, not to cohabiting ones.[93] Such a basic principle is also preserved in the report of the Special Committee on Medical Technology for Reproductive Treatment which was set up in 1998 by the Ministry of Health and Welfare with the purpose of regulating medically assisted reproduction.[94]

As it is discussed above, the relationship between parents and children are not so simple in these days. Due to high medical technology development, the persons who want to be parents in these days are able to be a parent. At the moment, Japan is lack of legal rules and regulation to define the legal status of the resulting child, and to recognize the legal relationship between the 'wannabe parent/s' and the resulting child born by using medical technology treatment. According to the current family law, only two kinds of legal parent-child relationship is available: natural parent-child relationship and adoptive parent-child relationship. This may be an undesirable situation for the welfare of those children born through the medical technology treatments because they can be only the adoptee to their biological parents.

According to the JSOG report[95], in 2008, over 600 clinics in Japan were providing the medical technology for reproduction treatment and 21,707 of children were born through use of various technologies in these clinics. Therefore, it is important to consider how to protect and guarantee the rights of these children legally.

Actually, the existence of legal relationship between parents and the child is an important factor in deciding child-related matters after parent's divorce or separation. If there is no legal relationship between parents and the child, there will be no child-related problem between the divorcing or separated parents to resolve.

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[93] Azumi Tsuge, "*How Society Responds to Desires of Childless Couples: Japan's Position on Donor Conception*", Bulletin of Institute of Sociology and Social Work, Meiji Gakuin University, No.35, 21-34, 2005, p.22.

[94] Michiko Ishii, "*Medically Assisted Reproduction and Family Law in Japan*", in Japanese Family Law in Comparative Perspective, Edited by Harry N. Scheiber and Laurent Mayali, Robbins Collection Publications, 2009, p.184.

[95] http://www.jsog.or.jp/english/index.html (Visited on June 27th, 2013).

In the following part, the number of children involved in parents' divorce and separation will be examined for the post-war period (1948-2011).

2.4 The Divorce Trends and Number of Children Affected by Parents' Divorce in the Post-war Period (1947-2011)

2.4.1 The Situation of Divorced Parents with Children

Before giving an explanation about post-war period, it should be provided a brief background of divorce trends in the pre-war period. The prewar period, particularly the Meiji period, is one of the turning points of divorce in Japan. During that period, the government tried to build up a new modernized nation by encouraging industrial revolution. [96] According to Kawashima, although industrialization encouraged the possibility of divorces in the western world based on the cultural changes, it was not the case in Japan because Japan sustained her cultural values in the traditional household system which was firmly established in the Meiji period[97] as described in 2.2.

Therefore, in contrast to the experiences of other industrialized countries which Japan shared a number of demographic similarities, the divorce rate in Japan was not correlated to the industrial advancement.[98] In the Meiji period, the general trend of divorce rate was greatly declined[99] from 3.39 per 1,000 population in 1883 to 1.40 in 1903[100] and then it was gradually declined to 0.68 in 1943[101] as shown in below[102].

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[96] Alexander David Brown, "*Meiji Japan, A Unique Technological Experience?*", Student Economic Review, Volume 19, Trinity College Dublin, 71-83, 1995, p.71.
http://www.tcd.ie/Economics/SER/index.php (Visited on June 27th, 2013)

[97] Takeyoshi Kawashima & Kurt Steiner, "*Modernization and Divorce Rate Trends in Japan*", Economic Development and Cultural Change, Volume 9, Number 1, Part 2, The University of Chicago Press, 213-239, 1960, pp.215-217.
http://www.jstor.org/stable/1151843 (Visited on July 5, 2013)

[98] James M. Raymo, Miho Iwasawa and Larry Bumpass, "*Marital Dissolution in Japan: Recent Trends and Patterns*", Demographic Research, Volume 11, Article 14, Max Planck Institute for Demographic Research, Germany, 395-420, 2004, p.398. Available at
http://www.demographic-research.org/volumes/vol11/14/ (Visited on July 5, 2013)

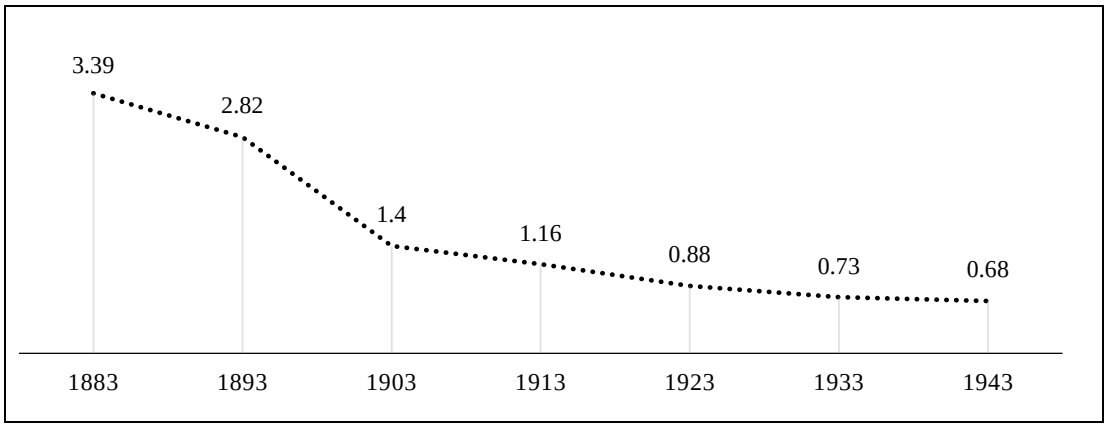
[99] With the enactment of Meiji Civil Code, the wife could not be divorced easily by their husband as before and then the divorce rate had dropped significantly.

[100] *Supra Note 97*, p.214.

[101] Trends in Vital Statistics by Prefectures in Japan, 1899-1998.

[102] It should be here noted that the reliability of statistical data at that time is questionable because a limited number of couples in those days registered about the changing of their personal status such as marriage or divorce.

Figure 2.2: Trends in Divorce Rate in Japan (Pre-war Period)



Sources: For 1883-1903, Takeyoshi Kawashima and Kurt Steiner, "Modernization and Divorce Rate Trends in Japan", 1960.

For 1913-1943, Trends in Vital Statistics by Prefectures in Japan, 1899-1998.

However, after the Second World War, the society has changed, the former household (*Ie*) system was abolished and the 1947 Constitution came out with the introduction of individual dignity and equal treatment to both sexes.[103] As a result, divorce became socially more accepted and more common.[104] Afterwards, the divorce rate has started to be increased. By the published data of the Vital Statistics in Japan, the divorce rate in 1947 was reached to 1.02 per 1,000 population which was increased by 1.5 times of that in 1943 which was before the Second World War.[105]

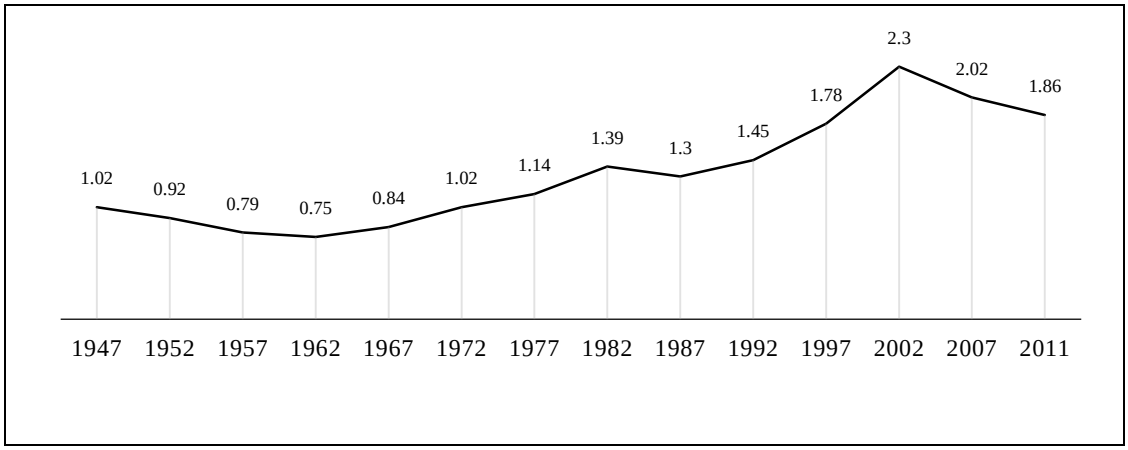
The divorce rate was reversed and slightly decreased again thereafter. In 1963, it reached the lowest point to 0.73. Then, the divorce rate was steadily increased again until 1983 when it was kept at 1.51. The reversed downward trend was happened again in reaching to 1.26 in 1988. Since then, Japan returned back to the divorcing society with a rapid increasing divorcing rate and reached its peak of 2.30 in 2002. The period between 2002 and 2011 has a downward trend of divorce rate and it was kept at 1.86 in 2011.

At present, divorce is relatively free from the relatives and community control, is recognized as a private matter clearly and also the social stigma of divorce is

[103] *Supra Note 29*, p.146.
[104] Mark D. West, "*Lovesick Japan*", Cornell University, 2011, p.176.
[105] The divorce rates in 1944-46 were unknown.

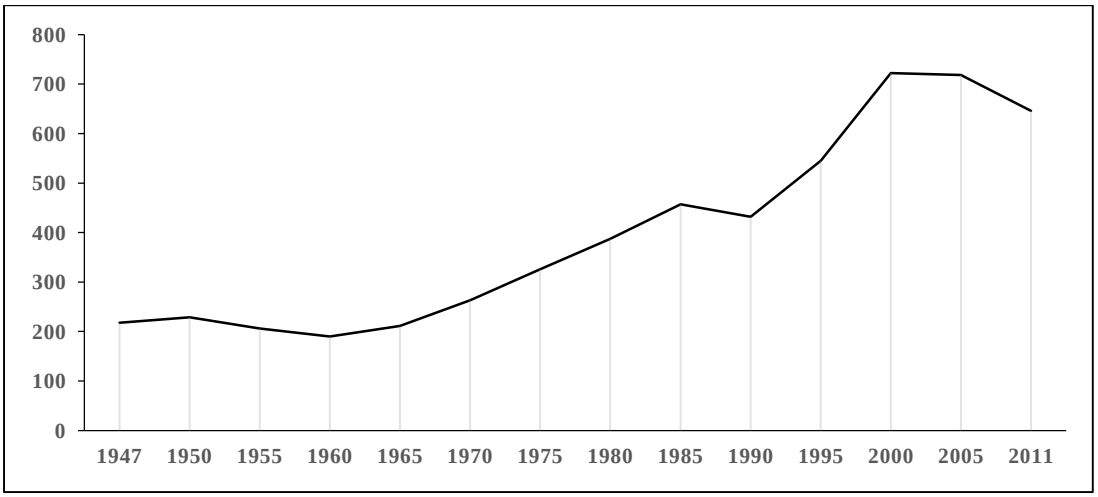
becoming weakened. This is really an opposite pattern of divorce in the prewar period when divorce was strictly adhered to traditional customs.

Figure 2.3: Trends in Divorce Rate in Japan (Post-war Period)



Source: Trends in Divorce, Divorce Rate and Population (1950-2008), Vital Statistics, Ministry of Health, Labor and Welfare in Japan[106]

Figure 2.4: Trends in Average Number of Divorce per Day (Post-war Period)



Source: Trends in Major Indices for the Vital Events, Vital Statistics 2011, Ministry of Health, Labor and Welfare

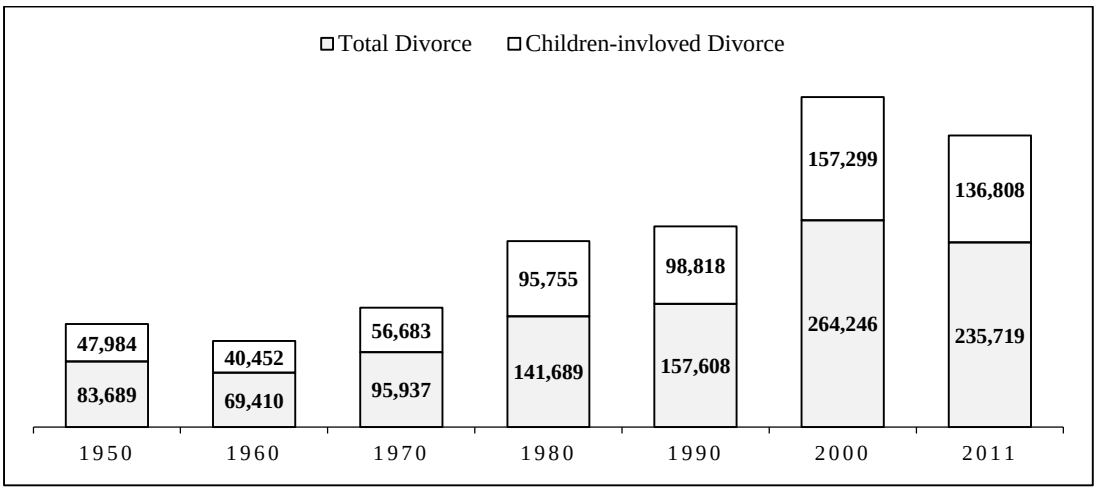
Although divorce itself is an individual matter, it may be followed by a series of serious consequences such as distribution of matrimonial property, changing of

[106] Only for 2011, the result was calculated by myself using required data from Vita Statistics 2011.

family name and establishing a new family registration book, designation of parent to exercise parental rights and duties, determination of custodial parent, deciding about child maintenance payment, discussing about the child contact with noncustodial parent, and so forth. In this thesis, only child-related matters are covered by and therefore, the following discussions will mainly be concerned with the child-related matters for divorced parents.

By studying annual published data in the vital statistics, it was found that the changing trends of divorce rate was accompanied by the changing number of children who were involved in parents' divorce. These two factors were strongly linked: the increasing divorce rate also increased the number of children involved and the reversed pattern was also true. In the early days of 20th century, only about 20% of divorce involved children[107], however, since 60 years ago, over half of the divorcing parents had children and it remains constant throughout that long period. In 2011, 136,808 of parents' divorce involved 235,200 children under the age of 20.

Figure 2.5: Trends in Number of Divorce in which Children Involved (1950-2011)



Source: Trends in Divorces by Number of Children Involved in Divorce, Japan, Vital Statistics 2011, Ministry of Health, Labor and Welfare

As shown in figure 2.5, about 60% of total divorce involved children. Therefore, it may be here noted that the existence of children had no restraining effect on parents to get a divorce because in some circumstances, parents thought that getting

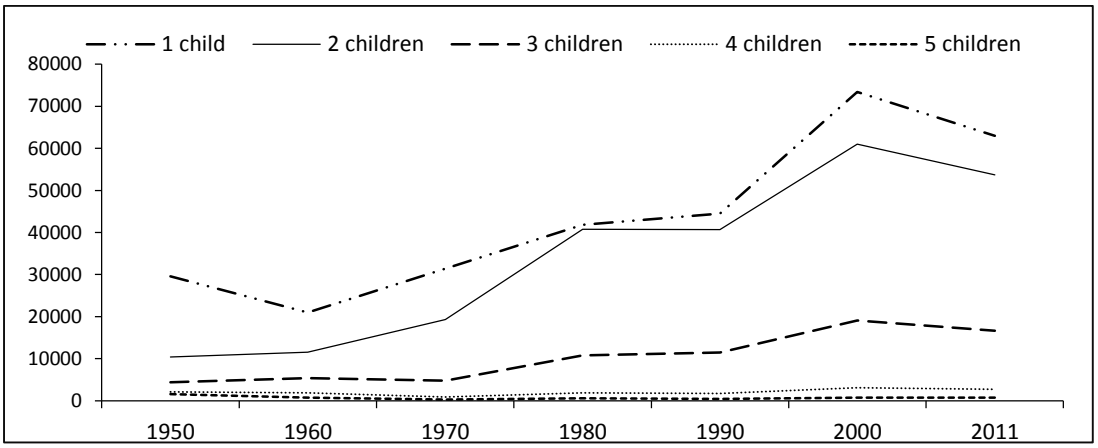
[107] *Supra Note 29*, p.156.

a divorce might be a better solution to both of them and children as well. It was pointed out that the trend after 1950 is a reversal trend that took place before 1950.[108]. Before 1950, parents who have children were trying to avoid divorce because they also wanted to avoid financial and social consequences to their children. Nowadays, however, parents with children are likely to seek a divorce for the sake of their children as they think that frequent parental conflicts before children may have a negative effect on them and may harm their welfare.

Additionally, financial situation of women in these days are also a reverse trend that was in the past. They are no longer completely dependent on their husband finance.[109] Also social stigma to divorce is becoming weakened. Partially because of these reasons, a large proportion of divorces in these days are initiated by the wife whose marriage is disrupted.

Since 2000, 0ver 10% of children have experienced parents' divorce before reaching their adulthood. Nonetheless, the number of children involved in each divorce case may vary from at least 1 to at most 5.

Figure 2.6: Trends in Divorce by the Number of Children Involved (1950-2011)



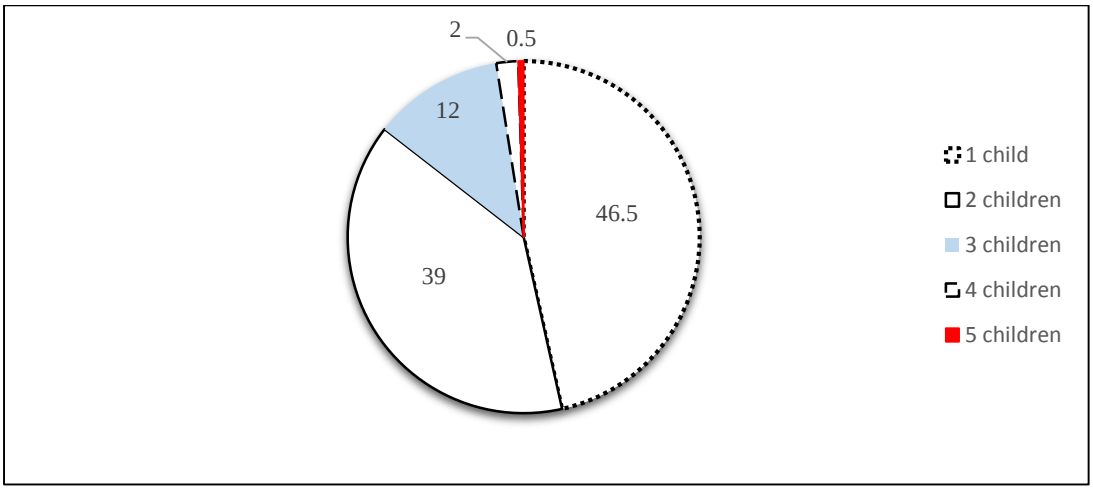
Source: Trends in Divorce by Number of Children Involved in Divorce, Japan, Vital Statistics 2011, Ministry of Health, Labor and Welfare

The above figure indicated that parents with one or two children are more likely to dissolve their marital relationship than those who have three or more children.

[108] Yamashita Katsutoshi, "*Divorce, Japanese Style*", Japan Quarterly, No.33, Volume 4, 416-420, 1986, p.417.
[109] *Ibid.*

In the last decade (2001-2011), on average, about 85.6% of total child-involved divorce had one or two children, about 12% had three children, only 2% had four children and the rest 0.5% had five children.

Figure 2.7: Distribution of Child-involved Divorce (2001-2011)



Source: Trends in Percent Distribution of Divorces by Number of Children Involved in Divorce, Japan, Vital Statistics 2011, Ministry of Health, Labor and Welfare

By using the data in Figure 2.5, 2.6 and 2.7, one may be figured out the 2011general situation of divorce as below.

The total number of 646 divorces was occurred on a daily basis. 58% of them involved children. Therefore, 375 couples with children were seeking divorce every day. Amongst them, 174 couples had one child each, 146 had two children each, 45 had three children each, 8 had four children each and only 2 had 5 children each. As a total, 643 children were involved in parents' divorce every day. That data-based estimated number is almost the same with the result which is obtained by dividing the total number of children involved in parental divorce (235,200) in 2011 by the number of days that a year has (365). Therefore, a final conclusion may be drawn here that, in 2011, over 600 children's lives were threatened in every single day because of parents' divorce.

This is the statistical evidence only for 2011 which is the most recent trend of divorce in which children involved.

2.4.2 The Situation of Separated Parents with Children

No principle and procedure is provided in the Japanese family law for a cohabiting couple to form or dissolve their relationship. Accordingly, no judicial statistics can be found for the number of cohabiting couples and of the dissolution of cohabiting relationship. Nonetheless, there may be a number of child-related disputes in the Family Court which are disputed between cohabiting parents.

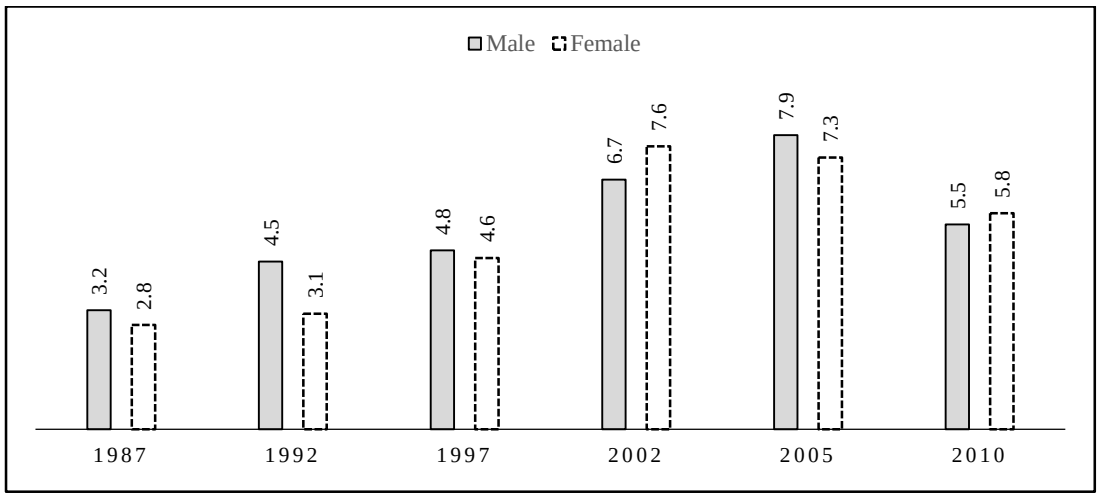
The only available data regarding cohabitation experience may be found out from 'the Fourteenth Japanese National Fertility Survey' which was conducted by 'the National Institute of Population and Social Security Research' in 2010.[110] The finding results in this survey were calculated on the responses of 10,581 unmarried respondents who were aged 18 to 34. Therefore, its findings may not represent the whole population in Japan.

The survey relating to cohabitating couples was started since 1982. Compared with the results of the previous surveys, the result of 2010 indicated that the proportion of respondents who had/have cohabiting experience with an opposite-sex person had been decreased to 5.5% for male and 5.8% for female. The highest proportion for male respondents was occurred in 2005 (7.9%) and that for female was in 2002 (7.6%). However, in a strict speaking, both sexes of aged 25-34 were more experienced in cohabitation.

According to the vital statistics, in 2011, 58.3% of total bridegrooms and 61.3% of total brides were the aged 25-34. Although it is not for sure whether these brides and grooms had the cohabitation experiences prior to their marriage, James M. Raymo, Miho Iwasawa and Larry Bumpass found in their research that cohabitation and marriage has a strong link in Japan.

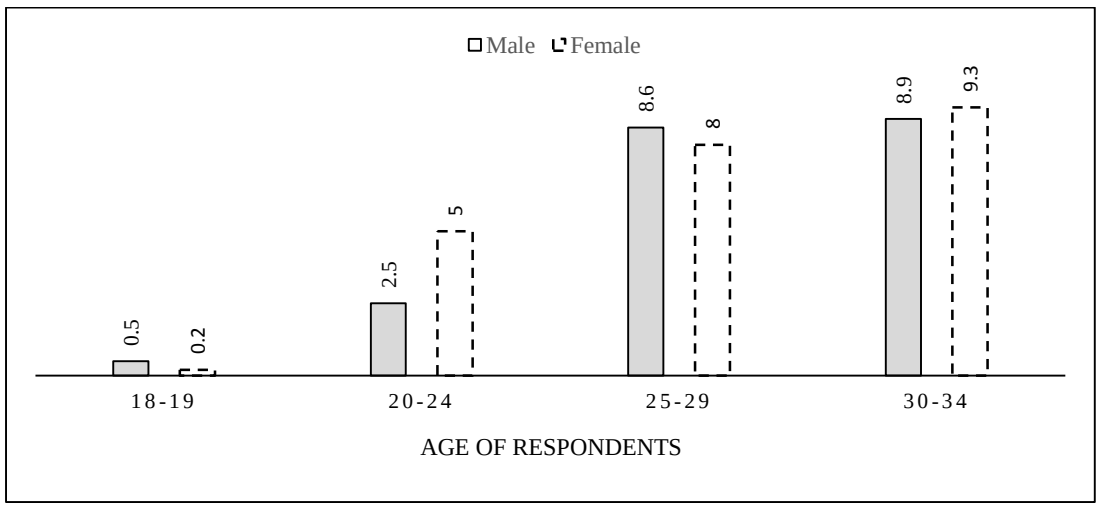
[110] http://www.ipss.go.jp/index-e.asp (Visit on 30th June, 2013).

Figure 2.8: Unmarried Persons of Aged (18-34) Who Have/Had Cohabited Experiences (1987-2010)



Source: Proportion of Never-married Respondents Who Have Experienced Cohabitation, The Fourteenth Japanese National Fertility Survey in 2010, Attitude toward Marriage and Family among Japanese Singles

Figure 2.9: Percentage of Unmarried Persons by Age Who Have/Had Cohabited Experiences in 2010

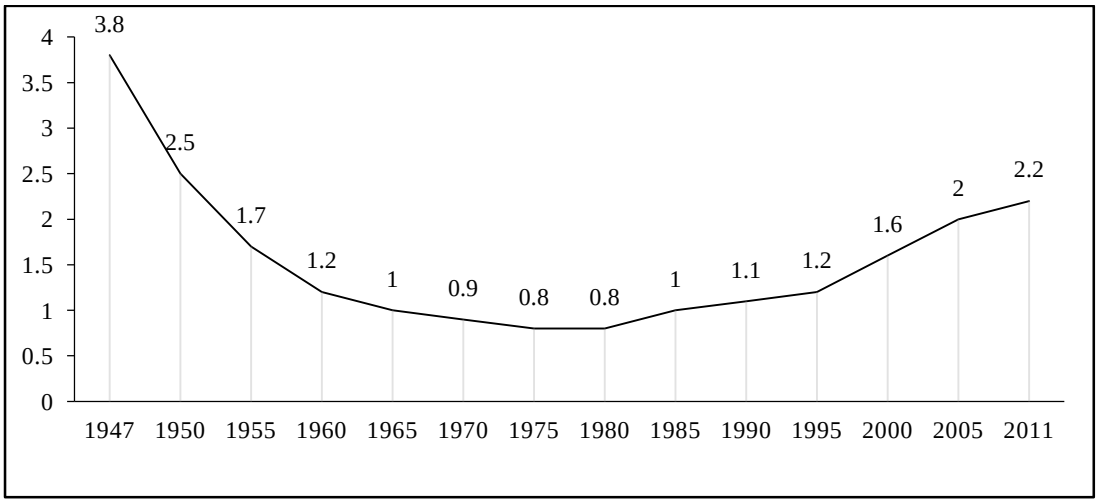


Source: Proportion of Never-married Respondents Who Have Experienced Cohabitation, The Fourteenth Japanese National Fertility Survey in 2010, Attitude toward Marriage and Family among Japanese Singles

The above figure shows that under 9% of unmarried persons who are in their late 20s and about 9 % in their early 30s have/had cohabiting experience. It was the highest proportion in 2010. Although it may not cover the whole population, it may be imagined that cohabitation still occupies a small proportion in the formation of a relationship between opposite-sex persons.

However, in contrast to the trend of cohabitating experiences which was shown in above figures, the vital statistics of Japan indicated that the number of children born from unmarried parents between 2005 and 2010 took a stable upward trend. Actually, the illegitimate child birth rate has been rising since 1980 and kept at a constant increasing rate although the current situation is incomparable to the rate in 1947. However, it may be here noted that the possibility of cohabitation opposite-sex couples may be higher in the future than in the past and present although it still remains low in comparison with some western countries

Figure 2.10: Trends in Percent Distribution of Illegitimate Child Birth Rate (1947-2011)



Source: Trends in Live Births and Percent Distribution by Legitimacy: Japan, Vital Statistics 2011, Ministry of Health, Labor and Welfare

Regarding same-sex cohabiting couples, no statistics is available yet because of the lack of survey research on it. Therefore, the number of such unions is still unknown. However, in the Japanese history, particularly to say in the Tokugawa

period, male homosexuality was extremely common and widely accepted by the society.[111] Such a common practice was prohibited by Article 266 of the *Kaitei Shinritsu koryo* in 1872.[112] However, in 1880, the Meiji Penal Codes abolished that prohibition and it became legalized again.[113] Since then, the homosexual people has disappeared from the public but what is happening in reality was unknown. In the late 20th century, male homosexuality was coming out again through a variety of media.[114]. Nonetheless, any public debate or discussion on the matter of same-sex relationship was never found throughout history.

As aforementioned, only married couples (of opposite-sex) have a full legal recognition and other cohabiting opposite-sex couples may have a partial legal recognition. Same-sex couples have no legal recognition at all. Therefore, the following discussions on child-related matters will deal with married and cohabiting opposite-sex couples in particular.

2.5 Child-related Disputes for Divorced or Separated Parents

The specific child-related matters that will discuss in this part cover parental rights and duties, custody, maintenance, contact and child abduction by a parent. The former issues are belonging to the private law whilst the last one is to the public law. The applicable principles and procedure for two different fields of law will be different as well. Moreover, the reliable legal institution for resolving these disputes is also different; the private law matters shall be resolved at the Family Court exclusively, whilst the public law matter, child abduction by a parent, will be resolved either at the Family Court or the District Court based on the nature of claiming. Nonetheless, it is true to say that all of these issues are related to the welfare of children, particularly of those from divorced families. Therefore, a number of academics/scholars have undertaken a variety of researches on these matters from various perspectives. The current research will be one of them, however, is viewed from the legal perspective only.

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[111] Gary P. Leupp, "*Male Colors: the Construction of Homosexuality in Tokugawa Japan*", University of California Press, 1995, p.1.
[112] Gregory M. Pflugfelder, "*Cartographies of Desire: Male-Male Sexuality in Japanese Discourse, 1600-1950*", The Regents of the University of California, 1999, p.159.
[113] *Supra Note 64*, p.24.
[114] Mark McLelland, "*Male Homosexuality in Modern Japan: Cultural Myths and Social Realities*", Curzon Press, 2000, pp.29-34.

2.5.1 Principles for Child-related Disputes

Under this topic, the discussion concerns with the statutory principles for the dissolution of child-related disputes for divorced parents.

a. Parental Rights and Duties

The term 'parental rights and duties' in current Japanese family law is mainly dealt with the responsibilities of a parent rather than the rights or authorities over his/her child.[115] This may be one of the prominent features of Japanese democratic society which was developed after the Second World War. For a long period prior to that time, a parent (mostly a father) had been legally vested supreme authority over his children, however, it was extinguished with the enactment of the Civil Code 1947. Within the scope of parental rights and duties stipulated by current Civil Code, a parent has to perform two main responsibilities to his/her child; one is that taking care and control over the person of the child and another one is that administering the child's property.[116]

Regarding the first part of parental rights and duties, a parent has to provide an appropriate custody arrangement regarding daily life of the child, must provide a proper standard of education to the child, has to decide the place where the child should live, may set up the disciplinary rules over the child to some extent and may give a consent to the child to start working.[117] With respect to the second part, a parent has to administer the property of the child with the same care as if it were his/her own and has to represent the child in any legal proceeding that has connected with the child's property.[118] In certain circumstances, the child's consent is necessary for parents to participate in a legal proceeding on behalf of him/her.

In performing such parental rights and duties, the family law sets out fundamental principles that determine which parent legally holds and exercises it when they are in a relationship.

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[115] *Supra Note 71*, p. 142.
[116] *Ibid*.
[117] Section 820-3 of the Civil Code 1947.
[118] Section 824 and 827 of the Civil Code 1947.

Table 2.1: Distribution of Parental Rights and Duties during the Existence of Parents' Marital Relationship

Parent-child relationship	**Parents' relationship**	**Status of a child**	**Who will hold parental rights and duties?**
Natural parents	Married parents	Natural legitimate child	-Both
	Cohabiting parents	Natural but illegitimate child to the mother and to the father in case he acknowledges paternity	-One of the parents ❖ Mother in principal ❖ Father may hold it only if necessary steps had taken after the acknowledgement of paternity
Adoptive parents	Married parents	Adopted legitimate child	-Both as long as joint-adoption is existed. -In case one of the adoptive parents cut out the adoptive relationship to the child, he/she will lose parental rights and duties.
	Cohabiting parents	Adopted legitimate child to an adopting parent	-Only one of the cohabiting couple will hold parental rights and duties.

As described in Table 2.1, married parents are exercising parental rights and duties jointly to their natural child.[119] The same is applicable to those children who are born to married parents through AIH or AID subject to certain conditions. Unmarried or cohabiting mother will hold and exercise parental rights and duties solely to her illegitimate child in principal. When the child's father has acknowledged paternity to his illegitimate child, he may hold parental rights and duties on the condition that the child's mother has agreed to transfer it. If the mother does not agree on it and transferring parental rights and duties is disputed between them, the father may apply to the Family Court. Then the court will decide such a dispute through the determination procedure.[120]

[119] Section 818 (3) of the Civil Code 1947.
[120] Section 819 (4) & (5) of the Civil Code 1947.

By the end of determination procedure, only one of the cohabiting parents will be vested parental rights and duties. In some cases, it is possible for the other parent who lost parental rights and duties to be vested a mere custody of the child. If the situation is so, the parent who has parental rights and duties is in a superior position to the other parent who has a mere custody of the child. As a result, any important decision which may affect the welfare of the child shall not be concluded without the consent of the parent with parental rights and duties.

As for the adoptive parents who are in a martial relationship, they shall exercise parental rights and duties jointly to their adopted child.[121] However, if one of the adoptive parents terminates adoptive parent-child relationship, such a parent will lose parental rights and duties thereafter because the dissolution of an adoption will extinguish any relationship between the child and his/her adoptive parent except the prohibited ex-parent-child relationship to enter into a marriage. Then the other parent who continues to retain adoptive parent-child relationship will hold and exercise sole parental rights and duties to the adopted child.

In case one's legitimated child is adopted by his/her new spouse, as described in 2.4, jointly adoption is not required and then natural parent-child relationship and adoptive parent-child relationship is separately existed although both married parents exercise joint parental rights and duties to the child. If the adoptive parent dissolves the adoptive relationship to the child, only natural parent-child relationship remains between the child and his/her natural parent. Afterwards, the natural parent will restore the whole parental rights and duties as before. These are the fundamental principles for exercising parental rights and duties during the existence of parents' relationship inclusive of both marriage and cohabitation.

When a married couple dissolves their relationship, either by a divorce or by a (non-judicial) separation, the rights to exercise parental rights and duties will also be needed to allocate again. If a married couple who has either natural or adopted children, gets a divorce, one of the parents will be vested singly parental rights and duties and the other has to lose it after divorce.[122] If such a married couple is living separately due to the breakdown of their relationship, both parents retain joint parental rights and duties as long as they do not get into a divorce. However, with regard to

[121] Section 818 (2) & (3) of the Civil Code 1947.
[122] Section 819 (1) & (2) of the Civil Code 1947.

daily care of the child, the resident parent has more opportunities to participate in the child's daily life than other non-resident parent.[123] When a cohabiting couple with natural or adopted children dissolves their relationship, the parent who has already exercised sloe parental rights and duties will continue to hold it exclusively.

These are the fundamental principles for parents to allocate parental rights and duties after dissolution of their relationship. Other child-related matters for those parents may include custody of the child, the matter of contact with noncustodial parent and the child maintenance payment by the noncustodial parent.[124]

For those parents who are in a separation but without in a valid divorce, there are no specific principles for them to resolve child-related disputes. However, in case they are disputed over these matters, they may apply to the Family Court since the dissolution of their relationship is recognized as a de facto separation.[125] In such a case, the court will apply Section 766 of the Civil Code 1947 as a reliable legal provision.[126]

b. Custody

Although Japanese family law does not give a clear definition on 'custody', one may be said that the concept of 'custody' is much related to the first part of parental rights and duties and less or no related to the second part. More strictly speaking, the custody which is provided in Section 766(1) of the Civil Code may literally means physical custody of a child attached with a restricted rights of legal custody. In this regard, physical custody may mean the rights to take care the child on a daily basic and legal custody may mean the limited rights to decide child-related matters.

When a married couple dissolves their relationship by a divorce, one of the parents will be vested custody over the child according to the sole custody practice after a divorce that has been being practiced in Japan since the Meiji period. Although it is possible for a parent who has custody of the child to be vested with limited rights

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[123] Satoshi Minamikata, "*Resolution of Disputes over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Nonlitigious Approach in Chotei (Family Court Mediation)*", Family Law Quarterly, Number 32, Volume 2, 489-506, 2005, p.492.
[124] Section 766 of the Civil Code 1947.
[125] *Supra Note 71*, p. 147.
[126] 2000 (Kyo) No. 5, May 1st, 2000, Minshu Vol. 54, No. 5. (Visited on 9th July, 2013) http://www.courts.go.jp/english/judgments/text/2000.5.1-2000.-Kyo-.No.5-101952.html

of deciding certain child-related matters, he/she may be restricted to exercise freely the rights to administer the child's property, to represent the child in the legal proceedings and to make major decisions unilaterally which may affect to the welfare of the child.[127]

According to the court's practice, vesting both rights, parental rights and duties and custody, to the same parent is preferable to allocating rights to each parent in order to avoid unnecessary difficult things and restrictions in exercising the custody parent's rights. For instance, in case the parent who has mere custody but not parental rights and duties of the child is unable to represent the child in the legal proceeding and such a parent is not allowed to apply for a Japanese passport for the child. This is an undesirable inconvenience for a parent who takes custody of the child.

Accordingly, such a practice is not a problem-free one. Regarding the role of a noncustodial parent who has no parental rights and duties after a divorce, a number of scholars were quite dissatisfied with the Japanese practice. One of these scholars commented in one of his papers that *parents who lose both physical and legal custody in a divorce had virtually no rights with respect to their children. They may not know where their children live, and custodial parents can change the children's names and have the children adopted by either a grandparent or a new spouse without the non-custodial parents' consent.*[128] Another scholar strongly criticized to the current system that '*Japanese legal institutions are ill-equipped and must be reformed to allow for joint custody*'.[129]

However, a Japanese scholar expressed Japanese way of thinking that *so long as children are being raised by loving and caring parents, outsiders should certainly not be allowed to interfere in their care, nor weaken – no matter how slightly – the parent-child bond.*[130] According to another scholar, *Japanese people are fond of maintaining status quo in order to avoid further stress to the child*[131]. Therefore, from

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[127] *Supra Note 71*, p.147.
[128] Colin P.A. Jones, "*In the Best Interests of the Court: What American Lawyers Need to Know about Child Custody and Visitation in Japan*", Asian-Pacific Law & Policy Journal, Number 8, Volume 2, 166-269, 2007, p.215.
[129] Matthew J. McCauley, "*Divorce and the Welfare of the Child in Japan*", Pacific Rim Law & Policy Journal association, Volume 20, Number 3, 589-606, 2011, p.589.
[130] Takao Tanase, "*Community and the Law: A Critical Reassessment of American Liberalism and Japanese Modernity*", Translated and Edited by Luke Nottage and Leon Wolff, Edward Elgar Publishing Limited, 2010, p.68.
[131] *Supra Note 123*, p.499.

the Japanese point of view, sharing parental rights and duties and/or sharing custody may not be necessarily required for the best interest of the child.

Regarding the interpretation on what is the best interest of the child by the Japanese view is that *once children are securely placed in a new environment, it is best for them to stay in that environment*[132] *because children have often gotten accustomed to living in a single-parent family and dragging them into hostilities between their parents would have an adverse impact on them.*[133] In view of that, 'one-parent family after divorce' system is well developed in Japan since more than a century ago. Due to such a way of thinking, it may be difficult to be granted for transferring parental rights and duties from one parent to another even though an application is made to a Family Court according to Section 819(6) of the Civil Code 1947. However, the court may transfer it if it satisfies that transferring the rights is more beneficial for the welfare of the child than the present situation and/or the current situation has a possibility to harm the welfare of the child,.[134]

Under certain circumstances, a third party other than the parents may be granted custody of the child by a private contract or court decision.[135] For instance, in case a couple gets a divorce on the ground that the wife is suffering from an unrecoverable disease, it is generally true to say that the father will hold sole parental rights and duties after their divorce. Nonetheless, father is also unable to take daily care of the child due to the nature of his business or something else. In such a case, the most suitable person will be chosen from the child's parents' family members and near relatives to take custody of the child. In many reported cases, the child's grandmother usually takes it.[136]

However, regarding the case in which a grandparent makes a self-application of granting custody over the child, the courts' practices were diversified: some were likely to accept the application whilst some were likely to refuse based upon their own legal interpretations whether a grandparent is an eligible person to make such an application.[137]

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[132] http://www.japantimes.co.jp/news/2008/07/15/national/campaigners-call-for-dual-custody-of-children/#.Ud6IncGmrIU (Visited on July 11th, 2013)
[133] http://www.law-t.jp/pdf/the-mainichi-daily-news_20111223.pdf (Visited on July 11th, 2013)
[134] *Supra Note 71*, p.159.
[135] *Ibid*.
Supra Note 123, p.493.
[136] *Supra Note 129*.
[137] *Ibid.*

When a married couple lives separately without dissolving their marital relationship by a divorce, the parent who lives with the child may be presumed as a parent with custody of the child. Unlike the parent who has custody of the child from divorced families, he/she still retains both parental rights and duties and custody over the child. Therefore he/she is able to exercise both rights independently only if non-resident parent has agreed to do so.[138]

Those parents who have vested parental rights and duties and/or custody over a child have to perform their responsibilities appropriately without any harm to the welfare of the child. In case they do not exercise so, the Family Court may remove or suspend their rights to exercise parental rights and duties.[139] In certain cases, suspension of the rights up to two years may be a perquisite for a court to make a removal order later. The major causes for a parent to be removed or suspended their rights are that he/she abuses the vested rights, or abuses the children either physically or mentally, or intentionally neglects the children for a long period.[140] In case the parent's abusive behavior has changed for the better during the monitoring period, the court may not remove parental rights and duties from them.

After allocating custody rights as described above, the noncustodial parent has legally to lose the opportunity to live with the child under the same roof. However, he/she still has an opportunity to maintain relationship with the child through various types of contact either direct or indirect.

c. Contact

In accordance with the case law, child contact in Japanese family law may be divided into two types, direct and indirect contact.[141] Direct contact may mean that both the child and noncustodial parent are present in person at a designated place for the purpose of contact and they can see and speak each other directly without any medium but under supervision if necessary, whilst indirect contact may mean that both the child and noncustodial parent are unable to see and speak directly however they can contact each other through certain medium such as video recording and

[138] *Supra Note 71*, p.146.
[139] Section 834 of the Civil Code 1947.
[140] *Ibid*.
[141] *Supra Note 71*, p.149.

telephone. Additionally, they can also communicate each other by sending letters, postcards and e-mail.[142]

For this reason, one may be noted that the real meaning of contact is not merely a visitation between a child and his noncustodial parent but is included both meeting each other and contact through medium. However in reality, most scholars who did research on child contact matter in Japanese family law were likely to use the expression 'visitation' instead of 'contact'. This may be a misnomer from the practical point of view as the term 'visitation' does not cover the real meaning. Therefore in this thesis, the term 'contact' is used explicitly with the purpose of avoiding misunderstanding on the real meaning of contact.

Formerly, Japanese Civil Code was lack of specific provision with respect of child contact. A number of scholars were unhappy with it and blamed for it continuously. At that time, only by interpreting child contact as a necessary matter regarding custody as provided in the old version of Section 766(1), the Family Court was able to handle child contact cases when a non-resident parent made an application for it. Although the law did not recognize child contact as a necessary factor to determine between divorced parents, the court accepted it as a necessary matter for the welfare of the child.[143] Accordingly, since the 1960s, the court was likely to grant a child contact in case the court believed that it is necessary to promote the welfare of the child. However, in case there was any likelihood which might be harm the welfare of the child, the court would refuse to grant a child contact.[144]

Actually, child contact is a difficult matter when a custody parent is not willing to cooperate in the process. Even after both parents has agreed through mediation procedure or the court has granted a determination order, the possibility of seeing the child regularly is uncertain for a noncustodial parent under the refusal of the custody parent. In such a case, the reasons for refusal might be various: that the custody parent merely denied it based on the bitterness feeling to see his/her ex-spouse or that he/she did not want to allow to create a strong attachment between the child and his noncustodial parent or that he/she did not want to shake the child's life which had already stabilized in his new family environment or that the child is sick or that the child has unavoidable/unexpected event at the school, etc.

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[142] *Ibid.*
[143] *Supra Note 123*, p.501.
[144] *Ibid*, pp.501-502.

Amongst these reasons, the first two reasons were uncertain to be accepted for a court in considering the enforcement of a child contact, however the rest are quite reasonable and the court might accept it. In one prominent case, the court has denied a child contact based upon the fact that the child was adopted by his step-parent and has already enjoyed in his newly formed environment.[145] By seeing this, it comes to understand that the child's need to see his noncustodial parent for his personal or emotional development was the crucial matter for a court in considering whether to grant a child contact. Consequently if a child does not have a wish to see his noncustodial parent, the opportunity of noncustodial parent for seeing his/her child might be ceased thereafter.

Under such circumstances in which the child and/or the child's custody parent has strongly refused to make a contact with noncustodial parent, the court may hesitate to take any action on the mediation agreement or the court's determination order of child contact[146] although the law provided some possible ways to enforce them.[147] As a result, the enforcement method on child contact agreement or determination order was weakened in the past. Therefore, it was criticized that *under Japanese case law, visitations are weak, not strict, rights. Courts can curtail such rights when a child is content in a new household.*[148]

Nonetheless, it is not the case anymore in Japanese family law because Section 766 of the Civil Code was finally revised in 2012 and soon after its revision, the prominent court judgments in which the court imposed a certain amount of pecuniary fine on non-compliant parent who has failed to cooperate in the implementation of child contact agreement has been come out.[149] On 28th March, 2013, the Supreme Court has made a series of judgments dealing with the imposing penalty on non-compliance parent.[150]

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[145] Takao Tanase, "*Divorce and the Bests Interest of the Child: Disputes over Visitation and the Japanese Family Courts*", Pacific Rim Law and Policy Journal Association, Volume 20, No.3, 563-588, 2011, p-568.
Supra Note 130, Takao Tanase, p. 67.
[146] *Supra Note 145*, pp.571-575
[147] Theint Theint Htwe, "*Intermarried Couples and Divorces in Japan: Resolution of Child-related Disputes after Divorce*", The Journal of The Study of Modern Society and Culture, No.53, Graduate School of Modern Society and Culture, Niigata University, 37-60, 2012, p.56.
[148] *Supra Note 130*, p. 70.
[149] http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403550_text (Visited on July 15th, 2013)
[150] 2013 (Kyo) No. 41, 47, 48, March 28th, 2013.

In one of these three judgments, the court approved the inferior court's decision which imposed fine as a penalty on the child's custody mother for her failing to allow child contact as has agreed at the time of divorce. The most highlighted thing by the Supreme Court in this case was that in order to impose a penalty for failing to comply with the former agreement or court's decision was that the contents of contact arrangement must be described very clearly and specifically in the mediation document or court's determination order.

For instance, the frequency, date, time and place of the contact, the method of passing a child at the contact date, the interval of time for contact, and the substituted arrangement in case one or both of them cannot afford to come and see at the contact date under sufficient reasons. Otherwise, the mediation document or the court determination order may not be useable to impose a penalty on the non-compliant parent. Grounded on such failure to describe in very detailed contact arrangements, two of the three cases has declined to impose a fine penalty by the Supreme Court at the same date.

By studying these judgments, one may be unhappy with the Supreme Court's reason for her rejecting the inferior court's decisions because the given reason was totally relying on the procedural inadequacy and did not relate to the main purpose of the agreement or the court's determination order. Actually, the final decision in both mediation and determination procedure is needed to be approved by a Family Court judge. In the mediation process, in case a Family Court judge is not satisfied with the contents of a final mediation agreement, he/she has an authority to give an instruction to amend or add some parts of the agreement. Needless to say that a determination order is made by a Family Court judge him/herself.

Therefore, if such a procedural inadequacy is a matter of fact that can deny the enforcement of a court's decision, there should be another remedy for those denied parties because the parties concerned are not the only responsible persons for such an inadequacy. Furthermore, in order to avoid the same problems in the future, the Supreme Court should make a significant guideline or instruction dealing with the necessary requirements in making a mediation agreement or a court determination order in deciding child contact arrangement.

Regarding out-of-court service which may provide an assistance in the implementation of a contact agreement or a court's order of contact, the Family Problems Information Center (hereinafter FPIC) is the only non-profit organization in

Japan which was first established 20 years ago. FPIC is mainly dealt with the family problems and may also offer out-of-court mediation service for certain matrimonial disputes including divorce and child-related matters.[151] Its head office is located in Tokyo and branches are distributed to nine other places - Osaka, Nagoya, Fukuoka, Chiba, Utsunomiya, Hiroshima, Matsue, Yokohama and Niigata.[152]

Although it is a non-profit organization, its service is not a free of charge one. Customers have to pay certain amount of payment depending on their requested services. Nonetheless, the service charges have not been fixed yet. The method of charging and offering services may be varied slightly from one place to another. According to the explanation of a member from Niigata FPIC, their services charges may vary from ¥2,000 to ¥10,000 depending on the types of service. Actually, all members of Niigata FPIC are voluntary workers, they may need fund to survive their organization and to operate their functions properly. For this purpose, they demand a service charge from their customers.

Regarding the child contact arrangement, for instance, Niigata FPIC acts as an intermediary organization between custody parent and noncustodial parent of the child. When they receive an application for arranging child contact, they will set up the first meeting to explain their offering services to both parents. Only if both parents agree on the terms of the service, they will make a paper work to acknowledge their agreement. After fixing all requirements, they will help in making a safe and comfortable contact between the child and his noncustodial parent.

In such a case, they will help to pick the child up from a custody parent, will pass the child then to a noncustodial parent, will keep their eyes on the child and noncustodial parent from a proper distance and place during the contact period, will receive the child from the noncustodial parent after contact period and will send back the child to the custody parent at last. This is one of their offered services for a child contact. As Niigata FPIC is a newly established one, they do not have their own office yet. Therefore, all meetings are usually held at a restaurant or somewhere and it may make their customers for extra charges.

As described, child contact in Japan was a big issue for the lack of effectiveness in the past. However, under the recent developments, it becomes a

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[151] *Supra Note 71*, p.52.
[152] http://www1.odn.ne.jp/fpic/soudan_1.htm (Visited on July 16th, 2013)

reliable system to be fulfilled the needs of the people, both the child from divorced families and their noncustodial parent. Actually the recent development has promoted not only importance of child contact but also of child maintenance payment which is also an important issue for the welfare of the child as described below.

d. Maintenance

Under the revised version of Section 766(1), the word 'child maintenance' has been appeared in it. Before the revision, same as the matter of child contact, child maintenance was lack of expression in the law and was merely recognized as a part of the custody which was provided in the old version of Section 766(1). If there was a dispute regarding child maintenance payment by a noncustodial parent, it was able to resolve at the family court through either mediation or determination procedure. Since that time, according to the case law's interpretation, every parents is responsible to give a financial support for raising their child regardless of their legal relationship to that child.[153] Therefore, whether the child is a legitimate or illegitimate child, whether the parent holds parental rights and duties or not, whether the parent has physical custody or not and whether the parent has a right of contact were not pertinent matters for parents in determining a parent's responsibility of child maintenance. Being a parent of the child is a sufficient reason to be imposed such a kind of obligation on them.[154]

Although parents were obliged to child maintenance payment like this way, they were neither under the pressure nor strongly forced to make a regular payment.[155] Some family court mediators were unhappy even to impose such an obligation on the noncustodial parent as they think that the custody parent should be obliged it solely[156] same as in the past practice. Some conservative legislators also blamed on the practice of imposing an obligation of child maintenance payment on the noncustodial father. They argued that such a practice was a contrary to the Japanese tradition.[157] Under such a way of thinking and forceless system, child maintenance system in Japan had

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[153] *Supra Note 71*, p.148.
[154] *Ibid*.
[155] Barbara Stark, "*International Family Law: An Introduction*", Ashgate Publishing Limited, 2005, p.218.
[156] *Supra Note 123*, p.502
[157] *Supra Note 155*, Barbara Stark.

a number of defects such as partly or totally failure to make a regular payment by the noncustodial parent, lack of collecting system, lack of statutory computing method and so forth.

The past survey showed that only between 10 to 20 percent of responsible parents were making the child maintenance payment[158] and the rest were totally reluctant their obligation. Theoretically, when a noncustodial parent was failing to do his/her obligation of paying child maintenance as have agreed themselves or determined by a court before, there are two possible ways for a custody parent to enforce the agreement or the determination order: one was that claiming for a lump sum maintenance payment from the non-compliant party according to the revised version of Section 151-2 of the Civil Execution Act and another one was prosecution the non-complaint party for his failure to act under Section 218 of the Penal Code. However in reality, taking a criminal action against the non-compliant party was very rare even though the custody party made an effort for its enforceability.

Regarding the civil action, the non-compliant party might be free from his/her obligation based on the fact that he/she was in a bad or insufficient financial situation.[159] In some circumstances, the noncustodial parent had entered into a new marriage life and consequently he/she had to share his finances between two households. It might be a difficult situation for him/her and finally, he/she would stop paying child maintenance payment in a certain period. In such a case, the court would hesitate to take an action upon it.

According to the literatures, the problem of failure to make child maintenance payment was a worldwide problem[160] and not the problem of only Japan. However, at the present, most of the industrial countries in the world have already taken some steps to be ensure that noncustodial parent paid regular child maintenance. For instance, the Unites States raised its legal measure in order to improve the compliance rate of child maintenance payment whilst the United Kingdom established a particular institution, the so-called Child Maintenance Service, to collect child maintenance payment from the noncustodial parent. However, Japan is still a lack of taking such a legal measure

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[158] *Supra Note 155*.
[159] *Supra Note 71*, p.148.
[160] Child Support, OECD Family Database, OECD – Social Policy Division – Directorate of Employment, Labor and Social Affairs http://www.oecd.org/els/family/oecdfamilydatabase.htm Visited on July 18th, 2013.
Supra Note 155, p.218.

and the supporting institution.[161] Even though the strong legal action is available to take action against the non-compliant parents, whether the noncustodial parent has sufficient financial resource might be a considerable fact.

Besides, there was also a lack of statutory computing method to determine the amount of payment. Although some rate schedules were applicable by the particular Family Court, they are not nationwide accepted yet. Therefore, in general, while determining the amount of child maintenance payment at the Family Court, all relevant factors such as the financial situation of both parents, their current marital status, the fundamental needs of the child, the number of children who needs to be provided were taking into account.[162] Even after agreeing or determining it, one or both of the parents may make an application anytime later in case they want to reduce or increase the amount of payment under a reason of changing status.[163] These are the current practice of child maintenance payment and it does not change much even after revising Section 766(1) of the Civil Code 1947.

As mentioned previously, allocating parental rights and duties, determining the custody, arranging child contact and imposing parental obligation of child maintenance are the crucial matters for divorced or separated parents. In certain cases, parents may not satisfied with their vested rights. After that they may try to change the existing situation. Consequently, one more important child-related problem, child abduction by a parent, has come out.

e. Child Abduction by a Parent

Child abduction by a parent simply may mean that a child (minor) is abducted or kidnapped by his own parent while he is under the custody of other parent. Such a case is usually happened when parents are living separately either on the breakdown of their relationship or during the divorce process. The reason of abduction may be that parents believe if the child is under his/her custody at that moment, they may take advantages under the Japanese practice of *status quo* principle to be granted the

[161] *Supra Note 155*, pp.217-218.
[162] *Ibid*, p.218.
[163] *Supra Note 71*, p.149.

custody of the child after the dissolution of their relationship. [164] According to the *status quo* principle, a parent who had already have a physical custody of the child is usually awarded the legal custody too on a divorce.[165]

Even after getting a divorce, abduction by a noncustodial parent may be happened in case he/she is not satisfied with the allocation of parental rights and duties after a divorce or a separation and wants to alter the possession of parental rights and duties according to the Section 819(6) of the Civil Code 1947. If the abducting parent makes an application by using this Section, the Family Court may reconsider the changing situation again and let to alter the parental rights and duties from a left-behind parent to an abducting parent.[166] On the other side, it is also possible for the left-behind parent to make an application for the return of the abducted child in different ways.

In such a situation, the problem is that it is difficult to enforce a return order and sometimes the result may be unsatisfactory.[167] This may be because the Japanese authority are traditionally likely to avoid to interfere the private matters by using a physical force even though an abducting parent does not comply with the return order. Moreover, they hesitate to treat a child as a moveable property. For instance, in a prominent case, a non-compliant parent did not care for being imposed penalty due to his/her inappropriate manner of failing to comply with the court order.[168] Such kind of people usually reluctant what the court ordered them to do and they usually do what they want to do with respect to the abducted child.

Regarding child abduction in Japan, there were some interesting judicial precedents and it may be worthy to study them in order to understand the Japanese system well. One of the prominent cases was that a mother's application to seek a return order under the Habeas Corpus Act for the wrongful retention of an illegitimate child by her ex-cohabitee.[169] The District Court dismissed her application based on the fact that the child had been well stabilized under the custody of the abducting

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[164] Theint Theint Htwe, "*The Legal Responses to Child Abduction by Parents in Japan and England and Wales*", The Journal of The Study of Modern Society and Culture, No.56, Graduate School of Modern Society and Culture, Niigata University, 87-107, 2013, p.96.
[165] *Supra Note 128*, p.217.
[166] *Supra Note 71*, p.152.
[167] *Supra Note 123*, p.504.
[168] *Supra Note 123*, p.504.
[169] 1994 (O) No. 1437, November 8, 1994, Minshu Vo.48, No. 7 at 1337.
http://www.courts.go.jp/english/judgments/text/1994.11.08-1994.-O-.No..1437.html (Visited on July 21st, 2013.

father with the help of his wife to care the child. Add to this, the financial situation and living standard of the abducting father was satisfactory to be secure the child's life. Therefore the court decided that placing the child under the custody of abducting father was not contrary to the best interest of the child and as a result returning the child to the mother was not necessary anymore.

However, the Supreme Court did not agree with it. The Supreme Court ruled that unless it was found that placing the child under the custody of the mother who has parental rights and duties was extremely inappropriate for the welfare of the child, it was unreasonable to place the child under the custody of a father who did not acknowledge paternity and was also lack of parental rights and duties. The decision showed that the role of a parent who had parental rights and duties should be respectful in deciding the child-related matters. In such a case, the financial stability of each parent was not a decisive factor although it was a relevant one.

Another case was imposing a penalty on the abducting father who had joint parental rights and duties at the time of committing an abduction.[170] In this case, a married couple was living separately and fighting for the rights of custody over the child who was, at that moment, living with the mother. One day, the father took away the child by using a physical force and he was then arrested for abducting his own child. Regarding imposing a criminal penalty on that father, the opinions of presiding Judges from the Supreme Court were diverse. The main concern was that whether such a family dispute should be resolved in the criminal justice system by using a rigid procedure or it should be resolved at a Family Court through amicable procedures.

All presiding judges agreed that it was the best way to resolve such a kind of family dispute at a Family Court fundamentally because taking a criminal action against the abducting father may be inappropriate matter from the Japanese point of view. However, most of the presiding judges did not accept the father's action as a legal act which may be deniable the criminal liability of his wrongful action. They pointed out that, in case such an action was regarded as a legal act now, parents would later attempt to abduct their child in this way instead of resolving their custody dispute at a Family Court legally.

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[170] 2004 (A) No. 2199, December 6, 2005, Keishu Vol.59, No. 10. http://www.courts.go.jp/english/judgments/text/2005.12.06-2004.-A-.No..2199.html (Visited on July 21st, 2013.

The father's action in this case was totally contrary to the socially-accepted thinking and inappropriate to be allowed to happen again in the future. Mainly for these reasons, majority of the presiding judges has agreed to impose a criminal penalty on the abducting father according to the Section 224 of the Penal Code even though he had still has parental rights and duties over the abducted child. The precedent showed that the traditional thinking of avoiding to intervene the private matter was still remained in the justice system. However it was not strong enough to neglect the real needs of the society to be protected properly.

Another prominent case was happened in 2000 when a foreign father abducted his daughter who was under the custody of the mother.[171] In this case, a Dutch father and a Japanese mother had been living separately. They had a daughter of two years old and she was at that moment living with the mother. The Dutch father then took away his daughter with the purpose of taking her to the Netherlands which was his home country. However, he was arrested when he tried to pass the immigration at the airport. Then he was prosecuted for the abduction of her daughter with the purpose of transporting the child to a foreign country. The Supreme Court judges unanimously agreed to recognize that the father's action in that case was constituted a criminal offense of kidnapping under the Section 226(1) of the Penal Code even though the father was still holding joint parental rights and duties.

By studying these precedents, one may be said that most of the abducting parents are fathers and the abduction usually takes place when the parents' relationship was fragile. Holding parental rights and duties is not a justifiable ground for committing a criminal offence of child abduction even though it is an important factor in deciding child-related matters.

The following section will explain in detailed how these child-related disputes, parental rights and duties, custody, contact, maintenance and parental child abduction are resolved under the Japanese system.

2.5.2 Procedures for the Resolution of Child-related Disputes

[171] 2002 (A) No. 805, March 18, 2003, Keishu Vol.57, N0.3 at 371. http://www.courts.go.jp/english/judgments/text/2003.03.18-2002-A-No.805.html (Visited on July 22nd, 2013.

Under this topic, the resolution system of private law matters inclusive of determination of parental rights and duties, custody, contact and maintenance at the time of parental divorce will be explained with their relevant legal provisions. In general, it may be said that all these disputes are resolvable either by the agreement or through the in-court mediation procedure or by a court determination order.

In case a married couple with the child agrees to get a divorce, they have to determine, as a legal requirement, who will take parental rights and duties over the child after their divorce.[172] Only if they reach an agreement on it, a submission of their divorce registration form could be made to the respective local office. Once their registration form is accepted as a valid one, their divorce process is completely finished and subsequently their relationship is legally dissolved. Then they may discuss other child-related matters such as who will take the custody of the child, how to arrange the regular contact between the child and non-resident parent and how should be paid maintenance payment from non-resident parent[173]

This is a common type of divorce in Japan and is called a divorce by mutual consent, in Japanese *kyogi rikon*.[174] In 2011, almost 90% of total divorces[175] was concluded by this way and in about 80% of total divorces in which children are involved, sole parental rights and duties was awarded to the child's mother.[176] Although Japanese people are fond of getting a divorce by mutual consent, the system is not a perfect one and has some defects from the legal point of view. For instance, in the divorce registration form, it is needed for divorced parties to write down the children's name to whom they hold parental rights and duties after divorce only.

Although they may have other agreements regarding custody, contact and maintenance matters, there is no place in this form to record it. This may make trouble them later in case they have to prove their former agreements. This is one of the disadvantages of divorce by mutual consent system. If the divorcing parties want to avoid such a kind of deficiency, there is a possible way to record their agreement legally. It is that making a notarial deed privately under the supervision of a notary public.[177] Since a notarial deed is a legally binding document, in case a responsible

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[172] Section 819 (1) of the Civil Code 1947.
[173] Section 766 (1) of the Civil Code 1947.
[174] Section 763 of the Civil Code 1947.
[175] It may include both divorce with children and divorce without children.
[176] Vital Statistics in Japan, 2011.
[177] http://www.moj.go.jp/ENGLISH/CIAB/ciab-01.html (Visited on July 22nd, 2013).

person fails to do his obligation properly as has agreed before, theoretically, he/she shall be taken a legal action without a court judgment.[178]

Another defect is that if a divorce is concluded by mutual consent, all decisions relating to children matters are completely done by the parents themselves. There is no overlook from legal professionals on a general basic. This is actually a traditional way of solving family problems which was being practiced for more than a century. Nonetheless, some legal scholars do not satisfy with such a practice because they have a concern relating to just and fairness between the divorced parties.[179] Moreover, some may concern over the extremely simple way of registration system because it may sometimes let to occur a submission of unilateral divorce registration form without the knowledge other party.[180]

In case parents agree on a divorce but do not agree on one or more of the child-related matters, or one of the parents do not agree even on a divorce, the case may be brought before a Family Court by one or both of them. At the Family Court, according to the principle of mediation prior to litigation, they have to enter into the mediation procedure mandatorily[181] in order to mediate their disputes with the help of a Family Court mediation committee which is usually composed of a Family Court judge and two mediators, one is male and another is female.[182] During mediation process, the mediation committee will help them to reach an agreement and only if they agree on both divorce and child-related matters, a mediation document will be issued them. The mediation document has the same enforceability as a court judgment. Within ten days after finalizing the mediation process, they have to submit their divorce registration form attached with a copy of mediation document.[183] Such a kind of divorce is called divorce by mediation, in Japanese *chotei rikon*, and in 2011, 10% of total divorces was completed through this procedure.

In case both parties do agree on divorce but disagree on the child-related matters after passing through the mediation procedure, the Family Court judge will make a decision only on the child-related matters by using the determination

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[178] *Ibid*.
[179] *Supra Note 129*, p.602.
[180] *Supra Note 71*, p.81.
[181] Section 257 of the Family Affairs Proceedings Act 2011.
[182] Satoshi Minamikata, "*Mediation for Mediators*?", Hosei Riron, The Journal of Law and Politics, Volume 39, No. 1, 133-152, Law and Political Science Association, Niigata University, 2006, pp.135-137.
[183] *Supra Note 71*, p.86.

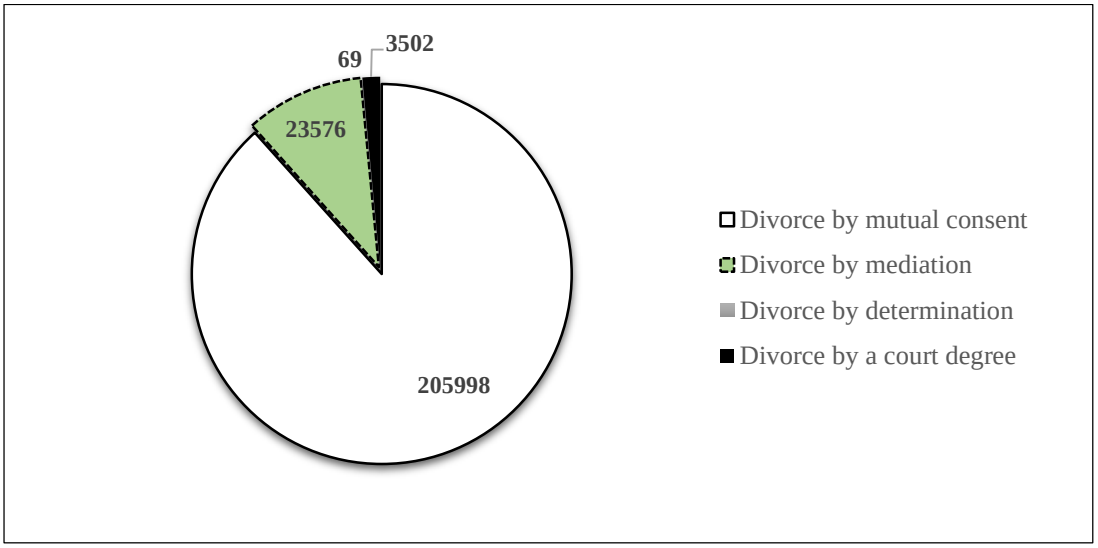
procedure. After that the divorce case may be concluded. In case parties are failing to reach an agreement on a divorce even after trying to mediate their disputes, the divorce-wanted party may bring the case to the last resort of litigation procedure at the same Family Court. Even during the litigation procedure, the parties may be encouraged by the presiding judge to reach an agreement by themselves.

If they follow the judge's suggestion and are reachable an agreement, they make a divorce there with a compromise, in Japanese *wakai rikon*. If the parties are still failing to reach an agreement and fighting over their disputes, the judge will decide their disputes by using the relevant legal provision. This is called a divorce by a court decree, in Japanese *saiban rikon* and in 2011, only 1.5% of total divorces are concluded by this way.

As stated by the above explanation, although child-related disputes could be resolved, either by an agreement or through a mediation procedure or by a determination order at a Family Court[184], in some circumstances, they are resolved by the litigation procedure. The main cause is that parties do not reach an agreement on divorce during the mediation procedure and determination procedure is also inappropriate to use for resolving it. Unless the parents agree to get a divorce, there is no cause to resolve their child-related disputes. Therefore, the court has to consider first whether a divorce should be granted or not. After that the judge will make a decision regarding the child-related matters. Such a kind of resolution method is an exceptional and the number is not so significant according to the reliable official statistics.

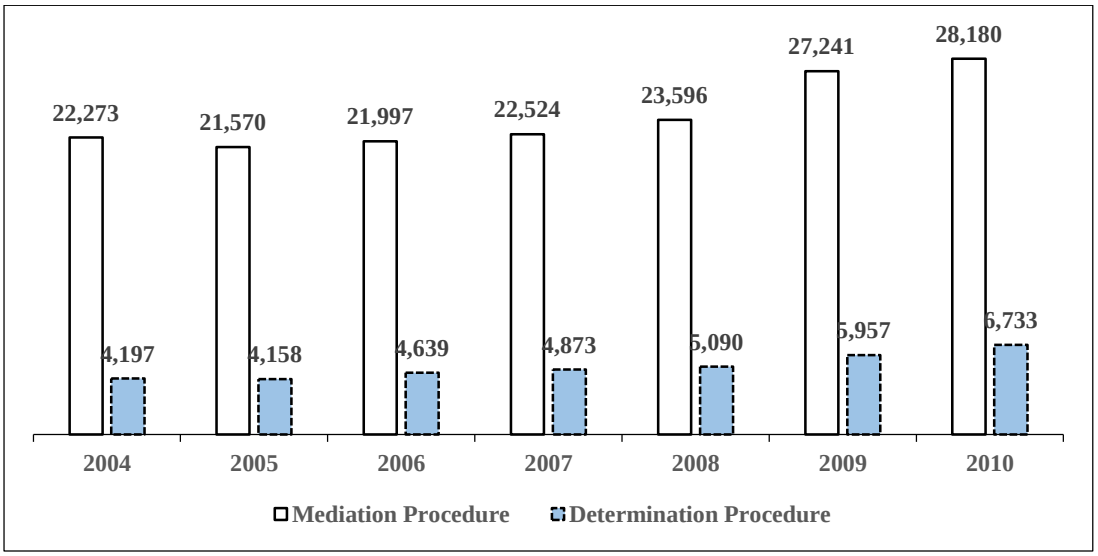
[184] http://www.courts.go.jp/english/judicial_sys/domestic_personal_index/domestic_personal/index.html#02_2 (Visited on July 22nd, 2013).

Figure 2.11: Different Types of Legal Divorce in 2011



Source: Trends in Divorces and Percent Distribution by Legal Type, Japan, Vital Statistics 2011, Ministry of Health, Labor and Welfare

Figure 2.12: Number of Child-related Disputes Resolved by Mediation and Determination Procedure (2005-2010)

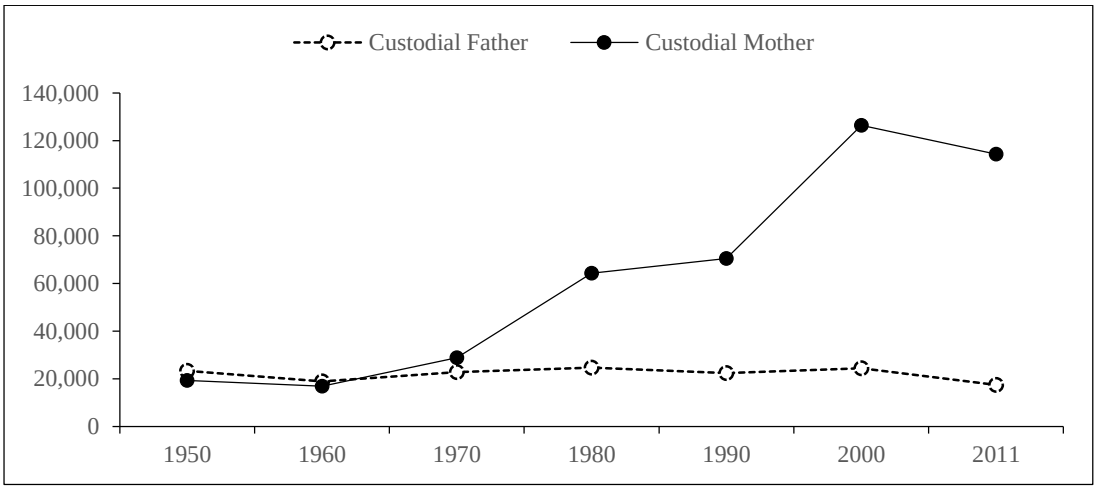


Source: For 2004-2008, Annual Comparison of Numbers of Newly Received Conciliation / Adjudication Cases, Guide to the Family Court of Japan, 2010, Supreme Court of Japan

For 2009-2010, Cases Newly Received and Cases Disposed by Kind of Domestic Conciliation / Determination Cases,

http://www.stat.go.jp/english/data/nenkan/back61/1431-25.htm
(Visited on July 22nd, 2013)

Figure 2.13: Trends in Number of Father and Mother who take parental rights and duties after a Divorce (1950-2011)



Source: Trends in Divorces and Percent Distribution by Number of Children and Custody of Wife and Husband: Japan, Vital Statistics 2011, Ministry of Health, Labor and Welfare

Figure (2.12) shows the trends of allocation of parental rights and duties between parents after a divorce. Until the mid-1960s, most of the parents with parental rights and duties were fathers. However the trend was reversed since the 1970s and nowadays, most of the parents with parental rights and duties after a divorce are mothers under the influence of maternal preference rule. Accordingly, as has mentioned in 2.7.1(e), most of the parents who abducted their own children were the child's fathers who had a strong concern for losing the custody of their child after a legal dissolution of their relationship. The following discussion is about the detailed procedure for the resolution of child abduction by a parent.

When a parental child abduction is occurred, there are two possible ways that the parent with custody may seek a legal protection. One is that claiming a return order either by using the Family Affairs Proceedings Act or by the Civil Procedure Code or by the Habeas Corpus Act and another is that prosecuting the abducting parent by

using the Penal Code.[185] Amongst them, claiming a return order at a Family Court by using the Family Affairs Proceedings Act is the most appropriate resolution method from the Japanese point of view as has mentioned in 2.7.1(e). The Supreme Court also gave a priority to resolution at a Family Court rather than the resolution at a District Court or a High Court in case there is no special circumstances to do so. However, in reality, the enforceability in a Family Court proceeding may not be strong enough to hand over the child from the abducting parent to the parent who lost custody of the child because of the nature of family court proceeding

Claiming a return order at a District Court following the Civil Code Procedure may be a little strange as the child is not a property or an asset of the parents. However, in one of the former cases, the court allowed a bailiff to take the abducted child (like as a moveable property) from the abducting parent by using physical force.[186] From the child welfare point of view, forcible separation of a child from his/her own parent is not an appropriate manner because it may cause distress and severe sadness to that child. However, viewing it from other side, if placing a child under the control of an abducting parent may be harmful the welfare of the child, the child should be removed from the control of abducting parent as soon as possible. In such a case, forcible removal may be the last resort for the welfare of the child. The main disadvantage of using this method is taking time to reach a conclusion and it is undesirable in such a situation.

Claiming a return order at a District Court or a High Court by using the Habeas Corpus Act and it is a common way of resolving method on parental child abduction problem even though the original purpose of the Act is not to use for child abduction cases.[187] The reason for using it as a common way is that the parent who lost the custody of the child can expect a quick court proceeding and a prompt child return by using this process. Moreover, the enforceability under this Act is relatively strong in comparison with the former two methods. For instance, according to Section 18 of the Habeas Corpus Act, if the abducting parent does not comply with the court order of returning the child, he/she may be under detention for a certain period. This may be a proper legal response to a person who does not obey the court order without sufficient legal reason.

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[185] *Supra Note 123*, p.503.
[186] *Ibid* at 504.
[187] *Supra Note 123*, p.503.

If the court thinks that detention is not still necessary to enforce the court order, it may make an order of paying fine instead.[188] In such a case, the abducting parent may oblige a certain amount of fine per day that he/she fails to comply with the court order of returning the child. If the abducting parent is still reluctant what the court ordered him/her to do even after imposing a fine penalty, the court may make then a detention order as a requirement. Sometimes, it is possible that the abducting parent is still refuse to return the child although he/she has been detained for his/her non-compliant action. Then the court may order a bailiff to take the child from the abducting parent and transfer then the child to the custody parent. These are the possible ways of enforcing a return order under the Habeas Corpus Act.

The most controversial procedure to resolve the parental child abduction problem is that prosecution the abducting parent according to the Section 224 or 226 of the Penal Code. As has mentioned in 2.7.1(e), there are scholars' different views on whether the abducting parent should be punished in the Criminal Justice System or not. Nonetheless, some abducting parent has already been punished in this way. If a custody parent choose this way to resolve a dispute of child abduction, his/her expectation may not be for returning the child but for imposing a criminal penalty on the abducting parent.

These are the current using principles and procedures of the specific child related problems and the later part will look what problems are still existed to be resolved.

2.6 Recent Development, Current Situation and Existing Problems

When one looks back the historical background of family law in Japan, it may be seen a number of partial or total reforms. Whatever the reform was, all were aiming at fulfilling the needs of society which is changing constantly. To fit with the society changes, the legal system also needs to reform from time to time and, some said that legal reform is a never-ending process. Recently, Japan has made a reform on the principles and procedures of child-related disputes resolution system. This is a welcome movement of Japan to promote the rights and interests of the child from divorced families. In this section, it aims to explain these legal developments of child-

[188] *Supra Note71*, p.154.

related dispute resolution, the effect on current situation and the existing problems which still needs to be solved.

2.6.1 Recent Legal Development for the Resolution of Child-related Disputes

In the past, lack of joint parental rights and duties and legal provision of contact and maintenance got a special attention among the scholars of Japanese family law. They had publicized their opinions from different perspectives and called for a required legal reform to be secure both the rights of the child and of the divorced parents.[189] Some scholars evaluated the system based upon the fairness point of view whilst some criticized it relying on their personal experiences. Majority of those people who strongly blamed on the Japanese family law system were foreign fathers and their blame was mainly concerned with the lack of joint parental rights and duties and the inadequate rights of child contact.[190]

Responding to these people's voices, the Japanese Government made an amendment to the Section 766 (1) of the Civil Code in 2012. The recent amendment was relating to the matters of contact and maintenance but not to the parental rights and duties. Japan is still fond of practicing sole parental rights and duties for divorced parents. In the old version of Section 766 (1) of the Civil Code 1947, only determining which parent take custody over the child was a requirement for divorcing parents. The matters of contact and maintenance were not specifically mentioned there to be considered.

However, both matters of contact and maintenance were not totally free from legal and judicial acknowledgement. Even under the old version of Section 766 (1) of the Civil Code 1947, contact and maintenance were recognized as 'necessary matters regarding custody'. Therefore, if there was any problem relating to them, parties were able to resolve it at a Family Court and the court resolved them by recognizing as parts of the custody. The actual problem was the insufficient measurement of enforcement system and most applicants felt depressed on it.

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[189] *Supra Note 128*.
Supra Note 129.
Supra Note 145.
[190] *Supra Note 129*.

Under the revised version of Section 766 (1), the position of both contact and maintenance are being raised slightly and are becoming the necessary matters which have to be considered at the time of divorce. Accordingly, under this section, the importance of determining custody, contact and maintenance are on the same level and parents need to pay attention to an equal degree. This is a desirable progress for the children because these all matters may impact on their welfare. After such a revision has done, a remarkable change was occurred regarding the enforcement of a contact agreement as mentioned in the next part.

Another important progress for promoting the welfare of the child is making to increase the involvement of children in particular Family Court proceedings. The main purpose of that development is to improve the rights of the child by letting them to express their own opinions in the court proceedings which may effect on them.[191] In this new provision of FAPA, the child's age is not limited to participate in the court proceedings, however, the capacity of the child may be taken into account. The main concern for the child's participation is that the child should have an intelligence to follow the court proceedings properly. If the child is lack of ability to follow the court proceedings, he/she may be represented by a lawyer or someone else.

As described above, Japanese family law has developed in both principles and procedures fields recently and the effect of such developments on enforcement method was obvious as described below.

2.6.2 Current Situation of the Resolution of Child-related Disputes

Soon after revising Section 766 (1) of the Civil Code, notable Supreme Court's judgment were come out regarding the enforcement of a contact agreement and accordingly a significant shift was occurred.[192] Before these precedents, it was never found that a court took a legal action on the non-compliance parent who fails to comply with the contact agreement or a court order of contact. In one of these precedents, however, the Supreme Court affirmed the judgment of a lower court to impose a fine penalty on the non-compliance parent for failing to act properly according to the former agreement of contact. It was probably a leading case regarding

[191] Section 258 of the Family Affairs Proceedings Act 2011.
[192] *Supra Note 149.*
Supra Note 150.

the contact dispute. It may not only increase the awareness of parent with custody for obeying the contact agreement or a court order of contact but also be secure both the rights of the child and non-resident parent to have an appropriate contact.

In other two Supreme Court's judgments which were made at the same day with the former leading case, the Supreme Court did not confirmed the lower courts' decisions for an inadequate description in contact agreements. Although it was regrettable for those applicants concerned, some lessons might be learnt from these judgments of dismissal. A clear line may be drawn between the enforceable and non-enforceable contact agreement. This may alert to divorcing parents to be cautious at the time of making a contact agreement. If it is necessary, noncustodial parent should consult with a lawyer to offer legal advices. Anyway, this movement may also be a recognizable development in the fields of resolution of child-related disputes after the dissolution of parents' relationship.

2.6.3 Existing Problems to the Resolution of Child-related Disputes

Although Japanese Government has moved forward by amending its legislation to promote and protect the welfare and rights of the child, some problems are still existed and are needed to be solved. According to the past experiences, it might be known that most of custody mothers were less willing to cooperate in the contact arrangement and most of the non-resident fathers were likely to reluctant to make a regular maintenance payment. That situation is not much changed in current. As both attitudes may be partly or completely concern with emotional distress through their sad experiences, an external help may be needed to act as an intermediary between them and to facilitate their difficulties.

Naturally, divorced parents are willing to avoid each other and likely to refuse to communicate each other too. In such a situation, they cannot behave properly to comply with their obligations. That reason is acceptable. However, according to the worldwide accepted practice, parents have to focus on their children's needs and interests rather than their personal interests. If so, they may need a professional support who may understand their situation well and be able to help them to overcome their difficulties. In Japan, FPIC staffs have been acting as an intermediary agent for years. However, because of the limited number of offices and staff's shortage, their

support might be seen as an insufficient one. This may be one of the major causes which made to fail regular contact between the child and noncustodial parent.

It is said that as there was no regular contact between the child and noncustodial fathers, most of those fathers were likely to reluctant their obligations of paying maintenance. This may be true to some extent only because it was said that some of noncustodial fathers were willing to meet their obligations, however, they could not effort it under sufficient reasons. Nonetheless, it is not a deniable fact that there may be other noncustodial fathers who were in affordable financial situation but intentionally reluctant to meet their obligations. To those fathers, there should be a professional support to persuade them to obey their former agreement or a court order of paying maintenance.

As to conclude, the question of how to promote current system in order to give a fully provide for those divorced parents may become the main concern in the future.

Add to this questionable situation, the Japanese family law has some other unresolved problems. As described in the earlier part, the classification of legitimate and illegitimate child and lack of legislation on surrogacy remains as the issues to be discussed. With respect to these issues, the child born to unmarried parents or the resulting child through medical technology treatment are absolutely non-guilty person. However, the law punishes them by imposing an unequal treatment. This may be a challenge for Japan while it is trying to promote the welfare of the child by protecting their rights.

2.7 Summary of the Chapter

In consistent with the described purpose in 2.1, respective Japanese law and particular court judgments are examined in this chapter. The first examination is related to the establishment of legal parent-child relationship and the next part is concerning the resolution system of child-related disputes for parents after the dissolution of their relationship. Both married and unmarried (cohabiting) parents are involved in the discussion. Different legal status of children, such as, legitimated child, illegitimate child, natural child, adopted child and child born by the assistance of medical technology for reproductive treatment are all including.

By comparing the previous system and the current practice, it may be seen a radical development in the field of child dispute resolution system. Viewed from the

equal treatment standing point, certain issues are still visible in the current family law as explained above. A specific area of family law in which a significant change has occurred recently is child contact. It was a good example of legislative solution that responded to the people's voice. The Supreme Court also showed the willingness of judicial sector to cooperate in the process of promoting the welfare of the child from divorced families. This was a good movement of Japan to be in line with Article 9 (3) of the UNCRC.

The less interested area of family law comparing with the aforementioned matters which may also affect the welfare of the child from divorced families is child maintenance payment. To raise its role as a necessary matter of determination for divorcing parents, a proper amendment was concluded in legislation. It should be said that the amendment must be a little step forward. The obvious result on this amendment has not emerged yet however, it may have the similar development with the child contact matter in the future.

Although a necessary legal reform has completed for the progress of child contact and child maintenance area, the external assistance from non-judicial organization may be still desired for the current system to be workable smoothly as explained previously. The existing non-profit organization (FPIC) cannot render an adequate service on its deficiency of office distribution. Therefore people cannot get equality of access to that service too. In spite of less public attention on this issue currently, it may be a debate topic for public in the future.

Chapter 3: The Resolution of Child-related Disputes for Parents after the Dissolution of their Relationship in England and Wales

3.1 Introduction

The discussion in this chapter mainly be concerned with diverse types of couples with children in England and Wales: married couples, cohabiting couples (including both opposite-sex and same-sex couples), and couples in civil partnership. It aims to investigate how these couples resolve child-related disputes at the time of their divorce or judicial separation or dissolution of civil partnership.

In the following part, the historical development of family law in England in Wales is explored. In the earlier days, divorce in there was highly restricted for the poor and women in particular. However, such an unequal practice between the husband and wife, and between the poor and rich was eventually abolished. Nowadays divorce is available regardless of gender that any person is treated equally before the law.

The next part lists the laws governing on the dissolution of parents' relationship and the resolution of child-related disputes.

After that different types of parent-child relationship and the ways to establish legal parent-child relationship is explained. In recent times, because of a variety of parents' relationships and the advent of assistant reproduction technologies, it has become difficult to determine who the legal parent of a child is. Therefore, in this part, the discussion mainly focuses on legal parenthood of a child and how one may become a legal parent of the child.

Then the situation of divorce, separation and dissolution of civil partnership is analyzed by using the statistical data released by the Office for National Statistics. In this analytical discussion, how many children are affected by the dissolution of parents' relationship annually is included.

The subsequent part is about the fundamental principles and procedures for the resolution of particular child-related disputes. In this part, the important child-related disputes inclusive of parental responsibility, residence order, contact order and child abduction by a parent are discussed.

The last part is the reviewing over the recent development in family law area, the current situation and the existing unsolved problems. It will be summarized at the end of this chapter.

3.2 Background of Laws on Parents' Relationship Dissolution and the Resolution of Child-related Disputes

In order to avoid complicated discussion, the presentation of legal background for parent's relationship dissolution and the resolution of child-related disputes will be divided into two.

3.2.1 Background of Laws on Parents' Relationship Dissolution

When it comes to discuss the historical background of divorce law in England and Wales, the year 1857[193] is a critical point for its first step to the development. Until 1858 when the first divorce law of 1857 was in effect, there was no legislation for a civil divorce.

Prior to that time, the ecclesiastical courts (the church courts) took jurisdiction over all family disputes[194] and were able to grant a divorce *a mensa et thoro*[195] which means separation from bed and board. For the hearing of that kind of separation suit, the ecclesiastical court applied the general Canon Law of Europe as a substantial law of separation[196] and the applicant had to prove that the other spouse had committed adultery and/or life-threatening cruelty against him/her.[197] If the court was satisfied with the presented evidence, an applicant might be granted a separation order but prohibited to remarry during the life time of the other.[198]

In 1700, a Private Act of Parliament was passed[199] and under this Act, a marriage was able to dissolve with the right to remarry after that dissolution. It was called a parliamentary divorce. In order to get a parliamentary divorce, the husband had to prove a fact of his wife's adultery only[200] however, the wife needed to prove her husband's adulterous behavior accompanied with other aggravating situations, for

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[193] The Matrimonial Causes Act 1857 was enacted and Section 6 of the Act transfers jurisdiction over divorce disputes from the ecclesiastical court to the newly established Court of Divorce and Matrimonial Causes.
[194] William Geldart, "*Introduction to English Law*", 9th Edition, Edited by D.C.M. Yardley, Oxford University Press, 1984, p.52.
[195] Harvey Couch, "*The Evolution of Parliamentary Divorce in England*", 52 Tul. L. Rev. 513. Available at http://www.lexis.com (Visited on December 27th, 2013)
[196] Frederic R. Coudert, "*Marriage and Divorce Laws in Europe*", Press of Livingston Middleditch Co., 1893, p.44.
[197] Lawrence Stone, "*Road to Divorce: England (1530 – 1987)*", Oxford University Press, 1990, p.141
[198] *Ibid.*
[199] *Supra Note 195*.
[200] *Supra Note 197*.

instance, incestuous adultery or adultery combined with bigamy.[201] As a matter of fact, that parliamentary divorce was extremely expensive and privilege for only the handful of rich husbands. Therefore the poor and wives were restricted to access divorce.[202]

The certain reasons why the parliamentary divorce was so expensive was that obtaining a separation from the ecclesiastical court and taking a Criminal Conversation action (hereinafter crim. con. Action) at the King's Bench (which is one of the two superior courts of common law) are prerequisites to a parliamentary divorce.[203] After receiving a separation from an ecclesiastical court, the applicant should continue the proceeding at the King's Bench for claiming a monetary damage from the other spouse's seducer for insulting his/her reputation, the so-called crim. con. Action.[204] Therefore, it may be said that the ecclesiastical courts were the fundamental legal institutions to initiate a parliamentary divorce.

Between 1680 and 1740, only 23 cases of crim. con. Action were recorded.[205] However, during and afterwards the 1790s, the number of crim. con. Action cases increased and 73 cases were brought before the court.[206] Following a completion of these two procedures, the applicant was eligible to claim a divorce against his/her spouse before the House of Lords. In practice, it was a difficult work for wives to prove the sufficient ground of divorce under the unequal treatment in terms grounds for divorce. Consequently, for a century, 1700-1800, there was no wife-initiated divorce which challenged the male monopoly over divorce.[207] In 1801, a wife started to claim for a divorce against her husband. Up until 1857, only three wives were granted parliamentary divorce.[208] During this period, merely 3 to 4 divorces were granted per year by the Parliament[209] and it was therefore intensely criticized as an impractical way of divorce procedure.

Those people who could not afford such an expensive parliamentary divorce attempted to dissolve their marriage by one of these proceedings; making a private

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[201] Dr. Ruth Gaffney-Rhys, "*Divorce Data in England and Wales: Gender Differences*", Women in Society, Volume 3, 2012. Available at http://www.newport.ac.uk/research/Journals/wis/vol3/Pages/default.aspx (Visited on July 30th, 2013).
[202] *Supra Note 197*, pp.354-355.
[203] *Ibid.*
[204] *Ibid*, p.355.
[205] David M. Turner, "Fashioning Adultery: Gender, Sex and Civility in England (1660-1740)", Past and Present Publication, 2004, p.172.
[206] *Ibid.*
[207] *Supra Note 197*, p.360.
[208] *Ibid*, p.362.
[209] *Ibid*, p.370.

separation deed, desertion the unwanted spouse, elopement with a new lover and wife-sale. A private separation deed was a signed agreement for separation between the husband and the trustee of his wife. In this regard, the wife was incompetent person to sign a contract under the common law practice of that moment.[210] If there was any dispute over a deed later, the Chancery Court had the jurisdiction to resolve it.[211] Desertion was mostly committed by the husband and elopement with a new lover was chosen by the pitiful wives who were treated badly and intentionally neglected by their husband.[212]

Wife-sale was the last resort for a husband to end the marriage tie with his wife and future financial responsibility to her as well.[213] The actual situation of some events of wife-sale was that there was a pre-arranged agreement among the parties concerned: the husband and wife wanted to terminate their marriage tie and the wife was already attracted to the other man who wanted to purchase her.[214] Then on a market day, it was taken place in a cattle market publicly to guarantee their transfer.[215] In fact, the court at the time declared that the practice of wife-sale was invalid, illegal and immoral.[216] Accordingly, several wife-sales were prosecuted in ecclesiastical courts as moral offense.[217] However, it could not stop such a practice and during the period of 1780-1850, less than 300 cases of wife-sale were occurred as an infrequent event.[218]

In 1857, a radical change to get divorced in England was introduced. The first divorce law, the Matrimonial Causes Act (hereinafter the MCA) 1857, was enacted. Under the act, the Court of Divorce and Matrimonial Causes in London (later it was consolidated into the High Court under the Supreme Court of Judicature Act 1873) was created[219] and it became the sole legal institution to handle all matrimonial disputes including divorce and its related matters.[220] The jurisdictions of all former

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[210] *Supra Note 197*, p.150.
[211] *Ibid.*
[212] *Ibid*, p.142.
[213] *Ibid*, pp.144-145.
[214] *Ibid*.
[215] *Ibid.*
[216] *Ibid*, p.146.
[217] Samuel Pyeatt Menefee, "*Wives for Sales*", Basil Blackwell Publisher, 1981, p.138.
[218] *Supra Note 197*, p.148.
[219] Section 6 of the Matrimonial Causes Act 1857.
[220] Gail L. Savage, "*The Operation of the 1857 Divorce Act, 1860-1910: A Research Note*", Journal of Social History, Volume 16, Number 4, 103-110, 1983, p.103.

courts over matrimonial matters were removed by its establishment.[221] However, the grounds for divorce were not much changed and retained the former practice. In addition to the former divorce grounds, desertion for two years and cruelty including mental pain were included as the aggravating situation for wives to claim for a divorce against their husband.[222]

As a consequence, the number of wife-initiated divorces was increased sharply after the enactment of the MCA 1857; 40-45% of total divorce petitions at that moment were initiated by wives.[223] In parallel with it, the number of divorce granted was also increased, 4 per year before the enactment of the MCA 1857 to 150 after its enactment and reached over 800 in 1914.[224] In spite of these considerable changes, the Act had still some defects. For instance, the unequal treatment to wives dealing with the grounds of divorce made them to be difficult to get a divorce in comparison with the husbands. The sole establishment of divorce court in London made the poor in the other areas of the country difficult to get a divorce. Therefore, the Parliament attempted for a legal reform to grant the wives with an equal access to divorce and the poor with an easier access to divorce.[225]

In 1920, the divorce courts were successfully decentralized; the County Courts became competent to hear divorce suits and the judicial machinery was then able to provide the poor with easier access to divorce.[226] In 1923, the MCA 1857 was partly amended. Under the MCA 1923, either spouse (both husband and wife) could petition for divorce on the same ground of mere adultery.[227] Consequently, the proportion of wife-initiated divorce cases was increased and occupied 63% of total divorces in 1925.[228] In 1937, the MCA 1923 was amended again regarding the grounds of divorce and after that amendment, cruelty, desertion and incurable insanity had also become the competent grounds for divorce.[229] Accordingly, the one could claim for divorce because of misfortune. A sudden increase in the number of divorce was happened

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[221] Danaya C. Wright, "*Untying the Knot: An Analysis of the English Divorce and Matrimonial Causes Court Records, 1858-1966*", 38 U. Rich. L. Rev. 903-1010, 2004, p.904. http://scholarship.law.ufl.edu/do/search/?q=Danaya%20C.%20Wright&start=0&context=1 (Visited on August 2nd, 2013.)
[222] Section 27 of the Matrimonial Causes Act 1857.
[223] *Supra Note 197*, p.385.
[224] *Ibid*, p.387.
[225] *Ibid*, pp.394-395.
[226] Section 1 of the Administration of Judicature Act 1920.
[227] *Supra Note 197*, p.396.
[228] *Ibid.*
[229] Section 2 of the Matrimonial Causes Act 1937.

during two years after such an amendment of broadening grounds for divorce; 4,900 in 1937 to 8, 200 in 1939.[230]

In 1965, the MCA 1937 was amended again. The MCA 1965 set out four grounds of divorce for both husband and wife and there was an extra ground applicable to just wife. According to Section 1(1) of the Act, adultery, desertion for three years, cruelty and incurably of unsound mind for more than five years were sufficient grounds of divorce for both spouses and, the husband's action of committing rape or sodomy or bestiality were composed as a ground of divorce for his wife.[231] Section 2(1) of the Act restricted claiming for a divorce within the period of three years from the beginning of the marriage.

In 1969, the significant changes was brought to the existing system of divorce in England and Wales with the enactment of the Divorce Reform Act 1969. The principle of divorce was changed from fault-based system to no-fault system.[232] The 'irretrievably breakdown' of marriage based on the five conditions inclusive of adultery, unreasonable behavior, desertion, separation for two years with consent and separation for five years without consent, was introduced as a sole ground for divorce.[233] Accordingly, those married couples who were willing to get a divorce through mutual consent were able to get a divorce on the proof of a period of separation for 2 years.[234] The Act also allowed the culpable person to claim for a divorce against his/her innocent spouse.[235] The Act was later consolidated into the MCA 1973 together with the Nullity of Marriage Act 1971 and the Matrimonial Proceedings and Property Act 1970.[236]

Since then, the MCA 1973 has become a substantive law of divorce in England and Wales. The Act keeps the same principle and grounds of divorce as the Divorce Reform Act 1969. However, the waiting period of 3 years to commence a divorce

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[230] *Supra Note 197*, p.401.
[231] Section 1(1) (b) of the MCA 1965.
[232] Section 1 of the Divorce Reform Act 1969.
Supra Note 197, p. 406.
Three of five facts which had to prove for the irretrievable breakdown of the marriage was entirely matrimonial faults though
[233] Section 2(1) of the Divorce Reform Act 1969.
[234] Jennifer Levin, "*The Divorce Reform Act 1969*", The Modern Law Review, Volume 33, Number 6, 630-648, 1970, p.633.
[235] Section 2(1)(e) of the Divorce Reform Act 1969.
[236] Rebecca Probert, "*Family and Succession, Law in England and Wales*", 2nd Edition, Kluwer Law International, 2012, *p.24.*

case[237] was later amended by Section 1 of the Matrimonial and Family Proceedings Act 1984. According to the amendment, a divorce petition may be presented after the expiration of one year from the date of the marriage. Judicial separation other than a divorce is still available under the Act same as before. The court's review on the children arrangement is still necessary before making an absolute decree of divorce or judicial separation.[238]

In the same year of 1973, a special procedure was introduced for undefended divorce. Under this procedure, those couples without dependent children may get a divorce after two years separation with consent.[239] In this procedure, divorcing parties do not need to appear before the court but they have to submit the divorce petition attached with the affidavits to the court.[240] In 1977, the procedure was extended to include all undefended divorce cases whether or not children are involved.[241] Nowadays, that special procedure is the norm of divorce and majority of divorces are granted through this procedure.

In 1996, the Parliament tried to change the divorce principles and procedures by enacting the Family Law Act 1996. The Act introduced attending an information meeting[242] before filing a statement of marital breakdown and waiting period for reflection and consideration[243]. According to the newly introduced procedure, the minimum period of time for a divorce was 54 weeks or 12 months and 14 days.[244] This lengthy procedure was aimed to save a marriage by promoting prospects of reconciliation between parties. Nonetheless, part I and II of the Act which is particularly related to divorce reform were later abandoned and part III which was dealing with family mediation and part IV which was dealing with domestic violence were implemented.[245]

The year 2004 brought another significant changing to the field of family law. With the purpose of giving a legal recognition to the same-sex couples, the Civil

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[237] Section 3(1) of the MAC 1973.
[238] Section 41 of the MCA 1973.
[239] R.J. Walker, "*The English Legal System*", 5th Edition, Butter Worth & Co. (Publishers) LTD., 1980, p-396.
[240] *Ibid.*
[241] Andrew Bainham, "*Children: The Modern Law*", 3rd Edition, Family Law, 2005, p.25.
[242] Section 8 of the Family Law Act 1996.
[243] Section 9 of the Family Act 1996.
[244] Frances Burton, "*Guide to the Family Law Act 1996*", Cavendish Publishing Limited, 1996, p.7.
[245] Lisa Parkinson, "*Family Mediation: Appropriate Dispute Resolution in a New Family Justice System*", 2nd Edition, Family Law, 2011, p.6.

Partnership Act 2004 (hereinafter the CPA 2004) was enacted. Those couples who formed a civil partnership according to this Act are able to obtain the same rights and responsibilities as the married couples who entered into a legal relationship according to the MCA 1973. Also, the laws governing for the dissolution of a civil partnership and for the resolution of child-related matters thereafter are the same as the married couple's practice.

In 2010, a unified procedural law of matrimonial matters was introduced with the legislation of the Family Procedure Rules 2010 (hereinafter FPR 2010). Before its enactment, the courts' practices were different and it made the parties difficult to follow. Currently, there are three kinds of court that have jurisdiction to hear matrimonial proceedings: a branch of the Magistrates' Court which is called the Family Proceedings Court, the County Courts and the High Court.[246] Amongst them, the Family Proceedings Courts have jurisdiction over the child-related disputes whilst the County Courts and the High Courts have jurisdiction over divorce, judicial separation and dissolution of civil partnership.

As to conclude, the study of legal development on the dissolution of parents' relationship was a long event with several reforms and frequent changes. The discussion of this part may not be able to cover all reforms and changes from time to time, however, it was tried to highlight the significant changes which had an impact on the previous existing practices.

3.2.2 Background of Laws on the Resolution of Child-related Disputes

In the past, children were neglected by both parents and the State[247]: for parental cruelty of any kind, no law provided remedy for children because children at that time were legally recognized as the property of their parents and were used by them as personal or family assets.[248]

In the early nineteenth century, the father's rights over the custody of his legitimate children were paramount and the mother had no rights over her legitimate

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[246] Catherine Fairbairn, "*Confidentiality and Openness in Family Courts*" http://www.parliament.uk/briefing-papers/SN06102 (Visited on August 2nd, 2013).

[247] Linda A. Pollock, "*Forgotten Children, Parent-child Relations from 1500-1900*", Cambridge University Press, 1983, p-1.

[248] Ivy Pinchbeck and Margaret Hewitt, "*Children in English Society, Volume II, from the Eighteenth Century to the Children Act 1948*", Routledge & Kegan Paul Ltd, 1973, p.348.

children during the lifetime of the father.[249] Accordingly, the allocation of custody rights over the children after the dissolution of parents' relationship was relatively unfair. Only fathers were eligible person to hold custody rights over the children. On the other hand, mothers had to relinquish the rights of custody over her children by reason of her extramarital relationship.[250] Furthermore, the rights to contact with the child was also uncertain for noncustodial mother since father exercised an exclusive power to control the activities of the child until the child reached the age of 21.[251] In case there was any problem relating to children, parents could resolve their problems either at the King's Bench or at the Court of Chancery, however, not at the ecclesiastical court.[252] No court, in this case, regarded itself as entitled entirely to extinguish a father's right to custody.[253]

Such a practice was eventually terminated in 1839 when the Custody of Infants Act, the first legislation to provide legal protection to the child[254], was enacted with the introduction of enormous change to the existing practice. The Act was, in fact, the first statutory intervention into the exclusive powers of the father.[255] After the enactment of the act, mother was also eligible to hold custody rights over her child as the Act provided that all children under 7 should be placed under the mother's custody and father could claim for custody only after the child had reached 7.[256] However, the act still maintained the prohibition of the adulterous mothers to hold custody rights over the child as the society still viewed them as ruined women and wanted them to be cut off totally from the children's life.[257] The Act also provided that all noncustodial parents should have a contact rights to their children.

In 1857, the MCA 1857 was enacted. Afterwards, the former presumption on the allocation of child custody rights after a divorce was abolished and the Act completely allowed the new court to determine the case on its own discretion.[258] The rights of contact were also guaranteed in the Act same as before. In 1873, the Custody

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[249] *Ibid*, p-*362*.
[250] *Supra Note 197*, p.172.
[251] *Supra Note 248*, p.362.
[252] *Supra Note 197*, pp.170-171.
[253] *Supra Note 248*, p.364.
[254] James Nixon, "Injury Prevention and Children's Rights", in *Injury Prevention and Control*, Edited by Dinesh Mohan and Geetam Tiwari, Taylor and Francis, 2000, p.181.
[255] *Ibid*.
[256] *Supra Note 197*, p.178.
[257] *Ibid*, pp. 339-341.
[258] *Ibid*, p.388.

of Infants Act was amended again and the legal position of mother was raised to a great extent in terms of holding custody rights.[259] According to the 1873 amendment, mothers in an extramarital relationship were also eligible to be a custody parent of the child under 16. Moreover, the Act legalized parents' agreement which gave custody of the child to the mother as long as it is not contrary to the best interest of the child.[260]

In 1886, the Guardianship of Infants Act was enacted and two important amendments were made: jurisdiction over guardianship disputes was extended to the courts of summary jurisdiction and both parents were put on the same footing[261] regarding power to appoint the guardians after the death of either parent.[262] Moreover, the court was given an authority to make a decree of declaration for an inappropriate parent to hold the custody rights after a divorce or judicial separation.[263] However, such a decree was not able to bar that inappropriate parent from seeking contact rights with non-resident child.[264]

In 1973, the Guardianship of Infants Act was reformed again. Afterwards, equal rights on custody was awarded to divorced father and mother in considering the welfare of the child as a decisive fact.[265] That practice was maintained until it was replaced by the Children Act 1989 (hereinafter the CA 1989). The CA 1989, which is currently the substantial law of child-related matters in family disputes, was implemented in 1991. The CA 1989 firstly introduced the notion of 'parental responsibilities' by replacing the former concept of 'parental rights and authorities'. The Act also replaced the term 'custody' and 'access' by 'residence' and 'contact' respectively. Section 1 of the Act apparently provided that any matter relating to the welfare of the child should be determined in a court by taking the child's welfare into paramount consideration. A slight amendments were occurred to this Act by the Adoption and Children Act 2002 and 2006.

As described above, determination of residence and contact rights after a divorce was improving from time to time. However, the matter of child maintenance was little silent. Accordingly, the practice on child maintenance was uncertain in terms

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[259] *Supra Note 236*, pp.23-24.
[260] *Supra Note 248*, p.377.
[261] Section 2 of the Guardians of Infants Act 1886.
[262] *Ibid*, p.384.
[263] Section 7 of the Guardianship of Infants Act 1886.
[264] *Supra Note 241*, p.12.
[265] Section 1(1) of the Guardianship Act 1973.

of enforceability and inconsistent with the needs of the child from divorced family.[266] In 1991, the maintenance system was finally modified from a court-based discretional system to a non-court based formulated system with the enactment of the Child Support Act 1991.[267] Since then the child maintenance system was free from the operation of judicial mechanism but was operated by the administrative one. The administrative institution, the Child Support Agency, was established afterwards in order to access the required information for tracing the obliged parent, to persuade them in order to meet their obligations, and to calculate and enforce the suitable level of child maintenance on them.[268]

The Act was partially amended later by the Child Support Act 1995, the Child Support, Pensions and Social Security Act 2000 and the Child Maintenance and other Payments Act 2008. Since 25th November, 2013, the Child Support Agency was replaced with the Child Maintenance Service with certain new operation systems.

As to conclude, the study of legal development on the resolution of child-related disputes in England and Wales was also a long event with several reforms and frequent changes. The discussion of this part may not be able to cover all reforms and changes from time to time, however, it was tried to highlight the significant changes which had an impact on the previous existing practices. The following part will list the current enforcing laws on the dissolution of parents' relationship and the resolution of child-related disputes.

3.3 The Laws Governing on the Determination of Child-related Disputes after the Dissolution of Parents' Relationship

The current enforcing substantive and procedural legislations for the dissolution of parents' relationship inclusive of divorce, judicial separation, dissolution of civil partnership, and the resolution of child-related disputes including parental responsibility, residence order, contact order and maintenance may be compiled as listed below:

- The Matrimonial Causes Act 1973

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[266] Judith Masson, Rebecca Aailey-Harris and Rebecca Probert, "*Principles of Family Law*", Sweet and Maxwell, 2008, p.444.
[267] Belinda Fehlberg and Mavis Maclean, "*Child Support Policy in Australia and the United Kingdom: Changing Priorities But a Similar Tough Deal for Children?*", International Journal of Law, Policy and Family, Volume 23, Number 1, 1-24, 2009, p.3.
[268] *Supra Note 241*, p.378.

-The fundamental law to regulate principles of divorce and judicial separation for married and cohabiting opposite-sex couples.

- The Civil Partnership Act 2004

  -The basic law to regulate the principles of forming civil partnership and its dissolution for same-sex couples.

- The Family Procedures Rule 2010

  -The major procedural law for all matrimonial proceedings including the dissolution of parents' relationship and the resolution of child-related disputes for them.

- The Children Act 1989

  -The most important source of children law which encompasses both private and public law issues of child-related disputes. It was partially amended by a series of laws, the Adoption and Children Act 2002 and the Adoption and Children Act 2006.

- The Child Support Act 1991

  -One of the principal laws to impose financial responsibility on non-resident parent for his/her children and it was later modified by the Child Support Act 1995. The Act established the Child Support Agency to access and collect the child maintenance payment. However, in recent, the Child Support Agency was replaced with the Child Maintenance Service.

- The Child Support, Pensions and Social Security Act 2000

  -The new law of imposing financial responsibility on non-resident parents for their children and it introduced the simpler calculation scheme than the former one to collect maintenance payment from non-resident parent.

- The Child Maintenance and Other Payments Act 2008

  -The latest law of imposing financial responsibility on non-resident parents for their children. It changed a little the calculating method and substantially extended the enforcement method.

Besides the above mentioned statutory laws, there are other important legislations for determining the legal status of a parent and for establishing the legal relationship between parents and the child. In recent time, with the development of assistant reproduction technology (hereinafter ART) including artificial insemination (hereinafter AI), in vitro fertilization (hereinafter IVF) and surrogacy arrangement in contemporary society, 'what is a parent' is becoming a question that has no

straightforward answer. In England and Wales, the necessary legislations have already enacted to resolve such a complicated problem.

- The Human Fertilization and Embryology Act (hereinafter the HFEA) 1990 and 2008, and
- The Surrogacy Arrangements Act 1985 (hereinafter the SAA 1985)

explicitly regulates who the legal parents of a child born by ART arrangement are. The following part will explain the recognition and regulation of a parents' legal status and of the establishment of parent-child relationships in accordance with the provisions of previous-described laws.

3.3.1 Different Types of Parent-child Relationship

The focus of discussion in this part is on the determination of a parent's legal status and the establishment of a legal relationship between parents and the child. For this purpose, married parents, unmarried or cohabiting parents and parents in civil partnership are included in the discussion. With respect to the children, natural children, children born with the aid of ART inclusive of surrogacy and adopted children of these parents are also included.

In England and Wales, both opposite-sex and same-sex couples are able to formulate legal relationship by the MCA 1973 or by the CPA 2004 respectively. In case a couple, either opposite-sex or same-sex, does not enter into the legal relationship, they will not be recognized as a legal union and also have no legal status even though they are in an enduring cohabiting relationship. Furthermore, in the past, those children born to such unmarried couples has no legal relationship with his parents, no legal rights to his parents and were labelled as illegitimate children.[269]

However, in 1979, the Law Commission had suggested to abolish the adverse legal consequence and the status of illegitimacy.[270] As a result, in 1987, discrimination against children based on their parents' marriage was ended and the label of illegitimacy has been abolished by Section 1(1) of the Family Law Reform Act 1987. In spite of several legal reforms for a removal of legally ill-treatments on the illegitimate children, the terminology of illegitimacy is still attached to these

[269] Mahshid Sadat Tabaei, "*Comparative Study of the Illegitimate Children's Rights under English and Iran Laws*", J. Basic. Appl. Sci. Res., Volume 3, Number 4, 254-262, 2013, p.255.
[270] *Illegitimacy*, Law Commission Working Paper No.74, 1979.

children.[271] When one looks back to the history of legal reforms for illegitimacy, a number of legislations may be found:

- The Legitimacy Act 1926 which allowed illegitimate children to be legitimated by the subsequent marriage of the parents. However, the child must not be born from one parent's adultery.[272]
- The Adoption Act 1926 which allowed to adopt the illegitimate children to be legitimated.
- The Legitimacy Act 1959 which expanded the opportunity for illegitimate children to be legitimated. According to the Act, those children who were born from a parent's adultery were also able to be legitimated by the parent's subsequent marriage.[273]
- The Family Law Reform Act 1969 which granted a succession rights to the illegitimate children from their parents.[274]
- The Family Law Reform Act 1987 which removed all legal distinctions between legitimate and illegitimate children.[275]

In 2012, 729,674 of children were born in England and Wales and nearly half of these children (47.5% of total live birth) were born to those who were neither married nor in civil partnership at the time of the child's birth.[276] That proportion was increased from 47.2% in 2011, 40.6% in 2002, 25% in 1988 and just 11% in 1979. It is in fact that the number of children born outside marriage or civil partnership was a continuous upward trend for years, and in the future, it may be possible that majority of children will be born outside marriage or civil partnership as a result of the development in prevalence of parents' cohabitating relationship without entering into a marriage or a civil partnership.

Although these illegitimate children are enjoyable certain equal rights same as other legitimate children, there is an unequal treatment on them regarding the establishment of legal relationship between them and their father. According to the CA 1989, the unmarried fathers are not able to obtain parental responsibility

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[271] *Supra Note 241*, p.188.
[272] Section 1 of the Legitimacy Act 1926.
[273] Section 1 of the Legitimacy Act 1959.
[274] Section 14 & 16 of the Family Law Reform Act 1969.
[275] Section 1of the Family Law Reform Act 1987.
[276] Births in England and Wales, 2012, Statistical Bulletin, Office for National Statistics.

automatically after the child's birth. Consequently, it may be impossible, in a legal sense, for the child to live with the father without taking necessary legal steps. These are a difference in provided legal rights between legitimate and illegitimate children although the law nowadays makes easier to obtain parental responsibility by the unmarried father.

Another type of parent-child relationship is related to those children who are born as a result of various ART licensed treatments. In 1978, the world first IVF child, baby Louise Brown, was born in the UK[277] and, at that time, there was no legislation in the UK to regulate ART treatments. However, the government later tried to cope with such an advanced reproductive technology development and to control properly the ART treatments by legislations. In 1982, the government set up a specific committee and started to investigate the development of IVF.[278] In 1984, the committee published their findings through a report, the so-called Warnock Report[279], with a recommendation of establishing a regulatory system for fertility clinics.

In the next year, in 1985, baby Cotton was born again by the first surrogate mother in the UK.[280] Rapidly after the birth of baby Cotton, within six months from the date of her birth, the government passed the SAA 1985[281] with the purpose of protecting the interests of intended parents and the child born. Although the Warnock Report suggested to prohibit surrogacy arrangements legally, the Act only prohibit commercial benefit from surrogacy arrangement[282] and commercial advertisement for surrogacy treatment[283]. A breach of these prohibitions is a criminal offence and punishable by a maximum of 3 months imprisonment or fine or both.[284] Accordingly, the SAA 1985 only permits non-commercial surrogacy which involves payment to the

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[277] Stuart Bridge, "Assisted Reproduction and the Legal Definition of Parentage", in *What is a Parent? A Socio-legal Analysis*, Edited by Andrew Bainham, Shelley Day Sclater, and Martin Richards, Hart Publishing, 1999, p.75.
[278] http://www.hfea.gov.uk/2068.html (Visited on August 5th, 2013.)
[279] Report of the Committee of Inquiry into Human Fertilization and Embryology, 1984. http://www.hfea.gov.uk/docs/Warnock_Report_of_Inquiry_into_Human_Fertilization_and_Embryology_1984.pdf (Visited on January 7th, 2014)
[280] Richardson Wilson, Shriya Luke, "*Surrogacy – Laws and Medical Ethics*", International Journal of Scientific & Engineering Research, Volume 3, Number 7, 1-9, 2012, p.5.
[281] *Ibid.*
[282] Section 2 of the SAA 1985.
[283] Section 3 of the SAA 1985.
[284] Section 4 (1) of the SAA 1985.

surrogate mother to cover the reasonable expenses including the expense of pregnancy and a fee for child bearing.[285]

Although making a contract on the surrogacy arrangement is legal, that contract will not be enforceable by the court later if either the surrogate mother or the intended parents are failing to perform any term of the contract.[286] This is a risky condition for the intended parents[287] if the surrogate mother changes her mind after giving a birth. When the surrogate mother refuses to hand over the child to the intended parents, the intended parents may bring the case before the court. However, the court, in this case, does not consider their former contract as a reliable legal document but will decide solely on what will be the best welfare of the child.[288] This was a controversial issue of the SAA 1985 regarding the enforcement of a surrogacy contract.

Five years later after the enactment of the SAA 1985, the HFEA 1990 was enacted with a little amendment to the SAA 1985. The 1990 Act firstly established the Human Fertilization and Embryology Authority [289] by imposing certain obligations to grant a license for fertility clinic[290] and to enforce a code of practice on these clinics[291]. The Act was made a drastic revision on the HFEA 2008 with a removal of different legal treatment on female same-sex couple. In accordance with the amendment, the female partner of a child's mother (who are in a civil partnership) nowadays is able to be a female parent of that child without following the adoption procedure.[292]

By following the HFEA 2008, it also enables same-sex couples in civil partnership and cohabiting couples of both opposite-sex and same-sex to apply for a parental order to be a parent of the child born as a result of surrogacy arrangement.[293] However, it is essential to be genetically related to either or both of a couple with the

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[285] Amy Garrity, "*A Comparative Analysis of Surrogacy Law in the United States and Great Britain – A Proposed Model Statute for Louisiana*", Volume 60, Number 3, Louisiana Law Review, 809-832, 2000, pp.810-811.
[286] *Supra Note 280*.
[287] The intended parents are those who want a child through surrogacy arrangement and may become later the child's legal parent as a result through the parental order by a court.
[288] *Supra Note 280*.
[289] Section 5 of the HFEA 1990.
[290] Section 11 of the HFEA 1990.
[291] Section 25 of the HFEA 1990.
[292] Section 42 of the HFEA 2008.
[293] Section 54 of the HFEA 2008.

resulting child.[294] Therefore, at the present day, both opposite-sex and same-sex couples regardless of their relationship status, have equal rights before the law to be a parent. Although such a development ought to be welcomed for those infertile couples who cannot afford by themselves to have a child, it may be undesirable for those children who will be legally motherless or fatherless due to this process.

Another type of parent-child relationship is in relation to the adopted children. Currently, the Children and Adoption Act (hereinafter CAA) 2002 which came into full effect in December 2005 is the sole legislation for adoption in England and Wales. The Act provided that the child under 18[295] who has never entered into a marriage or civil partnership[296] is eligible to be adopted. Regarding the adopters, a single person, married or couples in civil partnership and cohabiting couples are all eligible persons to adopt a child subject to very few restrictions. After an adoption is completed by a court order, the legal relationship between the child and his/her natural parents is immediately extinguished[297] except a ground of a bar to marriage in order to avoid incest relationship. Afterwards, the adopted child is immediately treated by law as a natural child of the adoptive parent or parents.[298]

As mentioned above, there are different kinds of parents' relationships and also different types of children raised by these parents. The following parts will give a detailed discussion in relation to the establishment of legal parent-child relationship between these parents and children.

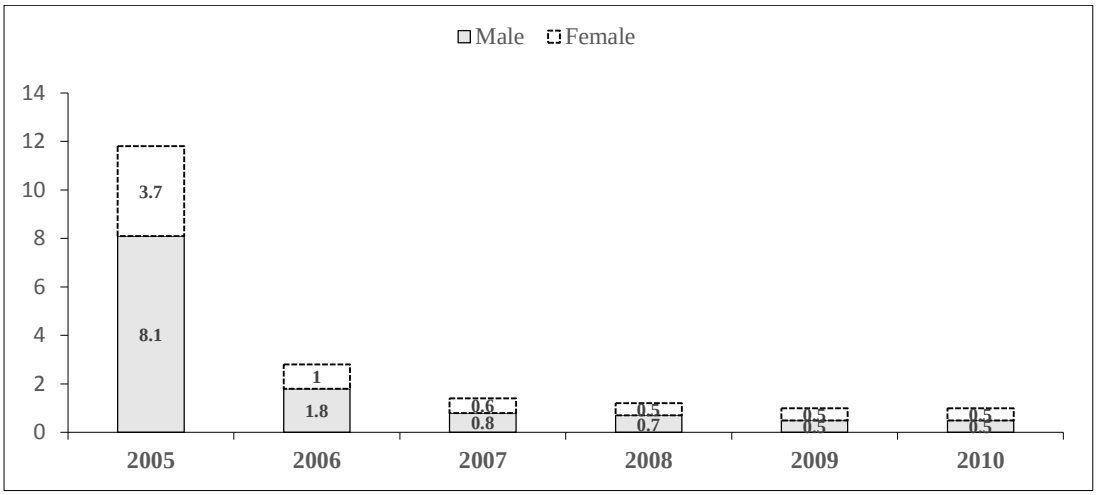
3.3.2 Married Parents or Parents in Civil Partnership with Children

In 2011, there were 247,890 provisional marriages[299] between persons of opposite-sex and almost 6,000 civil partnerships between persons of same-sex in England and Wales.[300] The figure pointed out that only 2.7% of total legal unions were formed between persons of the same-sex. Precisely speaking, over half of these same-sex couples (50.7% of total civil partnerships) were formulated between male partners.

[294] Section 54 (1) (b) of the HFEA 2008.
[295] Section 49 (4) of the CAA 2002.
[296] Section 47 (8) of the CAA 2002.
[297] Section 46 (2) (a) of the CAA 2002.
[298] Section 67 (1) of the CAA 2002.
[299] Number of Marriage and Divorces, 1931-2011, Office for National Statistics.
[300] Civil Partnership in the UK, 2011, Statistical Bulletin, Office for National Statistics.

Between the CPA 2004 firstly came into force in 2005 and until the end of 2010, there were 42,778 civil partnerships in total and 56% of them (23,968 in number) were formed as male couples.[301]

Figure 3.1: Rate[302] of Civil Partnerships by Sex per 1,000 people (2005-2010)



Source: Civil Partnership Five Years On, Office for National Statistics, 2011

The above figure shows that the rate of forming civil partnerships between males is much higher than those between females. This may be a feature of civil partnership in England and Wales. Nowadays, these male couples, irrespective of their legal relationship, are also able to be legal parents of the child who is genetically related to one of them and was born with the aid of ART. Among the various ART treatments, surrogacy is particularly important and a common option for male same-sex couples to be legal parents of the child who is genetically related to one of them. The following discussion will mainly be concerned with these married couples and couples in civil partnership of both opposite-sex and same-sex, regarding the determination of a legal parent's status, the establishment of legal relationship between them and their children, and the performing of parental responsibility over these children.

[301] Civil Partnership Five Years On, Office for National Statistics.
[302] Rates are based on the total number of civil partnered males or females per year as a proportion of the total population of male or female who are over 16 and currently are not in a legal marriage or civil partnership.

Not only for married couples but also for couples in civil partnership, the woman who carried and gave birth to the child is treated as the legal mother of the given child.[303] In this respect, a birth mother is the mother of a child whether the child is born by a natural mother or by a surrogate mother. It may be possible in certain cases the birth mother did not provide her own eggs to produce a child. In this case, the child might be borne by the utilization of the donated embryo, or the donated egg which was fertilized by the intended father's semen, or the intended mother's egg with was fertilized by the donated semen, or the embryo created by using the intended parents' eggs and semen. In these instances, the birth mother is genetically unrelated to the child born.

Nonetheless, until recently, no woman other than the birth mother may be recognized as the legal mother of the child. The law does not consider the existence of genetic link between the child and his/her birth mother while determining the legal motherhood. Even though both the genetic mother who provided the eggs for creation of an embryo and the gestational mother who carried that embryo in her womb and delivered as a child are included in the definition of a biological motherhood,[304] only the gestational mother can acquire a legal status of a mother and able to perform parental responsibility on the child born.

Before 2005, in case donated eggs were used while creating an embryo, the resulting child was even unable to access the information of his/her genetic mother because the egg donor was keeping as anonymous.[305] The policy was changed after 2005 and the new policy is applicable to those children who are born by donor conception after 1st April 2005. Presently, if the resulting child who attains 16 wishes to know who his/her the genetic mother is may be provided certain information regarding the donor of the eggs. Nonetheless, it is restricted for the egg donor to initiate a contact with the resulting child though the child is allowed to do it according to his/her own wish. Therefore the current practice is beneficial only for the protection of the rights of the child to know who their genetic parents are.

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[303] Gillian Douglas and Nigel Lowe, "Becoming a Parent in English Law", in *Parenthood in Modern Society, Legal and Social Issues for the Twenty-first Century*, Edited by John Eekelaar and Petar Sarcevic, Martinus Nijhoff Publishers, 1993, p.147.
Section 33 (1) of the HFEA 2008.
[304] *Supra Note 241*, p.89.
[305] http://www.hfea.gov.uk/1973.html (Visited on August 8th, 2013.)

In case a child is born through a surrogacy arrangement, the surrogate mother is the legal mother of the child until a parental order is granted by a court to the intended parents[306]. Before such an order is granted, the child is required to be registered as the surrogate mother's own child.[307] If the surrogate mother is married or in a cohabiting relationship, her husband or partner may be presumed as the father of the child born. In such a case, the surrogate mother and her husband or partner will be required to exercise parental responsibility on that child. However, as soon as the Family Proceedings Court has granted a parental order to the intended parents, the surrogate mother and her husband or partner will relinquish the legal status of being parent and transfer the rights of parental responsibility to the intended parents.[308] If the intended parents are males in a same-sex relationship, the resulting child will be legally motherless and both of the males are recognized as the legal parents of the child by the parental order.

The above explanation is mainly related to the establishment of maternity with some reference to paternity of the child conceived through surrogacy arrangement and the below discussion will only be concerned with the establishment of paternity for married father and father in civil partnership. With regard to the married father, he is recognized as the legal father of the natural child or the child born by ART using the husband's semen and his wife delivered the child. Then both parents automatically acquire parental responsibility for a child.[309] Although both father and mother is holding parental responsibility jointly, they are able to exercise parental responsibility independently without consulting each other as long as it is not contrary to the provisions of the CA 1989[310] and other enforcing orders in relation to the welfare of the child.[311]

In case a child is born by a mother (other than a surrogate mother) through IVF or AI by using donate semen, the mother's husband will be recognized as the legal father of the child born unless the husband shows that he did not consent at the

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[306] The intended parents must be 18 or over and at least one of them must be a genetic parent to the child.
[307] *Supra Note 280*.
[308] Section 1 (2) of the SAA 1985.
[309] Section 2 (1) of the CA 1989.
[310] According to Section 2 (7) & (8) of the CA 1989, there are two limitations in performing parental responsibility: (1) The decisions which require consent of more than one person cannot do independently and (2) All the rights, duties, powers, responsibilities and authority in parental responsibility may not be exercised in a way which is incompatible with a court order.
[311] Section 2 (7) & (8) of the CA 1989.

time of ART treatment.[312] Similarly, such a child is born to a female couple of civil partnership, the mother's female partner will be treated as the female parent of the child born only if it is not shown that the ART treatment was done without her consent.[313] In both cases, the donor of semen may not be the legal father of the child.[314] If a child is born by a surrogate mother, as described earlier, both married couples and couples in civil partnership are able to apply, within six months of the child born, for a parental order to be recognized as the legal parents of the child. All of these parents who have acquired the legal parent status have parental responsibility automatically.

Concerning the adopted children, adoption in England and Wales is full adoption which means an adoption by virtue of which the child is to be treated in law as not being the child of any person other than the adopters or adopter.[315] If a child under 18 is jointly adopted by a married couple or a couple in civil partnership, the legal status of being parents including the rights of exercising parental responsibility will be transferred from the former parents to the adoptive parents.[316] Since then, the legal relationship between the child and his/her former parents has been ceased and the adopted child will be treated as a natural child of the adoptive parents.[317] Then the child will be brought up in a normal family life. If a child is adopted by a new spouse of his/her former parent, the later does not need to relinquish the status of being a legal parent and the rights of parental responsibility.[318] In this case, joint adoption is not necessarily required. After granting an adoptive order by a court, such an order is permanent and cannot be revoked by either an adopter or an adoptee although readoption over an adopted child is possible under the law.[319]

As mentioned above, the legislation nowadays has opened the door for those couples who are not able to have children naturally. The following part will focus on the means by which legal parent status and parental responsibility are acquired for unmarried or cohabited parents.

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[312] Section 35 (1) (b) of the HFEA 2008.
[313] Section 42(1) of the HFEA 2008.
[314] Section 38 (1) & 45 (1) of the HFEA 2008.
[315] Section 88(3) of the Adoption and Children Act 2002.
[316] Section 46 (1) & (2) of the Adoption and Children Act 2002
[317] Section 67(1) of the Adoption and Children Act 2002.
[318] Section 51 (2) and 144 (7) of the Adoption and Children Act 2002.
[319] Section 46(5) of the Adoption and Children Act 2002.

3.3.3 Unmarried or Cohabiting Parents with Children

By the recent published government data, one in six adults who are under 50 may have the experience of cohabitation at any one time in the UK.[320] In 2012, about 6 million people were in a cohabiting relationship.[321] Although the existing law does not recognize the cohabiting couple as a legal union, more and more couples choose just to cohabit without entering to either marriage or civil partnership. Those children born to such cohabited couples have the same legal rights regarding child maintenance and inheritance as other children born to married couples or couples in civil partnership.[322]

In England and Wales, there were 2,298,234 cohabiting couples in 2011. Of these couples, 1,233,571 couples had no children and other 1,064,663 was with children. Precisely speaking, 949,564 cohabiting couples had dependent children and other 115,099 had non-dependent children.[323] The below discussion will be mainly concerned with those cohabiting couples in England and Wales who have dependent children.

When a child is born to a woman who is in a cohabited relationship, only the birth mother is recognized as the legal parent (mother) of that child after the child birth. That legal mother then acquires sole parental responsibility on the child born automatically.[324] On the other part, father is lack of parental responsibility until he takes necessary steps to be the legal parent of the child. In case the mother has died before the unmarried father acquires parental responsibility on the child, he does not entitle the rights to bring up the child and also is not an eligible person to give a consent on the adoption of that child.

Accordingly, the existence of marital relationship between parents was a decisive matter in determining whether the father has parental responsibility or not: the parents' subsequent marriage after the child's birth is one of the possible ways for father in order to acquire the parental responsibility on the child born.[325] In 2003, a legal reform was made to this practice by the Adoption of Children Act 2002. Since

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[320] Cohabitation and Marriage in Britain since the 1970s, Office for National Statistics, 2011.
[321] Short report: Cohabitation in the UK, Office for National Statistics, 2012.
[322] Ros Pickford, "Unmarried Fathers and the Law", in *What is a Parent? A Socio-legal Analysis*, Edited by Andrew Bainham, Shelley Day Sclater, and Martin Richards, Hart Publishing, 1999, p.144.
[323] 2011 Census, Household Composition.
[324] Section 2 (2) (a) of the CA 1989.
[325] Nancy Duffield, Jacqueline Kempton and Christa Sabine, "*Family Law and Practice 2011*", College of Law Publishing, 2011, pp.166-167.

then the unmarried father who registered his paternity jointly with the child's mother, is able to acquire parental responsibility automatically.[326] Importantly, at the time of birth registration, the personal attendance of both unmarried father and the child's mother together is necessary.[327]

When joint birth registration is not applicable for an unmarried father who seeks for acquiring parental responsibility, there are other means available for him: either to have the private agreement or to apply a court order. Regarding the private agreements, there are three options:

- making a formal private agreement with the child's mother,[328] or
- becoming an appointed guardian[329] by the mother,[330] or
- temporary delegation of parental responsibility by the mother to act on her behalf.[331]

Regarding the court order, father may acquire parental responsibility in any one of the following three options:

- being appointed as a guardian[332] under the CA 1989, or
- being granted parental responsibility order by the Section 4 (1) (c) of the CA 1989, or
- obtaining a residence order following Section 8 of the same Act.

It is very simple to make a private agreement with a child's mother to confer parental responsibility on an unmarried father. They only need to fill out the necessary personal data on the specific agreement form and then sign before one of the authoritarians. Then their agreement form needs to send attached with two copies to the Principal Registry of the Family Division. Once the Principal Registry of the Family Division accepts and records it officially, the whole procedure is completed.[333] As a consequence, the unmarried father becomes the child's legal parent and is able to exercise parental responsibility over the child. Once the procedures were completed,

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[326] Section 4(1)(a) of the CA 1989 as amended by Section 111(2)(a) of the Adoption and Children Act 2002.
[327] *Supra Note 241*, p.191.
[328] Section 4 (1) (b) of the CA 1989.
[329] This will be in effect only on the mother's death.
[330] Section 5 of the CA 1989.
[331] Section 2 (9) of the CA 1989.
[332] *Supra Note 329*.
[333] *Supra Note 325*, p.167.

no one is allowed to change the agreement without a court order. The agreement will be in effect until the child attains 18 unless it is terminated by a court earlier.[334]

Another private agreement is appointing the unmarried father as a guardian of the child by the child's mother. In this regard, it may be made without the knowledge of unmarried father because the appointed guardian's consent is not necessarily required in the process.[335] In this case, the mother may appoint the unmarried father as a guardian of her child in her will and on the condition of her death the unmarried father may become a guardian of that child.[336] Thereafter, the unmarried father may automatically acquire parental responsibility on that child.[337] The last option for acquiring parental responsibility under the private agreement is that delegation of parental responsibility temporarily by the mother according to Section 2 (9) of the CA 1989. These are the possible ways for unmarried fathers to take legal responsibility on the child born to their female partner through private agreement.

In case the private agreements were not carried out, there are three more options for unmarried father in order to acquire parental responsibility on his child. However, a court's order is necessary to follow these procedures. The first is that making an application at a court to be appointed as a guardian of the child in the event of the mother's death.[338] In some cases, it is possible for him that the mother has already appointed a person other than him as a guardian of his child. Under such a circumstance, the unmarried father has a right to challenge the other person's guardianship on his own child by applying for a parental responsibility order according to the Section 4 (1) (c) of the CA 1989, and/or for a residence order following Section 8 of the same Act at a court.

In considering whether to grant a parental responsibility order to an unmarried father or not, the court will have to weigh a number of relevant factors including the degree of commitment which the father has shown to the child, the degree of attachment which exists between the father and the child and the reasons of the father for applying for the order.[339] Only if the court believes that granting a parental responsibility order to an unmarried father is necessary for the welfare of the child, it

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[334] *Supra Note 325*, p.167.
[335] *Supra Note 236*, p.139.
[336] Section 5 (3) of the CA 1989.
[337] *Supra Note 297*, pp-168.169.
[338] Section 5 (1) of the CA 1989.
[339] Re H (Minors) (Local authority: Parental rights) (No.3) (1991 Fam 15).

may make an order of parental responsibility. Otherwise, the court is likely to refuse on granting such an order.[340]

When an unmarried father is willing to take over the physical care of the child, he may apply for a residence order to a court. During the proceeding, the father's involvement in the upbringing of the child from birth onwards and his real intention for making such an application will be taken into account.[341] In case he is granted a residence order, he may automatically acquire parental responsibility (subject to two limitations as mentioned earlier) as long as the residence order exists.

If a child is born to an unmarried mother through one of ART treatments, the birth mother is the child's legal mother irrespective of the fact if the child were not genetically related to her. With respect to an unmarried father, he may be recognized as the child's legal father on the condition that he gave his consent at the time of mother's ART treatment and did not withdraw it until the embryo was placed in the mother's womb.[342] If such a child is born to a mother who is in a cohabiting relationship with a female partner, the mother's female partner may become the second or another parent of the child born on the same condition with the unmarried father's situation as described above.[343] In these ART cases, the agreement from the mother's male or female partner must be in written document and signed by the agreed person.[344]

With respect to a child born through surrogacy arrangement, the cohabiting couples of both same-sex and opposite sex-couples are able to apply for a parental order in order to become the child's legal parents subject to the fact that one or both of the couple must be genetically related to the child.[345] If a parental order is granted by the court, the unmarried couple may be registered as father and mother in the child's birth certificate, the cohabiting female couple as the mother and other parent, and the cohabiting male couple as the parents respectively.[346] As the above explanation has shown, the current legislations in the England and Wales may grant a child to have two parents of the same-sex. As a consequence, there may be a case where a child is legally fatherless or motherless but have two legal parents.

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[340] *Supra Note 236*, p.142.
[341] *Supra Note 241*, p.212.
[342] Section 37 of the HFEA 2008.
[343] Section 44 of the HFEA 2008.
[344] Section 37 (2) & 44 (2) of the HFEA 2008.
[345] Section 54 of the HFEA 2008.
[346] *Supra Note 280*, p.6.

This is one of the considerable facts of the current system and it makes the people to be complicated in defining 'what a family is'. Not only the HFEA 2008, but also the Adoption and Children Act 2002 have the same provisions regarding the existence of legally fatherless or motherless children. The Act also makes it possible for the same-sex couples to adopt a child.[347] Moreover, according to the Section 144 (4) of the Adoption and Children Act 2002, a single man or woman is also eligible to adopt a child. Accordingly, a variety of family types exists nowadays.

As to conclude this part, some recent changes on the practice of establishing legal parent-child relationship will be summarized here. The important legislations which brought these significance changes are the HFEA 2008 and the Children and Adoption Act 2002. The two legislations provided flexible principles to completely eliminate the barriers for same-sex couples and single person to be a parent of the child legally. Nowadays the 'would-be-parent' people are enjoying with the flexible principles of becoming a parent. However, it may be argued whether such a practice is consistent to the objective of the adoption process.

Rebecca Probert said that the adoption is intended as a means for providing a family for a child.[348] However she did not say how to define the term 'family'. Based on the description regarding the intention of adoption and the actual practice of adoption procedures provided by the Children and Adoption Act 2002, it may be concluded that a family in England and Wales today is constituted without the involvement of father or mother and the never-married single persons are also eligible to form their own family inclusive of their legal child. This is a contradictory practice of the past experience because formerly it was defined that 'the family is a social group including adults of both sexes and one or more children, own or adopted'[349].

In parallel with the changing situation of the formation of a family unit, the number of the family breakdown has being increased in England and Wales and the following section will discuss it in detail.

3.4 The Divorce Trends and Number of Children Affected by Parent's Divorce in the Post-war period (1945-2011)

[347] Section 144 (4) (b) of the Adoption and Children Act 2002.
[348] *Supra Note 236, p.148*.
[349] Chris Barton & Gillian Douglas, "*Law and Parenthood*", Butterworths, 1995, pp.8-9.

As explained in 3.2, divorce was highly restricted for majority of people hundreds years ago under the Canon law practice. At that time, England and Wales was non-divorce society and only the death was a cause of dissolving marriage. In contrast to this practice, in today's England and Wales, divorce is a common phenomenon and a considerable number of children were annually affected by parents' divorce prior to their adulthood. In the following discussion, the changing trend of divorce in the post war period (1945-2011) and children affected by parents' divorce will be discussed based on the data releasing by the Office for National Statistics and the Ministry of Justice.

In 1947, after the Second World War, the number of divorces was increased considerably from 15,634 in 1945 to 60,254 in 1947. Of these sixty thousands divorces, two-thirds of them were initiated by the husband grounded on the war-time adulterous behavior of their wife.[350] This is one of the short-term reactions of the Second World War to England and Wales. After that, the number of divorce was in a downward trend and reached to 22,654 in 1958. However, the rates of divorce per a thousand married couples was still two and half times higher than that of the pre-war period.[351] This is another long-term effect of the Second World War.

In 1959, the number of divorces started to increase again and stood at 45,794 in 1968. One of the main reasons for causing this upward trend of divorce was the declining of the first-marriage-age.[352] As the teenagers were emotionally immature on a natural basic, their marriages were twice as likely to fragile as marriages between the emotionally mature adults.[353] Another partially important reason for this upward trend of divorce was the Government's financial aid program for those people of moderate income while they were in the divorce process. The program was initiated in 1948 based on the public finances and the purpose was to support the legal costs for these people.[354]

In 1969, the divorce law abandoned the former principle of matrimonial fault and substituted it with the no-fault principle: the irretrievable breakdown of the marital relationship became the sole ground of divorce. The Divorce Reform Act 1969 came into effect in 1971 and it was subsequently consolidated in the MCA 1973. Under the

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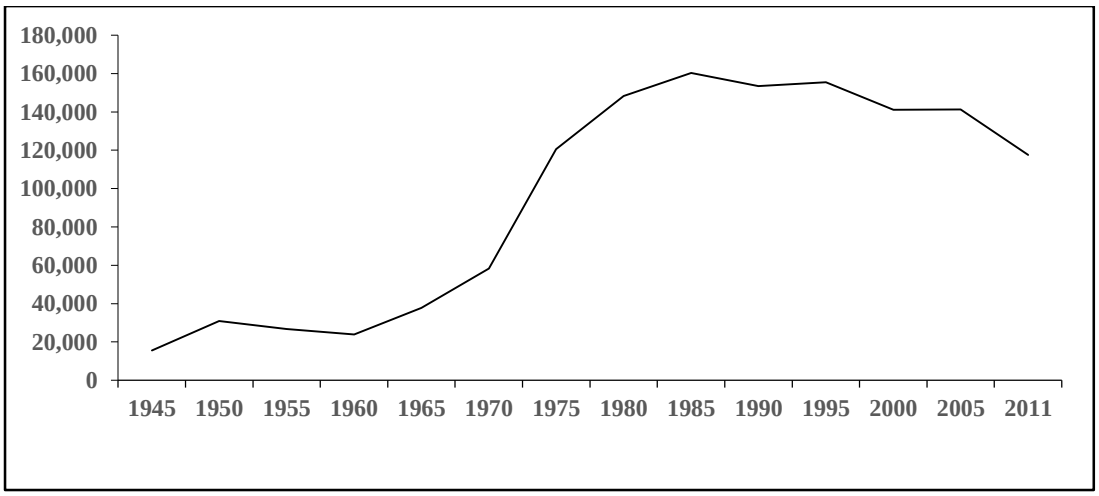
[350] *Supra Note 197*, p.401.
[351] *Ibid*, p.402.
[352] *Ibid*, p.411.
[353] *Ibid*.
[354] *Ibid*, p.403.

MCA 1973, it was possible for the first time to claim for a divorce grounded on the separation period. As a result of such a flexible divorce principle, a rapidly increased trend of divorce was occurred between 1969 and 1973; from 51,310 divorces in 1969 to 106,003 in 1973. Since then, over 100,000 divorce cases are processed each year until now.

For two decades (1973-1993), the number of divorce was steadily increasing and reached the historical highest number, 165,018, in 1993. After peaking in 1993, the divorce trend was reversed again and reached 153,065 in 2003. Since then, the divorce trend began to fall sharply until currently. In 2011, there were 117,558 divorces in England and Wales. The possible reasons for such a downward trend of divorce may be the decreasing trend of marriage population and the increasing trend of first-marriage-age.

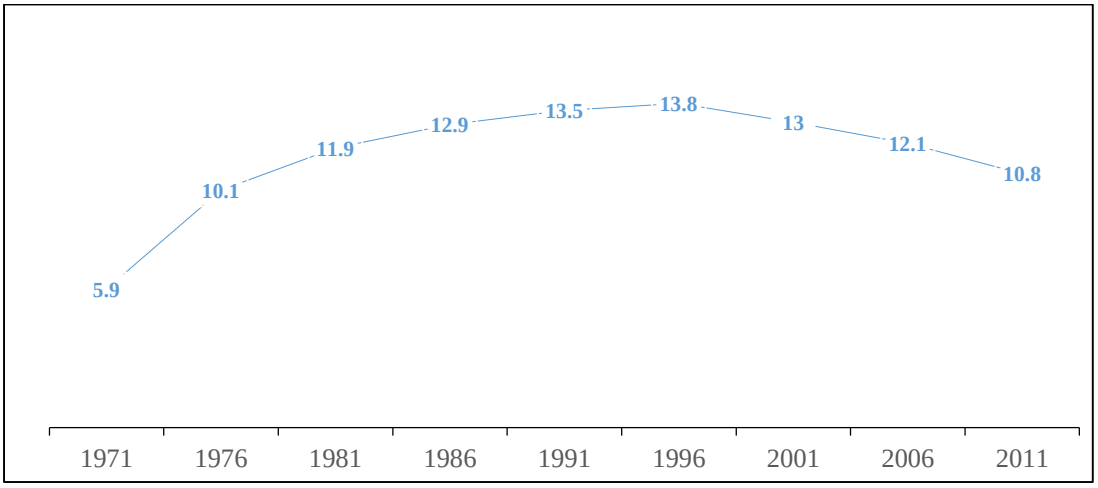
Figure 3.2: Trends in Number of Divorce in the Post-war Period (1945-2011)



Source: Number of Marriages and Divorces (1931-2011), Office for National Statistics

In parallel with the current decreasing trends of divorce, the divorce rate of both sexes per a thousand populations is also decreasing. The downward trend of divorce rate has been started since 2000. Prior to that time, there was a steady upward trend of divorce rate for both sexes.

Figure 3.3: Trends in Divorce Rate per 1,000 Married Population (1971-2011)

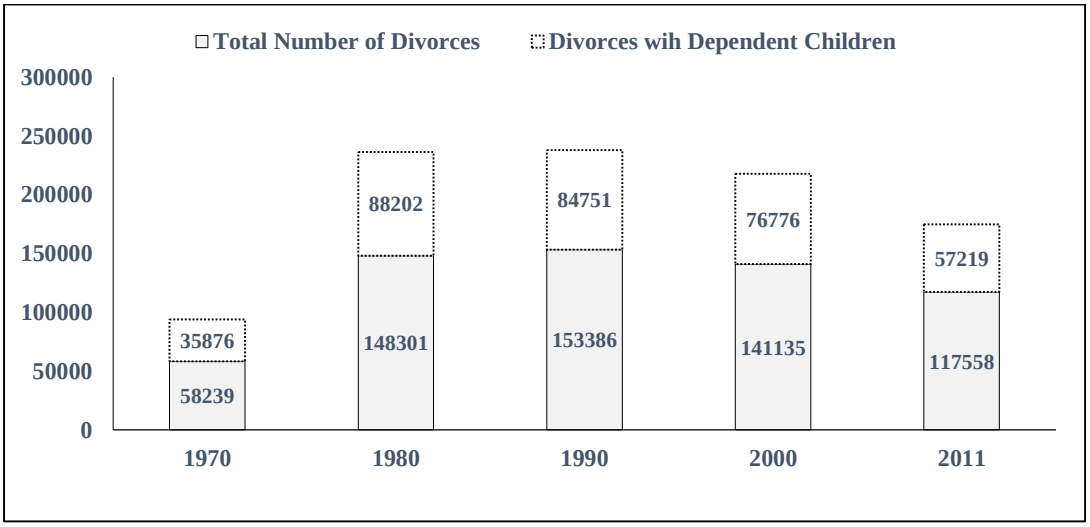


Source: Divorce Rate by Sex (1971-2011), Office for National Statistics

The above figures show the fact that despite the decreasing trend of divorce rate in recent years, a large number of parents in England and Wales dissolved their marital relationship. According to the annual official statistics, almost half of these divorced parents had at least one dependent child and consequently, a large number of children in England and Wales have been faced with the family breakdown experience before their adulthood.

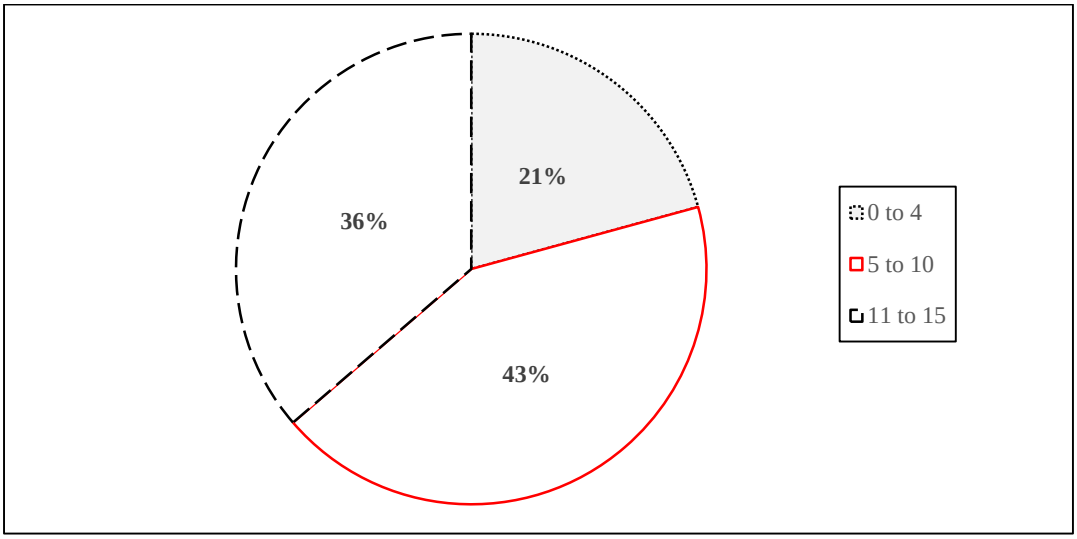
For instance, in 2011, 117,558 couples dissolved their marital relationship through a divorce. Of these couples, 57,219 couples (49% of total divorce couples) had dependent children. The total number of dependent children who were owned by these divorced parents was 100,760 in total. Of them, 20,907 were children between 0 and 4 years old, 43,261 were between 5 and 10 years old and the rest 36,592 were between 11 and 15 years old. This was a fairly large number of children who were affected by parental divorce in 2011.

Figure 3.4: Number of Divorces with Dependent Children (1970-2011)



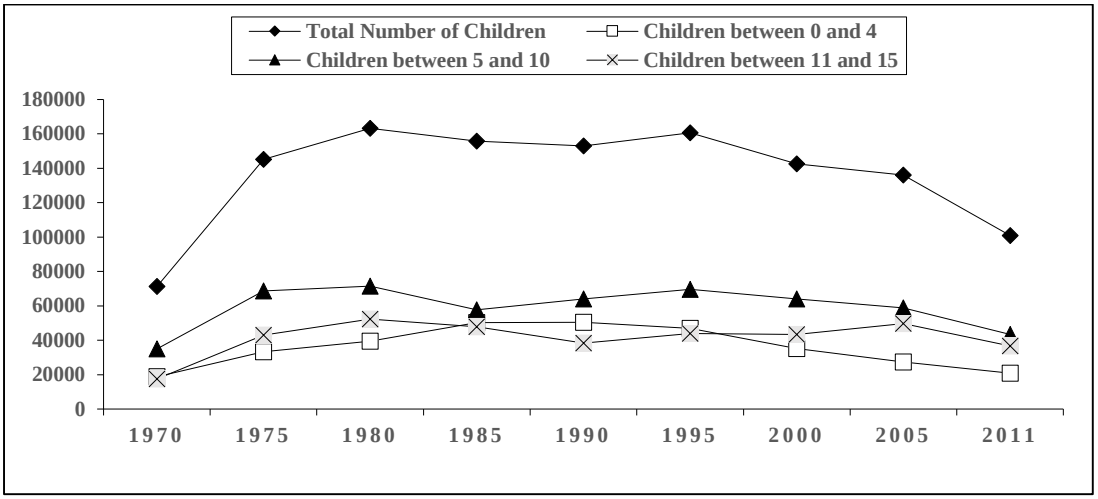
Source: Couples by Number of Children and Children by Age (1970-2011), Office for National Statistics

Figure 3.5: Percent Distribution of Dependent Children by Age in Parental Divorce (2011)



Source: Couples by Number of Children and Children by Age (1970-2011), Office for National Statistics

Figure 3.6: Trends in Divorce with Dependent Children by their Age (1970-2011)



Source: Couples by Number of Children and Children by Age (1970-2011), Office for National Statistics

According to Figure 3.6, children in their middle childhood (age between 5 and 10) were more affected by parent's divorce. It may be somehow related to the duration of marriage of the divorcing parents because around half of total divorces were usually occurred in the first ten years of their marriage anniversary.[355] In fact, it is said that the middle childhood is an important step of all children for their well development in various skills.[356] At the beginning of middle childhood, children usually face with a big challenge by starting their school-life out of their home. They may well be required to be adaptable with their changing environment, surrounding and daily activities.[357]

In this difficult period, if the child is faced with another challenge of parents' divorce, it is considered that the child will have additional difficulties in his/her life that it may cause any damage to the child's stability.[358] Some scholars believed that divorce has a number of negative effects to the children including;

- changes to the financial situation within the family,

[355] Divorces in England and Wales, 2011 & Age at Marriage, Duration of Marriage and Cohort Analyses, office for National Statistics.
[356] Cathy Glass, "*Happy Kids, The Secret to Raising Well-behaved Contented Children*", Harper Collins Publishers, 2010, p.64.
[357] *Ibid*.
[358] Daniel Porter, "*Psychosocial Well-Being and the Relationship between Divorce and Children's Academic Achievement*", Journal of Marriage and Family, 933-946, 2010, pp.933-934.

- reducing the parenting time and the parenting quality and
- disruption to the parent-child relationship.

Therefore, parents who get divorced with the dependent children between the age of 5 and 10 should aware that their divorce may have a number of negative effects on their children.

These are the situation of divorce in England and Wales and of dependent children affected by parents' divorce for a certain period. The later part will concern the separation of parents with children.

3.4.1 The Situation of Separated Parents with Children

According to Section 62 (1) (a) of the Family Law Act (as amended by the Domestic Violence, Crimes and Victims Act 2004), cohabitation means two persons who, although not married to each other, are living together as husband and wife or (if of the same sex) in an equivalent relationship. Unlike the married couple or couple in civil partnership, cohabiting couple does not need to notify the formation of their union to any public body. As a result, there is no record of official registration on cohabiting unions. Likewise, when the cohabiting couple dissolves their relationship through separation, they do not need to notify anyone about the end of their relationship. One consequence of the lack of registration is that the number of formation and separation of cohabiting couples remains unknown.

Herring states that married couples who have accepted a legal commitment to each other, tend to have more stable relationships than unmarried couples, whose relationships may vary from quasi marital to ephemeral.[359] In addition, based on the findings from the British Household Panel Survey, it was revealed that the cohabiting couples with children are much likely to break up their relationship: about 65 percent of cohabiting couples with children subsequently dissolve their relationship and only 35 percent of children born to cohabiting couple is able to live with both parents until they reach the age of 16.[360] Eventually, it was concluded that having a child in a cohabiting union is not an evidence of a long term partnership.

In England and Wales, there were 2,298,234 cohabiting couples in 2011. Of these couples, 949,564 cohabiting couples had dependent children.[361] In the same year,

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[359] Jonathan Herring, "*Family Law*", LONGMAN Law Series, 5th Edition, Longman, 2011, p.80.
[360] "*The Family Law Review: An Interim Report*", the Centre for Social Justice, 2008, p.28.
[361] 2011 Census, Household Composition, Office for National Statistics.

there were 2,487,764 lone parent families there and of them, 1,671,396 had dependent children. Although it is unknown how many of these lone parents had affected by the ending of cohabiting union, it may estimate that a certain portion of these lone parents and dependent children might be a result of the cohabiting unions' separation.

3.4.2 The Situation of Civil Partnership Dissolution with Children

In 2012, the most common family type in the UK was a married couple or couple in civil partnership without dependent children and it constituted 42% (7.6 million) of the total population. The second most common type of family is a married couple or couple in civil partnership with dependent children and it was about 25% (4.6 million) of the total population.[362] Of these millions of families, there were 60,000 couples in civil partnership without dependent children and 6,000 couples in civil partnership with dependent children. The official statistics pointed out that the number of dependent children living in the civil partnership families was constituted less than 1 percent of the total number of dependent children in the UK.

The 2012 statistics for civil partnership families with or without dependent children is not available for England and Wales particularly. Therefore, the estimation would be made based on the available data for 2010. Between the CPA came into force in 2004 and the end of 2010, the total number of 42,778 civil partnerships were registered in England and Wales. During the same period, 1,005 couples in civil partnership registered the dissolution of their relationship. Therefore, at the end of 2010, 41,773 couples in civil partnership were left in England and Wales. According to the published data by the "Civil Partnerships Five Years on"[363], in 2010, around 7% of all couples in civil partnership had 1.5 dependent children on average. Therefore, the estimation may be conclude that, in England and Wales, around 3,000 couples in civil partnership had about 4,500 dependent children as for 2010.

With respect to the trend of the dissolution of civil partnership between 2007 and 2010[364], it was a gradually and steadily upward trend but relatively small in number. The total number of the dissolution of civil partnership since the CPA 2004

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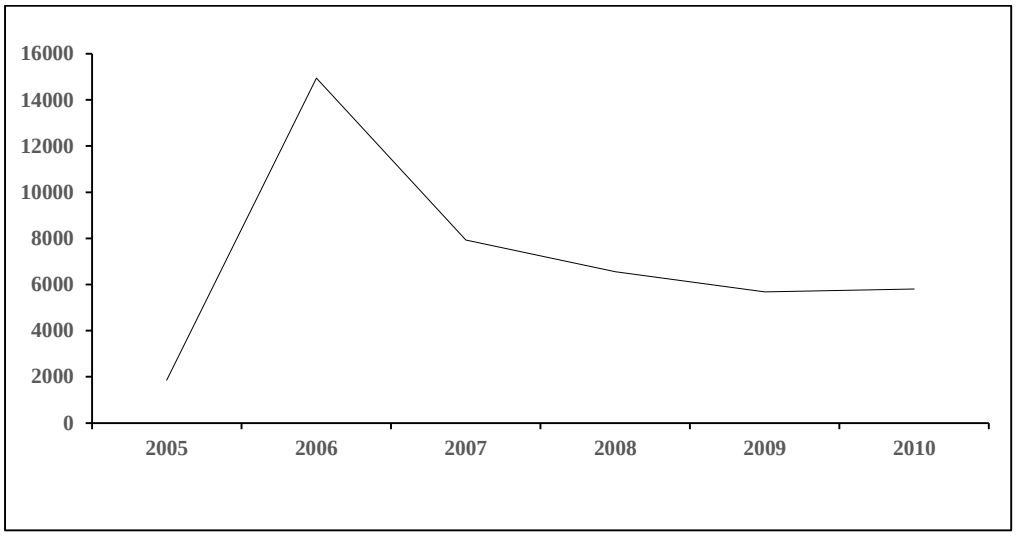
[362] Families and Household 2012, Office for National Statistics.
[363] Helen Ross, Karen Gask, and Ann Berrington, "*Civil Partnerships Five Years On*", Office for National Statistics, 2011, p.19.
[364] Although the CPA 2004 came into force in the late 2005, there was no dissolution of civil partnership until the end of 2006. (Statistical Bulletin, Office for National Statistics)

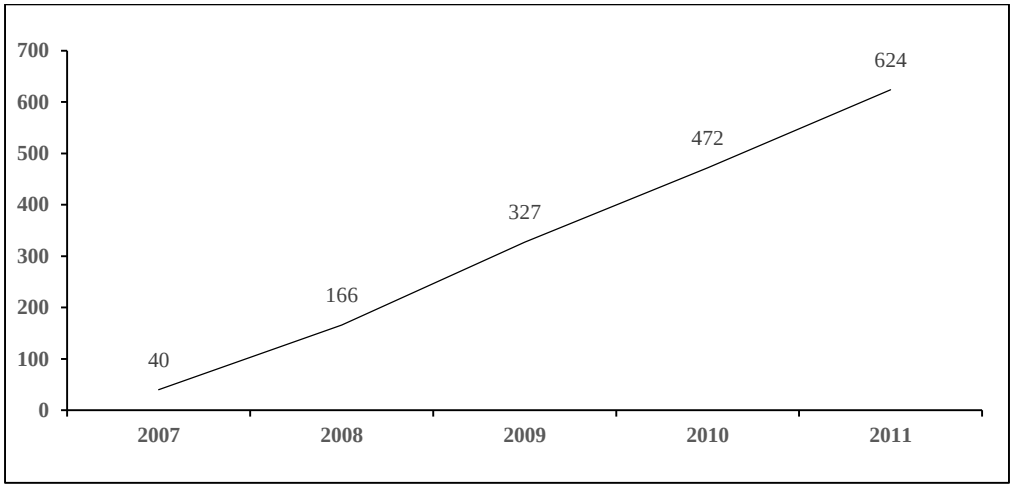
came into force until the end of 2010 is 1,005. Therefore, it may conclude that the number of dependent children affected by the dissolution of civil partnership may be a small number and may not be comparable with that number affected by the dissolution of marriage.

Figure 3.7: Trends of the Formation Civil Partnership in England and Wales (2005-2010)



Source: Civil Partnerships in the UK, 2010, Office for National Statistics

Figure 3.8: Trends of the Dissolution of Civil Partnership in England and Wales (2007-2011)



Source: Statistical Bulletin, Office for National Statistics

3.5 Child-related Disputes for Parents

This part is concerned with the basic principles and procedures for the resolution of child-related disputes at the time of the dissolution of parents' relationship. For this purpose, it will be dealt with married couples, couples in civil partnership, cohabiting couples and their children inclusive of natural children, adopted children and children born through the ART treatment in the following discussion.

3.5.1 Principles for Child–related Disputes

The relevant principles on private law matters for this part are gathered from the statutory laws that have already mentioned in 3.3.

a. Parental Responsibility

Section 3(1) of the CA 1989 defines the parental responsibility as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'. The rights, powers and authority in this definition are not intended to be exercised for the benefit of a person who holds the parental responsibility but for that of the child who is under his/her care. The duties and responsibilities conferred by this definition include making the decisions on all child-related matters with respect of the child's education, health, religion, place of residence and day-to-day care.[365] During performing these duties, a person who has parental responsibility is able to exercise the aforesaid power or authority conditionally.

Subject to the Section 46 of the Adoption and Children Act 2002 and Section 54 of the HFEA 2008, the parental responsibility is a non-transferable obligation from one holder to another, although delegating to someone or sharing with a person is possible. If the parental responsibility is delegated to someone, the primary holder does not need to lose his/her parental responsibility but the delegate acquires the legal power or authority temporarily to do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the welfare of the child.[366] In case

[365] *Supra Note 325*, p-166.
[366] Section 3 (5) of the CA 1989.

the parental responsibility is shared between two or more persons, each of them may act alone with no obligation to consult with other holders [367] subject to some limitations.

In fact, the acquiring principle for parental responsibility is becoming broaden and flexible nowadays. Owing to this, a variety of parents and non-parent persons are able to hold the parental responsibility legally. These persons may include:

- the single parent,
- the married parents,
- the unmarried or cohabiting parents,
- the parents in civil partnership,
- the non-parent persons, for instance the grandparent, the step parent and
- the third parties, for instance the local authority.

The parental responsibility holding by them continues until the child attains majority at the age of 18 unless it is terminated by the court order. In some cases, it comes to an end when the order conferred it to terminate: this is the case for emergency protection order, care order and residence order.

It should be noted that by merely due to the dissolution of parents' relationship, either through a divorce or a judicial separation or the dissolution of civil partnership, no parent would lose the exercising right of parental responsibility over their children. Both parents will retain all aspects of parental responsibility which they have exercised before dissolving their relationship. Of particular importance at that moment is determining other facts for child arrangement including the matters of residence, contact and child maintenance payment. This is a provisional requirement for them prior to the dissolution of their relationship.

b. Residence

According to Section 8 (1) of the CA 1989, a residence order means an order settling the arrangements to be made as to the person with whom a child is to live. Although both parents continue to hold parental responsibility even after the dissolution of their relationship, the non-resident parent may lose the opportunity to take care the child physically on a daily basis. Theoretically, the non-resident parent is still sharing parental responsibility on the child and he/she is still entitled to

[367] Section 2 (7) of the CA 1989.

participate in the child's upbringing process same as the resident parent. However, it can be difficult to implement this theory of equality into practice.

In order to overcome the difficulties, shared residence order may be a solution. The CA 1989 allows the court to grant a residence order being made in favor of more than one person. It aims the children to share their time between the two households of each parent. In such a case, the court, in its order, may specify the periods during which the child is to live in the different households concerned.[368] In fact, the specified period in the shared residence order may not be the same for all cases and may differ from one case to another depending on the needs of a particular family.

In some cases, it may be possible that the time shared between the two separate households is relatively unequal. Formerly, such a situation was recognized as '*a residence order in favor of one of the parties and a contact order in favor of the other*'.[369] Nonetheless, in recent days, the terminology of 'shared residence order' has been preferred to use rather than the former expression. In other words, granting a shared residence order is becoming a common practice in contrast with the former practice in which making a shared residence order was for exceptional circumstances or under unusual circumstances.[370] However, concerning recent practice, it was argued that the shift today is only the terminology rather than the substance.[371] It was also commented on the recent shift of sharing residence that *the adoption of a shared residence order presumption in England and Wales would lead to a rapid expansion of the 'wrong type' of shared residence, that is amongst the high conflict litigating cases least equipped to make it work for children.*[372]

In case sole residence order is in effect and the non-resident parent with parental responsibility is living abroad, the non-resident parent is unable to take the child to abroad (any place out of the UK jurisdiction) without either the leave of the court or the written agreement of every person holding parental responsibility.[373] If the non-resident parent takes the child to go abroad without making necessary requirements, he may be punishable under the Child Abduction Act 1984[374] for

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[368] Section 11 (4) of the CA 1989.
[369] *Supra Note 236*, p.164.
[370] *Ibid*.
[371] *Ibid*.
[372] Liz Trinder, "*Shared Residence: a Review of Recent Research Evidence*", Child and Family Law Quarterly, Volume 22, Number 4, 475-498, 2010, p.475.
[373] Section 13 (1) of the CA 1989.
[374] Section 1 of the Child Abduction Act 1984.

committing a criminal offence, namely, the offence of abduction of child by parent, even though he is still holding parental responsibility on that child. By contrast, the parent in whose favor the residence order is able to take the child freely out of the UK. In this regard he is not bound by obligation to consult with others who has parental responsibility or to apply for the leave of the court. The only limitation for the resident parent is that the travelling period might be less than one month.

In certain cases, the child itself may be an applicant for a residence order because the CA 1989 makes the children to be enable to apply for a residence order himself with the court's leave.[375] However, the court may grant such a leave only if it is satisfied that the child has sufficient understanding to make the application.[376] These may be exceptional cases because on a general basic, a child who is the subject of private law proceedings is not allowed to become a party in the proceeding unless represented by a guardian or next friend.

The discussion is now to turns to consider how the court may apply the paramount principle in determining a residence order. The paramount principle is laid down by Section 1 (1) of the CA 1989 and it provides that 'when a court determines any question with respect to -

a) the upbringing of a child; or
b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.

In real situation, there is an accusation that the courts, in determining a residence order, are biased towards mothers and against fathers because majority of children are living with their mother after the dissolution of parents' relationship.[377] In fact, there is no legal presumption that mother is more appropriate than the father to be granted a residence order. While determining a residence order, the court only pays particular regard to a number of factors including the child's physical needs such as food, warmth, safety, etc. and emotional needs such as love, family relationship, etc.

Another additional important factor to be taken into account is placing due weight upon the views of the child depending upon the child's age and

[375] Piers Pressdee, John Vater, Frances Judd QC and Jonathan Baker QC, "*Contact: the New Deal*", Jordan Publishing Limited, 2006, p.61.
[376] Section 10 (8) of the CA 1989.
[377] *Supra Note 375*, p.67.

circumstances.[378] The final decision, however, must be according to the court's discretion and not by the child. The status quo principle is applicable by the court in some circumstances only if there is a satisfactory status quo in relation to the residence arrangement for a child and lack of strong reason to interfere with it.[379] These are the general principles that the court should consider while determining the question with respect to the upbringing of a child.

Regarding the court's determination of a residence order for divorced parents, it was said that:

> 'the fact that most children remain with the mother represents not so much a judicial bias towards women but a reflection of how most families choose to operate, and a conservative attitude within society towards changing the children's normal arrangements'.[380]

It also added that there is less bias in favor of mothers amongst the judiciary than there was a generation ago. That may be a good development to ensure the equality rights of divorced parents regardless of gender.

c. Contact

According to Section 8 (1) of the CA 1989, a contact order is defined as an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other. The description 'contact' encompasses a wide range of practical measures such as direct contact (face-to-face meeting), visiting contact without staying overnight, staying contact inclusive of overnight stay and indirect contact through letters and cards, emails, videos, DVDs, webcam and any other form of written or visual contact made possible by the advanced information technology.[381]

While there is no presumption that contact should be granted at the instance of the parent, there is a strong assumption that it is beneficial for a child to maintain a relationship with both parents in the wake of parental separation.[382] Accordingly, it is likely to grant a contact order unless it is found that it may be harmful for the child to

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[378] *Supra Note 375*, p.63.
[379] *Ibid*.
[380] *Ibid*, p.68.
[381] White, Carr and Lowe*, "The Children Act in Practice",* 3rd Edition, Butterworths, 2002, p.152.
[382] *Supra Note 236*, p.165.

grant it.[383] In recent days, however, there has been an increasing awareness of importance of granting a contact order because of the great risks that may impact on the life of a child during contact. The clearest cases of harm to children are included the direct sexual, physical and emotional abuse or to clear neglect of their needs.[384]

The statistical data indicated that during 10 years between 1994 and 2004, at least 29 children have died during contact visits and the most cited problem was child abuse.[385] In order to reduce such kinds of risks while conducting a contact between the child and non-resident parent, the court nowadays are able to make an order which contains contact activity directions and conditions.[386] Under the Children and Adoption Act 2006, the court has a power to compel parents, at various stages in the litigation process, to take part in 'contact activities' before making a final decision whether to grant or vary or discharge a contact order.

A contact activity means the one which promotes contact with the child concerned,[387] and the categories of contact activities may include:

a) programmes, classes and counselling or guidance sessions of a kind that:
    i. may assist a person as regards establishing, maintaining or improving contact with a child;
    ii. may, by addressing a person's violent behavior, enable or facilitate contact with a child;
b) sessions in which information or advice is given as regards making or operating arrangements for contact with a child, including making arrangements by means of mediation.[388]

In case the court decides to grant a contact order, it may impose a contact activity condition on the person with whom the child lives or is to live, or the person whose contact with the child concerned is provided for in the order.[389] In the implementation of such a contact order, the assistance from the CAFCASS officer is necessary to monitor the contact process between the child and non-resident parent. The duty of a CAFCASS officer here is to monitor whether an individual in the contact

[383] *Supra Note 236*, p.72.
[384] *Supra Note 375*, p.7.
[385] *Ibid.*
[386] Section 11A (2) & 11C (1) of the CA 1989 as inserted by Section 1 of the Children and Adoption Act 2006.
[387]Section 11A (3) & 11C (2) of the CA 1989.
[388] Section 11A (5) of the CA 1989.
[389] Section 11C (3) of the CA 1989.

process complies with the contact activity condition and then to report its finding to the court.

In case the residence parent does not comply with the contact activity condition, the court may use a number of mechanisms including imposing a fine or even sending him/her to prison to enforce a contact order which were prescribed in the warning notice.[390] The available enforcement methods are as follow;

1) sending the noncompliance parent to a prison for an unpaid work requirement of up to 200 hours, or making a suspended order of imprisonment upon him;
2) imposing a certain amount of fine which may not exceed the amount of the applicant's financial loss;
3) transferring the child's residence from the noncompliance parent to another; and
4) giving up to enforce the order.

In reality, all of the enforcing methods have defects[391] and are not the appropriate way to resolve such a kind of problem because the resolution of family problem is delicate and complicated.

It may be possible in some circumstances that the child has no willingness to see non-resident parent and refuses to make a contact. In such a situation, the resident parent has no responsibility to persuade the child to go and see the other parent. The only obligation that imposed upon him/her is to allow the child to make a contact with his/her non-resident parent, rather than to ensure that the contact takes place successfully. Therefore, the resident parent is free of obligation for such an unsuccessful failing contact. The child is also free of duty to make a contact with non-resident parent because the court is unable to impose a contact activity condition on that child.

In England and Wales, family contact centers are available to assist the child and non-resident parent to facilitate contact arrangement between them. These centers are operated by a variety of organizations such as social services, charities, religious organizations, voluntary group and other interested people.[392] The NACCC is an umbrella organization in England and Wales to offer support and guidance to the

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[390] Section 11 H of the CA 1989 as amended by Section 3 of the Children and Adoption Act 2006 & Section 11I of the CA 1989 as amended by Section 4 of the Children and Adoption Act 2006.
[391] *Supra Note 344*, p.171.
[392] Clare Furniss, "*Family Contact Centre: The Position in England, Wales & Scotland*", Centre for Research on Family, Kinship & Childhood, 1998, p.1.

contact centers registered to it. As for 2011, there were 390 registered centers and four thousands volunteers are working there. Annually, over 70,000 children are using their services.[393]

It is common to see that the contact centers are operated on Saturday at the premises which are owned by other and used for another purposes in other days and permitted to the centers to use only on Saturday, for instance, church halls or community centers or nursery school.[394] Therefore, most of the contact centers are able to offer services without imposing charges on the users and some may charge the minimum amount. The referral sources of the families coming to enjoy these services are court welfare officers, solicitors, social services, mediation services and self-referrals. They are usually offered two main services: enabling parents to exchange children without meeting each other and enabling children to be with their parents in a safe, supervised environment.

Due to the satisfactory and reliable assistance offered by the child contact center in arranging contact between the child and non-resident parent, the demand for the assistance has been increasing year by year and in current situation, it is playing an important role to implement a successful child contact.

d. Maintenance

According to Section 1 (1) of the CSA 1991, both parents of a qualifying child are responsible for maintaining that child. 'A qualifying child' in this sentence means a child who is unmarried and:

- under 16;[395] or
- between 16 and 18 years old inclusive and receiving full-time, non-advanced education; or
- 16 or 17 years old and who has recently left education and who is registered for work or work-based learning for young people.[396]

Under some circumstances, a child under 19 receiving full time education is also recognized as a qualifying child.

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[393] "*20 years of NACCC: Raising the Standards, Raising the Flag*", Annual Review 2010-2011, National Association of Child Contact Centres.
[394] *Supra Note 392*, p.2.
[395] Section 55 (1) of the CSA 1991.
[396] "*Child Support Handbook*", Child Poverty Action Group, 19th Edition, 2011-12, p.18.

According to Section 54 of the CSA 1991, a parent for the child maintenance purpose is a person who is a legal mother or a legal father of the child. It may include a natural parent, an adoptive parent, a parent under a parental order, a female second parent under the HFEA 2008 and others who have the legal parent status. However, a person such as a step-parent or a foster parent who acquires parental responsibility is not a parent for this purpose. After dissolving the parents' relationship and one of the parents does not live together with the child, the non-resident parent is required to pay child maintenance. That child maintenance paid by non-resident parent is intended to reflect legal responsibility to provide financial support for their qualified children.

Until 25th November, 2013, there are three different ways for the non-resident parent to pay child maintenance: by the agreement or by the court order or through the Child Support Agency service (hereinafter the CSA) which is managed by the Child Maintenance and Enforcement Commission (hereinafter eh CMEC).[397] With respect the maintenance payment by agreement, it may be divided again into two different ways, either by the own agreement without going to a court, or by applying for a consent order at a court to make their agreement to be a legal document.[398] In very limited cases in which the CSA has no jurisdiction, the court will determine the amount of child maintenance by a court order. For instance, claiming maintenance for a child who is over 19 and is still in education or training or in which one of the parents or the qualified child is not habitually residence in the UK.[399]

On a general basic, the courts cannot make a maintenance order as long as the CSA has jurisdiction, subject to the making of consent orders and orders on special expenses, or supplementary maintenance or educational expenses.[400] Before making an application to the CSA, parents are able to seek the necessary information from the Child Maintenance Options service (hereinafter the CMO) which is managed by the CMEC. The CMO is intended to offer free and impartial information to the parents and to assist them to set up a child maintenance arrangement following the dissolution of parents' relationship.[401]

On the other part, the CSA is responsible to calculate child support payments and, in some cases, to collect and enforcement. Once the decision of one's liability

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[397] *Supra Note 396*.
[398] *Supra Note 325*, p.90.
[399] *Ibid*, p.89.
[400] *Supra Note 396*, p.27.
[401] *Ibid*, pp.6-7.

and calculation of the maintenance payment are made, a collection schedule is set up. In this case, the non-resident parent can make payments by standing order, direct debit, automated credit transfer, credit card, debit card, cheque, postal order, banker's draft, and voluntary deductions from earnings arrangements or cash.[402] For this payment, the day and frequency of payments may be set up according to the preference of the non-resident parent.[403] In case where the non-resident parent failed to comply with the payment arrangement, the CSA may make a deduction from earnings order to make a deduction from the non-resident parent's earnings.[404] If the non-resident is unemployed, the CSA may apply to the Magistrates' Court for a liability order to disqualify the non-resident parent from driving or to imprison for a term not exceeding six weeks.

This is the past practice and on 25th November, 2013 the CSA was replaced with the Child Maintenance Service (here in after the CMS).[405] Since then the resident parents have to apply for child maintenance at the Child Maintenance Service instead. The CMS uses the new calculation method which is based on the gross income of the non-resident parent and will be paid for its service. This is a very recent development and its operation system is not well settled yet. The old child maintenance cases operating by the CSA is still under the control of the CSA and they will be run by the CSA until the new system is well settled.

e. Child Abduction by a Parent

If a child is abducted by a parent or other person connecting to the child within England and Wales, it is not recognized as a criminal offence unless it is contrary to the common law or the child is in the care.[406]

Under the common law practice, if a parent takes away the child under 18 by using force or fraud without lawful excuse and without the child's consent, he is guilty of the common law offense of kidnapping.[407] In this respect, such offense shall be prosecuted with the consent of the Director of Public Prosecutions. When the court

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[402] *Supra Note 396*, p.395.
[403] *Ibid*, p.398.
[404] Section 31 of the CSA 1991.
[405] http://www.gov.uk/childmaintenance (visited on January 5th, 2014)
[406] Nigel Lowe, Mark Everall QC and Michael Nicholls, "*International Movement of Children, Law Practice and Procedure*", Family Law, Jordan Publishing Limited, 2004, p.135.
[407] "*Simplification of Criminal Law: Kidnapping*", Consultation paper No.200, The Law Commission. Available at http://lawcommission.justice.gov.uk/ (visited on September 10th, 2013).

found the offender is guilty, the abducting parent may be punishable with imprisonment or fine at the court's discretion.[408]

Under the Section 49 of the CA 1989, if any person (a parent or other person with parental responsibility) takes away the child in care from any responsible person[409] without lawful authority or reasonable excuse, he is guilty of child abduction in care and may be punishable with imprisonment for a term not exceeding six months or to a fine. Another civil remedy for such kind of abduction is applying a recovery order to seek the child's return.[410]

Another important legal instrument concerning the parental child abduction is the Child Abduction Act 1984. Under the Section 1(1) of this Act, if a person (a parent or other person connected with the child) takes or sends a child under 16 out of the UK without the appropriate consent, he commits a criminal offence of child abduction and punishable with imprisonment to a maximum of 7 years. Same as in common law practice, such a kind of abduction must be prosecuted with the consent of the Director of Public Prosecutions.[411] The interesting fact is that this Act is also applicable when a parent attempts to commit child abduction because attempting to take a child out of the UK itself is also an offense.[412]

This is a part of the legal response in England and Wales to the child abduction by a parent which is occurred within its jurisdiction. In order to make a prosecution of abduction, an abducted child must be under 18 years of age according to the common law but he/she must be under 16 years of age in application of the Child Abduction Act 1984. The different criterion of the abducted child's age is noticeable. It means that if a child between 16 and 18 is abducted or has been subject to an attempted abduction out of the UK, the domestic law of the Child Abduction Act 1984 is not applicable. However, if the same child is abducted within England and Wales, the concept of common law practice will be applied. Nonetheless, both procedures must be commenced under the discretion of the Director of Public Prosecutions.

Based on the above mentioned legal provisions, it can be noted that if a non-resident parent takes the child from his/her resident parent with the child's voluntary

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[408] *Supra Note 406*, pp.138-140.
[409] Responsible person means any person who for the time being has care of the child by virtue of the care order or the emergency protection order, or where the child is in police protection.
[410] Section 50 of the CA 1989.
[411] Section 5 of the Child Abduction Act 1984.
[412] *Supra Note 406*, p.137.

consent and travel along England and Wales, it is a lawful movement of the child within the definition of common law offense of kidnapping and the non-resident parent is not punishable. This may be one of the concerns of the resident mother to allow the child to meet the non-resident parent within a court contact order. In this respect, the resident mother can deter it by applying the prohibited steps order at a court.

3.5.2 Procedures for the Resolution of Child-related Matters

As long as both parties agree on the dissolution or separation of the relationship and on all issues with respect to their children, and the court satisfies with their proposed arrangements for children, there is no room for the legal authority to intervene in it. The possible response of what the court would do is granting a decree for dissolution of their relationship or a decree of judicial separation without applying Section 42 of the MCA 1973 to delay granting a decree absolute.

However, where one of the parties defends a petition based on disagreement concerned with children issues, particularly residence and contact, the private law proceedings will be applied with a regard to the child's welfare as the paramount.[413] According to the practice direction 12B of the FPR 2010, such proceedings will be commenced with a First Hearing Dispute Resolution Appointment (hereinafter FHDRA). This is a newly introduced procedure and its purpose is to identify the issues between the parties and to see whether it is possible for the parties to reach an agreement at an early stage.

At the FHDRA, it will be first checked whether the application complies with the pre-application protocol of the FPR 2010: mediation should be considered prior to making application. If the parties are failing to comply with it, the court will have to order them to do so. Only if the parties had already attended the Mediation Information and Assessment Meting (hereinafter MIAM) to consider mediation (usually out-of-court mediation), and also if they still wish to pursue the court proceedings, the court will then have continued the FHDRA. During the period of FHDRA, mediation again but absolutely in-court mediation service will be provided to the disputing parents prior to court hearing.

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[413] Section 1 of the CA 1989.

It may be desirable, under the FPR 2010, to negotiate between two parents without intervention by the court. Only if the parents are unable to reach an agreement voluntarily, the court will have to impose a judgment. Some scholars found that the conflict and fighting of two parents following a relationship breakdown may be very damaging to the children.[414] Therefore, the newly adopted procedure encourages the parents to use mediation as much as possible because negotiation through mediation is less confrontation than the court hearing in the litigation and avoiding the hostile situation between two parents is expected to minimize the harm caused to children. This new procedure of FHDRA is entirely in harmony with the no order principle of the CA 1989.

During the FHDRA, the people who will attend the meeting may include a judge or a magistrate, a Children and Family Court Advisory and Support Service (hereinafter CAFCASS) officer, the disputing parents, and a mediator when available. In many instances, the court may ask a CAFCASS officer to provide a report relating to the contested children matter. Prior to 2001, providing such report was usually undertaken by a family court welfare officer. However, on 1st April 2001, the CAFCASS was established and since then the CAFCASS officer has taken the functions to provide the information relating to children involved in the family proceedings and advise a court what it considers to be the best interest of the individual children.

With a willing to reach a voluntary agreement between the disputing parents at an early stage, the judge and/or the CAFCASS officer, with the assistance of a mediator, will seek to mediate the case and explore with the parties the resolution of all or some of the issues between them.[415] When an agreement is reached through FHDRA, a consent order will be made to confirm what was agreed between parents, only if the court considers it to be the best interest of the child.[416] If no agreement is reached, the court will ask them for further evidence, further necessary reports and further hearing in order to determine what is in the children's best interests.

All child-related matters are dealt with at Family Proceedings Court (which is part of the Magistrates' Courts), at Family Care Center (which is part of the County Court) or in the Family Division (Office of Care & Protection) of the High Court. The

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[414] *Supra Note 245*, pp.167-168.
[415] Practice Direction 12B of the FPR 2010.
[416] *Ibid.*

number of children in applications or disposals of child-related matters in 2011 is as follow. These may include not only the applications made by married parents and parents in civil partnership but also those applications made by unmarried cohabiting parents. The law opens to all parents, whether married or civil partnership or cohabiting, to be able to apply for private law proceedings relating to their natural children or step-children of their family.

Table 3.1: Number of Children Involved in the Private Law Application – 2011

No.	Application Type	Family Proceedings Court	County Court	High Court	Total
1	Parental Responsibility	1,564	3,916	22	5,502
2	Residence	5418	30,142	255	35,815
3	Contact	9,679	28,496	230	38405

Source: HMCTS Family Man System and Summary Returns.

Table 3.2: Number of Children Involved in the Disposal of the Case – 2011

No.	Application Type	Applications Withdrawn	Orders Refused	Orders of No Order	Orders made	Total Disposals
1	Parental Responsibility	277	45	40	5224	5586
2	Residence	788	96	354	39,123	40,361
3	Contact	1,755	333	662	108,552	111,302

Source: Source: HMCTS Family Man System and Summary Returns.

3.6 Recent Development, Current Situation and Existing Problems

3.6.1 Recent Legal Development for the Resolution of Child-related Disputes

The most recent development in the family justice system is the emergence of FPR 2010 and the introduction of CMS and new calculation method to child

maintenance system. The procedural rules governing the parent-child-related matters are to be found in Part 6 and 7 of the FPR 2010 and accompanying the Practice Direction 12B. Under its rule, every party to the family proceedings is encouraged but not required to attend the MIAM before they make any applications to the court. Formerly, only those who are seeking public funding, legal aid, were required to try mediation before having recourse to the court. However, in current situation, it is likely that mediation will be the first choice mechanism for parents who are disputed on the child arrangement.

After attending the MIAM, a parent is eligible to make a petition at a court. At the beginning of the court process, he/she has to attend the FHDRA again to try the in-court mediation service prior to court hearing. It was recently introduced into the court process by the FPR 2010 and was designed to enable the parties, with the assistance of the judge, the CAFCASS officer and the mediator, to identify and seek the real issue to be resolved. This was the government's idea to encourage the people to try and reach an agreement amicably in respect of their children without bitter process of litigation. The ultimate purpose of the introduction of such a new procedure is to protect and safeguard the welfare of the child effectively.

Regarding the introduction of new system to child maintenance, the new operation system has been started for a short period and it cannot be evaluated how it works in reality.

3.6.2 Current Situation of the Resolution of Child-related Disputes

Currently, the laws governing on the establishment of parent-child relationship has been widened its scope and both opposite- and same-sex couples are eligible to become the legal parent of the child regardless of their relationship status. It consequently protects and safeguards the welfare of the child and ensures the legal status of the child born through a varieties of medial assistant technologies.

In recent years, divorce rate has sharply decreased. In parallel with the trend, the number of children affected by parents' divorce is also deceasing. However, the number of children born outside marriage or civil partnership was steadily increasing. The rising trend of children born outside marriage or civil partnership indicated the likelihood of upward trend for cohabiting couple without marriage or civil partnership. It is a deep concern for the stable life of those children born to cohabiting couple

because the researchers showed that relationship between cohabiting parents is a high risk to fragile easily.[417]

The fundamental principles and procedure for the child-related matters is well established and sufficiently equipped with the statutory enactments. The rights and responsibilities of parents are clearly defined, and the enforcement methods to protect their rights and to impose obligations on them are also clearly provided. All the decisions with respect of the children are made according to the paramount principle. The out-of-court services to assist those parents and children, whose family has been broken down, are well established and the rendering services are really helpful for the welfare of the child. To conclude, the resolution system of child-related disputes in England and Wales is properly developed to comply with the current social situation.

3.6.3 Existing Problems to the Resolution of Child-related Disputes

With the development of legal instrument to be a parent, the legally fatherless and motherless children are emerged. It is totally contrary to the social norm and order. Consequently, to define what a family is becomes difficult. Furthermore, the fundamental rights of the child to be brought up by both parents is eroded accordingly. Ordinarily, a child bringing up without father or mother is undesirable for the welfare of the child because both parents are important members for the well development of the child.

Although shared residence order may bring the equal rights between the child's mother and father, it should be paid much attention before granting it. The connection between holding a shared residence order and the committing of parental child abduction should be researched. A parent who has shared residence order is free to take the child out of the UK jurisdiction. It may mean to assist the parent to commit the international child abduction. In addition, alternately moving from one place to another might disrupt the stability of the child. It may be a concern whether the child under shared residence order is satisfied with it. If sharing residence is contrary to the will of the child, parents should try to change the order as soon as possible irrespective of their wishes for the welfare of the child.

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[417] *Supra Note 359 & 360.*

3.7 Summary of the Chapter

In contrast to the practice of divorce law in the history of England and Wales, the present divorce law is well-equipped with the equality rules regardless of gender. In addition, under its flexible rules and principles, individuals nowadays are able to enjoy the equal rights in forming a legal relationship, in adopting a child and in trying to become a legal parent of the child born through ART treatment. Even a couple does not formulate their relationship legally, the children born to these couples may enjoy the equal rights same as other children from married coupled families, subject to few limitations.

While resolving child-related disputes after the dissolution of parents' relationship, the FPR 2010 makes mediation an important mechanism for divorcing parents. These divorced parents enable to share both parental rights and duties and the child's residence according to the CA 1989. Moreover, contact is ordinarily granted to a non-resident parent but may be under supervision if necessary. While implementing a contact arrangement, the CAFACASS and voluntary child contact centers under the NACCC are the supportive organizations to be a safe and successful contact between the child and non-resident parent. The CMS now becomes the organization which is obliged to operate the calculating, collecting and enforcing functions with respect of maintenance. With respect to child abduction by a parent, the sufficient legal instruments for taking action on the abducted parent and for applying a return order of the abducted child is provided by the Child Abduction Act 1984 and the CA 1989 respectively.

CHAPER 4
A COMPARISON OF CHILD-RELATED DISPUTES RESOLUTION SYSTEM BETWEEN JAPAN AND ENGLAND AND WALES

4.1 Introduction

Chapter 2 and 3 presented the general overview of existing system and current situation in Japan and England and Wales dealing with child-related disputes resolution system after the dissolution of parents' relationship. It is firstly explored the historical development of family law within a particular field of study, parent-child-related matters. Then it is presented an insight into the certain types of family, including married family, unmarried or cohabited family, civil partnered family, adoptive family, separated family, divorced family and single or same-sex family whose relationship was dissolved, towards understanding the current situation of children after the dissolution of parents' relationship. The late parts of these chapters were particularly concerned to the current practice of the resolution system on the child-related matters for divorced parents, separated parents and single or same-sex parents who dissolved their relationship.

Mainly based on the facts and figures presented in chapter 2 and 3, a comparison between Japan and England and Wales will be conducted in this chapter dealing with the current situation and system of the resolution of child-related matters for parents after the dissolution of their relationship. The objectives of the chapter (or comparison) are to point out the different situations and practices of each country in particular issues, and to investigate the degree of effectiveness of the existing systems in terms of the protecting and safeguarding welfare of the child.

For this purpose, the discussion is divided into three main parts: (1) the situation of children affected by the legal dissolution of parents' relationship from the statistical point of view, (2) the existing legislation relating to the parent-child relationship, and (3) the principles and procedures on the resolution of child-related disputes after the dissolution of parents' relationship. Then how the existing systems of Japan and England and Wales protect and safeguard the welfare of the child is analyzed.

4.2 The Situation of Children Affected by the Dissolution of Parents' Relationship in the Post-war period

In both countries, the common type of legal dissolution of parents' relationship is 'divorce'. Other available types of legal dissolution of parents' relationship in England and Wales are 'judicial separation' for opposite-sex couples and 'dissolution of civil partnership' for same-sex couples. In this part, it is intended to discuss the situation of children affected by these three legal types of dissolution of parents' relationship. Due to the lack of reliable data, those children affected by the separation of non-legal unions (unmarried or cohabiting couples) is excluded here. In the following discussion, the dependent children means any person under 20 years of age in Japan but under 16 years of age in England and Wales unless otherwise stated.

4.2.1 Japan

Divorce is the only means for parents to dissolve their legal marriage throughout history.

Table 4.1: The Situation of Dependent Children Affected by Parent's Divorce (1950-2011)

Year	Total number of divorce	Children-involved divorce	Percentage of children-involved divorce	Number of dependent children involved
1950	83,689	47,984	57.3	80,481
1955	75,267	45,710	60.7	83,138
1960	69,410	40,452	58.3	71,339
1965	77,195	44,963	58.2	74,412
1970	95,937	56,683	59.1	89,687
1975	119,135	74,668	62.7	121,223
1980	141,689	95,755	67.6	166,096
1985	166,640	113,681	68.2	202,585
1990	157,608	98,818	62.7	169,624
1995	199,016	122,067	61.3	205,901
2000	**264,246**	**157,299**	**59.5**	**268,929**
2005	**261,917**	**154,104**	**58.8**	**262,345**
2010	**251,378**	**147,120**	**58.5**	**252,617**
2011	**235,719**	**136,808**	**58**	**235,200**

Source: Vital Statistics 2011, Ministry of Health, Labor and Welfare, Japan

According to Table 4.1, since the beginning of 21st century, over 200,000 divorce was annually occurred and over half of these divorces was included more than 200,000 dependent children under 20. These numbers are almost three times higher than these in the middle of 20th century. Therefore, the possibility of being affected by divorce is also three times increasing for todays' children than for those in the mid of 20th century.

Table 4.2: Trends in Rate of Dependent Children Affected by Parents' Divorce per 1,000 Population[418] (2000-2011)

Year	Total number of children under 20 years of age	Total number of children under 20 years of age who are affected by parents' divorce	Rate of dependent children who are affected by parents' divorce (per 1000 population)
2000	25,785,069	268,929	**10.43**
2005	23,961,223	262,345	**10.95**
2006	23,632,000	254,982	**10.79**
2007	23,340,000	245,685	**10.53**
2008	23,092,000	244,625	**10.60**
2009	22,865,000	249,864	**10.93**
2010	22,717,343	252,617	**11.12**
2011	22,575,000	235,200	**10.42**

Source: Vital Statistics 2011, Ministry of Health, Labor and Welfare, Japan

Table 4.2 indicates that between 2000 and 2011, the rate of dependent children affected by parent's divorce was kept around 10 to 11 per a thousand children population. The rates did not change much although the total number of dependent children between these years has been steadily deceased from 25,785,069 in 2000 to 22,575,000 in 2011.

[418] In this chapter, hereinafter, it means 1,000 dependent children.

4.2.2 England and Wales

From the 1860s onwards, things have been changed dramatically and divorce is becoming a common phenomenon for married parents nowadays. The alternative form of divorce, judicial separation, is rare and is used for only those people who have a kind of objections to dissolve their marital relationship legally. Accordingly, the number of judicial separation is relatively small. In recent years, same-sex couples got legal recognition to form a legal union and the legislation also allows to dissolve their relationship. Since 2007, although the number is still small, the number of same-sex parents who dissolved their civil partnership has been being steadily and gradually increasing until now.

Table 4.3: The Situation of Dependent Children Affected by Parents' Divorce (1950-2011)

Year	Total number of divorce	Children-involved divorce	Percentage of children-involved divorce	Number of dependent children involved
1950	30,870	-	-	-
1955	26,816	-	-	-
1960	23,868	-	-	-
1965	37,785	-	-	-
1970	58,239	35,876	61.6	71,336
1975	120,522	73,881	61.3	145,096
1980	148,301	88,202	59.5	163,221
1985	160,300	88,955	55.5	155,740
1990	153,386	84,751	55.3	152,877
1995	155,499	85,867	55.2	160,563
2000	**141,135**	**76,776**	**54.4**	**142,457**
2005	**141,322**	**75,112**	**53.2**	**135,936**
2010	**119,589**	**59,309**	**50.0**	**104,364**
2011	**117,558**	**57,219**	**48.7**	**100,760**

Source: Divorce in England and Wales, 2011, Office of National Statistics

According to Table 4.3, during five years period from 2000 to 2005, the number of divorce was in an increasing trend for a short time. Then, it started to decrease again and reached to 117,558 in 2011. The percentage of child-involved

divorce was steadily decreasing and nowadays, only half of the total divorce involved dependent children under 16. In 2011, the number of children involved in parent's divorce was 100,760 and it was about 1.4 times of that in 40 years ago.

In 2001, the total number of dependent children in England and Wales was 11,163,600 and those dependent children affected by parents' divorce was 146,914. Therefore, the rate of dependent children affected by parents' divorce was 13.2 per a thousand population. In 2011, the total number of dependent children was increased to 11,265,900 but those children affected by parents' divorce was decreased to 100,760. Therefore, the rate of dependent children affected by parent's divorce in 2011 was also decreased to 8.94 per a thousand population.

Table 4.4: The Number of Divorce, Judicial Separation and the Dissolution of Civil Partnership (2000-2011)

Year	Divorce	Judicial separation	Dissolution of civil partnership
2000	141,135	540	-
2001	143,818	925	-
2002	147,735	560	-
2003	153,065	467	-
2004	152,923	419	-
2005	141,322	385	-
2006	132,140	353	-
2007	128,131	304	40
2008	121,708	214	166
2009	113,949	198	327
2010	119,589	171	472
2011	117,558	155	624

Source: Office of National Statistics

Table 4.4 shows that it is incomparable between the number of divorce and that of judicial separation and the dissolution of civil partnership. Amongst them, the number of judicial separation was the smallest one and went downward trend since 2002. The number of dissolution of civil partnership keep an upward trend since its enforcement to currently, however, the number is still small. Accordingly, the number

of children affected by the judicial separation or the dissolution of civil partnership might be quite small. For this reason, the officials may tend to neglect such a small number of children affected by judicial separation or dissolution of civil partnership to include into the statistical data and it could not find them in the statistics.

4.2.3 Finding the Differences (2000-2011)

Table 4.5: Differences of Children Affected by Parent's Divorce

No.	Japan	England and Wales
1	Children under 20 years of age are included.	Children under 16 years of age are included.[419]
2	The rate of dependent children affected by parents' divorce has been kept constant around 10 to 11 per a thousand population.	The rate of dependent children affected by parents' divorce has been decreased from 13.2 in 2001 to 8.94 in 2011 per a thousand population.
3	In 2011, the divorce rate per a thousand population was 1.86.	In 2011, the divorce rate per a thousand population was 2.09.
4	In 2011, there were 22,575,000 dependent children and amongst them 235,200 were affected by 235,719 of parents' divorce.	In 2011, there were 11,163,600 dependent children and amongst them 100,760 were affected by 117,558 of parents' divorce.

Irrespective of the divorce rate in 2011, the rate of dependent children affected by parents' divorce in Japan and in England and Wales was not much different. Therefore, it may be said that the risk of being affected by parent's divorce for dependent children in Japan and in England and Wales is not different significantly.

4.3 The Existing Legislation to Establish Parent-Child Relationship

This part seeks the different provisions and practices in determining the legal relationship between parents and certain types of children between Japan and England and Wales. It aims at finding the parts which may need to be developed by comparing each other.

4.3.1 Children Born out of Marriage

[419] Except from the dispute of parental responsibility, in others child-related disputes including residence, contact and child maintenance, a child means any person under 16 years of age generally and it may extend to some years under special circumstances.

In 2011, a quite small portion, only 2.2%, of total live births in Japan was born by unmarried mother and it numbered 23,354 children. However, in England and Wales, nearly half, 47.2%, of total live births was born to unmarried mother and it numbered 341,686 children which was almost 15 times larger than that in Japan. These data indicates that the number of unmarried or cohabitation couple in England and Wales is also 15 times larger than that in Japan.

Those children born to unmarried couples in Japan is labelled as the illegitimate children after birth. This is not a matter in England and Wales because the terminology of 'illegitimate children' has been abolished since 1987 by the Family Law Reform Act.

In both countries, regarding determination of maternity for these unmarried mothers, the same principle of 'a woman who gave birth to a child is a legal mother of the child born regardless of the genetic relationship between the child and the mother' is applied. On the other part, the way to acknowledge paternity by an unmarried father is different.

Table 4.6: Acknowledging Paternity by an Unmarried Father

No.	Japan	England and Wales
1	- by submitting a voluntary notice of acknowledgement to the Family Registration Office after the child's birth	- by registration the child's birth jointly with the child's mother
2	- by the unmarried father's will after his death	- by a formal agreement with the consent of the child's mother
3	- by a court order	- by a court order

4.3.2 Children Resulting from Medically Assisted Procreation

Japan is lack of legal regulation to establish legal relationship between parents and children resulting from various types of Assisted Reproduction Technologies including AIH, AID and surrogacy. In reality, a number of children has been born through these advent technologies since years ago. In case there was a dispute in relation to the child born by AIH or AID, the court decided it with the references of the previous judicial decisions as explained in 2.3.1. If the dispute is over the child born through a surrogacy, under the existing system, special adoption is the only

applicable way to establish a legal relationship between the married parents and the child.

In England and Wales, the HFEA 2008 and the SAA 1985 are playing vital roles to establish legal parenthood with those children born through Assisted Reproduction Technology treatments including IVF and surrogacy arrangement. Under these laws, married couples, unmarried or cohabited couples of both opposite- and same-sex and civil partnered couples are able to be legal parents of the child born without following the adoption procedure as have explained in 3.3.1.

It is in fact that the degree of legal recognition on those children born through various medical assisted reproductions in England and Wales is stronger than that in Japan.

4.3.3 Adopted Children

In Japan, not only children but also the adults are eligible persons to be adopted. Nowadays, the adult adoption is more common than the child adoption. Some of the purposes of adoption are to maintain one's household from one generation to another, to take care an orphan, to establish a legal relationship between a same-sex couple who are not allowed to form a civil union like in England and Wales, to get the legal parenthood on the child born by a surrogate mother and son on. The ultimate purpose in all cases is to establish the legal-parent child relationship through an adoption and to impose the legal mutual obligation between an adopter and an adoptee.

In England and Wales, only children under 18 are eligible to be adopted. Regarding those children born by a surrogate mother, there is a particular legislation to establish the legal parenthood and adoption is not necessarily required for this purpose.

Table 4.7: Different Adoption and Procedures

No.	Japan	England and Wales
1	Two types of adoption are available: (1) ordinary adoption and (2) special adoption.	Only one type of adoption is available.
2	Both children and adults are eligible persons to be adopted through ordinary adoption procedure: when no relative relationship exists between the adopting parents and a	Only children 18 and under are eligible to be adopted.

	minor child, an approval of a Family Court must be obtained. However only those children under six in normal or eight in particular situation are eligible to be adopted through special adoption procedure.	
3	Single persons and cohabited couples (with an approval of a Family Court), married couples are able to use ordinary adoption whilst only married couples are eligible to use special adoption procedure.	Single persons, cohabited couples, married couples and civil partnered couples are eligible to adopt a child.
4	No minimum age standard is applied for an adopter: adoption may be effective as long as the adopter is older than the adoptee.	The minimum age of an adopter must be 21 subject to certain conditions.
5	The ordinary adoption does not terminate the family relationship between the adoptee and his/her birth family, but the special adoption must terminate it with an exception of a prohibited degree of a marriage.	An adoption ceases the relationship between the adopted child and his/her birth parents.
6	Adult adoption can be made by submitting a notice form of adoption to the family registration office, whilst child (minor) adoption is only granted by a court order when no relative relationship exists between the adopting parents and a minor child.	An adoption is usually made by a court order.
7	An ordinary adoption may be dissolved either by the mutual consent or by a court decree, whilst a special adoption must be dissolved by a court order.	An adoption is permanent and can never be revoked.

4.4 The Principles and Procedures on the Resolution of Child-related Problems after the Dissolution of Parents' Relationship

The following discussion intends to encompass -

- the opposite-sex parents who dissolved their relationship through divorce in Japan and
- both opposite- and same-sex parents who dissolved their relationship by either of the three methods, divorce or judicial separation or dissolution of civil partnership in England and Wales.

4.4.1 Principles of the Resolution of Child-related Disputes

In Japan, there are four major child-related matters to be decided at the time of parent's divorce: (1) parental rights and duties, (2) custody, (3) contact and (4) maintenance.

In England and Wales, there are only three: (1) residence, (2) contact and (3) maintenance (child support).

This is because the dissolution of a parents' relationship is not a sufficient cause for losing parental responsibilities for married and civil partnered parents in England and Wales. Even after dissolving their relationship, both parents are able to retain parental responsibilities jointly. However, in Japan, only one of the parents is able to hold parental rights and duties solely after their divorce.

This is a fundamental difference between them and taking account of this difference, it may be conclude that the law in England and Wales seems to encourage both parents to participate in the child rearing process regardless of their relationship status, whilst the law in Japan seems to encourage the divorcing parents to decide who of them will take the primary responsibilities of bringing up the child after their divorce. Actually, the traditional preference method of 'one-parent-after-divorce' system is one of the significant features of Japanese family law in deciding child-related disputes for divorced parents.

a. Custody with Parental Rights and Duties in Japan and Residence in England and Wales

In Japan, it is a common practice that the custody with parental rights and duties is awarded to one of the divorced parents. However, there are some who have only custody of the child without parental rights and duties. In England and Wales, every parent who is favored a residence order holds parental responsibility automatically. In this regard, the resident parent has acquired parental responsibility previously or he/she just acquires it because of the favored residence order. Nonetheless, there is no residence parent who is lack of parental responsibility. Therefore, for a comparison purpose, the position of a custodial parent with parental rights and duties in Japan may be equivalent to a resident parent in England and Wales.

Table 4.8: Differences in Current Practice of Parental Rights and Duties, Parental Responsibility, Custody and Residence

No.	Japan	England and Wales
1	If a parent holds both custody and parental rights and duties, the other parent has very less opportunity to participate in the child's upbringing as he is lack of legal rights to participate. Under the current system, custody or parental rights and duties cannot be shared between parents after the dissolution of a marriage.	Even if a resident order is in force favoring to a parent, the other parent may still retain parental responsibility and he/she has the legal rights in relation to the child. Under current system, both parental responsibility and residence can be shared between parents after the dissolution of parents' relationship.
2	The child itself is not an eligible person to make an application for a custody arrangement, whilst the third party's application is depending on each court's discretion.	The child itself may make an application for a residence order with the leave of the court, whilst the third party is also an eligible person to make such an application.

According to the above table, it may be noted that granting a residence order in England and Wales has a wide range of meaning. For instance, not only the resident parent is granted to live with the child but also he/she is automatically responsible to take the primary responsibilities for taking care of the child on a day-to-day basis. The resident parent is entitled to make decisions independently in child-related matters subject to some exceptions. Furthermore, the resident parent is freely to take the child out of the jurisdiction without consulting any person or without taking any permission from the legal institution. It shows that the substantial responsibilities and the reasonable rights are vested to the resident parent. On the other part, the non-resident parent may still retain parental responsibility. In case parental responsibility is shared between resident parent and non-resident parent, the resident parent cannot change the child's surname unilaterally.

In contrast to this practice, it is possible in Japan that the custodial parent with parental responsibility is able to change the child's surname without the knowledge of other parent who is lack of parental rights and duties. In consequence, it is difficult for a non-custodial parent without parental rights and duties in finding his/her children when the custodial parent changed the child's name, moved to a new place and cut out all the possible contacts with him intentionally.

b. Contact

In both countries, during the nineteenth century, the father of a child was exclusively entitled to legal parental authority and was a superior authority than the child's mother in his family. However, the father's superior position was terminated in the twentieth century and nowadays both parents are treated equally before the law. However, as it has mentioned earlier, after the dissolution of parents' relationship, the parent who lives together with the child is the child's mother in majority. Consequently, the matter of contact between the child and non-resident parent (most are fathers) becomes important to maintain the relationship between the child and non-resident parent.

Table 4.9: Differences in Current Practices of Contact

No.	Japan	England and Wales
1	The determination of contact at the time of divorce is a recent legal development although the Supreme Court recognized contact as the necessary matter to promote the welfare of the child since the 1960s.	Since many years ago, a non-resident parent has a legal right to access his/her children. In 1989, the CA was enacted and since then the term 'contact' replaced the previous usage of 'access'.
2	The child concerned itself is not an eligible person to make an application for a contact.	The child concerned itself may make an application for a contact order with the leave of the court.
3	In the case of divorce by mutual consent, no place is there in the divorce registration form to record parents' agreement on the matter of contact because determination of a contact is not a perquisite for a valid divorce. Consequently, in case the custody parent does not obey such an agreement later, the lack of record makes the non-custody parent difficult to enforce the previous agreement. If the divorcing parents made a notary deed of their contact agreement, it is enforceable later when one of the parties does not comply with it.	Even in the case of divorce by consent, parents are required to submit the document of children arrangement to the respective divorce court. Then the court is responsible to check it whether the arrangement is proper for the welfare of the child. In case the resident parent does not comply with the former agreement, the non-resident parent is able to claim at a court based on the former agreement on contact.
4	There is almost lack of external support for parents and the children while implementing	The NACCC and the CAFCASS are the reliable public organizations in the

	the contact agreement or the court order of contact. Although services from FPIC is available in ten big cities, the offering service is very limited because of the shortage in staffs, the insufficiency in facilities and the high expenditure in rendering service.	implementation of child contact agreement or a court order of contact. Under the NACCC, there are almost 400 registered child contact centers and most of them are providing services without charges. Accordingly, people can easily access the service.

In accordance with the above table, non-custodial parents, majority are divorced fathers of the child, in Japan are still more difficult to conduct a regular contact than those in England and Wales.

c. Maintenance or Child Support

In both countries, unlike the past, parents are responsible to maintain their children irrespective of their marital status. As long as both parents and children are living together in a family unit, there is no reason to claim for child maintenance payment. However, when parents are living separately after dissolving their relationship and children are living apart from one of the parents, the non-custodial or non-resident parent is under the responsibility to provide financial support to his/her minor children.

Table 4.10: Differences in Current Practices of Maintenance

No.	Japan	England and Wales
1	In the case of a divorce by mutual consent, no place is there in the divorce registration form to record parents' agreement how to pay child maintenance by the non-custody parent because determination of a maintenance is not a perquisite for a valid divorce. However, the divorcing parents are able to make a notarized agreement in order to get a legal binding force on them.	Even in the case of divorce by consent, parents are required to submit the document of children arrangement to the respective court. Then the court is responsible to check it whether the arrangement is proper for the welfare of the child. In case the non-resident parent fails to make the regular payment, the resident parent is able to claim at a court based on the former agreement.

2	There are two possible ways to resolve the maintenance dispute: either (1) by a voluntary agreement whether is notarized or not, or (2) by a court order.	There are three possible ways to resolve the maintenance dispute: either (1) by a voluntary agreement or (2) by a court order or (3) by the CSA calculation. However, since 25th November, 2013, the CSA was replaced with the CMS. Since then the resident parents have to apply for child maintenance at the CMS instead and the maintenance payment is calculated by a new method operated by the CMS.
3	The court is responsible to resolve all contested maintenance disputes for divorced parents.	The court is responsible to resolve only those maintenance disputes which are out of the CMS jurisdiction.
4	Only Section 766 of the Civil Code is related to the determination of maintenance after divorce.	The CSA 1991, the Child Support, Pensions and Social Security Act 2000 and the Child Maintenance and Other Payments Act 2008 are the fundamental laws for the determination of maintenance. They covers the principles, procedures and calculation method for the resolution of maintenance disputes.
5	Only the court is responsible to decide the amount of payment and to enforce its decision.	The CMS is a government organization which takes the primary responsibility to calculate and decide the amount of maintenance payment, to collect it from the non-resident parent and to enforce its decision in case the non-resident parent fails to pay it without no reasonable cause.
6	The court-based discretional system for the determination of the amount of child maintenance has been practiced for years.	The non-court-based formulated system has been practicing since the enactment of the CSA 1991.

As mentioned above, the resolution system of child maintenance after the dissolution of parents' relationship in England and Wales is more strict and systematic than that in Japan.

4.4.2 Procedures on the Resolution of Child-related Problems

Table 4.11: Differences in Current Practice of Resolution Procedures

No.	Japan	England and Wales
1	The Family Court has an exclusive power to handle all family-related disputes inclusive of child-related problems of divorcing couples.	No separate Family Court is established. Most of child-related disputes are handled by the Family Proceedings Court which is part of the Magistrates' Court. The Family Care Center which is part of the County Court and the Family Division of the High Court also have jurisdictional power to hear certain child-related disputes. The CMS has the special jurisdiction power to handle child-maintenance disputes except from those cases in which parents reach an agreement on their own, or order on special expenses is required to make, or the child of the disputes is over 19 or parent or the child is not habitually resident in the UK.
2	In the case of divorce by mutual consent, the court has no obligation to approve parents' agreement on the matter of parental rights and duties, custody, contact and maintenance. Parents are able to determine according to their wish freely without involvement of any judicial or administrative power.	Even in the case of dissolution of parents' relationship by mutual consent, divorcing parties bound to submit the document of children arrangement to the respective court. Unless the court is satisfied with their children arrangement, they are not able to get dissolution of their relationship.
3	There are three possible ways to resolve child-related problems at the Family Court: either through mediation or determination or litigation procedure.	There are two possible ways to resolve child-related problems at the Court. In case parents reach an agreement through in-court or out-of-court mediation procedure, the court will make a consent order based on the parents' agreement. In case parents cannot reach an agreement on their own, the court will decide the case by using the relevant evidence presented to the court.
4	If necessary, the Family Court Investigation Officer meets with children and a person who has information on the child such as the	The CAFCASS officer has to go and meet with children of disputes to investigate the real situation and to do interview with them.

	teacher of the school to hear the children's voice and to enquiry the current condition of children's living environment. Then he/she is responsible to submit a report of finding facts to the court and in certain cases, he/she needs to attend the mediation session or the court hearing.	Then he/she is responsible to report about it before the case is started to hear.

In Japan, as long as parties are agreeing on the child-related matters, there is no room for a court to intervene in the process. In contrast, no children arrangement is free from the approval of the court in England and Wales. The court's involvement during the determination of child-related problems is more prominent in England and Wales than in Japan. That is the major difference between them.

4.5 Investigation on Certain Practices from the Children's Rights Point of View

As it is mentioned earlier, the probability of being affected by parents' divorce for dependent children in Japan and in England and Wales is not different much. However, the number of children born out of wedlock in England and Wales is relatively higher than that in Japan. This may be a considerable situation for those children who may be affected by the separation of their unmarried parents. Therefore, if it takes account all possible situations, the number of children affected by the dissolution of parents' relationship in England and Wales may be higher than that in Japan.

In both countries, it is possible to establish a legal relationship between the child and the unmarried father by acknowledging paternity through one of the various methods. The difference of the two countries is that in England and Wales, once the unmarried father registers the child birth jointly with the mother, he acquires parental responsibility thereby. Then both parents may exercise parental responsibility jointly. This is impossible in Japan: even after submitting a voluntary notice of acknowledgement to the Family Registration Office after the child's birth, the unmarried father cannot acquire parental rights and duties automatically although he is obliged to support financially his illegitimate child subsequently.

Since the unmarried parents cannot exercise parental rights and duties jointly, he cannot acquire it unless parental rights and duties is transferred from the mother to him by the mother itself or by a court order. The legal consequence of a lack of parental rights and duties is that a parent without parental rights and duties cannot participate in the child's upbringing. Article 18 of the UNCRC provides that both parents of the child have common parental responsibilities for the upbringing and development of the child. This is one of the conventional rights of the child to be cared for by both parents. However, in Japan, children born to an unmarried parent cannot enjoy such a right. This is also true for those children of divorced parents. The preference of 'one-parent-after-divorce' system has been practicing since years ago and is still surviving until now.

In comparing the dissolution system of child-related disputes between Japan and England and Wales, it is found that the system in England and Wales is operating with the cooperation of the national non-departmental public bodies whilst the system in Japan is running with the assistance from the limited number of local voluntary organizations. Actually, the external help is an important matter particularly in the facilitation of contact arrangement because the successful contact between the children and non-resident parent may not be implemented by the legislation or court order alone.

In order to implement a successful contact, both parents are needed to understand the impact on the child of parental conflict and separation, the children's need of both parents' participation in his/her life, and the damage that can be done to a child if he/she loses the rights to see the other parent who is no longer live together with him/her. Furthermore, parents may need the neutral place and impartial person to act as an intermediary between them while conduction a contact arrangement because after the dissolution of relationship, most parents do not want to see each other due to their emotional distress. Such requirements are fulfilled by the voluntary child contact centers in England and Wales and Japan is still in the developing situation to promote the external assistance for children and their non-resident parent.

4.6 Summary of the Chapter

This chapter is a comparative study of the current situation in Japan and England and Wales in relation to the child-related disputes.

Some significant differences are pointed out to understand how they are practicing differently on the same matter or issue. It is in fact that both were practicing the strict rules for family-related problems and the unequal treatment on gender basis in the past. However, nowadays, both are eliminated such improper practices, replaced with the modernized legislations and are providing the gender-equal society except from some unsolved problems in Japan.

Chapter 5: The Resolution of Child-related Disputes after a Divorce or Separation in Myanmar

5.1 Introduction

The purpose of the chapter is to explore and analyze the current practice on the dissolution of parent's relationship and the resolution of child-related problems for these parents within the context of family laws and other related laws in Myanmar. The discussion is divided into seven sections including the introduction part and the summary of the chapter.

In section 2, the history of family laws from pre-colonial period to now is explained. The discussion is divided into three periods: pre-colonial period, colonial period and post-independence period. In section 3, the current family laws governed on people of different religions is listed. It contains statutory laws, customary laws and judge-made laws particularly in relation to the dissolution of parents' relationship and the resolution of child-related disputes. The detailed discussion on the dissolution of parents' relationship is given in section 4 and on the resolution of child-related disputes is in section 5 respectively. After exploring how different family laws and some related laws are being applied in the respective area, the discussion on particular problems of the existing system which may affect the welfare of children is given in section 6. Finally, the chapter is concluded in section 7 by summarizing the previous discussions from section 2 to 6.

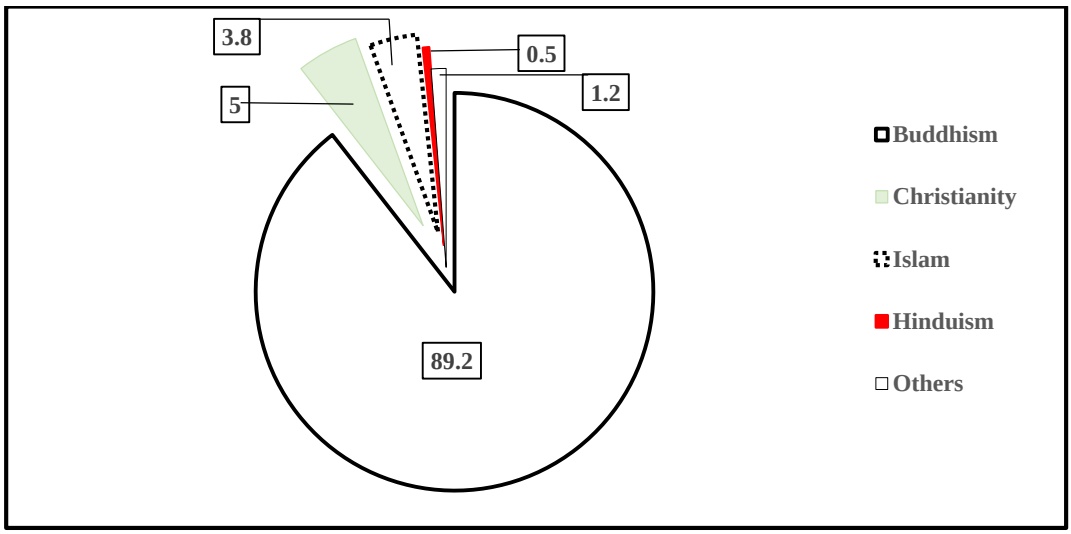
Before beginning the discussion in each chapter, it is important to notice here that there is no uniform single family law in Myanmar which is applicable to all people residing in it. The governing law for the dissolution of parents' relationship in individual case depends on what religion the parties are belonging to, even though the applicable laws for the resolution of child-related disputes such as guardianship[420] and child maintenance [421] (criminal proceeding), after the dissolution of parents' relationship, are the same. The detailed discussion on each matter is presented in the following parts. Accordingly the following discussion encompasses the whole range

[420] Under the Guardians and Wards Act 1890, a parent may be appointed as a guardian of his/her minor child to take care of the person of the minor or of his property or of both when the court is satisfied that it is for the welfare of the minor.

[421] Two different ways are available to claim for child maintenance: suing a civil suit based on the respective family law or applying a miscellaneous criminal case under the Criminal Procedure Code.

of people from four major religions in Myanmar: Buddhism, Christianity, Islam and Hinduism.[422] Based on the government published data[423], Buddhism is practiced by 89.2% of the total population, Christianity is 5.0%, Islam is 3.8%, Hinduism is 0.5% and others are 1.2% respectively.

Figure 5.1: The Percentage of Practicing Religions in Myanmar



Source: Myanmar Facts and Figures, 2002, Ministry of Information

While people of different religions are given the freedom to resolve their family disputes through their own personal laws, the legal institution where they should resolve these disputes is the same by following the same procedure: every family disputes has to resolve at an ordinary judicial court through the civil litigation procedures without any influence from the religious institutions. The persons who handle these cases are the well-trained professional judges appointed by the Supreme Court but not the religious leaders. Therefore, it is said that the administration of family justice in Myanmar is totally free from the influence of any religion, even though the religion impacts to some extent on the choice of applicable law. Such a practice has been being initiated in Myanmar since the colonial period.

Apart from these different family laws, a number of customary laws for other indigenous groups[424] is also existed in Myanmar since the country is composed of 8

[422] *Supra Note 2*, 2002, p.5.
[423] http://www.mofa.gov.mm/aboutmyanmar/religion.html (Visited on 18th August, 2013)
[424] Maung Maung, "*Law and Custom in Burma and the Burmese Family*", The Hague, Martinus Nijhoff, 1963, Preface.

major national races; Kachin, Kayah, Kayin, Chin, Bamar, Mon, Rakhine and Shan. Among them, only Bamar is the majority in number and others are the minority. Most of Bamar, Shan, Mon and Rakhine are belonging to the Buddhist, whilst most of Kachin, Kayah, Kayin and Chin are to the Christian.[425] Although people from these minority groups belong to one of the above-mentioned major religions, a small portion of them may preserve their own traditional custom, culture and belief which were inherited from their ancestors and firmly established within their unique society.[426]

Table 5.1: The Major Races[427] in Myanmar and the Religions[428] Belonging to Them

No.	Race	Religion
1	Kachin	Christian
2	Kayah	Christian
3	Kayin	Christian
4	Chin	Christian
5	Bamar	Buddhist
6	Mon	Buddhist
7	Rakhine	Buddhist
8	Shan	Buddhist

Source: U Ba Han, Tribal Customs and the Customary Law, the Judicial Journal (English Section), the Supreme Court of Myanmar, 1999.

By their cultural tradition, every dispute including both criminal and civil cases is usually settled through their own traditional way.[429] Regarding such a unique cultural tradition, a notable judicial precedent was made by the Supreme Court in 1969.[430] In this precedent, it was said 'in case there is a question in relation to the family matters among those people from indigenous groups, the decision should be made according to their respective customary law only, but not by any other

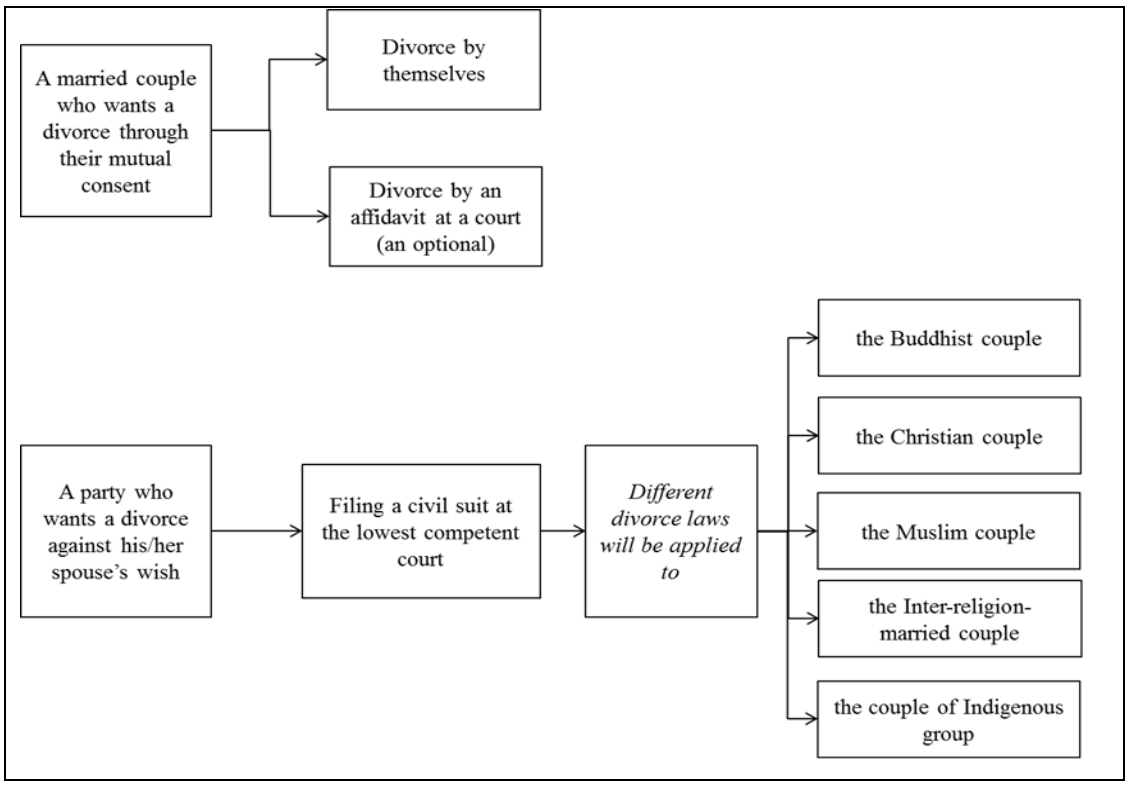
[425] U Ba Han, "*Tribal Customs and the Customary Law*", the Judicial Journal (English Section), the Supreme Court, 2-5, 1999, p.2.
[426] U Mya Sein, "*The Myanmar Customary Law*", 10th Edition (in Myanmar version), 2004, p.24.
[427] According to the official data, all of them are composed of over one hundred ethnic sub-groups.
[428] It is the religion which is belonging to majority of each racial group but not to all people from each group. Islam and Hinduism are generally practiced by people brought from India.
[429] *Supra Note 425*, p.3.
[430] Narsiti & Aphuusi, 1969, Burma Law Reports, p.155.

legislations'.[431] In this regard, an important additional requirement is added to that situation; in order to be adjudicated by a unique custom of an indigenous group, the party who makes an application has to prove that he/she is governed by that custom and it is in force as a customary law in Myanmar.

Importantly, it should be here noted that the customary laws of various indigenous groups will not be included in the following discussions because the reliable information about the customs and cultures of a number of indigenous groups is very limited in written documents and it is impossible to cope with all their customary laws in the one thesis. A lack of self-study and detailed personal interview with people of these groups dealing with their traditional way of resolution on family disputes is another limitation. For these reasons, the customary laws of indigenous groups are excluded from the thesis.

The next section will explain how the current family laws of different religions in Myanmar have been developed from time to time. By tracing the historical development, it may provide an understanding to why Myanmar has been being practiced such a unique system of family justice system for a century.

Figure 5.2: Different Laws Applicable to Divorces in Myanmar



[431] *Supra Note 430*, Narsiti & Aphuusi.

5.2The Historical Development of Family Law

Historically, family laws in Myanmar had been developed in parallel with the changing situation of political and social situations. However, it may be quite true to say that the development in recent decades is insufficient and unsatisfied in both the substantive and procedural law areas. Most of the fundamental laws relating to the principles of family affairs and procedures of the dissolution system are still unchanged and same as before except for a few minor amendments. Accordingly, no radical change has been visible currently in Myanmar although a number of countries in the world today are rapidly moving forward by making modernization of their family laws and its related procedures with the partial aim of providing equality among the family members through more flexible procedures.

To discuss the development of family laws in Myanmar through history, it is appropriate to divide the discussions into three major periods:

- Pre-colonial period in which the *Dhammathats* was standing as the only compilations of legal materials for family affairs and it was recognized as the ultimate source of the family law,[432]
- Colonial period in which a large number of people from other countries, mainly from India and China, were brought into Myanmar by the British colony and then the British Government enacted a number of statutory laws in relation to the family matters for people of different religions. Since then Myanmar has become a multicultural society which is composed of such a diversity of people,[433] and
- Post-independence period in which two important legislations that were primarily intended to promote the position of married women were enacted. One is the Muslim Divorce Act 1953 and another is the Buddhist Women's Special Marriage and Succession Act 1954. The former was intended to raise the position of the Muslim wives who had suffered from the unequal treatment under the Islamic law and the latter was intended for protecting and safeguarding the position of Myanmar Buddhist women who had entered into the inter-religion marriage with non-Buddhist man and had

[432] Andrew Huxley, "*The Importance of the Dhammathats in Burmese Law and Culture*", the Journal of Burma Studies, Volume 1, 1-17, 1997, pp.1-3.
[433] Aye Kyaw, "Religion and Family Law in Burma", in *Tradition and Modernity in Myanmar*, Edited by Uta Gartner and Jens Lorenz, Munster Hamburg lit., 1994, p.239.

suffered from the lack of legal acknowledgment on their marriage.[434] These two enactments are still in effect as the reliable legal instruments for these married women.

5.2.1 Pre-colonial Period (1044-1855)

a. An Overview of the Family Justice System

Before 1044, it is said that the country of Myanmar was organized with a number of small Kingdoms which had their own cultures, customs, laws and governments.[435] However in 1044, these small Kingdoms were firstly united into a single nation by the King Anawrahta. The King established the first Myanmar Kingdom which was called the Bagan Dynasty and then introduced the people to the Theravada Buddhism. It later became the major religion in Myanmar. Since the time of its introduction to Myanmar, the Myanmar society and its traditional culture have been being greatly influenced by the Buddhist ethics and the Buddha's teachings.[436] Accordingly, the traditional legal rules of Myanmar which was established in the ancient times have been substantial influenced by the Buddhism. However, it is important to note that Buddhism laid down no law for the secular matters of the people. Accordingly, the family law in Myanmar is no ecclesiastical law. Strictly speaking, its nature is totally different from the Muslim and Hindu family law which are founded on their respective religion.

During the pre-colonial period, from the Bagan Dynasty[437] which was the first Myanmar kingdom (1044-1287) to the Kongbaung Dynasty (1752-1855) which was the last Myanmar Kingdom[438], Myanmar was ruled by its own Customary Law which was comprised of three major components, the *Dhammathats*, the *Yazathats* and the *Phyattons*.[439] The *Dhammathats* are composed of legal rules and principles relating to

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[434] Mi Mi Khaing, "*The World of Burmese Women*", Zed Books Ltd, 1984, p.26.
[435] *Supra Note 424*, p.5.
[436] Lay Nwe, "*The Concept of Gratitude in Myanmar Ethical Thought*", Universities Research Journal, Volume 4, Number 7, 85-112, 2011, p.85.
[437] During the Bagan dynasty, Myanmar was firstly unified and the Theravada Buddhism was widely established with the help of Buddhist Missionary *Shin Arahan*. Accordingly, the Bagan dynasty was well-known as "*the Kingdom of Temple Builders*".
[438] *Supra Note 2*, 2002, p.8.
[439] Dr. Tin Aung Aye, "*Myanmar Customary Law and Culture*", The Judicial Journal, the Supreme Court, 12-25, 2000, p.16.
Kyaw Sein, "*A Brief Legal History of Myanmar*", the Law Journal, Volume 1, Number 2, the Office of Attorney General, 154-164, 1999, p.154.

civil matters, marriage, divorce, distribution of matrimonial property after a divorce, succession, inheritance, adoption, etc. while the *Yazathats* are composed of the King's commands and Criminal Laws for prevalence of law and order, security and peace,.[440] They are a series of law books and the compilers of these books were the educated Buddhist monks, the legal scholars, the judges and the ministers who were appointed by the King.[441] Besides, the *Phyattons*, a compilation of judicial precedents passed by the courts, benches and the King's *Hluttaw*[442], was also another reliable reference while administering the justice.

Particularly with regard to the *Dhammathats*, there were 36 *Dhammathats* in total number, namely, 1) *Manosara*, 2) *Manussika*, 3) *Pyu-min*, 4) *Dhammavilasa*, 5) *Waru*, 6) *Dhammathat-kungya*, 7) *Kaingza-shwe-myin*, 8) *Mahayazathat*, 9) *Myingun*, 10) *Dhammathat-kyaw*, 11) *Dhamma-vinicchaya*, 12) *Manugye*, 13) *Kandawpakein-nakalinga*, 14) *Shintayzawthara-shwe-myin*, 15) *Vannadhamma-shwe-myin*, 16) *Manuvanna*, 17) *Manuyin*, 18) *Vinicchayarasi*, 19) *Vinicchayapakasani in pali*, 20) *Manuvannana*, 21) *Vinicchayapakasani*, 22) *Mohavicchedani*, 23) *Rajabala*, 24) *Sondamanu*, (25) *Manu*, (26) *Panam*, 27) *King of Amarapura's Rescript*, 28) *Vinicchaya-kungya*, 29) *Dayajjadipani*, 30) *Waru in verse*, 31) *Dhammasara-manju*, 32) *Amwebon*, 33) *Manuchittara*, 34) *Shinthapa*, 35) *Kyetyo* and 36) *Kyannet*.[443]

Amongst them, *the Manugye Dhammathat* which was compiled and issued in 1756[444] was the most prominent and the best known of the surviving *Dhammathats*.[445] In these *Dhammathats*, it records the rules which were laid down in accordance with the customs and morals of the society, decisions on disputed points and rulings preserved in former judgments for successive periods.[446] Actually, it is true to say that the *Dhammathats* are the mirrors of the society of the day because they reflect the social customs of the day. They are therefore in need to be modified and to be adapted properly in order to comply with the changing society. Consequently, the *Dhammathats* grow freely in parallel with the development of the society. Some

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[440] *Supra Note 439*.
[441] *Supra Note 426*, p.5.
[442] *Supra Note 439*, p.16.
[443] Sisir Chandra Lahiri, "*Principles of Modern Burmese Buddhist Law*", 6th Edition, Eastern Law House Private Ltd., 1957, p.3.
Supra Note 394, pp.459-465.
[444] O. H. Mootham, "*Burmese Buddhist Law*", Oxford University Press, 1939, p.8.
[445] *Supra Note 434*, p.27.
[446] *Supra Note 444*, p.4.

rulings of these *Dhammathats* are still in effect and greatly recognized as one of the primary sources of the current family law in Myanmar.

Throughout the Myanmar Kingdoms, the primary objective of the administration of justice was to maintain harmony and peace in the society.[447] Accordingly, the resolution system of family matters was fundamentally based on the mutual agreement of the parties concerned.[448] In the rural area, the selected local elders who had the best knowledge with respect to the local customs acted as a mediator or an arbitrator and they were assisting to negotiate the disputants who brought the case before them. If the parties reached an agreement on the dispute through negotiation, the cases were said to be successfully finished. If the parties failed to reach an agreement, the local elders had to decide the cases in accordance with the rules of the *Dhammathats*.[449] In the urban area, the judicial courts were established, judges were appointed and family cases were decided according to the *Dhammathats*. The King at that time was the highest superior authority of the Judiciary.

With regards to the levels of judges, six classes of judges were recognized during that period:

1. the concerned parties themselves in the case of reaching a mutual agreement on their dispute,
2. the arbitrator or arbitrators appointed by the parties concerned,
3. the officially appointed arbitrator without payment from the government but paid by a small amount from the parties concerned,
4. the judge working at the Town Court,
5. the judge working at the Court of Capital and
6. the King himself.[450]

The right to appeal was also available in case one of the parties was not satisfied with the decision of a lower judge. Even a case was resolved through mediation or arbitration, the final agreement which was made by the parties

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[447] *Supra Note 424*, p14.
[448] *Supra Note 434*, p.27.
[449] *Supra Note 424*, p14.
[450] *Ibid*, p15.
Supra Note 434, p.27.

themselves or by the help of local elders had the same enforceability as the court judgments.[451] In this case, the local elders may be the best witnesses.

b. The Dissolution of Parents' Relationship

Regarding the dissolution of parents' relationship, the *Dhammathats* grants equal rights to both men and women for claiming a divorce grounded on their spouse's matrimonial fault, unless both parties do not reach an agreement on divorce. However, the grounds of divorce are different for men and women to commence a divorce case; women have to prove more relevant facts to get a divorce than the men have to. For instance, in order to get a divorce, the wife has to prove that her husband committed an adultery accompanying with cruelty to her. However, in case the husband wants to get a divorce against his wife, he has to prove his wife's adultery only. This is partly because polygamy is legally permitted to men.

With respect to other legal rights on the partition of matrimonial property after a divorce and the inheritance and succession, there is no discrimination based on gender and consequently both men and women are entitled to equal rights subject to some conditions. Therefore, it should be said that although the view of woman as the irrational sex or as the lesser person than the man has never been existed in the legal history of Myanmar,[452] women are being discriminated to some extent when they are claiming for a divorce grounded on their husband's adultery.

c. The Parent-child Relationship

Regarding the parent-child relationship, five social obligations exist to perform each other between parents and their children but not bounded by legally, except from the father's obligation to support his children financially. These social obligations are, in actual, based on the Buddha's teachings for all people regardless of one's religions, races and beliefs.[453] It is taught to every children in their primary school life as the basic manual of moral character for human being. Even now it is accepted as the guideline for all people to bring and obey throughout their life.[454]

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[451] *Supra Note 434*, p.27.
[452] *Ibid*, p.26.
[453] Dr. Kyaw Win, Professor from Department of History, the Yangon University, "*Approaches to Inventory – Making Methodology*", Sub-regional Experts Meeting on Tangible Cultural Heritage: Safeguarding and Inventory – Making Methodologies, Bangkok, Thailand, 2005.
[454] *Ibid*.

Table 5.2: The Mutual Social Obligations between Parents and their Children

No	Parents' Obligations towards Children	Children's Obligations towards Parents
1	To restrain children from doing immoral things	To cherish and support parents in their old age.
2	To encourage children to do good things.	To perform the duties incumbent on their parents.
3	To provide proper education for children.	To make oneself worthy of his/her heritage.
4	To support children financially.	To give charity and share the merit with parents.
5	To arrange a suitable marriage for children when they attained majority.	To keep up the tradition of the family and lineage.

Source: 1) Mi Mi Khaing, "*The World of Burmese Women*", Zed Books Ltd, 1984.
2) Dr. Kyaw Win, Professor from Department of History, the Yangon University, "*Approaches to Inventory – Making Methodology*", Sub-regional Experts Meeting on Tangible Cultural Heritage: Safeguarding and Inventory – Making Methodologies, Bangkok, Thailand, 2005.

After the dissolution of parents' relationship, according to the *Dhammathats*, the husband usually takes his son and the wife takes her daughter if it is a mutual consent divorce.[455] The very young son is usually left to mother for the sake of the child. If the divorce is based on one's matrimonial fault, the guilty person loses the rights to partition of the matrimonial property and also of the children too.[456]

These are the past practice of the family justice system and some relating principles during the pre-colonial period. The latter part particular concerns with the experience of the colonial period and it is the most important period in the development of family laws in Myanmar.

[455] *Supra Note 443*, p.120.
[456] *Ibid*.

5.2.2 Colonial Period (1885-1948)

a. An Overview of the Administration of Justice

Though Myanmar totally lost her independence in 1885, the lower parts of Myanmar already annexed by the British through two aggressive invasions even before it.[457] In 1826, Myanmar lost in the first Anglo-Myanmar war (1824-1826) and then the maritime areas of Myanmar, in particular Rakhine and Tanintharyi regions, were forced to annex by the British. These regions were later added to the British Indian Empire which was also one of the British colonies at that time. Shortly after the annexation, the British Commissioner, Mr. Maingy was sent to these British-occupied areas of Myanmar to administer and control these territories.[458]

After his arrival, Mr. Maingy made a declaration that "*proper measures shall be immediately adopted for administering justice to you according to your own established laws so for as they do not militate against the principles of humanity and natural equity*". [459] However, in reality, Mr. Maingy could not implement it successfully due to the lack of knowledge on Myanmar legal system and of the language ability.[460] Another important reason of its failure is that he failed to appoint and employ the qualified Myanmar officials in the field of judicial administration.[461] Eventually, he applied his own 'Code of Regulations' which was subjected to one provision that "*there shall always be a person in attendance who has sufficient knowledge about Myanmar traditional laws, legal system and previous judicial decisions*".[462]

In accordance with his own 'Code of Regulations', the Commissioners, the Deputy Commissioners and the Assistant Commissioners adjudicated the cases with the help of the local knowledgeable man. Therefore, the legal system in in those days was a remarkably Anglo-Myanmar character.[463] In this circumstance, one of the Assistant Commissioners, Dr. Richardosn, has completed the task of translation *the*

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[457] U Toe Myint, "*Judicial System in Lower Myanmar under British Rule*", the Law Journal, Volume 2, the General Attorney Office, 180-186, 2000, p-180.
[458] Hla Aung, "The Effect of Anglo-Indian Legislation on Burmese Customary Law", in *Law and Justice in Myanmar*, Tun Foundation Bank Literary Committee, 63-97, 2008, p.64.
[459] *Ibid*, p. 400.
[460] *Ibid*, pp.65-66.
[461] David C. Buxbaum, "Introduction", in *Family law and customary law in Asia: a contemporary legal perspective*, Edited by David C. Buxbaum, Martinus Nijhoff, 1968.
[462] *Supra Note 458*, p.66.
[463] *Ibid*.

Manugye Dhammathat, the most complete and best known one among the 36 *Dhammathats*, from Myanmar to English version in 1847.[464] It was a reliable legal book for the British judges who were responsible for the administration of family affairs.[465]

Such a way of administering justice in the British-occupied areas in Myanmar made to be disappointed the British authorities in British India who had responsibility to control over these areas. Consequently, they terminated the Anglo-Myanmar character of judicial operation system which was invented by Mr. Maingy. Then they transferred the right to administering justice in these areas to the High Court of Bengal which was a regional part of the British India at that time.[466] Eventually, the judiciary in the maritime areas of Myanmar was placed under the direct supervision of the British India.

In 1852, Myanmar was defeated again in the second Anglo-Myanmar war and then the Bago region fell under the British rule.[467] The British authorities then appointed a Commissioner and sent him to Bago as an administrative officer. That new Commissioner and another old Commissioner who was controlling over the Rakhine and Tanintharyi regions were exercising their administrative powers independently.[468] However, in 1862, these three regions, the whole of southern Myanmar inclusive of Rakhine, Tanintharyi and Bago were combined as one administrative entity. It was later known as the British Burma[469] and placed under the supervision of the Chief Commissioner.[470] Before this combination, in 1861, the Penal Code[471] of India came to be extended to the British-occupied areas of Myanmar.[472] Then the *Yazathats* which is one of the components of Myanmar Customary Law and is the principal Criminal Law was faded away from the administration of justice.

After combining the British-occupied areas as a province of the British Burma, six grades of courts were established according to the Act 1 of 1863:

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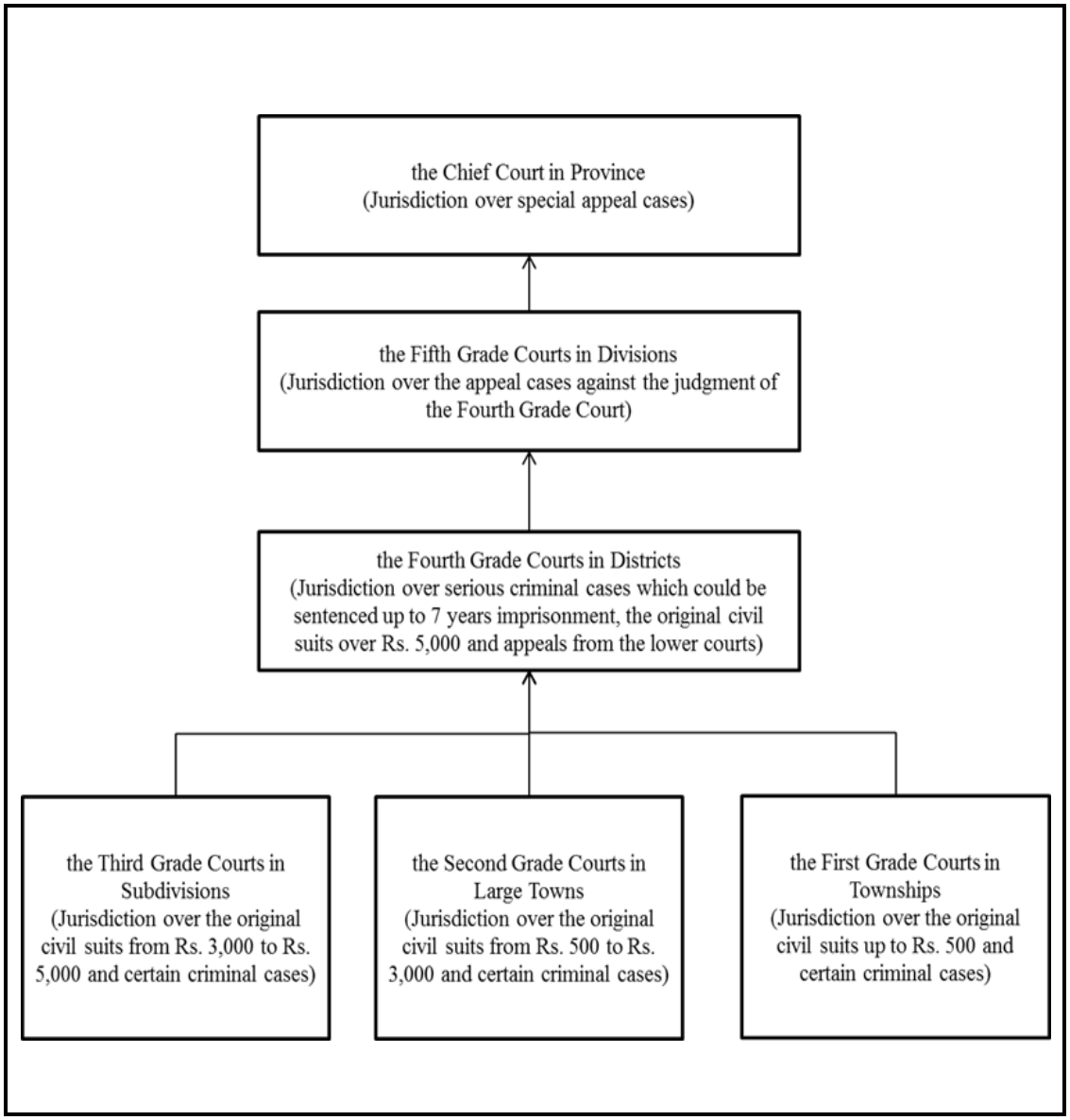
[464] Peter Gutter, "*Law and Religion in Burma*", Legal Issues on Burma Journal", Number 8, 1-17, 2001, p.4.
[465] The statistical data of family disputes at that time cannot be found.
[466] *Supra Note 458*, p.67.
[467] *Supra Note 457*, p.180.
[468] *Supra Note 458*, p.67.
[469] Burma was the former name of Myanmar.
[470] *Supra Note 458*, p.67.
[471] Some Sections of the Penal Code will be explained later regarding the child abduction by a parent.
[472] U Than Maung (Sittwe), "*Myanmar Legal History in Chronology*", the Judicial Journal (Myanmar version), Volume 2, Number 1, the Supreme Court of Myanmar, 79-85, 2003, p.80.

Figure 5.3: The Formation of Courts in the British Burma



- the first grade courts in which the Extra Assistant Commissioners of the lowest rank tried the civil suits up to Rs.500 and certain appropriate criminal cases;
- the second grade courts in which the Extra Assistant Commissioners of the higher rank tried the civil suits between Rs.500 and Rs.3,000, and certain appropriate criminal cases;

- the third grade courts in which the Extra Assistant Commissioners of the highest rank or the Assistant Commissioners tried the civil suits from Rs.3,000 to Rs.5,000, and certain appropriate criminal cases;
- the fourth grade courts in which the Deputy Commissioners tried the original civil suits over Rs.5,000, certain criminal cases which could be sentenced up to seven years imprisonment and the appeal cases from the lower courts,
- the fifth grade courts in which the Divisional Commissioners heard only the appeal applications from the fourth grade court, and
- the Chief Court in which the Chief Commissioner heard only the special appeal cases.[473]

As described, at that time, both the administrative and judicial powers were holding together by the British administrative officers; all the criminal and civil cases including the family matters were tried by the various Courts of Commissioners. The highest authority of both administrative and judiciary was the Chief Commissioner and he was regarded, *the ex officio*, as the Judicial Commissioner as well. In this way, the Myanmar traditional justice system in lower (southern) Myanmar was wholly replaced by the British practice. In the same year, some Recorder's Courts were established in the important areas for some reasons.[474] For instance, the Court of Recorder in Yangon was responsible for hearing all criminal cases committed within its jurisdiction by the European British subjects.[475]

In 1880, the Kazis Act was enacted and the Kazis[476] were appointed in the local areas to help the Muslim people in their celebration of marriage and the performance of certain other rites. Although these Kazis were not conferred the judicial power to administer justice over any disputes, the Muslim people in disputes brought their case before the Kazis and they requested the Kazi's decision.[477] This is the way of dispute resolution system for Muslim people outside the court even though the Kazi's decision was not legally binding on anyone. Presently, there is no Kazi appointed but the Kazis Act 1880 is still in effect.

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[473] *Supra Note 457*, p.182.
[474] *Ibid*, p.183.
[475] *Ibid*.
[476] The Kazi means an Islamic legal scholar.
[477] U Khin Maung Sein, "*The Islamic Law*", San Shar Publishing (in Myanmar version), 1987, p.40.

b. Introducing New Laws by the British Government

For the meantime, the substantive family laws for the British subjects who were belonging to the Christian religion were enacted. They were the Burma Divorce Act 1869 and the Christian Marriage Act 1872. The Christian Marriage Act 1872 allows the Christians to get married to either with a Christian or with a person of different religion. In addition, the Special Marriage Act 1872 which was particularly designed for the inter-religion marriage was introduced and it was later greatly amended in 1923. After the amendment, the inter-religion marriage between a Buddhist and a Hindu was possible to be legalized but was subjected to some necessary requirements.[478] However, when these inter-religion married couples get a divorce, the Burma Divorce Act 1869 would govern on them. Actually, the Act does not well protect the Myanmar Buddhist women's rights and therefore, the Special Marriage Act 1872 is less utilized by the Buddhist women. Even until now it is out of application though it is still in effect. As for other people of Islam or Hindu religion, no family law was officially enacted yet although the respective customary laws were applied for the dissolution of their family disputes.

In 1872, the British authorities of the British Burma started to separate powers between the administration and judiciary. They established the Court of Judicial Commissioner of Lower Burma and appointed a new Judicial Commissioner to administer judicial affairs exclusively.[479] However, regarding the lower levels of Commissioners' Courts, the Commissioners were still holding both the administrative and judicial powers. In the same year, the Evidence Act which is still using in the administrative of justice was enacted and it is applicable for all criminal, civil and family proceedings.[480] In this way, legislations passed by the British Governor-General of India came to be extended to the British Burma gradually. However, the Myanmar customary law of family affairs for Buddhist people is an exemption and it is still free from the direct imposition of the British-made law.[481]

In 1885, the third Anglo-Myanmar war was broke out, Myanmar was lost again and then the upper Myanmar was forced to annex by the British. Then, the administrative authority of the Chief Commissioner of Lower Myanmar was extended

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[478] Section 2 of the Special Marriage Act 1872.
[479] *Supra Note 458*, p.68.
[480] *Supra Note 472*.
[481] *Supra Note 461*.

to the upper Myanmar.[482] In 1886, the Court of Judicial Commissioner for Upper Myanmar was founded and the Myanmar traditional legal system was ceased there completely.[483] In 1897, Myanmar became a province of India which was controlled by the Lieutenant-Governor[484] and 'Kinwun Mingyi U Kaung' who was the former Minister during the last Myanmar Kingdom was appointed as the advisor of the Lieutenant-Governor to give him the proper legal advices.[485] As a matter of fact, 'Kinwun Mingyi U Kaung' was recognized as a prominent legal scholar for his valuable work compiling the digest of 36 *Dhammathats* which is still in applicable in Myanmar.

Throughout the colonial period, Myanmar was subject to the impact of English Common Law system. The British Government established courts and promulgated codes and statutes that were based upon the British Law. In 1890, a prominent legislation in the family law area regarding the determination of the guardian of a ward, the Guardians and Wards Act, was enacted. This Act is applicable not only for the third party to be appointed as a guardian of a minor but also for a parent to be appointed as a guardian of his/her minor child in case the court is satisfied that it is for the welfare of the minor. Add to this, two important procedural laws, the Code of Criminal Procedure which is applicable for claiming the child maintenance and the Code of Civil Procedure which is applicable in the resolution of family disputes irrespective of one's religion, were enacted in 1898 and 1909 respectively.

Despite the enactment of a number of codes, the *Dhammathats* is continuously being recognized as the primary legal instrument for the Buddhist people. This was because of the British policy not to interfere, as much as possible, in the matters of one's religion, customs and cultures of their colonial territories.[486] Eventually, the British authorities tried to preserve the existing traditional customs of people from different religions dealing with the family affairs. Based on this principle, they enacted the Burma Laws Act 1898 in which an explicit guideline for the application of appropriate family law on people of different religions was provided. Section 13 of the Act provides that:

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[482] *Supra Note 458*, p.69.
[483] *Supra Note 439*, p.156.
[484] *Supra Note 458*, p.70.
[485] Donald M. Seekins, "*Historical Dictionary of Burma (Myanmar)*", Scarecrow Press Inc., 2006, p.255.
[486] *Supra Note 433*, p.237.

(1) Where in any suit or proceeding in Myanmar, it is necessary for the court to decide any questions regarding succession, inheritance, marriage or caste or any religious usage or institution, [the court shall apply]

(a) the Buddhist Law in cases where the parties are Buddhists,

(b) the Mohammedan Law in cases where the partiers are Mohammedans,

(c) the Hindu Law in cases where the parties are Hindu shall form the rule of decision, except in so far as such law has by enactment been altered or abolished or is opposed to any custom having the force of law.

(3) In cases not provided for by sub-section (1), or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience.[487]

In this provision, the term 'Buddhist Law' may make the audiences to misunderstand and mislead to its real definition. In fact, it is not the law laid down by the Buddhism. However, it is the customary law which governed on Buddhist people in Myanmar to dissolve the family disputes. During the colonial period, the British authorities called it 'the Burmese Buddhist Law' and then the name has passed into the common usage.[488] Later, the Myanmar prominent jurists expressed it as a misnomer and urged the legal professionals to use it in the sense of 'the Myanmar Customary Law' instead of 'the Burmese Buddhist Law'. The Myanmar jurists' effort to replace the correct term was finally successful and since 1969, the Supreme Court started to use the term 'Myanmar Customary Law' in its precedent.[489]

In 1935, the British authorities enacted the Government of Burma Act to separate Myanmar from the British India. Since then Myanmar was standing independently from the British India. Actually, the Act was constituted in the nature of a Constitution and it was said the very first Constitution of Myanmar in her history.[490] After the Act came into effect in 1937, Myanmar became a separate colony under the British rule and governed by the British Government through a Governor. However, the former Indian laws enacted in Myanmar is still in effect unless it was amended, altered, or repealed, according to the Section 14 of the Government of Burma Act 1935.

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[487] Sub-section 2 has been already abolished.
[488] *Supra Note 424*, p.32.
[489] *Supra Note 426*.
[490] *Supra Note 439*, p.157.

During the period governed by the said Act, two important laws relating to the family affairs were enacted. The first one is 'the Registration of *Kittima* Adoption Act 1939' and still in effect. The term *Kittima* in the act shall mean 'the full adoption of a son or a daughter with the intention that the child shall inherit from the adoptive parents'. The act only concerns with the Myanmar Buddhist parents who want to adopt a child irrespective of the child's religion, race and nationality. However, by merely adoption, the adopted child cannot acquire the adoptive parents' religion, race and nationality[491] although the child is totally belonged to the adoptive parents' family.

The second enactment in this period is 'the Buddhist Women's Special Marriage and Succession Act 1939'. It aimed at the protection of the rights of Buddhist women who were in a marital relationship with non-Buddhist men. In spite of its good objective, the Act was a lesser-known legislation under the unstable political situation affected by the Second World War. Therefore, it was later repealed and replaced by 'the Buddhist Women's Special Marriage and Succession Act 1954' which is still standing as the only noteworthy legislation dealing with the inter-religion marriage of the Buddhist women.

c. The Administration of Justice during the Japanese Occupation

Shortly after the separation of Myanmar from India, on December 10 of 1942, the state of emergency was announced by the Evacuee Government from India [492] because India had already involved in the Second World War. It was the best opportunity for the Myanmar's Patriotic Force for Independence and then they drove away successfully the British colony from the Myanmar territory with the help of the Japanese Army. Then the Japanese Army conquered Myanmar and they recognized the Independence of Myanmar in 1943.[493] They enacted the Law Regulating the Administration of Burma 1943 as a Constitution of the State. According to Section 23 of this Regulation, the existing legislations in Myanmar could be applicable as long as they were not contrary with the new Regulation.

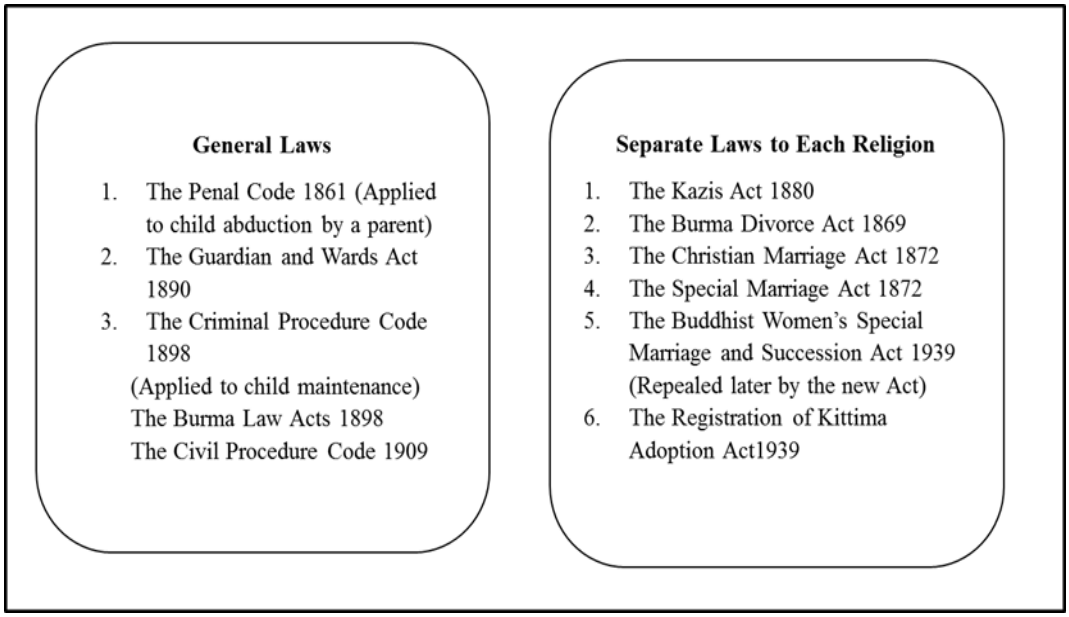
During the period in which Myanmar fell under the Japanese control, the British Evacuee Government in India carried out its administrative and legislative

[491] Ma Woung Shwe Lin vs. the Union of Burma, 1970, B.L.R (C.C), p.222.
[492] *Supra Note 439, p.158*.
[493] *Ibid*.

authority upon Myanmar.[494] In 1945, Myanmar rebelled against the Japanese and joined the Allied force. Then the Evacuee Government returned back to Myanmar and was involved in drafting the Constitution for Myanmar. In 1947, the Constitution was approved and according to the Section 266 (1) of this Constitution, the existing legislations for the time being in force should continue to be in force unless it was contrary to the Constitution. Subsequently, the term 'the British Burma' was replaced with the new term 'the Union of Burma'. On January 4th of 1948, Myanmar gained its independence from the British and the British rules on Myanmar came to an end completely.

During the colonial period between 1826 and 1948, a number of legislations were introduced to Myanmar as the substantive and procedural laws relating to the family dispute resolution system. The traditional dispute resolution system of Myanmar was completely destroyed and replaced it with the formal judicial proceeding operated by the new legal institutions which were established under the British rules. Its court procedure is rigid to follow and is contrary to the traditional aim of amicable dispute resolution. Therefore, since that time the courts have been being viewed as the place where both parties were attacking for a result in the hostile situation, rather than the place where to find the solution for a dispute.

Figure 5.4: The List of Laws Which Are Applied to Family Disputes in the British Colonial Period



[494] *Supra Note 439*, p.159.

The above-listed laws are still in effect, except from the Buddhist Women's Special Marriage and Succession Act 1939, without substantial changes. Therefore, the provided principles and procedures for the dissolution of parents' relationship and the resolution of child-related problems will be explained in next parts. The following section will explain the current situation of family laws in Myanmar since gaining the independence.

5.2.3 Post-independence Period (1948 to current)

In the post-independence period, the important and noteworthy legislations with respect to the protection of women's rights were enacted.

a. The Enactment of Certain Laws for the Protection of Women's Rights

Even before the time of these enactments, there had already been a huge number of Indian immigrants who were entering into the British Burma to work in various fields.[495] Between 1931 and 1938, the estimated number of 1,099,991 Indians belonging to either Hindu or Islam religion resided in British Burma.[496] According to their traditional customary law, both Hindu and Islam married women were under the unequal treatment regarding the rights of divorce. For instance, with respect of the Hindu couples, bigamy is legal for men only and the married women are not allowed to get a divorce at any circumstances. For Muslim couples, the husband are able to divorce his wife at any time by his will only without any reason for doing it.

Furthermore, a number of poor Buddhist women formed the inter-religion marriages with either the Hindu or the Muslim men and then these Buddhist women were in a worse position because the Hindu's and the Muslim's customary laws does not recognized their marriage as a legal union.[497] Therefore, the government tried to promote the position of these vulnerable women by promulgating the necessary legislations. Eventually, the Muslim Divorce Act 1953 for Muslim women and the Burmese Buddhist Women's Special Marriage and Succession Act 1954 for Buddhist

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[495] *Supra Note 434*, p.42.
[496] *Ibid*.
[497] Although the Special Marriage Act 1872 (as amended in 1923) was in force at that time, it remained outside the application. If the Act was applied to their marriage, an inter-religion marriage between a Buddhist and a Hindu may be legalized following the requirements of the Act.

women were successfully enacted. Unfortunately, no law is enacted yet for the Hindu women and therefore they are still in the bad situation in terms of the termination of a marriage. Under the Muslim Divorce Act 1953, the Muslim women were firstly able to initiate a divorce case against their abused Muslim husband grounded on certain reasons.

b. The Intermarriage between the Buddhist Woman and the Non-Buddhist Man

In fact, the Burmese Buddhist Women's Special Marriage and Succession Act 1954 is not the first attempt to protect the legal rights of Buddhist women who has the intermarriage relationship with non-Buddhist man. The very first legislation has already enacted since 1939 with a particular attention to eliminate the injustice practice over the Buddhist women. Prior to this enactment, these women usually lost their rights which they could expect from a marriage such as the rights of distribution of matrimonial property and of inheritance.

Under the 1939 Act, the unmarried Buddhist woman at least 16 and the non-Buddhist man at least 18 were able to legalize their marriage with the consent of both parents. Before solemnizing their marriage, a notice had to be submitted to the registrar or the headman of the village for 14 days in advance. After the lapse of 14 days of the advanced notice, their marriage was able to solemnize in the presence of two witnesses and the registrar.[498] As soon as the marriage procedure was completed, all questions relating to their family affairs were governed by the Myanmar Customary Law regardless of the husband's religion.

In case the couple was cohabiting without following the said procedure, the woman herself or her parents or any other related person to the woman were able to inform later about it to the registrar. [499] After receiving such information, the registrar had to summon the concerned parties to legalize their union according to the law. In case the non-Buddhist man refused to follow the registrar's suggestion, he would be penalized for breach of promise to marry or for seduction.[500] Although that provision was specifically intended to protect the interest of the Buddhist women, actually, it was not beneficial for these women in terms of the safeguarding of their future

[498] Section 6 & 7 of the Buddhist Women's Special Marriage and Succession Act 1939.
[499] *Supra Note 434*, p.423.
[500] *Ibid.*

financial situation. Therefore, in 1954, the Act was repealed with major amendments to replace these provisions.

Under the new Act, the eligible age to enter into the inter-religion marriage is decreased: 14 for unmarried Buddhist women and no age-limitation for non-Buddhist man although he is necessary to attain his puberty at the time of contracting the marriage.[501] The parent's consent is necessary for the one who is under 20. Both are necessary to be mentally competent in order to understand well the meaning of marriage and its consequences.[502] Only those couples who are satisfied with these conditions are able to legalize their marriage by sending a notice form to the registrar for 14 days in advance and by following the aforementioned procedure provided by the old law of 1939.

After legalizing an inter-religion marriage through such a procedure, they are recognized as a legal union notwithstanding that the personal law relating to the husband's religion may prohibit not to marry with people of different religions.[503] Moreover, all disputed matters relating to the family affairs within their unions are governed by the Myanmar Customary Law: divorce, distribution of matrimonial property, succession and inheritance, etc. shall be governed by and decided according to the Myanmar Customary Law irrespective of the husband's religion.[504] Those children born to these couples have legal capacity and are recognized as the legitimate children to them.[505]

In case the couple cohabits without following the said procedure, however, are living together in the manner that they are presumed as husband and wife under the Myanmar Customary Law, they may be presumed as a legalized union since the time they have started living together.[506] According to Section 20 (2) of the Act, they can register their marriage at any time in the presence of the registrar. When one or both of the couple does not willing to register their marriage, the registrar has to report it to a jurisdictional court with the necessary information.[507] Then the court will hear the case as if it is a civil litigation case and made a decision whether the couple is a

[501] Section 5 of the Buddhist Women Special Marriage and Succession Act 1954.
[502] *Ibid.*
[503] Section 3 & 20 of the Buddhist Women Special Marriage and Succession Act 1954.
[504] Section 25 & 26 of the Buddhist Women Special Marriage and Succession Act 1954.
[505] Section 27 of the Buddhist Women Special Marriage and Succession Act 1954.
[506] Section 20 (1) of the Buddhist Women Special Marriage and Succession Act 1954.
[507] Section 21 (2) of the Buddhist Women Special Marriage and Succession Act 1954.

legalized union or not. In this way, their legal status will be affected by the court's decision.

The most important feature of the whole Act was seen in the proviso of Section 25. It provides that the non-Buddhist husband is able to claim for a divorce against his Buddhist wife grounded that his respective religion forbids him to continue the marital relationship with the Buddhist woman. However, as a consequence, he has to;

- leave his share of joint matrimonial property and custody of all children to his wife,
- pay the wife compensation,
- support financially for the minor children until they attain majority.

This may be a special provision imposing the obligation of the responsible party and granting the legal rights of an innocent party on a no-fault divorce initiated by the non-Buddhist husband.

From 1948 to now, though the judicial system, particularly the formation of court system and its operating method, was changed from time to time, the principles and procedures for family justice system was not much changed. Within this period, only the Muslim Divorce Act 1953 and the Buddhist Women Special Marriage and Succession Act 1954 were enacted with respect of the family law area. Majority of the related laws had prescribed since the colonial period and still being used without significant amendments or changes. This does not mean that the current system is smoothly perfect and no reform is necessarily required for the development of the family justice system.

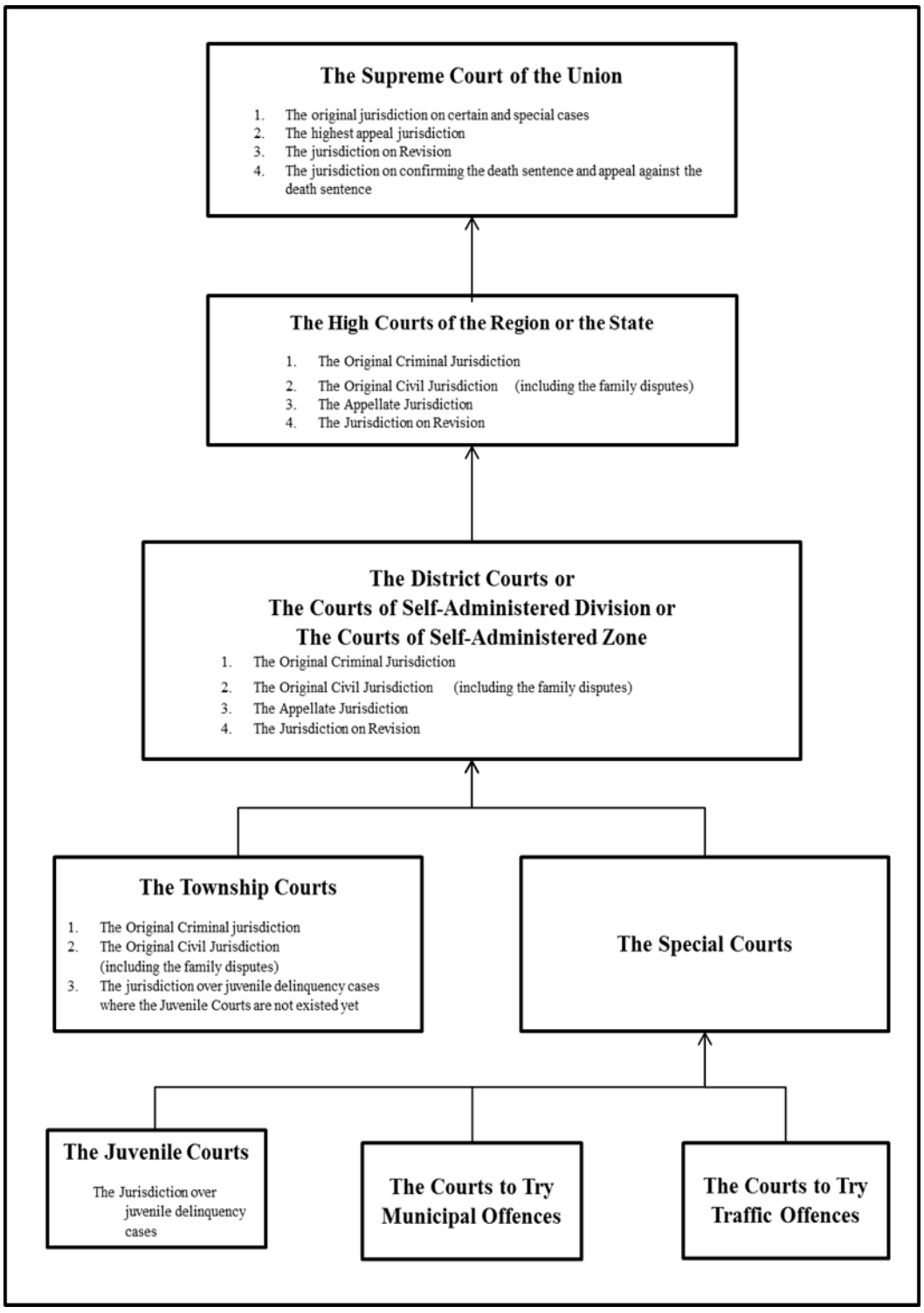
The detailed discussion on the current enforcing family laws particularly on divorce and child-related matters, and the facing problems in the existing system will be explored in the succeeding parts.

Before going to the discussions on the divorce laws and other laws on child related matters, a brief explanation about the current court system in Myanmar is presented here. The current judicial courts are established in accord with the Union Judiciary Law 2010 as follow:

1. The Supreme Court of the Union,
2. The High Courts of the Region or the State,
3. The District Courts or the Courts of Self-Administered Division or the Courts of Self-Administered Zone,
4. The Township Courts and

5. Other Special Courts inclusive of the Juvenile Courts, the Courts to Try Municipal Offences and the Courts to Try Traffic Offences.

Figure 5.5: The Formation of Judicial Courts



5.3The Current Family Laws on Divorce and Child-related Disputes

The primary sources of family laws in Myanmar for all religions consist of the Myanmar *Dhammathats*, the respective traditional customs, the former judicial precedents and various legislative enactments. In order to avoid the complicated discussion for governing family laws on different religions, the following discussion will be divided into four main parts according to the major groups of religion: Buddhism, Christianity, Islam and Hinduism. Inter-religion marriage is an additional part. Among them, the Buddhists, the Muslims and the Hindus are largely influenced by the Customary Law and the Christians and the intermarried couples are by the statutory law.

5.3.1 The Buddhist Couple

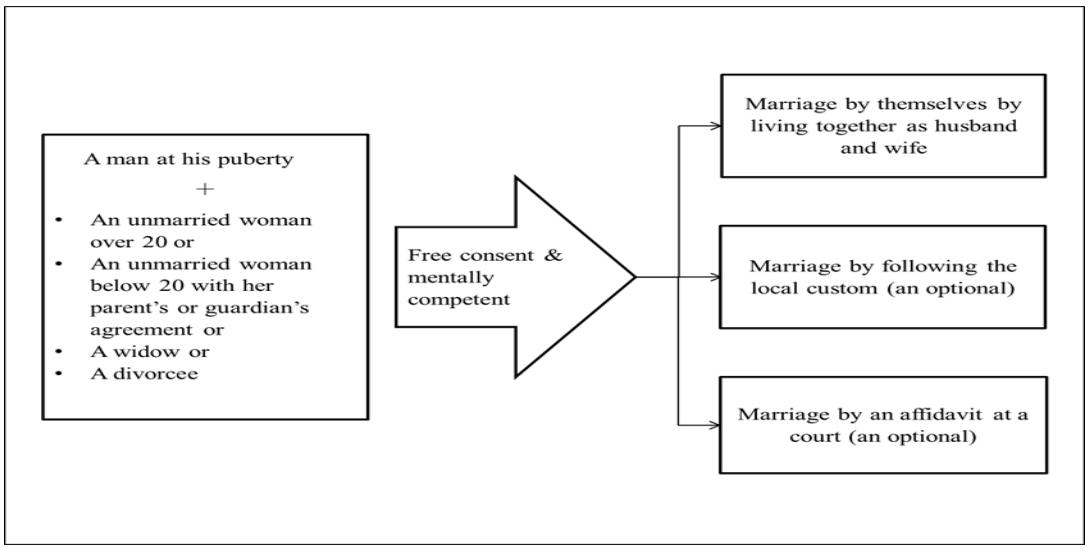
Table 5.3: The Major Applicable Laws for the Dissolution of Parents' Relationship and the Resolution of Child-related Disputes

No.	Applicable law	Applicable area
1	The Myanmar Customary Law inclusive of the Dhammathats and the former judicial precedents (It is not a codified law yet.)	- All questions relating to the family disputes (The marriage, divorce and child maintenance will be highlighted under this topic.)
2	The Registration of *Kittima* Adoption Act 1939	-The adoption of a minor or an adult (The minor child adoption will be highlighted here)
3	The Guardians and Wards Act 1890	- Appointing a parent as the guardian of his/her minor child after the parents' divorce (The guardian parent should take care of the minor or of his/her property or of both.)
4	Section 488 of the Code of Criminal Procedure 1898	-The child maintenance
5	The Code of Civil Procedure 1909	-A fundamental procedural law for all family proceedings
6	The Penal Code 1868	-A fundamental law for all crimes (the child abduction will be highlighted under this topic)
7	The Code of Criminal Procedure 1898	-A procedural law for all criminal cases

The above mentioned laws are applicable to all Buddhist people who are permanent residents in Myanmar irrespective of their nationality.[508] Before 1939, there was a conflict of laws regarding the Sino-Burmese marriage in Myanmar to decide which law should govern the validity of their marriage, inheritance and succession rights.[509] At that time, a considerable number of Chinese people were residing in Myanmar and not all of them were belonging to the Buddhist religion; some were Taoists. Accordingly, which law, the Myanmar Customary Law or the Chinese Customary Law, should be governed on the Sino-Burmese marriages was problematic in deciding certain family-related matters.

Such a problem was difficult to reach an agreeable solution and was unsettled for about forty years. Eventually, in 1939, a leading case[510] was emerged with the decision that a Chinese Buddhist domiciled in Myanmar should be governed by the Myanmar Customary Law in the matter of marriage, divorce, inheritance and succession. In case such a Chinese Buddhist could prove that he is governed by a special custom or usage which is being in force in Myanmar and is contrary to the principles of the Myanmar Customary Law, the Myanmar Customary Law will not be applied to him in the above-mentioned matters.[511] Regarding the child-related disputes after a divorce, these Chinese people will also be governed by the same general laws as with other people in Myanmar.

Figure 5.6: The Formation of a Valid Marriage between Buddhists



[508] Daw Thaike (a) Won Ma Thaike vs. Cyoung Ah Lin, 1951, B.L.R, 133.
[509] Hla Aung, "Sino-Burmese Marriages and Conflict of Laws", in *Law and Justice in Myanmar*, Tun Foundation Bank Literary, 2008, p.115.
[510] Tan Ma Shwe Zin vs. Koo Soo Chong, 1939, 88 R.L.R, 548 (P.C)
[511] *Supra Note 508*, Daw Thaike (a) Won Ma Thaike vs. Cyoung Ah Lin, p.141.

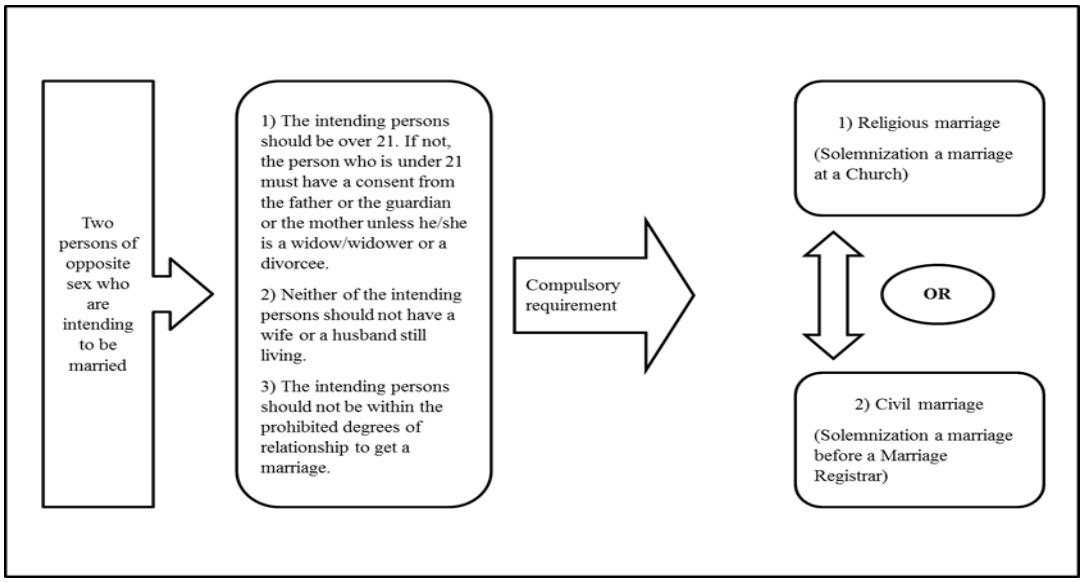
5.3.2 The Christian Couple

Table 5.4: The Major Applicable Laws for the Dissolution of Parents' Relationship and the Resolution of Child-related Disputes

No.	Applicable law	Applicable area
1	The Christian Marriage Act 1872	-The marriage
2	The Burma Divorce Act 1869	-The divorce, the judicial separation, child custody and child maintenance -partially a procedural law for these matters
3	The Guardians and Wards Act 1890	-Appointing a parent as the guardian of his/her minor child after the parents' divorce (The guardian parent should take care of the minor or of his/her property or of both.)
4	Section 488 of the Code of Criminal Procedure 1898	-The child maintenance
5	The Code of Civil Procedure 1909	-A fundamental procedural law for all family proceedings
6	The Penal Code 1868	-A fundamental law for all crimes (the child abduction will be highlighted under this topic)
7	The Code of Criminal Procedure 1898	-A procedural law for all criminal cases

These laws are applicable to all Christian people who are professing the Christian religion and solemnized their marriage within the jurisdiction of Myanmar.

Figure 5.7: The Formation of a Valid Marriage between Christians



5.3.3 The Muslim Couple

Table 5.5: The Major Applicable Laws for the Dissolution of Parents' Relationship and the Resolution of Child-related Disputes

No.	Applicable law	Applicable area
1	The Islamic Law (The compilation of the former judicial precedents plus the traditional custom)	- All issues relating to the family affairs (the marriage, divorce, child custody and child maintenance would be highlighted under this topic)
2	The Muslim Divorce Act 1953	- The divorce initiated by a wife
3	The Guardians and Wards Act 1890	-Appointing a parent as the guardian of his/her minor child after the parents' divorce (The guardian parent should take care of the minor or of his/her property or of both.)
4	Section 488 of the Code of Criminal Procedure 1898	-The child maintenance
5	The Code of Civil Procedure 1909	-A fundamental procedural law for all family proceedings
6	The Penal Code 1868	-A fundamental law for all crimes (the child abduction will be highlighted under this topic)
7	The Code of Criminal Procedure 1898	-A procedural law for all criminal cases

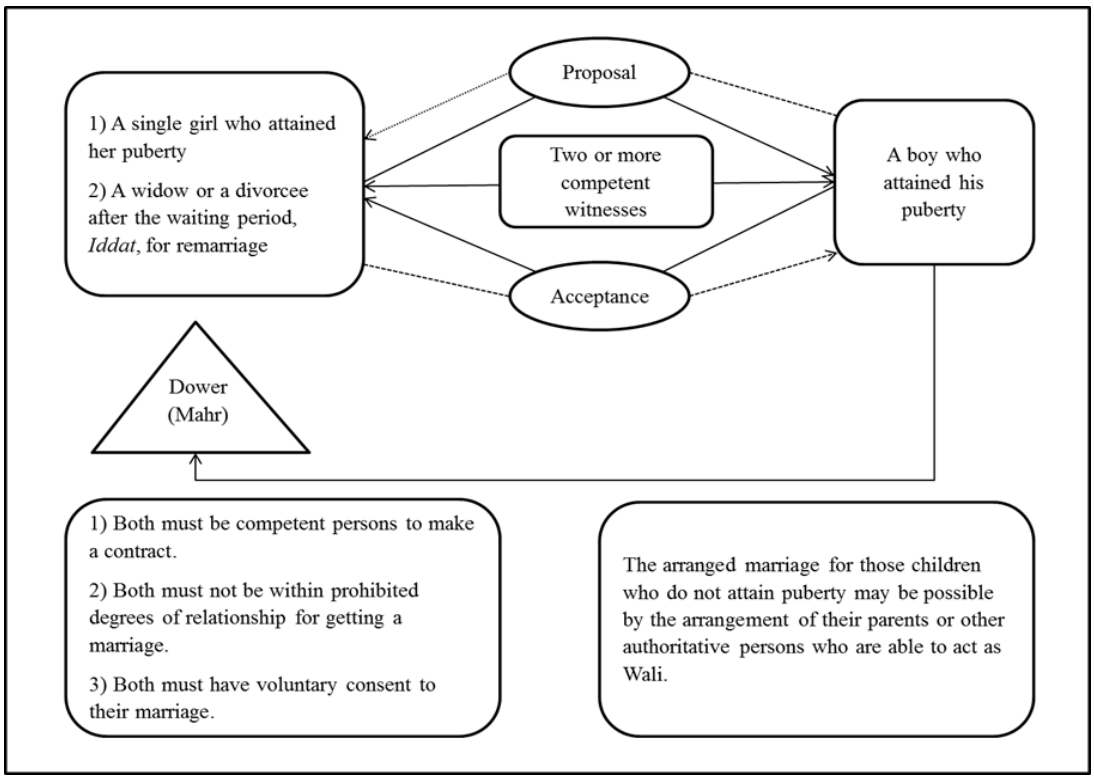
The said laws should be applied to those Muslim people who believe that there is no God but Allah and Mohamed is his Prophet.[512] There are two kinds of Muslim in Myanmar: Muslim by birth and Muslim by conversion. If a child is born to a Muslim couple, the child shall be presumed as a Muslim, or in case a child is born to an intermarried couple of which one of the parents is Muslim, the child shall be presumed as a Muslim too after birth.[513] Another type of Muslim is that who converted to Islam religion based on one's belief.[514]

Although there are two kinds of Islamic Law, *Sunni* and *Shiah* in the world, majority of the Muslim people in Myanmar are belonging to the *Sunni* Law.[515] Therefore, if there are any questions relating to family matters, these Muslim couples

[512] *Supra Note 477*, pp.47-48.
[513] *Ibid*, p.48.
[514] *Ibid*.
[515] *Ibid*, p.49.

will be governed by the Sunni Law as long as they cannot prove that they are under different law and practice.[516]

Figure 5.8: The Formation of a Valid Marriage between Muslims



5.3.4 The Hindu Couple

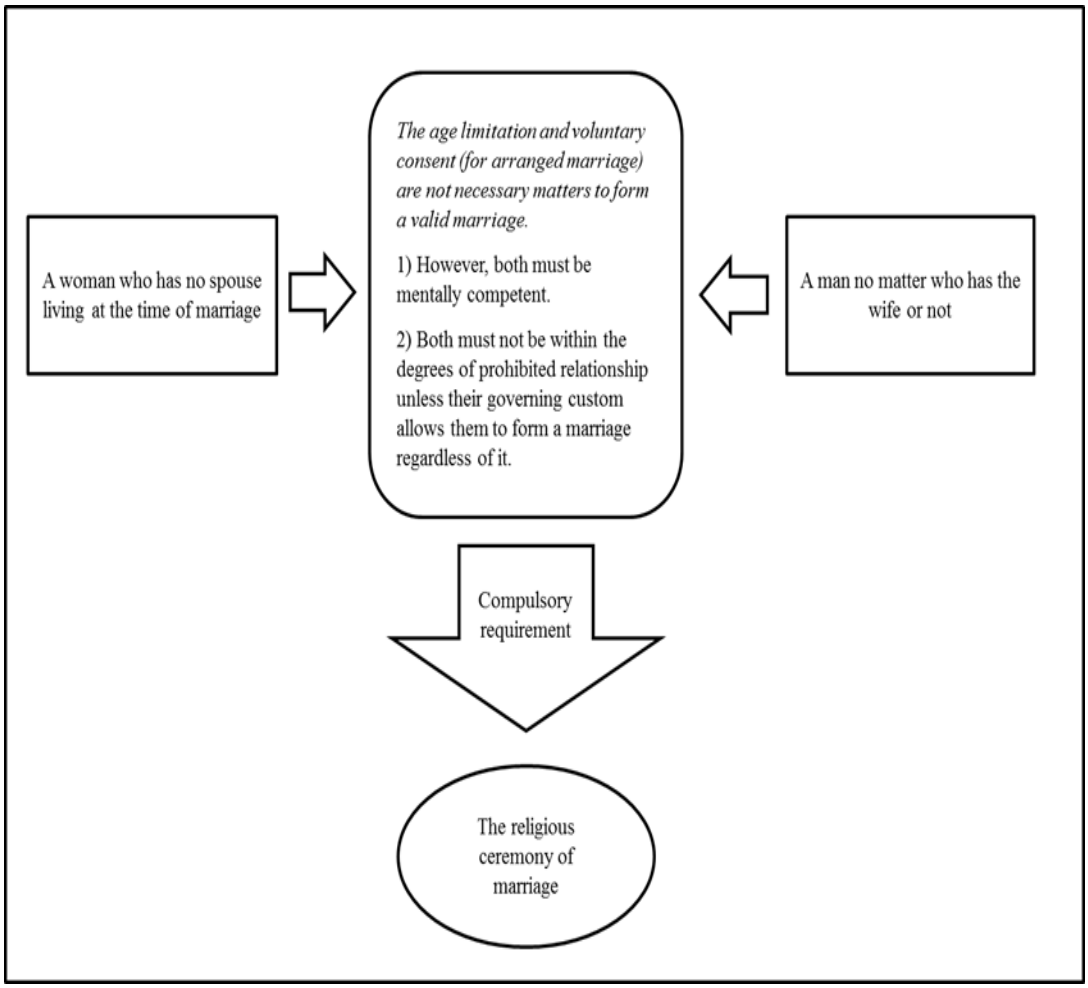
Table 5.6: The Major Applicable Laws for the Dissolution of Parents' Relationship and the Resolution of Child-related Disputes

No.	Applicable law	Applicable area
1	The Hindu Customary Law (The Law of the Origin) inclusive of the traditional customs and the former judicial precedents	- All questions relating to the family affairs (Divorce is not allowed.)
2	The Hindu Widows Remarriage Act 1856	- The remarriage of widows and custody of children in this process
3	The Code of Civil Procedure 1909	-A procedural law for all family proceedings
4	The Penal Code 1868	-A fundamental law for all crimes (the child abduction will be highlighted under this topic)
5	The Code of Criminal Procedure 1898	-A procedural law for all criminal cases

[516] *Supra Note 477*, p.49.

The Hindu people residing in Myanmar are governed by those laws mentioned in the above table. The caste system is not necessarily required in determining which family law should be governed on a Hindu couple while deciding family-related matters. All are treated equally before the law. A child born to the Hindu couple is presumed as a Hindu; however, those children born to an intermarriage of a Hindu may not be presumed as a Hindu. Furthermore, there is no specific requirement for the conversion from a non-Hindu religion to a Hindu religion. Therefore, it is difficult to find out who successfully converted to a Hindu from other religions.

Figure 5.9: The Formation of a Valid Marriage between Hindus



5.3.5 The Intermarried Couple[517]

[517] A marriage between people of different religions.

Table 5.7: The Major Applicable Laws for the Dissolution of Parents' Relationship and the Resolution of Child-related Disputes

No.	Applicable law	Applicable area
1	Section 4 of the Christian Marriage Act 1872	- The marriage between a Christian and a non-Christian
2	The Special Marriage Act 1872	- The marriage between a Hindu and a Buddhist
3	The Burma Divorce Act 1860	- The divorce and its related matters for those couples who got married either of the above-mentioned two legislations
4	The Buddhist Women Special Marriage and Succession Act 1954	- The marriage between a Buddhist woman and a non-Buddhist man (partly applicable in matters of divorce, child custody and child maintenance of these couples)
5	The Myanmar Customary Law inclusive of the Dhammathats and the former judicial precedents (It is not a codified law yet.)	- All questions relating to the family affairs of those couples who got married according to the preceding mentioned Act (the divorce and child maintenance would be highlighted under this topic)
6	The Guardians and Wards Act 1890	-Appointing a parent as the guardian of his/her minor child after the parents' divorce (The guardian parent should take care of the minor or of his/her property or of both.)
7	Section 488 of the Code of Criminal Procedure 1898	-The child maintenance (for all intermarried couples)
8	The Code of Civil Procedure 1909	-A fundamental procedural law for all family proceedings
9	The Penal Code 1868	-A fundamental law for all crimes (the child abduction will be highlighted under this topic)
10	The Code of Criminal Procedure 1898	-A procedural law for all criminal cases

The following table will show who are eligible to form an inter-religion marriage with whom under the existing system. Remarkably, no law provides to form an inter-religion marriage between a Hindu and a Muslim. In addition, the existing laws do not cover an inter-religion marriage between a Buddhist man and a Muslim woman. That is quite interesting although the real situation is unknown.

Table 5.8: The Validity of Legal Intermarriage

No.	Man	Woman	Validity[518]	Applicable law
1	Buddhist	Christian	O	- the Christian Marriage Act 1872
2	**Buddhist**	**Muslim**	**X**	
3	Buddhist	Hindu	O	- The Special Marriage Act 1872
4	Christian	Buddhist	O	- the Christian Marriage Act 1872 OR The Buddhist Women Special Marriage and Succession Act 1954
5	Christian	Muslim	O	- the Christian Marriage Act 1872
6	Christian	Hindu	O	- the Christian Marriage Act 1872
7	Muslim	Buddhist	O	- The Buddhist Women Special Marriage and Succession Act 1954
8	Muslim	Christian	O	- the Christian Marriage Act 1872
9	**Muslim**	**Hindu**	**X**	
10	Hindu	Buddhist	O	- The Special Marriage Act 1872 OR The Buddhist Women Special Marriage and Succession Act 1954
11	Hindu	Christian	O	- the Christian Marriage Act 1872
12	**Hindu**	**Muslim**	**X**	

To conclude this part, it is true to say that the existing family justice system in Myanmar is extremely complicated. In consequence, majority of people except few who are familiar with the legal field do not well understand it. It subsequent makes the disputing parties to rely largely upon the professional lawyers to proceed a family law case at a court. This may be one of the major causes of the expensive court proceeding. Although the effective public legal education system is desirable in order to increase the public awareness of the existing legislations, it does not exist yet. It could be said that the complex legislations and lack of legal knowledge among the

[518] 'O' stands for a valid marriage whilst 'X' for an invalid marriage.

public may be a big challenge for the development of family justice system in the future.

The following topic will concern the detailed discussion of all legislations described in this section.

5.4 Principles on the Dissolution of a Marriage

In Myanmar, registration is not mandatory neither for the formation nor the dissolution of a marriage. In case there is a question on the existence of either a marriage or a divorce, the relevant facts to be proved may vary according to the laws governing on them. The required procedures to enter into a valid marriage have been explained above and to obtain a divorce will be explained below. In actual, it is sometime difficult to prove the existence of marriage or divorce unless the parties present the reliable documentary evidence. Moreover, due to the lack of official data on them, it is impossible to know how many couples get married and how many couples dissolve their marital relationship each and every year. Consequently, how many children are annually affected by the dissolution of parents' relationship is also unknown. Then, the analysis on the current situation of divorce and child-related matter after a divorce is a difficult and incomplete work.

In the following discussion, it intends to explore the different principles which are laid down by the different legislations for people of different religions.

5.4.1 The Buddhist Couple

Under the Myanmar Customary Law, two different types of divorce are possible for the Buddhist couple: (1) divorce by mutual consent[519] and (2) divorce by a court decree.

If a couple gets agree on the dissolution of their marriage, the only requirement for them in order to be a successful divorce is to express their mutual and free consent on it.[520] Although this may not be a difficult task, it may create a controversial situation since the law does not regulate a unified system how to prove such a kind of mutual consent. Consequently, a variety of practices are existed in and the utilizing method may vary from one case to another:

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[519] *Supra Note 424*, p.72.
[520] *Supra Note 426*, p.131.

- some make a divorce deed in the presence of their parents, relatives, friends and so on[521];
- some go to the elder people or headman of the village to make a divorce deed before him;
- some go to the lawyer and sign their divorce deed in the presence of a lawyer;
- some announce publicly their divorce by mutual consent via the public or private media such as newspaper[522]; and
- some go to a court and make an affidavit before an authorized judge.

On a general basic, people from the rural areas usually get a divorce by either method (1) or (2), whilst those from urban areas usually end their marriage by one or more of the three methods, (3), (4) and (5). Nowadays, the vast majority of divorcing couples in the urban areas are willing to go to a court and make an affidavit because they wish to have better evidence dealing with their divorce. In this process, both parties have to present in person before an authorized judge to take the oath.[523] In addition, the divorcing parties should bring two qualified witnesses in order to be identified who the declarants before the judge are.[524]

Then the divorcing couple declares their voluntary agreement before the judge and signed together on the affidavit. The two witnesses also have to sign on the affidavit and finally the authorized judge will approve and date it. Such a practice should be recognized as a kind of divorce registration system because the court will record it in the affidavit registration book and keep a copy of their affidavit together. In case one or both of the parties lost their original affidavit later, they are available to apply for a certified copy of the court's record and use it as the secondary evidence. That is one of the advantages of making a legal document at the time of mutual consent divorce.

In case one of the couple does not agree on a divorce, the other spouse is able to claim for a divorce at a court, however, it must be grounded one or more of his/her spouse's matrimonial fault. The current system is fault-based divorce system and one of the married couple could not claim for a divorce against the other's will in the absence of any fault on the part of the other. The Myanmar Customary Law recognizes

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[521] *Supra Note 424*, p.72.
[522] *Ibid*, p.75.
[523] Order XIX, Rule 4 of the Code of the Civil Procedure 1909.
[524] Order XIX, Rule 10 of the Code of the Civil Procedure 1909.

five kinds of simple matrimonial faults and two kinds of serious matrimonial faults[525] for a divorce. Five simple matrimonial faults include (1) cruelty, (2) adultery by husband, (3) taking another wife without the consent of the present wife, (4) desertion and (5) misrepresentation. Two serious matrimonial faults include (1) adultery by wife and (2) serious cruelty.[526]

Table 5.9: Grounds for Divorce and its Explanation

No.	GROUNDS FOR DIVORCE	EXPLANATION
1	Cruelty	- Not only physical violence but also infliction of mental pain is included.
2	Adultery by husband	- The husband's adultery accompanied by the cruelty to the wife.
3	Taking another wife without the consent of the present wife	- Although bigamy is legal for husband, it gives the sufficient ground for the present wife to claim a divorce against her husband.
4	Desertion	- Desertion with the intention to end the marriage tie. - Waiting period is 3 years for wife but only 1 year for husband.
5	Misrepresentation	- Inducing the other spouse to enter into the marriage by giving false statement.
6	Adultery by wife	- Not only the husband can claim a divorce against his wife but also he is entitled to make a direct complaint to a court against his wife's partner for committing the criminal offence of adultery.
7	Serious cruelty	-Grievous hurt -Serious mental pain

Only if the plaintiff could prove that the defendant had committed one or more of the matrimonial faults described in the above table 5.9, the court may grant a divorce decree. As soon as the court has granted a divorce decree, the marital relationship of a couple is completely terminated and both are immediately becoming the eligible spouses to remarry again.

5.4.2 The Christian Couple

[525]If the court is found that the defendant had committed one or more of the serious matrimonial faults, he/she has to surrender the share of matrimonial property after granting a divorce.
[526] *Supra Note 426*, pp.131-132.

Under the Burma Divorce Act 1872, a Christian couple is able to get a divorce through a court order only. No mutual consent divorce is available for them. Nonetheless, judicial separation is legally possible in certain circumstances.[527] The jurisdictional power to handle divorce and judicial separation between the Christians are holding explicitly by the District Court and the High Court but not by the Township Court which is a common-used court for claiming a divorce between the Buddhists.[528] In relation to the dissolution of a marriage, different grounds are provided for husband and wife separately.

The wife's guilty of adultery is the sole ground for divorce that the husband may claim for a divorce against the guilty wife.[529] However, several grounds of divorce are prescribed for the wife to initiate a divorce case against her husband. They include:

- converting the religion from the Christian to any other religion and forming a marriage with another woman[530];
- guilty of incestuous adultery[531];
- committing bigamy with adultery[532];
- marrying with another woman with adultery;
- committing the rape, sodomy and bestiality;
- committing adultery coupled with the cruelty that it enables a wife to claim for a divorce; and
- committing adultery coupled with the desertion[533] a wife at least two years without any reasonable cause.

As described above, merely the husband's adultery may not be constituted as a sufficient ground to be claimed for a divorce against him. The wife is legally required to prove more additional facts to be granted a divorce degree. On the other hand, the husband is able to claim for a divorce grounded on the wife's adultery alone.

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[527] Section 22 & 23 of the Burma Divorce Act 1872.
[528] Section 3 (4) of the Burma Divorce Act 1872.
[529] Section 10 of the Special Marriage Act 1872
[530] 'Marriage with another woman' means marriage of any person, being married, to any other person, during the life of the former wife.
[531] 'Incestuous adultery' means adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity (whether natural or legal) or affinity.
[532] 'Bigamy with adultery' means adultery with the same woman with whom the bigamy was committed.
[533] 'Desertion' implies abandonment against the wish of the person charging it.

Moreover, the husband has to make the alleged adulterer a co-defendant in his divorce application.[534] That is the similar practice of the former English divorce system.

If such a divorce case is initiated at a District Court, the court may render a divorce decree when the court satisfies on the presented evidence by the plaintiff.[535] However, it is not the final one: every divorce decree made by a District Court required to be confirmed by an order of its higher rank, the High Court.[536] The confirmation process at a High Court is usually done by a three-judge court and the decision is made by the majority rule.[537] During the process, the High Court may direct the original District Court to collect further enquiry or additional evidence if necessary.[538] After taking all necessary steps, the High Court may make an order as it thinks fit. Importantly, the High Court is prohibited not to confirm the divorce decree of a District Court during six months from the date of the divorce decree made by the District Court.[539]

In case a divorce case is initiated at a High Court, the High Court should make a decree nisi first.[540] Within the six months after granting a decree nisi, the successful party has to apply for an absolute decree to conclude the divorce process.[541] If it is failed to apply for an absolute decree within the reasonable time, the divorce case may be dismissed.[542] The prominent feature of the Act is that the husband who claimed for a divorce against his wife, has a provisional right to claim for a damage and costs for court proceedings, on both the wife and the alleged adulterer.[543]

Another significant feature of the Act is that the judicial separation without divorce is possible according to the Section 22 of the Act. However, likewise in a divorce proceeding, the plaintiff who wants to get a judicial separation has to prove that the other spouse has committed the adultery or the cruelty or the desertion for two or more years without any reasonable excuse.[544] The application of judicial separation should be made either at a District Court or at a High Court. If the court is satisfied

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[534] Section 11 of the Burma Divorce Act 1872.
[535] Section 14 of the Burma Divorce Act 1872.
[536] Section 17 of the Burma Divorce Act 1872.
[537] *Ibid.*
[538] *Ibid.*
[539] *Ibid.*
[540] Section 16 of the Burma Divorce Act 1872.
[541] Section 16 of the Burma Divorce Act 1872.
[542] *Ibid.*
[543] Section 34 & 35 of the Burma Divorce Act 1872.
[544] Section 22 of the Burma Divorce Act 1872.

that there is no legal ground not to grant the judicial separation, it may render a decree to the petitioner.

These are the current practice of the dissolution of marital relationship for a Christian couple. The law provides not only the principles on divorce and judicial separation but also a unique feature of procedural law. As the law was enacted during the colonial period and is still using without changes, it may be seen a large influence of the former English legal system. Some provisions are very similar with the former practice of English divorce law. Although the English law in the Britain has changed and developed throughout the history, the English-made legislation, the Burma Divorce Act 1872, in Myanmar is quite silent for changes.

5.4.3 The Muslim Couple

According to the Islamic Law, five different divorces are available for the Muslim couple in Myanmar:

- Divorce by the husband's unilateral will,
- Divorce by the wife's unilateral will by using the delegated power of *talaq*,
- Divorce by mutual consent,
- Divorce by a court degree (only the wife-initiated divorce), and
- Divorce by the wife's apostasy from the Islamic to another religion.[545]

The divorce by the husband's unilateral will is called the *talaq* and in such a case, the husband does not need to show any reason for divorce.[546] The only requirement for him, to be a successful divorce is, that he has to express his intention to dissolve the marital relationship between him and his wife clearly either by orally or in writing.[547] That is one of the easiest ways to divorce all over the world. From the gender-equality point of view, it is the most unfavorable practice in order to protect and safeguard the equal rights of women.

Subject to certain conditions, the husband may delegate the power of *talaq* to his wife before entering into their marriage. In such a condition, if the husband breaches later any of the conditions that they had agreed before, the wife is able to get

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[545] U Ba Maw, "*The Marriage Laws of Myanmar, the Myanmar Buddhist, Muslim, Christian and Hindu Marriage Laws*", Yangon, 1992, p.108.
[546] *Supra Note 477*, p.98.
Supra Note 545, p.108.
[547] *Supra Note 477*, p.99.

a divorce by her unilateral will on pronouncing the *talaq*.[548] It is important to note that the delegation of power of *talaq* to the wife can be irrevocable later; however, by merely such a delegation of power of *talaq*, the Muslim husband does not lose the right of divorce against this wife.[549] He is able to divorce his wife any time according to his will.

Another easy and simple way of divorce for an Islamic couple is divorce by mutual consent and it is sub-divided into two types: *Khula* and *Mubarat*. *Khula* is a kind of divorce initiated by a wife with a commitment of giving or agreeing for the benefit of the husband.[550] For instance, the wife has to make a payment or has to release her dower and other rights to the husband on the termination of the marriage tie. *Mubarat* is a kind of divorce based on the mutual consent of both parties. Accordingly, the wife does not need to pass anything on this divorce.

During these three different ways of divorce, no official intervention is necessary to constitute a valid divorce. A couple may dissolve their marital relationship fundamentally based upon one's will or their mutual consent. However, one may notice that the legal right to divorce is distributed unequally between the husband and wife. That is the well-know characteristics of the Islamic family law and consequently, the position of Islamic wife in Myanmar is still in a low position as those in many other countries.

Nonetheless, there is the sole statutory legislation in Myanmar to ensure the Islamic women's rights of divorce. That is the Muslim Divorce Act 1953. Under the Act, two different types of divorce are available: divorce by a court degree and divorce by the wife's apostasy from the Islamic to another religion. According to Section 2 (1) of the Act, a wife may initiate a divorce against her husband on the following grounds:

- that the whereabouts of the husband has been unknown;
- the husband's negligence or failure to maintain his wife for the consecutive six months;
- the husband's failure to have a sex, without reasonable cause, throughout the year;

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[548] *Supra Note 477*, p.99.
[549] Nga Kyaw vs. Mi Hla, 1917 – 20, Upper Burma Rulings, 99.
[550] Abdurrahman vs. Ma Kyal, 26 Indian Court, 102, (Lower Burma)

- the husband's impotency at the time of the marriage and it continues so;
- the husband's insanity for not less than one year, or that he has suffered from either the leprosy or a virulent veneral disease;
- that she, having marriage in her minority arranged by her father, or by any other guardian and no sexual relationship with the husband, repudiates her marriage before she attains fifteen;
- the husband's cruelty including the physical assault, the mentally ill-treatment, and an attempt to force the wife to lead an immoral life; and
- any other reason that the Islamic Law recognizes as the sufficient ground for divorce to be initiated by a wife.

In case the wife initiates a divorce case grounded on the fact that the whereabouts of the husband has been unknown, the court may render a decree nisi first and the wife has to wait for another four years to be granted an absolute decree of divorce.[551] If the wife claims for a divorce based on the fact that the husband's impotency at the time of the marriage and it continues so, the court may also render a decree nisi first and the waiting period for the wife is one year in order to be granted an absolute decree.[552]

These are the significant principles laid down by the Muslim Divorce Act 1953. The Act is primarily intended to promote the legal position of the Muslim wife and it is still in effect. The most prominent feature of the Act is that if a Muslim wife abandons the Islam or converts from the Islam to another religion, her marital relationship with the Muslim husband is automatically terminated thereafter.[553] The similar principle is laid down by the Islamic Law and it is said that either one of the Muslim couple converts from the Islam to another religion, the marital relationship between them is immediately dissolved.[554]

5.4.4 The Hindu Couple

Under the existing system, a marriage between the Hindus is for life and no Hindu can dissolve their marital relationship legally yet.[555] It means that once getting

[551] Section 2 (2) of the Muslim Divorce Act 1953.
[552] Section 2 (3) of the Muslim Divorce Act 1953.
[553] Section 4 of the Muslim Divorce Act 1953.
[554] A M Ibrahim vs. Fatima Ve Ve, 1939, Rangoon Law Reports, 383.
[555] *Supra Note 545*, p.112.

married, the Hindu women are not allowed to enter into a second marriage although the Hindu men are allowed to take a second wife as polygamy is legal for them. Moreover, it was said that the Hindu widows could not get remarried because their previous marriage was not ceased even after their husband's death. Accordingly, in case the Hindu widow remarriages again, the marriage is invalid and those children born to this remarriage were regarded as the illegitimate children who don't have the right to inherent from the father.

With the aim of removing such an unequal treatment to the Hindu widows, the Hindu Widows' Remarriage Act was enacted in 1856. Thereafter, according to the Section 1 of the Act, the Hindu widows' remarriage become valid and consequently their children are recognized as the legitimate children to both parents.

5.4.5 The Intermarried Couple

Under this topic, the intermarried couple should be divided into three groups: (1) those couples who got married under the Christian Marriage Act 1872, (2) those got married under the Special Marriage Act 1872 and (3) those got married under the Burmese Buddhist Women's Special Marriage and Succession Act 1954. When couples from group (1) and (2) want to dissolve their marital relationship, the Burma Divorce Act 1869 will govern on them. The divorce principles laid down by this Act has already explained in 4.2 and the same principle and procedure will also be applied to these intermarried couples.

When couples from group (3) dissolve their marital relationship, the Myanmar Customary Law will explicitly governed on them subject to the Section 25 of the Burmese Buddhist Women's Special Marriage and Succession Act 1954. The principles of divorce under the Myanmar Customary Law have already mentioned in 4.1 and the same will be applied to them. The significant feature of Section 25 of the Burmese Buddhist Women's Special Marriage and Succession Act 1954 has already explored in the late part of 2.3. It particular concerns the divorce initiated by the non-Buddhist husband, and his obligation at the time of divorce.

5.4.6 Summary

Table 5.10: The Validity of Divorce and the Applying Divorce Principles to the Married Couples in Myanmar

No.	Types of couple		Validity of divorce	Mutual consent divorce	Divorce by a court decree	Grounds for divorce in a court proceeding
1	Buddhist couple		O	O	O	- Different grounds are provided for husband and wife.
2	Christian couple		O	**X**	O	- ditto
3	Muslim couple		O	O	O	- Only wife-initiated divorce is existed.
4	Hindu couple		**X**	**X**	**X**	**X**
5	Intermarried couple	Group 1 & 2	O	**X**	O	- Different grounds are provided for husband and wife.
		Group 3	O	O	O	- ditto

The following part will explain how these different types of couples should establish the legal relationship with their children.

5.5 The Legal Parent-child Relationship

5.5.1 Types of Parent-child Relationship

Under the current system, parents can establish two different types of parent-child relationship in Myanmar: by giving birth to a natural child and by adopting a minor or an adult.

a. Natural Parent-child Relationship

Regarding the natural children, it may be divided into two types; the legitimate and illegitimate children. Section 112 of the Evidence Act 1989 provides that '*the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son*

of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten'.

This is the only ultimate legislation to determine the legitimacy of a child born and it governs on every child within Myanmar regardless of the child's and his/her parents' religion. Accordingly, those children born out of the valid marriage or born after two hundred eighty days of the divorce may be categorized as the illegitimate children to their father. Once the child is recognized as an illegitimate child, the child cannot be legitimate unless the child sues a civil suit against his/her father to declare that he is his/her father. Such a kind of suit is named as the declaration suit for legal character under the Specific Relief Act. Unlike Japan and England and Wales, the voluntary acknowledgement of paternity by the father is not legally provided yet in Myanmar.

b. Adoptive Parent-child Relationship

The adoption Act is applicable to only those adoptive parents who are professing Buddhism. Under the Myanmar Customary Law, a child of any age can be adopted[556] by a bachelor, spinster, widow, and widower as his or her own child.[557] In case a married couple adopts a child, both parties' consent is necessary to be a valid adoption and they have to adopt the child jointly. However, two unmarried persons cannot adopt a child jointly. If the adopted child is an adult, his/her consent to be adopted is essential. If a child is adopted successfully, the child's relationship with the natural parent is completely terminated in terms of the inheritance rights.

In the case of *Ma Khin Than vs. Ma Ahma*[558], it was decided that the adoption under the Registration of *Kittima* Adoption Act 1939 was automatically cancelled if the adoptive parent forsake their Buddhist faith and embrace any other faith, for instance Christianity, which does not recognize adoption. Another important case regarding the child adoption is *Mg Khin Maung vs. U Musar*[559] in which the Supreme Court decided that the Islamic Law does not recognize child adoption. In accordance with these two precedents, one may conclude that both the Christianity and the

[556] Maung Aing vs. Ma Khin, 2 Upper Burma Rulings (92-96), p.22 (26).
[557] Ma Bu Lone vs. Ma Mya Shin, 14 Burma Law Reports 9.
[558] 12 Rangoon 184.
[559] 1967, Burma Law Reports (Supreme Court), 615.

Muslim are not being allowed to adopt a child legally. Although it is said that the Hindus are able to adopt a child[560], no statutory law is found to regulate it.

Therefore, the Registration of *Kittima* Adoption Act 1939 is standing and working as the sole statutory enactment in Myanmar to regulate child adoption for Buddhist parents. According to this Act, every adoption, after its operation from the 1st April 1941, shall be done by an instrument of adoption executed by the adoptive parents and the adopted person. In case the adopted person is under 20, the person whose consent was required to effect the adoption shall execute it. The instrument of adoption must be duly attested by two witnesses and registered with the Registrar of Deeds.

After taking the necessary steps, the status of an adopted child, *Kittima*, in the adoptive family is close to that of a natural child. The *Kittima* child owes the same filial duties to his adoptive parents as a natural child does. Although the primary purpose of the adoption of the Kittima child must be that the child shall inherit from the adoptive parents, in one precedent, it has been held that failure to discharge the filial duties to the adoptive parents may forfeit the *Kittima* child of the right to inherit.[561]

According to the above discussion, the natural parent-child relationship is the most common relationship between parents and the child, and the adoptive parent-child relationship is exclusively applied to the Buddhist couples.

The below part will concern the resolution system of child-related disputes for those parents who dissolved their relationship through a divorce or a judicial separation. Children in the following discussion mean both the natural children and the adopted children of these parents.

5.6 Principles on the Resolution of Child-related Disputes after a Divorce or a Judicial Separation

Under this topic, particular child-related matters inclusive of taking care of the child (guardianship), child maintenance and child abduction issues are discussed in detailed. As usual, the discussion will be divided into four parts depending on the religion of the couples. The Hindu couple is excluded from the following discussion

[560] *Supra Note 477*, p.191.
[561] *Supra Note 556*.

due to the lack of legal divorce between them. Consequently, the resolution of child-related disputes at a court is not necessarily required for them.

5.6.1 The Buddhist Couple

At the time of parents' divorce which is either by mutual consent or by a court decree, the arrangement of children is not a legal requirement for a valid divorce. However, divorcing parents may make a voluntary agreement on children arrangement before or after their divorce. In case they cannot reach an agreement on divorce and children arrangement, it is unable to resolve both cases in the same court proceeding because it needs to be sued and proceeded separately. For divorce dispute, the plaintiff may initiate a civil suit either at a Township Court or at a District Court depending on the value of the suit. For the dispute on guardianship of the child, the parent who wants to be appointed as the guardian of the child shall make a civil application at a District Court having jurisdiction in the place where the child ordinarily resides. This is the basic procedure for divorce and guardianship issues raised between the Buddhist parents.

Dealing with the guardianship of the child, the father of an illegitimate child is restricted not to make an application. Such a restriction is provided by one of the leading cases' decision. In this case, it was held that the father of an illegitimate child does not have a legal right of claiming to be appointed as a guardian of that child.[562] Therefore, it should be here noted that the parent who had not established the legal parent-child relationship does not have a right to be a guardian of the child consequently.

a. Guardianship

When the marital relationship of a Buddhist couple is terminated by a mutual consent divorce, it is for these parents to arrange and agree on which children should go with whom. The minor children in this respect are bound by the choice of their parents, however, when the children attain the age of discretion, they are able to alter the taking-care arrangement in accordance with their intellectual preference.[563] According to the *Manugye Dhammathat*, the divorced father is generally entitled to

[562] U Maung Maung vs. Ma Aye Bu, 1952, Burma Law Report (High Court), 406.
[563] Mi San Mra Rhi vs. Mi Than Da U, 1 L.B.R (Lower Burma Rulings), 167.

take the sons and the divorced mother is entitled taking the daughters after their divorce. Nevertheless, if the son is too young to separate from the divorced mother, he shall be left with the mother until the age of 7 years, or until he is sufficiently grown up.[564]

In case the Buddhist couple gets a divorce grounded on one's matrimonial faults, it is said that the innocent spouse shall be entitled to take care over all children and the guilty person shall release the rights of taking care over these children.[565] Such a kind of principle may be based on the fact that the delinquent is morally unfit to take care of the minor child.[566] These are the general principles of taking care the child which are laid down by the Myanmar Customary Law. On a general basic, the Buddhist couples are likely to follow these principles while determining their child arrangement after a divorce.

Nonetheless, whenever a dispute arises between divorcing couple in relation to the child arrangement, the person who wants to be the guardian of the child may go to a District Court and make an application to be appointed as a guardian. In this case, the District Court shall apply the Guardians and Wards Act 1890 as a fundamental law for determining the guardianship. In Myanmar, the parental guardianship system is still applied and as a matter of fact, the Guardians and Wards Act 1890 has the ultimate authority to decide child arrangement disputes for everyone regardless of their religion.[567]

In order to be applicable the Act, the minor in the dispute must be under 18.[568] However, if the minor under 18 has already got married with a person who is not the minor, the law does not allow the court to appoint other persons as the guardian of the minor.[569] While the court is considering the appropriate person to be appointed as a guardian of a minor, the following factors may be taken into account:

- the welfare of the minor as the priority,
- the age, sex and religion of the minor,
- the character and capacity of the applicant,

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[564] E Maung, "*Burmese Buddhist Law*", Mya Sapay, Rangoon, 1970, p.169.
[565] U May Oung, "*A Selection of Leading Cases on Buddhist Law*", 2nd Edition, British Burma Press, 1926, p.88.
[566] *Ibid*.
[567] Ma Thein May vs. Mg Poe Kywe, 8 B.L.T 73.
Ma Tin Nyunt vs. Ko Aung Thein, 1963, Burma Law Report, 287.
[568] Section 4 (1) of the Guardians and Wards Act 1890.
Section 3 of the Majority Act 1875.
[569] Section 19 (a) of the Guardians and Wards Act, 1890.

- the attachment between the minor and the applicant,
- the minor's preference in case he/she is old enough to form an intelligent preference.[570]

Regarding the appointment of a parent who is a European Christian[571] as the guardian of the person of his/her child, there is a particular provision in the Act and is controversial due to its unfair treatment to divorced parents. Section 17 (4) of the Act provides that '*if the minor is a male of tender years or a female, the minor should be given to the mother, and if the minor is a male of an age to require education and preparation of labor and business, then to the father*'.

In accordance with this provision, divorced parents cannot get equal rights to be the guardian of their child. Furthermore, by following this provision, it is also impossible for parents to be appointed as the joint guardians of the person of their own child although Section 15 of the Act provides that the court may appoint more than one guardian of the person of the minor or of the property or of both. However Section 17 (4) of the Act is concerned with only parents who are European Christians. Regarding the duty of a guardian, the guardian of the person of a minor is charged with the custody of the minor and must look to his/her support, health, education, and other necessary matters,[572] whereas the guardian of the property of a minor is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, may do all acts which are reasonable and proper for the realization, protection or benefit of the property.[573]

Another unequal treatment between parents is Section 19(b) of the Act in which it provides that '*nothing in this chapter shall authorize the Court to appoint and declare a guardian of the person of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor*'. With reference to this provision, it was held that in a case[574] like that; '*since the father is the natural guardian of his minor children, the court even does not need to declare the father as a legal guardian of his children by applying the Guardians and Wards Act 1890.*

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[570] Section 17 (1), (2) and (3) of the Guardians and Wards Act, 1890.
[571] European Christians includes any Christians of European descent.
[572] Section 24 of the Guardians and Wards Act 1890.
[573] Section 27 of the Guardians and Wards Act 1890.
[574] Ma Lae Lae Win Vs. Mg Soe Lwin, Burma Law Report, 1968, 237.

As described above, the applicable law to the determination of guardianship of a child after a divorce is a complicated legislation regarding the appointment of a guardian of the person of a child in particular. The relevant provisions are conflicting each other. One provision[575] provides joint guardianship of the person of the child whilst another provision[576] provides sole guardianship based on the child's gender with other conditions. Furthermore, one provision[577] vests the superior rights to father to be the guardian of the child.

b. Maintenance

i. The Responsible Parent for Child Maintenance

As described in Table 5.2, maintaining children is one of the social obligations for parents. Nowadays, it is not only the social obligation but also the legal obligation for both parents. However, in Myanmar, the law imposes that legal obligation to the father only.

ii. Claiming Maintenance through a Civil Litigation

In 1940, there was a prominent civil case relating to the child maintenance dispute. In this case,[578] it was held that although the wife (not the divorced wife)[579] has a legal right of claiming maintenance against her husband through a civil litigation, the child does not have such a legal right to claim for maintenance against his/her father through the process of civil litigation. That doctrine was accepted and applied among the Buddhist families until 1985. Nevertheless, a turning point of child maintenance system was appeared then.

In this year of 1985, a minor daughter initiated a civil suit for claiming maintenance against her father.[580] However, the lower court dismissed her application based on the fact that the daughter has no legal rights to sue a civil suit of maintenance

[575] Section 15 of the Guardians and Wards Act 1890.
[576] Section 17(4) of the Guardians and Wards Act 1890.
[577] Section 17(4) of the Guardians and Wards Act 1890.
[578] Dr. Tha Mya vs. Ma Khin Pub and two others, 1940 Rangoon 807.
[579] After getting a divorce, because of the termination of husband-wife relationship, the divorce husband has no more responsibility to maintain his ex-wife but still has the responsibility to main his children.
[580] Ma Aye Ti Nyein, the minor (Ma Nu Nu Yee, her nearest friend) vs. U Kyi Lwin, 1987, the Civil Appeal Application, the Chief Court, Number 116.

against her father. The daughter did not satisfied with the lower court's decision, and subsequently she made an appeal application to the Chief Court. That was a big challenge for the existing practice of child maintenance system and therefore the Chief Court admitted it to be heard.

After completing necessary hearings from both sides, the Chief Court finally pronounced a judgment that '*as the father has a social and legal obligation to maintain his children, the children should have a legal right to sue a civil suit of child maintenance payment against their father where the father is failing to meet his obligation without sufficient reasons*'. Since then children from the Buddhist families are able to claim for a civil suit of the child maintenance payment against their absent father. However, there is no rule, guideline, or regulation to calculate the proper amount to be paid.[581]

With respect to the modes of that payment, it was provided that the father may pay money -

1. to the court where the decree of payment is executed, or
2. to the children directly out of the court, or
3. by any other method as the court directs.[582]

After making the payment, the parties concerned shall inform it to the court in case the payment is made out of court. Then the court has to record for each payment. In case the father is failing to make a regular payment without sufficient cause, there are three different ways to take action against him:

1. by the detention in the civil prison, or
2. by the attachment and sale of his property, or
3. by both.[583]

Regarding the attachment of his property, if the father is a public officer or of a servant of a railway administration or local authority, the law allows making an attachment of his salary or allowances in one payment or by monthly installments as it thinks fit.[584] In this regard, the court may direct him or other persons whose duty it is to disburse such salary or allowances to withhold and remit to the Court the amount due under

[581] As for the maintenance payment to the wife, she may be granted the one-third of her husband's income in case the husband does not have a second marriage but one-sixth in case the husband has already married to a second wife.
[582] Order XXI, Rule 1(1) of the Code of Civil Procedure 1909.
[583] Order XXI, Rule 30 of the Code of Civil Procedure 1909.
[584] Order XXI, Rule 48(1) of the Code of Civil Procedure 1909.

the order, or the monthly instalments, as the case may be. The other methods are very rare to use in practice. These are the provided procedures of a civil litigation for claiming child maintenance against the father.

iii. Claiming Maintenance through a Criminal Litigation

If the child maintenance is claimed through the criminal proceeding, there were also comprehensive provisions relating to the amount of payment, the enforcement method on the order of maintenance, alteration the amount of payment and so on. As regards the criminal proceeding for child maintenance, the relevant provisions are Section 488 to 490 of the Criminal Procedure Code 1898. Section 488 (1) of the Act prescribes as follows:

'If any person having sufficient means neglects or refuses to maintain ..... his legitimate or illegitimate child unable to maintain itself ..... a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of such child .....'

Accordingly, a father has the deniable liability to maintain his children, whether legitimate or illegitimate, until these children are able to maintain themselves. However, an adopted child is not entitled to claim maintenance from its adoptive father under this Code.[585]

In determining the amount of maintenance payment, the actual needs for the children such as daily expenses for food and clothing, the basic expenses for lodging and educational fees, shall be included.[586] Nonetheless, in reality, the provided maximum amount for monthly child maintenance payment, in the criminal proceeding, is one hundred Kyats.[587] This might be a proper amount when the Act was enacted one hundred years ago. However, nowadays, this is an extremely small, unreasonable and inappropriate amount to grant as the child maintenance.

In case the father is wilful neglect to comply with the court order of maintenance, the court may issue a warrant for levying the amount due as the first step to enforce the order.[588] Even after the execution of the warrant, if there is still unpaid

[585] Ma E Mya vs. U Ko Ko Gyi, All Indian Reports, 1937, Rangoon, 370.
[586] Nga Hla vs. Mi Hla Kyu, 1 Upper Burma Rulings (07-09), p.17.
[587] Section 488 (1) of the Code of Criminal Procedure 1898.
[588] Section 488(3) of the Code of Criminal Procedure 1898.

amount, the court may sentence upon him to a term not exceeding one month or until the payment if sooner made.[589]

Notably, claiming for child maintenance through the criminal proceeding is a prominent feature of child maintenance system in Myanmar. In fact, the law makers were designed this system to provide a speedy relief to the children, who are living separately with their father, to meet their minimum daily needs for food, clothing, shelter and education.[590] In spite of its meaningful purpose, the system nowadays does not work well due to the lack of proper amendment to the inappropriate parts especially to the improper granted amount. Consequently, it should be said that children from the divorced families are suffered from the defects of ineffective legislation currently.

c. Child Abduction by a Parent

In today's world, the issue of child abduction by a parent has become a hot topic and all are making an effort to prevent it effectively. Although it is a kind of family-related problems and usually occurred as a consequence of family breakdown process, it may be a criminal offence according to the Criminal law. Based on its nature, it may be divided into two types: domestic and international parental child abduction. Under this topic, the relevant legislation in Myanmar for the prevention of parental child abduction on a domestic level will be explained. It would like to be here noted that the following discussion will cover all married couples in Myanmar regardless of their religions.

i. Principles for Application

The important legislations with respect to the domestic parental child abduction issue are the Penal Code 1868 and the Guardian and Wards Act 1890. The former intends to impose a punishment on the child's abductor whilst the latter intends to have a safe return of the child. The definitions of 'the child' in these two legislations are not the same. In order to apply the Penal Code, the abducted child must be under 14 in male or under 16 in female. However, in order to apply for a return order of an abducted child, the child must be under 21.[591]

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[589] Section 488(3) of the Code of Criminal Procedure 1898
[590] *Supra Note 424*, p.98.
[591] Section 3 of the Majority Act 1875.

According to Section 361 of the Penal Code 1868, if a parent who lacks legal guardianship takes or entices his/her own child under 14 if a male or under 16 if a female, from the lawful guardian without the consent of such guardian, the law said he/she commits the parental child abduction. In this case, the lawful guardian may be the child's own parent or the grandparent or any other person who were lawfully entrusted with the care or custody of such child. If the court found that a parent has committed such an offence of the domestic parental child abduction, he/she shall be punished with imprisonment for a term not exceeding 7 years and shall also be liable to fine.[592]

However, there is an exception that if a person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful guardian of such child, has committed the said offence, he may not be punishable and may be exempted from imposing the punishment unless he committed for an immoral or unlawful purpose.[593]

ii. Applying for a Return Order

In case the legal guardian of the person wants to apply for a return order of that abducted child, he/she may apply Section 25 of the Guardians and Wards Act 1890. On his/her application, the court may make a return order. During the enforcement of such a return order, if it is necessary, the child may be arrested and delivered then to his/her legal guardian.

These are the current practices on the prevention of parental child abduction within Myanmar and it should be said that the current system is strong enough to protect the rights of legal guardian. This may be a satisfactory situation as long as it is not contrary to the welfare of the child.

To conclude the discussion on the resolution system of child-related disputes for Buddhist parents, some defects of the current system would be pointed out here. The first is the utilization of old and outdated laws without proper amendment or modification. The absent of the proper and modernized legislations make the children from the divorced families to be in trouble. The second is the position of illegitimate children's father. They are in the vulnerable situation. The father of an illegitimate

[592] Section 363 of the Penal Code 1868.
[593] Section 361 of the Penal Code 1868.

child is legally bounded to maintain the child until the child could maintain itself. However, he has no legal rights to maintain the relationship with his children. Not only he is lack of rights to be the guardian of the child but also no law in Myanmar provides the right of contact between him and his absent child. Reciprocally, children are likely to lose their legal rights to contact with non-resident parent. For these reasons, a proper legal reform is desirable to promote the situation of the children from divorced families.

5.6.2 The Christian Couple

Under the Burma Divorce Act 1860, both divorce and judicial separation are possible for the Christian couple and the following discussion will encompasses all Christian couples who dissolve their relationship either through the divorce or the judicial separation. Under this Act, the minor child means a child under 16 in male and a child under 13 in female who are the offspring of the native fathers or any other unmarried children who are under 18.[594]

To eliminate the repeated discussion and to provide clear information on the resolution of child-related problems for the Christian parents, all relevant provisions and necessary explanations are combined as one part in below.

a. Guardianship, Maintenance and Child Abduction by a Parent

Unlike the practice of a Buddhist couple, disputes on taking care of the child and maintenance of a Christian couple is able to be resolved during the court proceeding of the dissolution of a marriage. According to Section 41 and 43 of the Burma Divorce Act 1860, in a civil suit for the dissolution of parents' relationship, the court, if it thinks fit, may make an interim order in respect of taking care of the child and child maintenance, before making a decree on the original civil suit.

Furthermore, according to Section 42 and 44 of the same Act, after making a decree of judicial separation or an absolute decree of divorce, the court may make, on the application of a parent, an appropriate order with respect to taking care of the child and child maintenance. The important feature of the said Act is that if necessary, the court may make an interim order or an order to place such minor children under the protection of the court. This is not possible in other family laws.

[594] Section 3 (5) of the Burma Divorce Act 1860.

The above provisions laid down in the Burma Divorce Act 1860 are general rules and it is lack of basic principles such as how to determine the parent who should take care of the child or how the amount of maintenance payment should be calculated. Under such circumstances, the Guardians and Wards Act 1890 and Section 488 of the Criminal Procedure Code 1898 are applicable in order to make a proper decision. Their basic principles and procedures of these laws have been already explained in 6.1 and the same will be applied here.

The difference between Buddhist and Christian couples is that no civil litigation is possible for the children to claim maintenance from their Christian father. In case the child is abducted by a parent, the problem should be resolved in the same way that described in 6.1(c).

5.6.3 The Muslim Couple

Although there is an Islamic family law to govern the family matters of Muslim couples, the court cannot ignore the rules laid down by Guardians and Wards Act 1890 and the Criminal Procedure Code 1898 in determining guardianship and maintenance disputes after parents' divorce. The following discussion will cover all divorced parents regardless of the types of divorce used when they dissolve their marital relationship.

a. Guardianship

According to the Islamic family law enforced in Myanmar, a right to take care of the infant children is entitled by the mother exclusively. The mother takes responsibility taking care of her son until his age of seven years and her daughter until she has attained puberty.[595] Such an exercising right may not be affected by the parental divorce. Therefore, even after a divorce, the mother will hold continuously such a responsibility over her children. However, if the divorcee woman remarries with another man, she has to lose such a right to all children.[596]

These are the basic principles of the Islamic family law on the issues of taking care of the child for the Muslim parents. In 1971[597], the Supreme Court made a remarkable decision regarding the application of traditional customary law in

[595] *Supra Note 477*, p.135.
[596] *Ibid.*
[597] 1971, Burma Law Report, 18.

determining the rights to take care of the child. The court clearly said, when the court has to decide any disputes in relation to the problem of taking care of the child, the court shall decide it according to the principle laid down by the Guardians and Wards Act 1890 by giving priority to the welfare of the children. In accordance with this decision, the court has to decide what would be to the best interests of the child regardless of the principles laid down by the respective traditional customary law. Therefore, concerning the issue of taking care of the child after a divorce, the Guardians and Wards 1890 has a superior authority to the Islamic family law.

b. Maintenance

With respect of the child maintenance, according to the Islamic family law, the father is responsible to maintain his legitimate son until he attains his puberty and his legitimate daughter until she enters into a marriage.[598] However, such a traditional custom does not influence over the statutory law and according Section 488 of the Criminal Procedure Code 1898, the father is bound by the legal obligation to maintain both legitimate and illegitimate children until they could maintain themselves.

c. Child Abduction by a Parent

In case the child is abducted by a parent, it should be resolved in the same way as described in 6.1(c).

5.6.3 Intermarried Couple

Those couples who got married under the Christian Marriage Act 1872 or those got married under the Special Marriage Act 1872 are following the same principles and procedures as Christian couples. (See 6.2)

Those couples who got married under the Burmese Buddhist Women's Special Marriage and Succession Act 1954 are following the same principles and procedures as the Buddhist couples subject to Section 25 of the said Act. (See 6.1)

5.7 Summary of the Chapter

The family justice system in Myanmar has been well developed since many hundred years ago. Among the three different periods, pre-colonial, colonial and post-

[598] *Supra Note 477*, p.93.

independence periods, the colonial period is the most important one because a number of necessary statutory laws were enacted during this period and most are still in effect. However, some provisions in these laws were outdated and provide unfair treatment based on gender. Therefore an appropriate legal reform is in need. Some particular child-related matters which are needed to be reformed are -

- providing a clear and fair legislation regarding the determination of guardianship of a child,
- imposing an equal obligation to both parents for a financial support to their children and granting a reasonable amount of child maintenance,
- considering to provide the matter of child contact in the legislation as a necessity for divorcing parents, and
- providing an equal legal protection to the children of both sexes who are abducted by a parent.

CHAPTER (6)

CONCLUSION

6.1 Introduction

This is the conclusion part of the thesis in which the author's own view will be presented regarding way to improve 'resolution system of child-related disputes for parents after the dissolution of their relationship in Myanmar'. The chief aim of the proposed reform is to improve the welfare of children from divorced families by providing children's conventional rights laid down by the UNCRC. Since Myanmar is a State Party to the UNCRC, it is bound by an obligation to implement an adequate legal mechanism in order to provide children's conventional rights fully. For this purpose, at the last part the following discussion, a conclusion will be drawn for a proposed reform. The discussion is made by references to the experiences of Japan and England and Wales which are also the State Parties to the UNCRC and had a long history of family law reform from a strictly restricted system to a fairly democratic one.

Firstly, it highlights certain provisions of the UNCRC which are related to this thesis.

6.2 Provisions of the UNCRC Relating to This Thesis

The UNCRC is one of the landmarks in the development of children's rights. It ensures the rights of children to be recognized them as a full human being, with integrity and personality, and with the ability to participate fully in society.[599] The Convention had a starling success in so far as it was quickly ratified by every member of the United Nations except the US and Somalia.[600] The Convention contains a lengthy list of children's rights:

- General rights,
- Rights requiring protective measures,
- Rights concerning the civil status of children,

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[599] Michael Freeman, "Introduction: Children as Persons", in *Children's Rights: A Comparative perspective*, Edited by Michael Freeman, Dartmouth Publishing Company, 1996, pp.1-3.

[600] Jane Fortin, "*Children's Rights and the Developing Law*", 2nd Edition, Reed Elsevier (UK) Ltd, 2003, p.43.
http://treaties.un.org (visited on January 5th, 2014)

- Rights concerned with development and welfare,
- Rights concerning children in special circumstances or in especially difficult circumstances.

In the following, some related provisions of the UNCRC to this thesis will be described.

❖ Article 2

It prohibits any discrimination against any child. It provides that every child should not be discriminated irrespective of their race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

❖ Article 3

It is the most important provision in the UNCRC in relation to the dissolution of child-related disputes. It provides that the best interest of the child must be the primary consideration whenever making a decision which may affect the welfare of the child.

❖ Article 7

It becomes important in parallel with the development of medically assisted reproduction technologies across the world. In this thesis, it mainly concerns with Japan and England and Wales. It provides that every child must have the right to know his/her parents.

❖ Article 9

It is deeply related to this thesis. It provides that those children who are living apart from one or both of the parents shall have the right to direct contact on a regular basis unless it is contrary to the best interest of the child.

❖ Article 12

It is paid attention by most of the countries across the world nowadays in order to encourage the child's participation in the court hearing process. It provides that whenever in making a decision which may affect the welfare of the child, the child concerned shall have the rights to express his/her own views and it should be taken

into account being given due weight in accordance with the age and maturity of the child.

❖ Article 18

It is the fundamental principle in the dissolution of child-related disputes after the dissolution of parents' relationship. It provides that both parents of the child have common parental responsibilities for the upbringing and development of the child.

❖ Article 27

It mainly concerns with the child maintenance payment. It provides that parents are responsible to support their children financially within their financial capacities.

❖ Article 35

It is related to the criminal cases committed to the children. It provides that every member country to the UNCRC should take all possible measures to prevent child abduction.

These selected-mentioned provisions are directly related to this thesis and the following part is to examine how far the current legislations of Japan, England and Wales and Myanmar meet with them.

6.3 Reviewing Incorporation of the UNCRC at the National Level

Although children in the world were lack of statutory protection for their rights over hundred years, statutory provision for the care and welfare of the children attitude to children has changed since the 19th century as mentioned below.[601]

Table 6.1: Reviewing Incorporation of the UNCRC in Japan, England and Wales and Myanmar

Article	Japan	England and Wales	Myanmar
2	Discrimination against illegitimate children	All discriminations to the children based on	*Discrimination between legitimate and illegitimate children is still existed*

[601] *Supra Note 248*, p.347.

	regarding inheritance rights was abolished recently. *The terms 'legitimate' and 'illegitimate' are still being applied though.*	legitimacy had been eliminated since years ago.	*especially with regards to the inheritance rights.*
3	That principle of 'the best interest of the child is the primary consideration' has been being applied whenever child-related disputes are resolved.	That principle of 'the best interest of the child is the primary consideration' has been being applied whenever child-related disputes are resolved.	That principle of 'the best interest of the child is the primary consideration' has been being applied whenever child-related disputes are resolved.
7	*Although a number of children has born through ART treatments, no law is enacted yet in relation to the resulting child. Accordingly, these children do not have a legal right to know their parents.*	The resulting child who attains 18 and wishes to know his/her genetic mother may be provided certain information of his/her mother.	The medical assisted reproduction technologies are not developed yet and no child is recorded as a child born through one of these technologies.
9	The recent development proved that Japan is willing to promote the possibility of contact between children and their non-resident parent after parents' divorce.	Not only the legislation is well-developed but also the practicing system is well-equipped to provide the regular contact between the children and their absent parent after the dissolution of parents' relationship.	*No provision is found to guarantee the contact rights between the child and non-resident parent after a divorce or a judicial separation.*
12	The recent development of FAPA 2011 makes the children to participate in the family law cases which may affect to them, as an interested party. The requirement of participation in the procedure is that the child should have mental capacity to take the procedural actions.	The views of children may be taken into account where appropriate. The weight that is attached to the children's views may vary according to the children's age and their understanding level.	The children can express their preference while resolving the issue on guardianship and it may be taken into account by the court.

18	*Due to the sole parental responsibility and custody system after a divorce, it is difficult for both parents to participate together in the child's upbringing. In practice, the custody parent is vested the sole parental responsibility and the other non-custody parent is lack of rights to involve in the child rearing.*	Both parental responsibility and the child's residence are able to be shared between parents. Therefore, theoretically, both parents are able to participate in the child's upbringing.	*The law allows to share guardianship if necessary. However, in case sole guardianship is granted to one of the parents, the other parent is lack of opportunity to contact the child and then may lose the rights to involve in the child rearing.*
27	Both parents are responsible to provide financial support to their child irrespective of legitimacy of the child.	Both parents are responsible to provide financial support to their child irrespective of legitimacy of the child.	*According to the general law, only father is responsible to provide financial support to his child irrespective of legitimacy of the child.* *By following the particular family law of each religion group, there is a kind of discrimination between legitimate and illegitimate children to be supported financially by their father.*
35	Sufficient legislation is provided to prevent child abduction by a parent.	Sufficient legislation is provided to prevent child abduction by a parent.	Sufficient legislation is provided to prevent child abduction by a parent. *However, the age differentiation based on the sex of the abducted child is an exception.*

6.4 Conclusion

As described in the above table, the national implementation of the UNCRC in Myanmar is weaker than that in Japan and England and Wales.

Regarding discrimination legally against illegitimate children, because of the lack of statistical data, it is impossible to know how many children are suffering from that kind of discrimination in Myanmar. However, because of the strong social stigma to cohabitation without a valid marriage, a few number of couples may live together in a cohabiting relationship. Accordingly, only a small number of children may be borne by the unmarried mother. Nonetheless, this should not an excuse to cover the failure of Myanmar to eliminate discrimination against illegitimate children. Taking the practices of Japan and England and Wales as instances, all forms of discrimination against illegitimate children should be eliminated in order to comply with Article 2 of the UNCRC which provides that *every child should not be discriminated irrespective of their race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

In the past, both Japan and England and Wales had the same problem of discrimination against illegitimate children regarding inheritance rights. However, England and Wales had succeeded first in the elimination of all kinds of discriminations against illegitimate children since 1987. It is a very recent development in Japan to abolish the unequal treatment of inheritance rights between legitimate and illegitimate children. According to the Japanese Supreme Court judgment which was rendered in September 2013, illegitimate children nowadays are enjoying equal inheritance rights same as legitimate children. However it is still practiced in Myanmar that the illegitimate children may lose the inheritance rights from their father. Therefore it is desirable to eliminate such a kind discrimination in the future.

Another failure of Myanmar to comply with the UNCRC is a lack of legislation to allow contact between the child and his noncustodial parent after parents' divorce. This may be because the practicing family laws in Myanmar were enacted since many years ago and at the time of their enactment, the legislatures did not recognize the matter of contact as a necessity to promote the welfare of children. In recent days, the regular contact between the child and his noncustodial parent is widely accepted as the necessary matter for the development of the child. A number of researchers accepted that the child who is living apart with one of the parents is beneficial by conducting regular contact with his absent parent.

However, children of divorced families in Myanmar are not able to enjoy such a right to contact due to the lack of legal provision. In current practice, one of the

parents is usually excluded from the child's upbringing after divorce and children usually lose their rights to see both parents accordingly. Although it is possible to share guardianship between parents legally, it is still uncommon. The usual practice is that the child's mother is holding the sole guardianship and the child's father is responsible to maintain the child without the rights to contact. That practice is not comply with Article 9 of the UNCRC which provides that *those children who are living apart from one or both of the parents shall have the right to direct contact on a regular basis unless it is contrary to the best interest of the child*. Therefore, taking the experiences of Japan and England and Wales as instances, it is desirable for Myanmar to make necessary legislation in order to be granted a contact between the child and his absent parent.

Recently in Japan, there is a legal development concerning the matter of contact between the child and non-resident parent. The word 'contact' is inserted in Section 766(1) of the Civil Code as a matter for divorcing parents to consider at the time of divorce but not as a legal requirement to be a valid divorce. The problem in Japan is that the external assistance for implementing a contact arrangement is insufficient. As a result, it is still difficult to conduct a contact between the child and non-resident parent. However in England and Wales, a number of voluntary organizations are assisting to implement a successful contact between the child and his non-resident parent. In this way, a number of children and their non-resident parent in each year are beneficially supported to maintain their relationship smoothly. Taking into account all these practices, an appropriate legal reform which recognizes the contact as a necessary matter for divorcing parents as well as the establishment of certain organizations to help the vulnerable children and non-resident parent is desirable as a future legal development in Myanmar.

The last incompliance of Myanmar is relating to the child maintenance. The law in Myanmar imposes parents' responsibility of maintaining the child to the child's father only. It may be a kind of gender discrimination and does not comply with the provision of the UNCRC which provides that *parents are responsible to support their children financially within their financial capacities*. In both Japan and England and Wales, the law provides that both parents are responsible to maintain the child. The amount of maintenance payment is usually granted to cover the basis needs of the child concerned. However in Myanmar, the provided allowance for child maintenance is quite small and it cannot meet the actual needs of the child.

With regard to this, the practice of England and Wales is comparatively strict and systematic. There are particular legislations and specific organizations to operate the child maintenance system. Under the recent changes, the amount of child maintenance is calculated based on the non-resident parent's gross income. The CMS takes responsibility collecting the payment and taking action on the non-compliant parent who is failing to pay without sufficient reason. Such a kind of system is practiced in England and Wales for years. However in Japan, the Family Court is responsible to resolve child maintenance disputes but not responsible to collect the child maintenance payment directly. In case a non-resident parent fails to make a payment, the court may issue an enforcement order on the application of the parent with custody. The law does not provide formulated system but the court may use the rate book[602] for child maintenance in considering all other relevant factors including the non-resident parent's income and the actual living expenses of the child. The court is able to take an action when the non-resident parent does not meet his obligation.

The current operation system of Myanmar is similar to that of Japan. The whole system is exclusively operated by the court. The problem in Myanmar is not related to the operation system but mainly associated with the defects of the outdated legislation. The maximum amount of payment granted by the Code of Criminal Procedure is unreasonable.[603] In both countries, Japan and England and Wales, the amount of payment is calculated based on the income of the non-resident parent. It will be helpful for children of divorced families in Myanmar in case there is a suitable legal reform regarding the computing method of child maintenance payment.

As to conclude, the above mentioned explanations are the desire legal reform for Myanmar to promote the welfare of children from divorced families. It is also a desire for Myanmar to meet its obligation as a State Party to the UNCRC.

[602] The rate of maintenance in this book is not a legal norm but the court uses it as a guideline in calculating the amount of payment.

[603] Claiming a child maintenance through a civil litigation is time-consuming, expensive and complicated to follow the court procedures. Although the amount of payment is not fixed, there is no legal standard to decide the amount of payment as well. Accordingly, parties are preferred claiming through a criminal case to claiming through a civil suit.

BIBLIOGRAPHY

INTERNATIONAL LEGAL INSTRUMENT

1. The United Nations Convention on the Rights of the Child 1989 http://treaties.un.org

JAPAN

Books

1. Barbara Stark, 2005, *International Family Law: An Introduction*, Ashgate Publishing Limited.
2. Gary P. Leupp, 1995, *Male Colors: the Construction of Homosexuality in Tokugawa Japan*, University of California Press.
3. Gregory M. Pflugfelder, 1999, *Cartographies of Desire: Male-Male Sexuality in Japanese Discourse, 1600-1950*, The Regents of the University of California.
4. Harald Fuess, 2004, *Divorce in Japan: Family, Gender and the State, 1600-2000*, Stanford Ford University Press, 2004.
5. Hdo, 2005, *History of Law in Japan since 1868*, Edited by Wilhelm Rohl, Brill.
6. Jens Beckert, 2004, *Inherited Wealth*, Campus Verlag GmbH.
7. Joy Larsen Paulson, 2010, *Family Law Reform in Postwar Japan*, Joy Larsen Paulson.
8. Mark D. West, 2011, *Lovesick Japan*, Cornell University.
9. Mark McLelland, 2000, *Male Homosexuality in Modern Japan: Cultural Myths and Social Realities*, Curzon Press.
10. Masha Belenky, 2008, *The Anxiety of Dispossession; Jealous in Nineteenth-Century French Culture*, Rosemont Publishing Corp.
11. Satoshi Minamikata, 2013, *Family and Succession Law in Japan*, Kluwer Law International, Electronic Press.

12. Takao Tanase, 2010, *Community and the Law: A Critical Reassessment of American Liberalism and Japanese Modernity*, Translated and Edited by Luke Nottage and Leon Wolff, Edward Elgar Publishing Limited.

Part of the Books

1. Masayuki Murayama, 2009, *Convergence from Opposite Directions? Characteristics of Japanese Divorce Law in Comparative Perspective*, in Japanese Family Law in Comparative Perspective, Edited by Harry N. Scheiber and Laurent Mayali, 61-98, Robbins Collection Publications.
2. Michiko Ishii, 2009, *Medically Assisted Reproduction and Family Law in Japan*, in Japanese Family Law in Comparative Perspective, Edited by Harry N. Scheiber and Laurent Mayali, 175-205, Robbins Collection Publications.
3. Shelley Day Sclater, Andrew Bainham and Martin Richards, 1999, *Introduction*, in What is a Parent? A Socio Legal Analysis, Edited by Andrew Bainham, Shelley Day Sclater, and Martin Richards, 1-24, Hart Publishing.
4. Shigenori Matsui, 2009, *The Constitution and the Family Law in Japan*, in Japanese Family Law in Comparative Perspective, Edited by Harry N. Scheiber and Laurent Mayali, 33-60, Robbins Collection Publications.

Articles

1. Alexander David Brown, 1995, *Meiji Japan, A Unique Technological Experience?*, Student Economic Review, Volume 19, 71-83, Trinity College Dublin.
2. Azumi Tsuge, 2005, *How Society Responds to Desires of Childless Couples: Japan's Position on Donor Conception*, Bulletin of Institute of Sociology and Social Work, No.35, 21-34, Meiji Gakuin University.
3. Colin P.A. Jones, 2007, *In the Best Interests of the Court: What American Lawyers Need to Know about Child Custody and Visitation in Japan*, Asian-Pacific Law & Policy Journal, Number 8, Volume 2, 166-269.
4. James M. Raymo, Miho Iwasawa and Larry Bumpass, 2004, *Marital Dissolution in Japan: Recent Trends and Patterns*, Demographic Research,

Volume 11, Article 14, 395-420, Max Planck Institute for Demographic Research, Germany.

5. James M.Raymo, Miho Iwasawa and Larry Bumpass, 2008, *Cohabitation and Family Formation in Japan*, GCOE Discussion Paper Series, Global COE Program.
6. Kazuyasu Sakamoto and Yukinobu Kitamura, 2007-8, *Marriage Behavior from the Perspective of Intergenerational Relationships*, The Japanese Economy, Volume 34, Number 4, 76-122.
7. Matthew J. McCauley, 2011, *Divorce and the Welfare of the Child in Japan*, Pacific Rim Law & Policy Journal association, Volume 20, Number 3, 589-606.
8. Miho Iwasawa, 2004, *Partnership Transition in Contemporary Japan: Prevalence of Childless Non-Cohabiting Couples*, The Japanese Journal of population, Volume 2, Number 1, 76-92.
9. Noriko Mizuno, 2010, *Parent-child Relationship in the Japanese Civil Code: Regarding Medical Technology for Reproductive Treatment*, GEMC journal, No. 2, 16-35, Tohoku University Global COE Program.
10. Rachel Brehm King, 2009, *Redefining Motherhood: Discrimination in Legal Parenthood in Japan*, Pacific Rim Law & Policy Journal Association, Volume 18, Number 1, 189-216.
11. Satoshi Minamikata, 2005, *Resolution of Disputes over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Nonlitigious Approach in Chotei (Family Court Mediation)*, Family Law Quarterly, Number 32, Volume 2, 489-506.
12. Satoshi Minamikata, 2006, *Mediation for Mediators?*, Hosei Riron, The Journal of Law and Politics, Volume 39, No. 1, 133-152, Law and Political Science Association, Niigata University.
13. Takao Tanase, 2011, *Divorce and the Bests Interest of the Child: Disputes over Visitation and the Japanese Family Courts*, Pacific Rim Law and Policy Journal Association, Volume 20, No.3, 563-588.
14. Takeyoshi Kawashima & Kurt Steiner, 1960, *Modernization and Divorce Rate Trends in Japan*, Economic Development and Cultural Change, Volume 9, Number 1, Part 2, 213-239, The University of Chicago Press.

15. Teiko Tamaki, 2009, *Distribution of Matrimonial Property of Married, Cohabiting and Same-sex Couples in Japan*, Housei Riron, The Journal of Law and Politics, Volume 42, No. 1, 21-36, Law and Political Science Association, Niigata University.
16. Teiko Tamaki, 2011, *National Report: Japan*, American University Journal of Gender, Social Policy & the Law, Volume 19, Issue 1, 251-264, The Berkeley Electronic Press.
17. Theint Theint Htwe, 2012, *Intermarried Couples and Divorces in Japan: Resolution of Child-related Disputes after Divorce*, The Journal of The Study of Modern Society and Culture, No.53, 37-60, Graduate School of Modern Society and Culture, Niigata University.
18. Theint Theint Htwe, 2013, *The Legal Responses to Child Abduction by Parents in Japan and England and Wales*, The Journal of The Study of Modern Society and Culture, No.56, 87-107, Graduate School of Modern Society and Culture, Niigata University.
19. Yamashita Katsutoshi, 1986, *Divorce, Japanese Style*, Japan Quarterly, No.33, Volume 4, 416-420.
20. Yayohi Satoh, 2008, *Current Issues Regarding the Japanese Civil Law Pertaining to Family Law*, Ankara Law Review, Volume 5, Number 2, 129-152.

LEGAL DOCUMENTS

1. The Civil Code 1947
2. The Habeas Corpus Act 1948
3. The Penal Code 1907
4. The Personal Affairs Litigation Act 2003
5. The Family Affairs Proceedings Act 2011

OFFICIAL DOCUMENTS

1. 2010, *Guide to the Family Court of Japan*, The Supreme Court of Japan.

OFFICIAL WEBSITES

1. http://www.courts.go.jp
2. http://www.ipss.go.jp
3. http://www.jsog.or.jp
4. http://www.loc.gov/lawweb/servlet
5. http://www.mhlw.go.jp
6. http://www.moj.go.jp
7. http://www1.odn.ne.jp/fpic/soudan
8. http://www.oecd.org/els/family
9. http://papers.ssrn.com

CASES

1. 1994 (O) No. 1437, November 8, 1994, Minshu Vo.48, No. 7 at 1337.
2. 2000 (Kyo) No. 5, May 1st, 2000, Minshu Vol. 54, No. 5.
3. 2002 (A) No. 805, March 18, 2003, Keishu Vol.57, N0.3 at 371
4. 2004 (Ju) No. 1748, September 4, 2006, Minshu Vol. 60, No. 7.
5. 2004 (A) No. 2199, December 6, 2005, Keishu Vol.59, No. 10.
6. 2006 (Kyo) No. 47, March 23, 2007, Minshu Vol. 61, No. 2.
7. 2013 (Kyo) No. 41, 47, 48, March 28th, 2013.

ENGLAND AND WALES

Books

1. Andrew Bainham, 2005, 3rd Edition, *Children: The Modern Law*, Family Law.
2. Cathy Glass, 2010, *Happy Kids, The Secret to Raising Well-behaved Contented Children*, Harper Collins Publishers.
3. Chris Barton & Gillian Douglas, 1995, *Law and Parenthood*, Butterworths.
4. David M. Turner, 2004, *Fashioning Adultery: Gender, Sex and Civility in England (1660-1740)*, Past and Present Publication.
5. Frances Burton, 1996, *Guide to the Family Law Act 1996*, Cavendish Publishing Limited.

6. Frederic R. Coudert, 1893, *Marriage and Divorce Laws in Europe*, Press of Livingston Middleditch Co.
7. Ivy Pinchbeck and Margaret Hewitt, 1973, Volume I, *Children in English Society, From the Eighteenth Century to the Children Act 1948*, Routledge & Kegan Paul.
8. Ivy Pinchbeck and Margaret Hewitt, 1973, Volume II *Children in English Society, from the Eighteenth Century to the Children Act 1948*, Routledge & Kegan Paul.
9. Jane Fortin, 2003, 2nd Edition, *Children's Rights and the Developing Law*, Reed Elsevier (UK) Ltd.
10. Jonathan Herring, 2011, 5th Edition, *Family Law*, LONGMAN Law Series, Longman.
11. Judith Masson, Rebecca Aailey-Harris and Rebecca Probert, 2008, 8th Edition, *Principles of Family Law*, Sweet and Maxwell.
12. Lawrence Stone, 1990, *Road to Divorce: England (1530 – 1987),* Oxford University Press.
13. Linda A. Pollock, 1983, *Forgotten Children, Parent-child Relations from 1500-1900*, Cambridge University Press.
14. Lisa Parkinson, 2011, 2nd Edition, *Family Mediation: Appropriate Dispute Resolution in a New Family Justice System*, Family Law.
15. Michael Freeman, 1996, Introduction: Children as Persons, in *Children's Rights: A Comparative perspective*, Edited by Michael Freeman, Dartmouth Publishing Company.
16. Nancy Duffield, Jacqueline Kempton and Christa Sabine, 2011, *Family Law and Practice 2011*, College of Law Publishing.
17. Nigel Lowe, Mark Everall QC and Michael Nicholls, 2004, *International Movement of Children, Law Practice and Procedure*, Family Law, Jordan Publishing Limited.
18. Piers Pressdee, John Vater, Frances Judd QC and Jonathan Baker QC, 2006, *Contact: the New Deal*, Jordan Publishing Limited.
19. R.J. Walker, 1980, 5th Edition, *The English Legal System*, Butter Worth & Co. (Publishers) LTD.
20. Rebecca Probert, 2012, *Family and Succession, Law in England and Wales*, 2nd Edition, Kluwer Law International.

21. Samuel Pyeatt Menefee, 1981, *Wives for Sales*, Basil Blackwell Publisher.
22. White, Carr and Lowe, 2002, 3rd Edition, *The Children Act in Practice*, Butterworths.
23. William Geldart, 1984, 9th Edition, *Introduction to English Law*, Edited by D.C.M. Yardley, Oxford University Press.

Part of the Books

1. Gillian Douglas and Nigel Lowe, 1993, Becoming a Parent in English Law, in *Parenthood in Modern Society, Legal and Social Issues for the Twenty-first Century*, Edited by John Eekelaar and Petar Sarcevic, Martinus Nijhoff Publishers.
2. James Nixon, 2000, Injury Prevention and Children's Rights, in *Injury Prevention and Control*, Edited by Dinesh Mohan and Geetam Tiwari, Taylor and Francis.
3. Ros Pickford, 1999, Unmarried Fathers and the Law, in *What is a Parent? A Socio-legal Analysis*, Edited by Andrew Bainham, Shelley Day Sclater, and Martin Richards, Hart Publishing.
4. Shelley Day Sclater, Andrew Bainham and Martin Richards, 1999, Introduction, in *What is a Parent? A Socio Legal Analysis*, Edited by Andrew Bainham, Shelley Day Sclater, and Martin Richards, Hart Publishing.
5. Stuart Bridge, 1999, Assisted Reproduction and the Legal Definition of Parentage, in *What is a Parent? A Socio-legal Analysis*, Edited by Andrew Bainham, Shelley Day Sclater, and Martin Richards, Hart Publishing.

Articles

1. Amy Garrity, 2000, *A Comparative Analysis of Surrogacy Law in the United States and Great Britain – A Proposed Model Statute for Louisiana*, Volume 60, Number 3, Louisiana Law Review, 809-832.
2. Belinda Fehlberg and Mavis Maclean, 2009, *Child Support Policy in Australia and the United Kingdom: Changing Priorities But a Similar Tough Deal for Children?*, International Journal of Law, Policy and Family, Volume 23, Number 1, 1-24.

3. Danaya C. Wright, 2004, *Untying the Knot: An Analysis of the English Divorce and Matrimonial Causes Court Records, 1958-1966,* 38 U. Rich. L. Rev. 903-1010.
4. Daniel Porter, 2010, *Psychosocial Well-Being and the Relationship between Divorce and Children's Academic Achievement*, Journal of Marriage and Family, 933-946.
5. Gail L. Savage, 1983, *The Operation of the 1857 Divorce Act, 1860-1910: A Research Note*, Journal of Social History, Volume 16, Number 4, 103-110.
6. Harvey Couch, 1978, *The Evolution of Parliamentary Divorce in England*, 52 Tulane Law Review 513.
7. Jennifer Levin, 1970, *The Divorce Reform Act 1969*, The Modern Law Review, Volume 33, Number 6, 630-648.
8. Liz Trinder, 2010, *Shared Residence: a Review of Recent Research Evidence*, Child and Family Law Quarterly, Volume 22, Number 4, 475-498.
9. Mahshid Sadat Tabaei, 2013, *Comparative Study of the Illegitimate Children's Rights under English and Iran Laws*, J. Basic. Appl. Sci. Res., Volume 3, Number 4, 254-262.
10. Richardson Wilson, Shriya Luke, 2012, *Surrogacy – Laws and Medical Ethics*, International Journal of Scientific & Engineering Research, Volume 3, Number 7, 1-9.
11. Ruth Gaffney-Rhys, Dr., 2012, *Divorce Data in England and Wales: Gender Differences*, Women in Society, Volume 3.
12. Theint Theint Htwe, 2013, *The Legal Responses to Child Abduction by Parents in Japan and England and Wales*, The Journal of The Study of Modern Society and Culture, No.56, 87-107, Graduate School of Modern Society and Culture, Niigata University.

Legal Documents

1. The Custody of Infants Act 1839
2. The Matrimonial Causes Act 1857
3. The Guardianship of Infants Act 1886
4. The Matrimonial Causes Act 1923
5. The Matrimonial Causes Act 1937
6. The Matrimonial Causes Act 1965

7. The Divorce Reform Act 1969
8. The Matrimonial Causes Act 1973
9. The Guardianship of Infants Act 1973
10. The Child Abduction Act 1984
11. The Surrogacy Arrangements Act 1985
12. The Children Act 1989
13. The Human Fertilization and Embryology Act 1990
14. The Child Support Act 1991
15. The Family Law Act 1996
16. The Child Support, Pension and Social Security Act 2000
17. The Adoption and Children Act 2002
18. The Civil Partnership Act 2004
19. The Adoption and Children Act 2006
20. The Child Maintenance and Other Payments Act 2008
21. The Human Fertilization and Embryology Act 2008
22. The Family Proceeding Rules 2010

Official Documents

1. Catherine Fairbairn, *Confidentiality and Openness in Family Courts*. http://www.parliament.uk/briefing-papers/SN06102
2. Clare Furniss, 1998, *Family Contact Centre: The Position in England, Wales & Scotland*, Centre for Research on Family, Kinship & Childhood.
3. Divorces in England and Wales, 2011 & Age at Marriage, *Duration of Marriage and Cohort Analyses*, office for National Statistics
4. Helen Ross, Karen Gask, and Ann Berrington, 2011, *Civil Partnerships Five Years On*, Office for National Statistics.
5. Law Commission Working Paper No.74, 1979, *Illegitimacy*.
6. Report of the Committee of Inquiry into Human Fertilization and Embryology, 1984, *Warnock Report*.
7. Simplification of Criminal Law: Kidnapping, Consultation paper No.200, The Law Commission. http://lawcommission.justice.gov.uk/
8. 2008, *The Family Law Review: An Interim Report*, the Centre for Social Justice.

9. 2011-12, 19th Edition, *Child Support Handbook*, Child Poverty Action Group.
10. 2011, *Cohabitation and Marriage in Britain since the 1970s*, Office for National Statistics.
11. 2012, *Short report: Cohabitation in the UK*, Office for National Statistics.
12. *20 years of NACCC: Raising the Standards, Raising the Flag*, Annual Review 2010-2011, National Association of Child Contact Centres.
13. *Divorces in England and Wales, 2011 & Age at Marriage, Duration of Marriage and Cohort Analyses, office for National Statistics*

Official Websites

1. http://www.parliament.uk
2. http://legislationlgov.uk
3. http://www.hfea.gov.uk
4. http://lawcommission.justice.gov.uk
5. http://www.statistics.gov.uk
6. http://www.ons.gov.uk
7. http://www.lexis.com
8. http://www.naccc.org.uk
9. http://www.gov.uk

CASES

1. Re H (Minors) (Local authority: Parental rights) (No.3) (1991 Fam 15).

MYANMAR

Books

1. Ba Maw, U, 1992, *The Marriage Laws of Myanmar, the Myanmar Buddhist, Muslim, Christian and Hindu Marriage Laws*, Yangon.
2. Chandra Lahiri, Sisir, 1957, 6th Edition *Principles of Modern Burmese Buddhist Law* Eastern Law House Private Ltd.
3. E Maung, 1970, *Burmese Buddhist Law*, Mya Sapay, Rangoon.

4. Khin Maung Sein, U, 1987, *The Islamic Law*, San Shar Publishing (in Myanmar version).
5. Maung Maung, 1963, *Law and Custom in Burma and the Burmese Family*, The Hague, Martinus Nijhoff.
6. May Oung, U, 1926, 2nd Edition, *A Selection of Leading Cases on Buddhist Law*", British Burma Press,
7. Mi Mi Khaing, 1984, *The World of Burmese Women*, Zed Books Ltd.
8. Mya Sein, U, 2004, 10th Edition *The Myanmar Customary Law*, (in Myanmar version).
9. O. H. Mootham, 1939, *Burmese Buddhist Law*, Oxford University Press.

Part of the Books

1. Aye Kyaw, 1994, Religion and Family Law in Burma, in *Tradition and Modernity in Myanmar*, Edited by Uta Gartner and Jens Lorenz, Munster Hamburg lit.
2. David C. Buxbaum, 1968, Introduction, in *Family Law and Customary Law in Asia: A Contemporary Legal Perspective*, Edited by David C. Buxbaum, Martinus Nijhoff,
3. Hla Aung, 2008, The Effect of Anglo-Indian Legislation on Burmese Customary Law, in *Law and Justice in Myanmar*, Tun Foundation Bank Literary Committee.
4. Hla Aung, 2008, Sino-Burmese Marriages and Conflict of Laws, in *Law and Justice in Myanmar*, Tun Foundation Bank Literary.

Articles

1. Andrew Huxley, 1997, *The Importance of the Dhammathats in Burmese Law and Culture*, the Journal of Burma Studies, Volume 1, 1-17.
2. Ba Han, U, 1999, *Tribal Customs and the Customary Law*, the Judicial Journal (English Section), the Supreme Court, 2-5.
3. Lay Nwe, 2011, *The Concept of Gratitude in Myanmar Ethical Thought*, Universities Research Journal, Volume 4, Number 7, 85-112.
4. Kyaw Sein, 1999, *A Brief Legal History of Myanmar*, the Law Journal, Volume 1, Number 2, the Office of Attorney General, 154-164.

5. Kyaw Win, Dr., Professor from Department of History, the Yangon University, 2005, *Approaches to Inventory – Making Methodology*", Sub-regional Experts Meeting on Tangible Cultural Heritage: Safeguarding and Inventory – Making Methodologies, Bangkok, Thailand
6. Peter Gutter, 2001, *Law and Religion in Burma*, Legal Issues on Burma Journal, Number 8, 1-17.
7. Than Maung (Sittwe), U, 2003, *Myanmar Legal History in Chronology*, the Judicial Journal (Myanmar version), Volume 2, Number 1, the Supreme Court of Myanmar, 79-85.
8. Tin Aung Aye, Dr., 2000, *Myanmar Customary Law and Culture*, The Judicial Journal, the Supreme Court, 12-25.
9. Toe Myint, U, 2000, *Judicial System in Lower Myanmar under British Rule*, the Law Journal, Volume 2, the General Attorney Office, 180-186.

Legal Documents

1. the Buddhist Women's Special Marriage and Succession Act 1954
2. the Burma Divorce Act 1869
3. the Christian Marriage Act 1872
4. the Code of Civil Procedure 1909
5. the Code of Criminal Procedure 1898
6. the Guardians and Wards Act 1890
7. the Hindu Customary Law
8. the Mohammedan Law
9. the Muslim Divorce Act 1953
10. the Myanmar Customary Law
11. the Special Marriage Act 1872
12. the Penal Code 1868

Official Documents

1. 2002, *Myanmar Facts and Figures 2002*, Ministry of Information.

Cases

1. A M Ibrahim vs. Fatima Ve Ve, 1939, Rangoon Law Reports, 383.
2. Abdurrahman vs. Ma Kyal, 26 Indian Court, 102, (Lower Burma)
3. Daw Thaike (a) Won Ma Thaike vs. Cyoung Ah Lin, 1951, B.L.R, 133
4. Dr. Tha Mya vs. Ma Khin Pub and two others, 1940 Rangoon 807
5. Ma Aye Ti Nyein, the minor (Ma Nu Nu Yee, her nearest friend) vs. U Kyi Lwin, 1987, the Civil Appeal Application, the Chief Court, Number 116.
6. Ma Bu Lone vs. Ma Mya Shin, 14 B.L.R, 9
7. Ma E Mya vs. U Ko Ko Gyi, A.I.R, 1937, Rangoon, 370
8. Ma Khin Than vs. Ma Ahma 12 Rangoon 184
9. Ma Lae Lae Win Vs. Mg Soe Lwin, B.L.R, 1968, 237
10. Ma Thein May vs. Mg Poe Kywe, 8 B.L.T 73
11. Ma Tin Nyunt vs. Ko Aung Thein, 1963, B.L.R, 287
12. Ma Woung Shwe Lin vs. the Union of Burma, 1970, B.L.R (C.C), p.222
13. Maung Aing vs. Ma Khin, 2 U.B.R (92-96), p.22 (26).
14. Mg Khin Maung vs. U Musar 1967, B.L.R (Supreme Court), 615
15. Mi San Mra Rhi vs. Mi Than Da U, 1 L.B.R, 167.
16. Narsiti & Aphuusi, 1969, B.L.R, p.155.
17. Nga Hla vs. Mi Hla Kyu, 1 U.B.R (07-09), p.17.
18. Nga Kyaw vs. Mi Hla, 1917 – 20, U.B.R, 99
19. Tan Ma Shwe Zin vs. Koo Soo Chong, 1939, 88 R.L.R, 548 (P.C)
20. U Maung Maung vs. Ma Aye Bu, 1952, B.L.R (High Court), 406

ANNEX-1

LEGISLATIONS IN MYANMAR

I. The Christian Marriage Act 1872

Section 4: Every marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void.

II. The Special Marriage Act 1872

Section 2: Marriages may be celebrated under this Act between persons neither of whom professes the Christian or the Jewish, or the Hindu or the Muhammadan, or the Parsi or the Buddhist, or the Sikh or the Jaina religion, or between persons each of whom professes one or other of the following religions, that is to say, the Hindu, Buddhist, Sikh or Jaina religion, upon the following conditions:

1. neither party must, at the time of the marriage, have a husband or wife living;
2. the man must have completed his age of eighteen years and the woman her age of fourteen years, according to the Gregorian calendar;
3. each party must, if he or she has not completed the age of twenty-one years, have obtained the consent of his or her father or guardian to the marriage;
4. the parties must not related to each other in any degree of consanguinity or affinity which would, according to any law to which either of them is subject, render a marriage between them illegal.

First Proviso – No such law or custom, other than one relating to consanguinity or affinity, shall prevent them from marrying.

Second Proviso – No law or custom as to consanguinity shall prevent them from marrying, unless a relationship can be traced between the parties through some common ancestor, who stands to each of them in a nearer relationship than that of great-great-grandfather or great-great-grandmother, or unless one of the parties is the lineal ancestor, or the brother or sister of some lineal ancestor, of the other.

ANNEX-2

III. The Burma Divorce Act 1869

Section 10: Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that, his wife has, since the solemnization thereof, been guilty of adultery.

Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;

- or has been guilty of incestuous adultery,
- or of bigamy with adultery,
- or of marriage with another woman with adultery,
- or of rape, sodomy or bestiality,
- or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et toro,
- or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

Every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded.

IV. The Majority Act 1875

Section 3: Subject as aforesaid, every minor of whose person or property or both a guardian, other than a guardian for a suit within the meaning of the Code of Civil Procedure, has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years shall, notwithstanding anything contained in the Succession Act or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before.

Subject as aforesaid, every other person domiciled in the Union of Burma shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before.

ANNEX-3

V. The Guardians and Wards Act 1890

Section 7(1): Where the Court is satisfied that it is for the welfare of a minor that an order should be made –

a. appointing a guardian of his person or property, or both, or
b. declaring a person to be such a guardian,

the Court may make an order accordingly.

Section 8: An order shall not be made under the last foregoing section except on the application of –

a. the person desirous of being or claiming to be, the guardian of the minor, or
b. any relative or friend of the minor, or
c. the Collector of the district or other local area within which the minor ordinarily resides or in which he has property, or
d. the Collector having authority with respect to the class to which the minor belongs.

Section 15(1): If the law to which the minor is subject admits of his having two or more joint guardians of his person or property, or both, the Court may, if it thinks fit, appoint or declare them.

ANNEX-4

Section 17(1): In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) As between parents who are (European Christians) adversely claiming the guardianship of the person, neither parent is entitled to it as of right, but other things being equal, if the minor is a male of tender years or a female, the minor should be given to the mother, and if the minor is a male of an age to require education and preparation for labor and business, then to the father,

(5) The Court shall not appoint or declare any person to be a guardian against his will.

Section 19: Nothing in this chapter shall authorize the Court to appoint and declare a guardian of the person –

a. of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or,
b. subject to the provisions of this Act with respect to (European Christians) of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor.

Section 24: A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires.

ANNEX-5

Section 25(1): If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure.

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.

Section 27: A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of this chapter, he may do all acts which are reasonable and proper for the realization, protection or benefit of the property.

VI. The Code of Criminal Procedure 1898

Section 488(1): If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the district Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding one hundred kyats in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner or later.

ANNEX-6

VII. The Code of Civil Procedure 1909

Order XXI, Rule 1(1): All money payable under a decree shall be paid as follows, namely: -

a) into the Court whose duty it is to execute the decree; or
b) out of Court to the decree-holder; or
c) otherwise as the Court which made the decree directs.

Order XXI, Rule 30: Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both.

Order XXI, Rule 48(1): Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway administration or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of the order to such officer as the President of the Union may, by notification in the Gazette, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be.

Order XXI, Rule 60: Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

ANNEX-7

VIII. The Penal Code 1868

Section 361: Whoever takes or entices any minor under fourteen years age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation – The words 'lawful guardian' in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception – This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody or such child, unless such act is committed for an immoral or unlawful purpose.