

CURRENT ISSUES REGARDING THE JAPANESE CIVIL LAW PERTAINING TO FAMILY LAW

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ABSTRACT

The purpose of this article is to report on the present issues about Japanese family law. The Japanese Civil Code came into force in 1898; since then it has been amended several times. Above all in the field of family law, the Civil Code was greatly amended in 1947 according to the Article 14 (equal treatment) of the Japanese Constitution. But the rapid developments in the world have changed the thinking of the Japanese people. In 1994, the Japanese Legislative Council made public "The Summary Draft of the Amendment of Civil Code about Marriage and Other Matters," and in 1996 the Council created "The Draft of the Act for Partial Amendment of the Civil Code." This work is now stopping. But now in Japan, the maternal relationship has become a hot issue when a child was borne by a gestational mother. On this problem, the Supreme Court has decided, but some judges of the opinion that there should be a legislative solution. In these circumstances, the amendment of family law in near future seems to be unavoidable. We should reexamine the Summary Draft and the Draft to make new and better family law.

ÖZ

Bu makalenin amacı, Japon aile hukukundaki güncel konular hakkında bilgi vermektir. Japon Medeni Kanunu 1898 yılında yürürlüğe girmekle birlikte, bu tarihten

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itibaren birçok değişikliğe uğramıştır. Medeni Kanunda aile hukuku alanında yapılan en büyük değişiklik 1947 yılında Japon Anayasasının 14. maddesine (eşit muamele) uygun olarak yapılan değişikliktir. Bununla birlikte, dünyadaki hızlı gelişmeler, Japon halkının bakış açısında da farklılıklar yaratmıştır. 1994 yılında, Japon Yasama Konseyi "Evlenme ve Diğer Hususlar hakkında Özet Medeni Kanun Değişikliği Taslağı"nı ilan etmiş, 1996 yılında da "Medeni Kanunun Kısmi Değişikliğine dair Kanun Taslağı"nı oluşturmuştur. Bu faaliyetler şu anda durma noktasındadır. Ancak, bugün Japonya'da taşıyıcı annelik hususu maternal bağ açısından oldukça tartışmalı bir hal almıştır. Bu tartışma hususunda Yüksek Mahkeme kararları bulunmakla birlikte bazı hâkimler soruna yasama aracılığıyla bir çözüm getirilmesinin gerekliliğini savunmaktadır. Bu durum ışığında, aile hukukunda yakın gelecekte yapılacak olan değişiklikler kaçınılmaz olacaktır. Özet Taslak ve Kanun Taslağı yeniden incelenmeli ve daha modern ve işlevsel bir aile hukuku yapılandırılması sağlanmalıdır.

Keywords: *Japanese Civil Law, Japanese Family Law, Equal Treatment, Marriage & Divorce, Succession.*

Anahtar Kelimeler: *Japon Medeni Hukuku, Japon Aile Hukuku, Eşit Muamele, Evlenme ve Boşanma, Miras.*

I. INTRODUCTION - A BRIEF HISTORY

As is well known, Japan introduced a western-type legal system for the first time in the Meiji Era. Before then, there could be found influence¹ from Chinese legal system dating from the 8th century, but all through the feudal times (after 1192, that is, in the times of the government of Shogun), Japan had developed her own legal system. From 1639 to 1858 (Edo Era--- the Tokugawa Government), the Japanese government had closed the country (*Sakoku*), so that this original legal system was completed especially during the Edo Era.²

In 1853 (towards the end of Edo Era), the American Navy Admiral, Matthew C. Perry, and his four warships (in Japanese these ships are called *Kurofune* because of their black color) came to Uraga to show their cannons to the Japanese and to force Japan to open up to the world. In 1858, the Tokugawa government finally concluded the Treaty of Friendship, Commerce and Navigation between Japan and the United States of America, and treaties of similar contents were concluded with the other western powers, one after another. These treaties were unequal ones, which was one of the main reasons for the fall of the Tokugawa Government.

¹ In A.D. 701 from Taihou Rituryou and in A.D.757 from Yourou Rituryou.

² A good reference in English on the history of Japanese law is Hiroshi Oda, *JAPANESE LAW* (Oxford University Press, USA; 2nd ed., 2001).

In 1868, the new Government (Meiji Government) was born. From the beginning, this government faced many great difficulties, especially in foreign policies where a little error should be fatal. Because the western great powers (England, French, Russia, German and so on) had been colonizing other Asian countries in those times,³ and a slight diplomatic error would make a plausible excuse for them to colonize Japan. Thus the Meiji Government had two main foreign policies: one was to amend the unequal treaties to be equal ones, and the other was to abolish the influence of the Western powers.

Necessity to accomplish the latter purpose compelled the Meiji Government to introduce a legal system which could convince the western countries that the Japanese judicial system could be as fair and fine as that of their own countries. Therefore, the Meiji Government invited and employed many western scholars to draft laws. Among those scholars, Gustave Emile Boissonade de Fontarable, a professor from the University of Paris, was the most famous in Japan, who wrote the "Code civil de l'Empire du Japon" in Japan, this code is called "Old Civil Code or *kyuuminpou*) following the example of the French Civil Code.

This Civil Code was promulgated in 1890, but never went into effect. For soon after the promulgation, very heated argument arose about this Code. In particular, opinions against the family law provisions were very strong; this family law would be contrary to Japanese tradition and *boni mores*, so that it would break valued Japanese traditions.

Finally this Old Civil Code was "amended" by referring to the draft German Civil Code at that time. The present Civil Code (*minpouten*) entered into force in 1898. This Code adopted the Pandect System in the same way as the German Civil Code. Therefore, the Japanese Civil Code consists of five books:

Book I: General Provisions (*Sousoku*)

Book II: Real Rights (*Bukken*)

Book III: Claims (*Saiken*)

Book IV: Relatives (*Shinzoku*)

Book V: Succession (*Souzoku*)

³ In particular, the Opium War (1840-1842) had surprised the Tokugawa government.

As mentioned above, this Civil Code had been influenced by both French and German legal thought, but in the field of family law (Books IV& V), Japanese traditional thought, especially the beliefs of the governing Samurai class, had been maintained after the dispute about the Old Civil Code. This could be found in the beliefs of the "House-System" (*Ie-seido*) and the very strong power of a householder (*Koshu*).

In 1945, Japan accepted the Potsdam Declaration because of its defeat in World War II, and in 1946, the new Japanese Constitution was promulgated under the occupation of the Allies. The new Constitution attached importance to equality, especially equal treatment between men and women, so the family law provisions in the Civil Code were greatly amended in 1947 according to Article 14⁴ (regarding equal treatment) of the new Constitution. As a result of this amendment, "*Ie-seido*" was abolished, and the status of members of family, especially the status between wife and husband, came to be treated equally in the new act.

This new act has been maintained for more than 50 years. During all these years, of course, some amendments have been made, but the rapid movement of the world has changed the way of life and the thinking of people, which has brought about new thinking of equality and the necessity for further amendments. Therefore, in 1994, the Legislative Council (*Houseishinngikai*) made public "The Summary Draft of the Amendment of Civil Code about Marriage and Other Matters" (*Koninseido-tou ni kansuru minpoukaiseiyokou-shian*)" after soliciting opinions from all concerned parties. Then on 26 February 1996, the General Assembly of the Legislative Council approved the draft amendment -- "the Draft of the Act for the Partial Amendment of the Civil Code" (*minpou no ichibu wo kaiseisuru houritsuyokouann*).⁵

But this work has been slowing for various reasons.⁶ Furthermore, the remarkable development of science has been a great influence on family relationships. In particular, reproductive technologies are now shaking the very

⁴ Article 14 of Japanese Constitution provides as follows: (1) All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status of family origin.

The official English version of the Japanese Constitution is at <http://www.ndl.go.jp/constitution/e/etc/col.html#s3>.

⁵ Hereinafter, "The Summary Draft of the Amendment of Civil Code" is called the "Summary Draft" and "The Draft of the Act for Partial Amendment of the Civil Code" is called the "Draft."

⁶ The draft of an act usually would be introduced as a bill into the Diet, but this draft has been pending.

base of family relationships and now in Japan, some actions concerning maternal relationships are being brought to the courts. In these circumstances, the necessity for amendment of the family law is growing stronger.

In the following paragraphs, I'd like to survey these new issues about the family law provisions in the Civil Code, especially after the Summary Draft mentioned above.

II. ISSUES TAKEN UP BY THE SUMMARY DRAFT

This section will address specific revisions being considered for the family law provisions in the Japanese legal system.

A. Formation of Marriage⁷

The provisions for marriage have been addressed for the initial marriage and for remarriage.

(1) Requirements for Marriage

In Japan, a marriage becomes effective by providing notification (*Todokede*) to the Family Registration Bureau (Art. 739⁸), but in order for a notification to be accepted by the Family Registration Bureau (acceptance is indispensable for a marriage to become effective), a marriage shall satisfy some requirements such as the prohibition of bigamy (Art. 732) and the prohibition of marriage between close relatives (Art. 734⁹).¹⁰

⁷ All the English translations of Civil Code cited in this thesis are from the "Translations of Laws and Regulations" on the website of Cabinet Secretariat. These translations are not allowed to be official, but have been prepared in compliance with the Standard Bilingual Dictionary (March 2007 edition). These are available at <http://www.cas.go.jp/jp/seisaku/hourei/data2.html#ka>.

⁸ Article 739 (Notification of Marriage) states that:

(1) Marriage shall take effect upon notification pursuant to the Family Registration Act (Act No. 224 of 1947).

(2) The notification in the preceding paragraph shall be given by document with the signatures of both parties and not less than two adult witnesses, or given orally by these persons.

⁹ Article 734 (Prohibition of Marriage between Close Relatives) state that:

(1) Neither lineal relatives by blood nor collateral relatives by blood within the third degree of kinship may marry; provided that this shall not apply between an adopted child and his/her collateral relatives by blood through adoption.

The Summary Draft takes up two provisions: the marriageable age (Art. 731) and remarriage (Art. 733), because these provisions might be counter to the equal treatment of men and women.

With regards to the marriageable age, the present law, in Article 731 states “[a] man who has attained 18 years of age, and a woman who has attained 16 years of age may enter into marriage.”

At the time of enactment of Article 731, the disparate treatment was introduced after considering medical research that has shown the difference of maturity between men and women. However, the social position of women has changed drastically in Japan. Now almost all women think it natural to work outside the home, so that permission for marriage at a younger age for women than for men has now been criticized as being an assignment of roles in society based on gender; that is, the thinking was that a woman should be a full-time housewife after marriage and that social experience or economic independence should therefore be unnecessary for women.

(2) The preceding paragraph shall also apply after the termination of a family relationship pursuant to the provision of Article 817-9.

¹⁰ Marriages which do not satisfy these requirements are not void but voidable according to Article 743 (Rescission of Marriage), which states that “A marriage may not be annulled, unless pursuant to the provisions of Articles 744 to 747 inclusive.” Those provisions are below:

Article 744 (Rescission of Unlawful Marriage) provides:

(1) Either of the parties, their relatives, or a public prosecutor may make a claim to the family court to rescind a marriage if it violates the provisions of Articles 731 to 736 inclusive; provided, however, that a public prosecutor may not claim this after the death of one of the parties.

(2) A spouse or previous spouse of a party to a marriage that violates the provisions of Article 732 or Article 733 may claim for rescission of marriage.

Article 745 (Rescission of Marriage in Violation of Marriageable Age) provides:

(1) When a person of non-marriageable age reaches marriageable age, a claim for rescission of a marriage that violates the provisions of Article 731 may not be made.

(2) A person of non-marriageable age may claim rescission of a marriage within a further three months after he/she has reached marriageable age, provided that this shall not apply if he/she has ratified the marriage after reaching marriageable age.

Article 746 (Rescission of Marriage Formed within the Period of Prohibition of Remarriage) provides:

A claim for rescission may not be made for a marriage that violates the provisions of Article 733 if six months have passed from the day on which the previous marriage was cancelled or rescinded, or if a woman has conceived a child after remarriage.

To rectify the disparity in marriageable age, the Summary Draft proposes the following wording: “Both men and women may enter into marriage after the completion of full eighteen years of age.”

The reasons for setting the age of eighteen in the Draft are that the high-school education¹¹ is now prevalent and it is proper to expect social maturity at the level of a high school graduate. Second, the present age for men is eighteen and there are no reasons to go lower than eighteen.¹²

Similarly, the Draft has the following wording: “Marriage may not be entered until after the completion of full eighteen years of age.”¹³

On the issue of re-marriage, the present law states, in Article 733 (Period of Prohibition of Remarriage) that:

(1) A woman may not remarry unless six months have passed since the day of dissolution or rescission of her previous marriage.

(2) In the case where a woman had conceived a child before the cancellation or dissolution of her previous marriage, the provision of the preceding paragraph shall not apply.

As to Article 733, a shorter elapsed period is proposed – 100 days instead of six months. This provision is recommended in order to avoid an overlap of the presumption of legitimacy.¹⁴ This remarriage restriction only applies to

¹¹ Japanese educational system has 6 years of elementary school, 3 years of junior high, and 3 years of high school. Elementary school and junior high school are mandatory, but more than 90% pupils go to high school. More than 50% of the students who graduate from high school go to university or college.

¹² On 1 November 2007, the government decided to introduce a bill on the change of age of majority in the extraordinary Diet session in the autumn of 2009 or in the ordinary Diet session of 2010. The present Article 4 of the Civil Code prescribes that majority is attained on the completion of full twenty years of age. In this bill, the age of majority will be changed from 20 years of age to 18 years. On May 14th in 2007, the Act on the Procedure of Amendment of Japanese Constitution (*Nihonkoku Kenpou no Kaiseitetsuzuki ni kannsuru Houritsu*) was passed. This Act prescribes the plebiscite according to Article 96 of Japanese Constitutional Law and shall be enforced from 2010. In this Act, all Japanese people above the age of 18 years shall have the right of vote. For this reason, the government has been considering lowering of the age of majority.

¹³ Section I (Formation of Marriage), subsection i (Marriageable Age).

¹⁴ Article 772 (Presumption regarding a Child in Wedlock)

(1) A child conceived by a wife during marriage shall be presumed to be a child of her husband.

women and has been thrown into doubt as to its validity since the amendment of 1947. This issue was left for future discussion because it should be necessary to examine both this provision and the provision of the presumption of legitimacy.

The view that 100 days should be enough to avoid the overlap of the presumption of legitimacy has been strongly advocated for a long time. Those advocating this provision have given the following reasons:

- 100 days is enough because *de facto* separation usually precedes notification of divorce.

- The number of cases involving the overlap of the presumption of legitimacy is small.

Recently the drive to remove this restriction completely has gained strength, but the Summary Draft does not take this view because even if the number of cases involving the overlap of the presumption of legitimacy may be small, such cases do exist as a result of Article 772.¹⁵ Those advocating removal of the restriction have proposed making the provision stipulate which husband shall be the father of such a child (for example, to say that the second husband (after remarriage) is presumed to be the father of a child), but on what grounds they can say that this presumption should be better than the previous one is not clear. Therefore the Summary Draft should not make this proposal.

The Summary Draft reads as follows:

(1) A woman may not remarry unless 100 days have passed since the date of the dissolution or rescission of her previous marriage.

(2) If a woman conceives a child within 100 days after the cancellation or dissolution of her previous marriage, the provision of the preceding paragraph shall not apply.

Furthermore, the Summary Draft states that whether to make an exception out of a case where a woman can remarry with a doctor's certificate attesting to there being no pregnancy, even during the period of prohibition of re-marriage, will be examined in the future.

(2) A child born after 200 days from the formation of marriage or within 300 days of the day of the dissolution or rescission of marriage shall be presumed to have been conceived during marriage.

¹⁵ See *supra* note 12.

On the issue of remarriage, the Draft reads as follows:

(1) A woman may not remarry unless 100 days have passed since the date of the dissolution or rescission of her previous marriage.

(2) If a woman gives birth to a baby after the cancellation or dissolution of her previous marriage, the provision of the preceding paragraph shall not apply.¹⁶

A claim for rescission of a marriage that violates the provisions for remarriage may not be made if 100 days have passed from the date on which the previous marriage was cancelled or rescinded, or if a woman has conceived a child after remarriage.

(2) Void¹⁷ and Annulled Marriage

The Summary Draft has addressed the problem about the remarriage of a spouse of an absentee marriage partner and the rescission of the adjudication of disappearance.

The present law has two causes for the dissolution of a marriage: divorce or death of a spouse. In the case of a judicial disappearance, an absentee partner shall be deemed to have died,¹⁸ so that the marriage of an absentee spouse shall

¹⁶ Section I (Formation of Marriage), subparagraph ii (Period of Prohibition of Remarriage).

¹⁷ The grounds on which marriage is void are prescribed in Article 742 (Grounds on Which Marriage is Void)

Marriage shall be void only in the following cases:

- (i) if one of the parties has no intention to marry due to mistaken identity or other cause; or
- (ii) if the parties do not lodge notification of marriage; provided however, that the effect of marriage shall not be prevented merely because notification was not given in the form prescribed in paragraph (2) of Article 739.

¹⁸ Article 30 (Adjudication of Disappearance)

(1) If it is not clear whether the absentee is dead or alive for 7 years, the family court may make the adjudication of disappearance at the request of any interested person.

(2) The procedure of the preceding paragraph shall likewise apply with respect to any person who was engaged in any war zone, was aboard any vessel which later sank, or was otherwise exposed to any danger which could be the cause of death, if it is not clear whether such person is dead or alive for one year after the end of the war, after the sinking of the vessel, or after the termination of such other danger, as the case may be.

Article 31 (Effect of Adjudication of Disappearance)

be dissolved. The rescission of the adjudication of disappearance, however, shall cancel the effect of the adjudication from the outset. As the result of this rescission, the marriage with an absent partner continues, and if the spouse of an absent partner has remarried before the rescission, there could be a finding of double marriage (bigamy). Therefore an adjustment of the multiple marriages would be necessary.

The latter paragraph of Article 32¹⁹ provides that such rescission shall not affect the validity of *bona fide* acts done after the adjudication of disappearance but prior to its rescission. But it is not clear whether this provision includes cases of remarriage and there are differing opinions about this issue. Therefore, a legislative solution is necessary for this issue, especially in order to stabilize the status of the spouse of an absentee partner.

The Summary Draft reads as follows:

(1) Where the spouse of a person against whom the adjudication of disappearance has been made is remarried before its rescission, the marriage between them shall not revive.

(2) In the case of a rescission of the adjudication of disappearance against one of the parents of a minor, the parental authority (*shinken*) shall not revive when the marriage does not revive according to (1). In this case, Article 766 shall apply to the matters necessary for the custody.²⁰

Any person who has become the subject of the adjudication of disappearance pursuant to the provision of paragraph 1 of the preceding Article is deemed to have died upon elapse of the period set forth in such paragraph, and a person who is the subject of the adjudication of disappearance pursuant to the provision of paragraph 2 of the same Article is deemed to have died upon the termination of such danger.

¹⁹ Article 32 (Rescission of Adjudication of Disappearance)

(1) If there is any proof that an absentee is alive, or that he/she died at a time differing from that provided in the preceding Article, the family court must, at the request of the absentee himself/herself or any interested person, rescind the adjudication of disappearance. In such case, the rescission shall not affect the validity of any act which was performed without knowledge after the adjudication of disappearance but before the rescission thereof.

(2) Any person who acquired any property by the adjudication of disappearance shall lose its/his/her right upon rescission thereof; provided, however, that such person shall have the obligation to return such property only to the extent he/she is actually enriched.

²⁰ Article 766 (Determination of Matters regarding Custody of Child after Divorce etc.)

The Draft reads as follows:

VII. Dissolution of Marriage by Adjudication of
Disappearance

(1) Where one party to a marriage remarries after the adjudication of the disappearance of the other party, the rescission of adjudication of the disappearance after the remarriage shall not affect the dissolution of the previous marriage by the adjudication of disappearance.

(2) In the case of (1), the relationship by affinity by the previous marriage shall come to an end with the rescission of adjudication of disappearance. However the effect of the manifestation of intention after the adjudication of disappearance but prior to its rescission according to Article 728²¹ (End of Relationship by Affinity) shall not be prevented.

(3) Article 751²² shall apply in the case of (1).

(4) VI (1) and (2)²³ shall apply in the case of (1), and Article 769²⁴ (Assumption of Ritual Rights) shall apply in the case of former paragraph of (2).

(1) If parents divorce by agreement, the matter of who will have custody over a child and any other necessary matters regarding custody shall be determined by that agreement. If agreement has not been made, or cannot be made, this shall be determined by the family court.

(2) If the family court finds it necessary for the child's interests, it may change who will take custody over the child and order any other proper disposition regarding custody.

(3) The rights and duties of parents beyond the scope of custody may not be altered by the provisions of the preceding two paragraphs.

²¹ Article 728 (End of Relationship by Affinity by Divorce etc.)

(1) The relationship between relatives by affinity shall come to an end by divorce.

(2) The same shall apply in the case where a spouse has died and the surviving spouse indicates an intention to end the relationship between relatives by affinity.

²² Article 751 (Surviving Spouse Reverting to Previous Surname etc.)

(1) If a husband or wife dies, the surviving spouse may revert to using the surname he/she used before marriage.

(2) The provisions of Article 769 shall apply mutatis mutandis to the preceding paragraph and to the case referred to in paragraph (2) of Article 728.

²³ See Section II.D.

²⁴ Article 728 (End of Relationship by Affinity by Divorce etc.)

IX. Rescission of Adjudication of Disappearance and Parental Authority (*shinken*)

(1) Where the adjudication of disappearance that was given to one parent during the marriage is rescinded after the other parent's remarriage, this parent shall have parental authority.

(2) The Family Court may, on the application of any relative of the child, rule that the other parent shall have parental authority in relation to the child if the court finds it necessary for the interests of the child.

B. Effect of Marriage

(1) Surname (*uji*) of a couple

In Japan, a couple has to use the same surname. The present Law reads as follows: "A husband and wife shall adopt the surname of the husband or wife in accordance with that which is decided at the time of marriage."²⁵

This provision itself is not against the equal treatment of men and women on its face, but more than 90% of couples, in practice, choose the surname of husband as the surname of the couple. Recently the number of women who stop working outside the home after marriage has gotten very small, so the change of the woman's surname after her marriage may put a woman at a disadvantage when she wants to have a successful career; therefore the clamor for continued use of the maiden surname has gotten stronger among women. The feminist movement especially asserts that Article 750 should be in fact considered to be counter to the principles of equal treatment. Taking into account these opinions

(1) The relationship between relatives by affinity shall come to an end by divorce.

(2) The same shall apply in the case where a spouse has died and the surviving spouse indicates an intention to end the relationship between relatives by affinity.

Article 897(Assumption of Rights Relating to Rituals)

(1) Despite the provision of the preceding Article, rights to ownership of a genealogy, equipment used in rituals, and any grave, shall be succeeded by the person who custom dictates shall preside over rituals for ancestors; provided that if the decedent designates a person who shall preside over rituals for ancestors, this person shall succeed rights to ownership.

(2) If, in the case referred to in the main text of the preceding paragraph, the custom is not evident, the family court shall determine who shall succeed the rights in that paragraph.

²⁵ Article 750 (Surname of Husband and Wife)

and the social changes, the Summary Draft has proposed that a couple can use the same surname or separate surnames.

This Summary Draft, however, mentions three possible methods to handle surnames, therefore we have to examine which would be the best. Moreover, if we are to permit a couple to use different surnames, it will be necessary to make a provision on how to determine the surname of any children from the marriage.²⁶

In addition to these difficulties, there is a big problem peculiar to the Japanese legal system. The surname is used as a standard for the Japanese family registration system,²⁷ so that these proposals will inevitably require changes in the family registration system, but it will be very difficult and hard work, because the change of the surname provision means a complete change of the family registration system.

As mentioned above, the work for this amendment is now stopping, and it would not be too much to say that this difficulty in treating the surname of a couple is one reason for the halt of work in this area.²⁸

The Summary Draft reads as follows:

Proposal (a)

(1) Husband and wife can adopt the surname of the husband or wife in accordance with the agreement made at the time of the marriage. However a couple shall be permitted to not make such an agreement (in the following provisions, a couple who made an agreement and both assumed the surname of the husband or wife is called “a same surname couple,” and a couple who did not make such an agreement and continue to each use their own surname is called “a separate surname couple”).

²⁶ As to the surname of child, the present Art. 790 (Child's Surname) provides that:

(1) A child in wedlock shall take the surname of his/her parents; provided that if the parents divorce before the child is born, the child shall take the surname of his/her parents at the time of divorce.

(2) A child out of wedlock shall take the surname of his/her mother.

²⁷ In Japan, the unit of family registration is a couple with unmarried children, that is, a core family of the same surname. Here the surname is used as the standard for the family registration (*Koseki*).

²⁸ The greatest reason for stopping this work would be that according to the public opinion poll done after publishing the Draft, many Japanese were against the introduction of a selective separate surname system.

(2) A separate surname couple must determine their children's surname by using either the surname of the husband or the wife.

(3) A separate surname couple may adopt the surname of the husband or wife by notification thereof in accordance with the provisions of the Family Registration Law.

Proposal (b)

A husband and wife can adopt the surname of the husband or wife in accordance with the agreement made at the time of the marriage. However a couple shall be permitted to not make such an agreement at the time of the marriage.

The difference from Proposal (a) is that this proposal (b) will not allow for the change of the separate surnames into the same surname and vice versa after marriage.

Proposal (c)

(1) A husband and wife can adopt the surname of the husband or wife in accordance with the agreement made at the time of the marriage.

(2) A husband or wife who changed his or her surname at the time of the marriage may use his or her surname before marriage with the consent of the other spouse by notification thereof in accordance with the provisions of the Family Registration Law.

(3) A husband or wife who uses the surname of his or her own surname before marriage in accordance with (2) can repeal this surname by the notification in accordance with the provisions of the Family Registration Law.²⁹

The Draft reads as follows:

III. Surname of a couple

(1) A husband and wife can adopt the surname of the husband or wife, or can maintain each surname as before marriage, in accordance with the agreement made at the time of marriage.

²⁹ The standard registration is the surname which was assumed at the time of marriage, but proposal (c) means that the standard name of registration shall be assumed at the time of marriage, and that in addition to this standard name, a husband or wife can change his or her surname in society officially after the marriage.

(2) Where a husband and wife make an agreement to maintain each surname before marriage, the couple must determine their children's surname at the time of marriage using either surname of the husband or wife.³⁰

(2) Right to rescind a contract between husband and wife

The present Article 754³¹ allows marital couples the right to rescind the contract between a husband and wife. The Summary Draft recommends abolishing this provision because the judicial precedents deny this right when the matrimonial relationship is broken down; that is, this article has been effectively amended in practice. Section V of the Draft does the same.

C. Matrimonial Property System

Japanese law has both a contractual property system³² and a statutory property system.³³ According to the Summary Draft, the present systems should

³⁰ In Section IV of the Draft "Surname of child," "Surname of adopted child" and "Change of child's surname" continue. These items are treated also in the Summary Draft, but in this thesis those items are omitted, because they are related deeply with Japanese Family Registration System, and an explanation about this system would be indispensable to understand them but needs a whole other article.

³¹ Article 754 (Right to Rescind Contract between Husband and Wife)

Either husband or wife may at any time during marriage rescind a contract between husband and wife; provided, however, that this may not harm the rights of a third party.

³² Article 756 (Requirements of Perfection of Contract on Property of Husband and Wife)

If a husband and wife have entered into a contract that departs from the statutory property system, the contract may not be asserted against the successor in title of the husband or wife, or a third party unless registered prior to notification of marriage.

Article 758 (Limitations on Altering Property Rights of Husband and Wife etc.)

(1) The property rights of a husband and wife may not be altered after notification of marriage.

(2) In the case where one party to a marriage administers property and that property is imperiled by misadministration, the other party may make a claim to the family court for his own administration over that property.

(3) A claim may be made for division of property held in co-ownership together with the claim referred to in the preceding paragraph.

Article 759 (Requirements of Perfection of Change of the Administrator of Property or Division of Property in Co-ownership)

If an administrator of property has been changed, or property held in co-ownership has been divided pursuant to the provisions of the preceding Article or as a result of the contract referred to in Article 755, this may not be asserted against the successor in title of the husband or wife, or a third party unless it is registered.

be maintained. For the statutory property system, however, the ownership of the house and/or land which a couple acquired during marriage is often registered under the name of either the husband or the wife. Then if this named owner disposes of the properties, it is necessary to protect the right of the other spouse to continue living there. The way to protect this right will be examined in the future. No reference regarding this issue can be found in the Draft.

D. Divorce

(1) Divorce by agreement

In Japan, a couple may divorce by agreement (Art. 763). This divorce becomes effective by notification to the Family Registration Bureau (Art. 764, Art. 739 (1)). As divorce by agreement, the Draft has taken up two issues: custody of the children after divorce and the distribution of property.

(a) Custody of children

No provision exists about the visitation rights (*Mensetsukoushouken*) of a parent who does not have custody (*kango*) of their children after a divorce. Therefore various discussions have developed about whether or not to create this right, the nature of this right, the standard for this right and so on. In practice, however, this right has been established by the judicial precedents of the lower courts since the 1960s. In 1974, the Japanese Supreme Court regarded this visitation right as one of the dispositions concerning the custody of children according to Article 766³⁴ and the Law for Court Proceedings for Family

³³ Article 755 (Marital Property of Husband and Wife)

The property rights and duties of a husband and wife shall be prescribed by the following subsections, unless they entered into a contract setting forth otherwise, regarding their property before giving notification of the marriage.

Article 762 (Ownership of Property between Husband and Wife)

(1) Property owned by one party before marriage and property obtained in the name of that party during marriage shall be separate property (property owned singularly by one party to a marriage).

(2) Property that does not clearly belong to either husband or wife shall be presumed to be held in co-ownership.

³⁴ Article 766 (Determination of Matters regarding Custody of Child after Divorce etc.)

(1) If parents divorce by agreement, the matter of who will have custody over a child and any other necessary matters regarding custody shall be determined by that agreement. If agreement has not been made, or cannot be made, this shall be determined by the family court.

Affairs (*Kajishinpanhou*), Article 9 (1) Otsurui No. 4. As a result of these judicial precedents, the treatment of this right by the Family Court is well-established, so that it is better to create a statutory provision for visitation rights.

The Summary Draft proposes:

(1) If parents divorce by agreement, the visitation right of a person who is not to have the custody of their children after the divorce may be determined as a disposition necessary to the custody by their agreement.

(2) If the father and mother make an agreement about the visitation rights in accordance with the preceding paragraph (1), the best interests of the child should be given the highest priority.

(3) If no agreement is reached or possible about the matter (1), the Family Court shall determine this matter.

(4) The Family Court may, if it deems necessary for the best interests of child, may order the appropriate measures with respect to the change of right determined in accordance with the preceding paragraphs (1) or (3).

To make clear the scope of “custody” of Article 766 and whether to apply the concept of co-custody will be examined in the future.

The Draft reads as follows:

(1) If parents divorce by agreement, the matter about who will have custody over a child, the father or mother’s visitation thereof and communications with their child, share of expenses necessary for custody, and any other necessary matters regarding custody shall be determined by that agreement. In this case, the best interests of child must be given the highest priority.

(2) If agreement of (1) has not been made, or cannot be made, this shall be determined by the Family Court.

(3) If the Family Court finds it necessary, it may change the determination of (1) or (2) and order any other proper disposition regarding custody.,

(2) If the family court finds it necessary for the child's interests, it may change who will take custody over the child and order any other proper disposition regarding custody.-

(3) The rights and duties of parents beyond the scope of custody may not be altered by the provisions of the preceding two paragraphs.

(4) The rights and duties of parents beyond the scope of custody may not be altered by the provisions of the preceding paragraphs.³⁵

(b) Distribution of property

The distribution of property from one spouse to the other is prescribed in Article 768 and Article 771,³⁶ but there is no provision about how and what to distribute, only a reference in Article 768 (III); “taking into account the amount of property obtained through cooperation of both parties and all other circumstances.”

Therefore all the matters about distribution of property are left to the discretion of the court, but the fact that there are neither clear principles nor standards about the distribution of property has, in fact, resulted in inequalities between husband and wife; *i.e.* the low regard for the labor of housekeeping by a full time housewife results in little distribution of property to wife. The Summary Draft proposes a complete no-fault divorce, where more consideration should be given to the inequality of economic situation between the husband and wife, or to quality of life after divorce. In Japan as a result, many women often have fallen into the economically hard circumstances after divorce.³⁷ Therefore the role of distribution of property would have more importance and its clear principle and standard would be necessary.

³⁵ Section VI. (Divorce by Agreement), subsection i (Determination of Matters regarding Custody of Child after Divorce etc).

³⁶ Article 768 (Distribution of Property)

(1) One party to a divorce by agreement may claim a distribution of property from the other party.

(2) If the parties do not, or cannot, settle on agreement with regard to the distribution of property pursuant to the provision of the preceding paragraph, either party may make a claim to the family court for a disposition in lieu of agreement; provided that this claim for distribution of property shall be extinguished at the expiration of two years from the day of divorce.

(3) In the case referred to in the preceding paragraph, the family court shall determine whether to make a distribution, and the amount and method of that distribution, taking into account the amount of property obtained through the cooperation of both parties and all other circumstances.

Article 771(Application Mutatis Mutandis of Divorce by Agreement Provisions)

The provisions of Articles 766 to 769 inclusive shall apply *mutatis mutandis* to the case of judicial divorce.

³⁷ According to a 2005 investigation by the Ministry of Health, Labor and Welfare, the annual income of all Japanese families was 5,804,000 yen whereas for fatherless families it was 2,334,000 yen (40%). Of fatherless families, 79.7% are those of divorced woman.

To correct this situation, the Summary Draft proposes the following:

(1) One party to a divorce by agreement may claim a distribution of property from the other party in order to create fair and equal economic conditions.

(2) If the parties do not, or cannot, settle on agreement with regard to the distribution of property pursuant to the provision of the preceding paragraph (1), either party may make a claim to the Family Court for a disposition in lieu of agreement, provided that this claim shall be extinguished at the expiration of two years from the date of divorce.

(3) In the case mentioned in the preceding paragraph (2), the Family Court shall determine whether any such distribution is to be made or not, and if it is to be made, the amount as well as the mode of the distribution, taking into account the amount of such property as was acquired by the cooperation of the parties, the degree of the contribution of each party to acquire or maintain such property, the period of marriage, the level of life during marriage, the mode and degree of efforts given by each party to maintain the common life, the age of each party, the condition of mind and body, occupation, income, ability of work and all other circumstances.

The Draft for this matter reads as follows:

(1) One party to a divorce by agreement may claim a distribution of property from the other party.

(2) If the parties do not, or cannot, settle on an agreement with regard to the distribution of property pursuant to the provision of preceding paragraph (1), either party may make a claim to the Family Court for a disposition in lieu of agreement, provided that this claim shall be extinguished at the expiration of two years from the date of divorce.

(3) In the case mentioned in the preceding paragraph (2), in order to make fair and equal economic conditions between parties, the Family Court shall determine whether any such distribution is to be made or not, and if it is to be made, the amount as well as the mode of the distribution, with taking into account the amount of such property as is acquired by cooperation of the parties, the degree of the contribution of each party to acquire or maintain such property, the period of marriage, the level of life during marriage, the mode and degree of efforts given by each party to maintain the common life, the age of

each party, the condition of mind and body, occupation, income, ability of work and all other circumstances.³⁸

(2) Judicial divorce

The present Article 770³⁹ is understood to adopt “no fault divorce,” but this provision has not been interpreted as permitting a complete no fault divorce. Even if the marriage has effectively broken down, the court, in practice, has not allowed the spouse who caused the breakdown of marriage to bring a divorce action.⁴⁰ But in 1987, the Supreme Court revised its thinking, so that the judgment allowed the responsible spouse to bring an action in some situations.⁴¹

Moreover public opinion has got stronger against the way judicial precedents actually make the relationship of the parties’ worse, because the question of who bears responsibility for the breakdown of marriage often results in exposing the private life of each party in court and gravely damaging the children mentally.⁴²

According to a public opinion poll, the number of people who have the opinion that “no love and divorce is O.K.” is increasing. This reflects a change in thinking about life and marriage within Japanese society.

³⁸ Section VI. (Divorce by Agreement), subsection ii. (Distribution of Property).

³⁹ Article 770 (Judicial Divorce)

(1) Only in the cases stated in the following items may either husband or wife file a suit for divorce:

- (i) if a spouse has committed an act of unchastity;
- (ii) if abandoned by a spouse in bad faith;
- (iii) if it is not clear whether a spouse is dead or alive for not less than three years;
- (iv) if a spouse is suffering from severe mental illness and there is no prospect of recovery; or
- (v) if there is any other grave cause making it difficult to continue the marriage.

(2) A court may dismiss a suit for divorce if it finds continuing the marriage reasonable taking into account all circumstances, even in the case where there is a cause listed in items (i) to (v) inclusive of the preceding paragraph.

⁴⁰ See, e.g. Minshu, S.C. 6 – 2-110, 19 February 1952.

⁴¹ Minshuu, S.C. 41-6-1423, 2 September 1987.

⁴² In Japan, more than 90% of divorces are divorce by agreement. The number of judicial divorces is very small, that is, a couple who brings an action for divorce to a court is very antagonistic towards each other before coming to the court. Therefore the action will last long and the spouses will often insult each other in the court. Jeremy Morley, Japanese Family Law, at http://www.international-divorce.com/recognition_japanese_divorces.htm.

To address this issue, the Summary Draft reads as follows:

(1) A husband or wife can bring an action for divorce only in the following cases, however, as to cases of (i) or (ii), this shall not apply if the matrimonial relationship has not yet broken down so completely that it cannot be repaired;

- (i) If one spouse has committed adultery,
- (ii) If one spouse has been deserted maliciously by the other,
- (iii) If it is not clear whether a spouse is dead or alive for not less than three years,
- (iv) If a spouse is suffering from severe mental illness and there is no prospect of recovery,
- (v) If a couple has not lived together for more than five years continuously,
- (vi) If the marriage is broken down so completely that it cannot be repaired.

(2) Even in cases where any grounds mentioned in the paragraph (1) exists (as to cases (i) or (ii), the marriage must be broken down because of that ground so completely that it cannot be repaired), the Court may dismiss the action for divorce if a divorce would leave either spouse or a child from the marriage in an extremely severe situation mentally, socially or economically.

On this issue, the Draft reads as follows;

(1) A husband or wife can bring an action for divorce only in the following cases, however, in the cases of (i) or (ii), this shall not apply if the matrimonial relationship has not yet broken down so completely that it cannot be repaired:

- (i) If one spouse has committed adultery,
- (ii) If one spouse has been deserted maliciously by the other,
- (iii) If it is not clear whether a spouse is dead or alive for not less than three years,
- (iv) If a couple has not lived together for more than five years continuously,

(v) If the marriage, as well as cases of (iii) or (iv), is broken down so completely that it cannot be repaired.

(2) Even in cases where any grounds mentioned in the paragraph (1) exists, the Court may dismiss the action for divorce if divorce will leave either spouse or child in an extremely severe situation of life or it will cause them intolerable pain. In cases of (iv) or (v), the claim for divorce may be dismissed where the claim can be regarded as extremely against the good faith because of the conspicuous negligence of cooperation or help to the other party by the party who brought the action for divorce.

(3) (omitted).⁴³

E. Succession

The present Article 900⁴⁴ (IV) provides that the share in the succession of an illegitimate child shall be half the share of a legitimate child. However, opposition to this provision as being against Article 14⁴⁵ of the Constitution (equal treatment provision) is now growing. In practice, the Tokyo High Court decided that this provision is against Article 14 of the Constitution,⁴⁶ but this decision was overturned by the Supreme Court.⁴⁷ Many European countries

⁴³ Subsection (3) is omitted for the purpose of this paper because it refers to the judicial dissolution of adoptive relations.

⁴⁴ Article 900 (Statutory Share in Inheritance)

If there are two or more heirs of the same rank, their shares in inheritance shall be determined by the following items:

(i) if a child and a spouse are heirs, the child's share in inheritance and the spouse's share in inheritance shall be one half each;

(ii) if a spouse and lineal ascendant are heirs, the spouse's share in inheritance shall be two thirds, and the lineal ascendant's share in inheritance shall be one third;

(iii) if a spouse and sibling(s) are heirs, the spouse's share in inheritance shall be three quarters, and the sibling's share in inheritance shall be one quarter;

(iv) if there are two or more children, lineal ascendants, or siblings, the share in the inheritance of each shall be divided equally; provided that the share in inheritance of an child out of wedlock shall be one half of the share in inheritance of a child in wedlock, and the share in inheritance of a sibling who shares only one parent with the decedent shall be one half of the share in inheritance of a sibling who shares both parents.

⁴⁵ See *supra* note 5.

⁴⁶ Hanrei Jihou, Tokyo H.C. 1465,55 (23 June 1993).

⁴⁷ Minshu, S.C. 49,7,1789 (5 July 1995).

have already abolished the discrimination between an illegitimate child from a legitimate child. Taking account into these movements, the Summary Draft proposes that the share of an illegitimate child should be the same as that of a legitimate child. The Draft is same as the Summary Draft.

III. A RECENT ISSUE

The hottest issue now in Japan is “Who is the “Mother” of a child borne by the gestational mother?” There is no provision about “mother” in the Civil Code. Only Article 779⁴⁸ provides that the acknowledgement by mother shall be necessary to establish the legal parental relationship. In 1962, however, the Supreme Court decided that the legal maternal relationship shall be established by the fact of delivery and the acknowledgement shall be unnecessary in normal cases.⁴⁹ This problem of surrogate motherhood or gestational motherhood has become a matter of great concern to the Japanese people in every sense.

According to this judgment, in Japan a woman who is an egg donor will not be legally regarded as the mother of a child born from that egg. However, there are quite a few couples who went to the U.S.A and had a child with the help of a gestational mother. In the U.S.A., some states permit a woman with the intention to be mother or a genetic mother shall be the mother of a child who was born by a gestational mother. In Japan, as mentioned above, only the gestational mother will legally be the mother. In short, the woman who is regarded as the legal mother of a child in Japan could be different from that in the U.S.A. Therefore, it has become a matter of grave concern which woman shall be registered as the mother at the Family Registration Bureau.

The Supreme Court decided to maintain the current precedents in 2007,⁵⁰ but in the same decision, many judges of the Supreme Court expressed the opinion that this problem should be solved by legislation, so that the legislative solution as soon as possible would be hoped for.

Now the government has referred this matter to the Science Council of Japan, and in December of 2006, a special committee was established. The legislature is waiting for their report before proceeding.

⁴⁸ Article 779 (Affiliation) provides that “A father or a mother may affiliate with his/her child out of wedlock.”

⁴⁹ Minshu, S.C. 16,7,1247 (27 April 1962).

⁵⁰ Saibanshojihou, S.C. 1432,4 (23 March 2007).

IV. CONCLUSION

As mentioned above, the work of the Legislative Council is stopping. I used to think that it is not be good to stop the work of amending the present family law after making the Draft, but now I think that it might be lucky, because both the Summary Draft and the Draft have not taken into account the recent influences on family law. It can be enlightening for other countries, developed and developing, to see the types of changes that the Japanese government and people are wrestling with to bring the family law provisions in line with current beliefs. Now the conception of “mother,” which is the very base of family law, is also shaky. On this occasion, we should reexamine both the Summary Draft and the Draft to make a new better family law with taking account of international affairs. Anyway it should not be long before the family law in Japan is amended to reflect more modern thinking.

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