

# THE DEVELOPMENT OF JAPANESE FAMILY LAW

—A Personal Appraisal of Japanese Family Law—

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In order to fully understand contemporary Japanese Family Law, one must appreciate the exact nature of the changes which the 1897 Civil Code underwent in 1947. I believe such an understanding will, in addition, help to provide a fundamental structure on which many developing countries in the world today will be able to build their own family legal system.

First let us look at the Civil Code as it was established in 1897.

## I The 1897 Civil Code

### i. Characteristics of the Code

Family Law under the 1897 Civil Code was characterised by the legal structure of the institutional family system.

In many other western countries there is a dichotomy between family organization and that of the society as a whole, although there are strong links between the two. Japan, however, must be counted as an exception to such a general observation, because whilst the family unit certainly existed as separate from other social and economic groupings, the early Japanese family was essentially feudal in its structure and took its rules and regulations from the feudal model. This applied in all possible situations and had done so for many centuries.

Before World War II, the primary unit of Japanese society was the family rather than the individual, and within the family group the relationship between one member and another was one of inequality. The relationship between parent and child, husband and wife, or eldest brother and younger sibling was that of superior and subordinate. Each family was in turn responsible to the head of the larger family from which it stemmed. This patriarchal order of the family system extended beyond domestic life: political organization was also based upon familial type rule and subordination. The parent-child relationship was the pattern for all relationships throughout Japanese society.

Because of the reinforcement which the hierarchical family system afforded the similarly structured political system, the government attempted to strengthen the existing social order by giving the family system both moral and legal support. The Imperial speech on Education on October 30th, 1890, established a scheme of "moral education" which accorded with the spirit and tenets of the family system, and the family system itself was formally established as a legal institution in the Civil Code of 1897. This unique feature of the Japanese legal and political system continued until the end of the World War II.

ii. What is the "Institutional Family System"?

It seems to me there were three basic concepts:

1. The "House System"
2. The powers of the Head of the House
3. The hereditary rights within the family

The "House System", which was patterned along similar lines to that of a clan unit, differed from the western type of nuclear family (*Famille Conjugale*) consisting of husband, wife and minority. The "House System" was based on the concept of an extended family which was governed by the Head of the House. The Head of the House, most often the eldest male

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of the clan, wielded important powers over the other members.

As for the powers of the Head of the House, his approval was legally required for almost all the important decisions in the lives of the members of the family, such as change of residence, marriage, divorce and adoption. Since property and inheritance were largely under the control of the Head of the House, refusal to obey the Head could lead to expulsion from the house, and had serious economic implications apart from social ones. This power of the Head of the House was to some extent counter-balanced by his obligation to support the needy members of the family. One may therefore say that the principal element in the social, economic cohesiveness of the house system was primogeniture and male superiority. It is necessary to add that by supporting all the members within a family, a social security system like that in England could not have developed in our pre-war society.

All this was a reflection of Confucian philosophy, which neglected the individual and his inalienable right in favour of a hierarchical system. In Japan, the pre-war Imperial system was itself a political product of this philosophy. At the top of the pyramid, the Emperor towered as a kind of super-paterfamilias over the State with the family below him. The individual was far down, with duties to all levels of government and family, and with pitifully few rights. There existed only a variety of personal dependencies, as we have seen, within the family unit. Family estates and property could only be inherited by the Head of the House. All the legal provisions in Family Law were based on the above-mentioned points.

Concerning marriage, traditionally it was a transaction between two families rather than the creation of a union based on mutual love between two individuals. Marriage involved the intrusion of a stranger—that of the new wife into the husband's house and family. The choice of a wife affect-

ed a far larger group of people than simply the marriage partners themselves. Consequently free choice was largely eliminated.

The husband's dominant position was reflected in the prerequisite of marriage. A man, although not acquiring title to his wife's property upon marriage, acquired the right to the possession and management of the property and to enjoyment of rent and profits in a fashion similar to the common-law estate. He, of course, bore all the expenses of the family. In many cases a married woman could not enter a legal transaction without the prior consent of her husband. The wife had no legal capacity.

In Criminal Law, while adultery committed by married women could be punished, extramarital intercourse by a married man with an unmarried woman was no crime because it would not affect the purity of the family lineage.

In the premodern period, divorce was an exclusively male privilege which a husband could exercise simply by announcing the divorce. On the other hand, the wife was permitted to divorce only on the grounds of cruel treatment, desertion, or other serious misconduct of the husband.

By comparison, it can be seen that highly significant changes were made in this code at the time of its revision in 1947:—

## II The 1947 Revised Civil Code

### i. How were the principles and legal concepts revised?

The principal change which appeared in the revised Civil Code of December 12th, 1947, lies (of course) in the replacement of the "house" by the "conjugal" Western family. The powers of the Head of the House disappeared with the abolition of the house system.

The inferior position of the wife with regard to her legal incapacity in the management was also abolished. The husband had previously been

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bestowed with the right to manage the property owned by his wife, and the father alone had exercised parental power over his children. Only the wife had been placed under the legal obligation to maintain custody of the child. All such provisions running counter to the principle of equality between the sexes were completely abolished in the Code of 1947.

Thus in this revised Civil Code, equality between husband and wife was firmly established.

ii. What was the reason for the revision?

Ostensibly people believed that it was necessary for such fundamental changes to adhere to basic constitutional principles such as the dignity of the individual, the equality of the sexes and the free choice of the marriage partner.

(i) I think a more precise and accurate analysis should be made. In the first place, statistics (which I reproduce below) show clearly that the family system which was provided for in the 1897 Civil Code, no longer corresponded to the economic and social family structure as it existed in the 1930's.

The following statistics indicate clearly that a new pattern was

**Table 1. Distribution of Households According to Size**

No. persons	(Unit : %)					
	1930	1955	1960	1965	1970	1975
1	5.5	3.5	5.2	8.1	10.8	13.7
2	11.7	10.8	12.7	14.3	15.4	16.9
3	14.8	14.5	15.9	18.2	19.7	20.1
4	15.1	16.6	18.7	22.3	25.5	26.5
5	14.5	16.7	17.1	16.2	14.5	12.4
6	12.7	14.1	13.1	10.6	8.4	6.4
7	9.9	10.3	8.5	6.1	3.5	2.8
8	6.8	6.5	4.6	2.5	1.4	0.9
9	4.1	3.6	2.3	1.1	0.5	
10	2.4	1.9	1.1	0.4	0.2	0.4
11	2.5	1.6	0.8	0.3	0.1	
Average no. of persons	4.98	4.97	4.54	4.05	3.69	3.44

(a) no pre 1930's to statistics to compare with.

(b) Exacty what pattern? (Gradually decreasing size of households.)

established in the 1930's. It means this was largely brought about by the development of Capitalism.

It became apparent, for example, that the power of the Head of the House was unrealistic in the light of the real lives and on occasion this inevitably led to unintentional abuse of that power.

Moreover along with the fundamental social changes that were taking place, among them (principally the move from the country to the cities by people in search of jobs), it became clear that the wage-earner could no longer be expected to maintain all the family members.

(ii) In the second place, it is important to remember that the Family Law Provisions made in the Civil Code of 1897 can be regarded from different viewpoints.

On the one hand they can be seen in isolation as maintaining a rigidly structured family system from the past, consolidating on existing tradition. Yet on the other hand, they can also be seen as forming part of the pre-war political and social situation at that time and, therefore, as being conditioned by that situation. In other words, the Provisions of 1897 were a reflection of both a long-existing family system and the period which produced them.

After the Meiji Restoration of 1868, the feudal system, which had existed for the previous 250 years, was swept away. Unfortunately, a modern democratic society was unable to develop because of the enforced rapid development of an Imperialist Capitalist state, a process which was precipitated by the attempted colonization of Japan by Western nations.

In contrast to the structures of government which characterised most other democratic Capitalist countries, at that time, the government in Japan successfully established the absolute authority of the Emperor. Thus, the Confucian concept of a "Family State" gradually became a reality which could be seen to reflect the political ideology of the time. The implicati-

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ons, in society, of this essentially political development, were far-reaching. Japanese people had no choice but to accept the idea of the "Family State" since social and moral values came to be based on the idea, and education ensured that it was adopted by the people without question.

Only after the Second World War, as a result of which a democracy was established, the new Constitution in 1947 declared that the Sovereign Power was no longer absolute. From that time on, the status of the Emperor was dependent upon the "will" of the people. The traditional "family system" was subsequently abolished as part of the first stage of the democratization of Japanese society.

Thus the reasons for a revision of the Civil Code in 1947 can be found both in the political transformation made by the new Constitution of that year, and in the longer term social and economic changes that were gradually taking place in the early decades of the century. (according to the development of Capitalism in Japan.)

### III Marriage Law and Divorce Law in the 1947 Revised Civil Code.

I shall now discuss marriage and divorce in further detail. Article 24 of the 1947 Constitution reads:

Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through co-operation with the equal rights of husband and wife as a basis.

With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

These provisions provide the base for both marriage and divorce law.

i. Marriage

(Formation of Marriage)

Marriage is now recognised as a legal union of two individuals based exclusively on their free agreement. The formation of marriage is only by the mutual consent of both partners. However, a marriage becomes effective only by notification, in accordance with the provisions of The Family Registrative Law.

The partners should be 20 years of age or older. Minors require parental consent. Minimum age of marriage for women is 16, and for men, 18. The provisions provide for an outright prohibition of bigamy. Article 734—736 contains provisions relating to marriage between relatives; prohibition of marriage between lineal relations, collateral relatives to third degree, etc.

In practice, in 1979 the average age of marriage for women was 25.2 years and 27.7 years for men. An “arranged marriage” is a tradition which has long existed in Japan. A go-between who knows both families formally introduces the man and woman concerned. The couple continue to meet socially over a period of time and decide by themselves whether they wish to marry or not. The practice continues today, but introductions are made by friends on informal occasions. About 70% of marriages were by love matches in 1978.

(Consequences of Marriage)

Husband and wife assume the surname of either in accordance with the agreement at the time of marriage. Minors are deemed to come of age upon marriage. Article 752 provides:



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Husband and wife shall live together, and shall co-operate and aid each other.

This provision means that the wife has at last been elevated to the status of a full and equal partner in the marriage.

The most characteristic and problematical clause in contemporary Japanese marriage law is : The Matrimonial Property System. With respect to property owned by husband and wife, unless a separate property ownership system has been adopted prior to the notification of marriage regarding property owned either by the husband or wife before marriage Article 762 comes into effect:

Property belonging to either a husband or wife from a time prior to the marriage and property acquired during the subsistence of the marriage in his or her own name constitutes his or her separate property.

2. Any property, in regard to which it is uncertain whether it belongs to the husband or the wife, is presumed to be the property in their co-ownership.

As regards the separate-property system contained in this provision, there are a great many Japanese women demanding a co-ownership system and wanting to extend substantially the housewife's right to matrimonial property. That is to say that a wife's labour should be given equal recognition to that of the husband in relation to the resultant income. A separate-property system does not evaluate fairly the housewife's role.

If women were able to work on exactly the same terms as men and have claim to matrimonial property, I believe separate ownership would be preferable. It would help to strengthen the principle of individualism and

also would not conflict with or contradict the principle of present day Japanese property law, which is based on individual ownership. This would be particularly relevant where there were difficulties relating to land registration or protection of any third person concerned. However women's working conditions and opportunities for working are extremely poor, compared with those of married women. If a couple are happily married, there would be no problem regarding matrimonial property, but when the couple split and come to divorce, problems inevitably occur. A new way has to be found for re-evaluating the wife's role, i. e, child-bearing and rearing and providing a home for the family, etc. New legal rules must be drawn up to establish the housewife's equality in the home. In this context, present-day Japanese Family Law is in a state of chaos. So it has been very interesting for me to learn something of English Family Law cases and statutes which are very well grown and continue to be improved as British people recognize good enough.

## ii Divorce

### (Divorce by mutual consent)

In this field, Japanese women suffered particular discrimination in the Old Civil Code. An example of the remarkable difference between European legislation and Japanese is the Japanese law concerning divorce by "mutual consent". More attention is devoted to this in the revised Civil Code than to judicial divorce. Moreover the means of divorce by consent is not barred to the spouse by virtue of the presence of children of the marriage. The formal requirement for a divorce is notification to the authorities by the registration after divorce has been agreed (Article 765).

The question of custody of children is supposed to be settled by

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agreement. In the event of disagreement, either party may apply to the Family Court for settlement of the issue. The Court awards custody depending on the merit of the individual case only from the point of view of the children's welfare and needs. If the wife is given custody, in many cases the husband is required to contribute to the support of the child or children.

### (Judicial Divorce)

There are five grounds upon which a divorce can be sought. They are set out in Article 770:

#### (Judicial divorce-causes)

Article 770. Husband or wife can bring an action for divorce only in the following cases:

- (1) If the other spouse has committed an act of unchastity;
- (2) If he or she has been deserted maliciously by the other spouse;
- (3) If it is unknown for three years or more whether the other spouse is alive or dead;
- (4) If the other party is attached with severe mental disease and recovery therefrom is hopeless;
- (5) If there exists any other grave reason for which it is difficult for him or her to continue the marriage.

2. Even in cases where any or all of the grounds mentioned in items (1) to(4) inclusive of the preceding paragraph exist,the Court may dismiss the action for

divorce, if it deems the continuance of the marriage proper in view of all the circumstances.

Following a divorce, there are still serious problems ; the provision for the distribution of matrimonial property following divorce.

(Distribution of property)

Article 768. Husband or wife who has effected divorce by agreement may demand the distribution of property from the other spouse.

2 . If no agreement is reached or possible between the parties with respect to the distribution of property in accordance with the provisions of the preceding paragraph, any of the parties may apply to the Family Court for measures to take the place of such agreement ; however, this shall not apply after the lapse of two years from the time of the divorce.

3 . In the case mentioned in the preceding paragraph, the Family Court shall determine whether any such distribution is to be made or not, and, if it is to be made, the sum as well as the mode of the distribution, taking into account the sum of such property as is acquired by co-operation of the parties and all other circumstances.

Ordinarily the parties themselves determine which of them should receive the matrimonial property and in what amount. Article 768 does not stipulate how the property should be divided, so most commonly the husband, who would usually have control of the bulk of the property, would make a payment to the wife. There is no legal guarantee that the wife will get any part of the matrimonial property and there is no provi-

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sion in our law for maintenance to be paid to the wife following divorce.

The only provision made regarding the distribution of property(Article 768)is where a Court tries to get a lump sum of money paid to the divorced wife(usually to support her for a period of two or three years only). The idea that a divorce should not entail lasting obligation of one spouse toward the other dominates Japanese law. However, under separate ownership it is unusual for the wife to own property and especially the matrimonial home.Divorced wives are usually underprivileged economically, having children to care for. Also there are still many difficult problems unsolved today concerning the concept of matrimonial property; obligation and credit in future,the pension rights,the mortgage,and valuation of the properties,etc. If agreement between the two parties could not be found,the decision is made by the Family Court. In reality it is far from being equivalent to the alimony system found in the U.S.A.and England.

However the attitudes of the Court are slowly changing and moves have been made to try to establish a half share of matrimonial property as a legal right in our case law.

Recent trends towards joint-ownership of the matrimonial home by young couples are increasing.Taxation changes have already been made which allow the husband to give the wife a gift of half the matrimonial house free of tax,providing they have been married 20 years. The above indicates that advances are being made in Japanese Family Law concerning matrimonial property following divorce and it seems to be developing along the lines of the English model.

In comparison to other countries the divorce rate is comparatively low but nevertheless it is steadily increasing. The statistic shows : in 1980 there were 1.17 cases per 1,000 persons. Most divorce cases occur in those marriages in the 25-29 age group,but the rate is highest among those under 20 and decreases with age.90%of all divorce are by mutual consent,

9% are by arbitration and only 1% are through a court of law.

#### IV CONCLUSION

Compared with Common Law legal system like Britain, as I explained it in "The Law and The Codification", the disadvantage of the codified legal system like Japan is that it tends to be accompanied by the authoritarian and political character of the law as an aggregate of legal rules imposed by a sovereign authority, rather than by the embodiment of reason and reality.

So I believe it is absolutely necessary to examine how well contemporary Japanese family law functions and the effect it has on the people.

To what extent does the Family Law in Japan correspond to the reality of Japanese social life?

i. The most significant factor since the end of the Second World War contributing to the development of Japanese Family Law is related to changes in the political sphere.

There has been a democratization in the function of government, which had previously wielded its powers in name of the Emperor. The power of those political groups which was based on authoritarian imperialist ideals at one time stemmed from and relied upon the institutional family system; however after the Second World War, this was swept away by the fiat of the Revised Civil Code. As a result of this change in the political atmosphere, the Japanese gradually became free to criticize the Emperor openly and also the system of government for the first time in her history. Since then, the basic aim has been to develop a self-reliant society which at the same time ensures the freedom of the individual.

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ii. Despite the guarantee of legal equality, equality between men and women has not been attained.

Many women are still unable to undergo training, and job opportunities are fewer for women than for men. Nowadays instead of the previous attempt to tackle the problem at the level of legal inequality, attention is being focused at great length on the inequality caused by economic factors. In addition, there still persists the problem of people regarding men as superior. Such an attitude has remained unchanged in our society for centuries and it enforces women into domestic roles and second class citizenship.

It is necessary to overcome both these attitudes towards factors before there can be any progress toward equality in Japanese society as provided for in the Japanese Civil Code.

iii. As we see on the development of Japanese family law, Family Law seems to be deeply rooted in the consciousness of the people, their moral and religion, their culture and social value, finally politics, but in fact, it can be true that it is fundamentally based upon and confined by the social and economic structure of the time.

後 記

本稿は“Society and Family Law”(獨協大学創立二十周年記念論文集所収)の続稿, part IV として書かれたものであり, 元来は, 1982年にケンブリッジ大学法学部家族法研究会で行ったプレゼンテーションの後半の部分にあたる。

イギリス家族法の現在の問題点を意識しつつ, 日本家族法を発展的にとらえ, その評価と問題点を明らかにせんと意図したものである。

プレゼンテーションであったこと及び前記研究会機関誌への転載を前提としていたため, 論文として特殊な形式をとらざるをえなかった事情をお許し願ひ, 英米法の碩学田中和夫先生へ献稿とさせて戴く。

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