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FAR EASTERN SECTION

POSTWAR CHANGES IN THE JAPANESE CIVIL CODE

KURT STEINER*

I. HISTORICAL OBSERVATIONS

THE FIRST great wave of foreign culture to reach Japan came from China by way of Korea. This period, which was landmarked by the coming of priests to Japan, resulted in the creation of a new moral structure, which even today forms an integral part of Japanese social ethics. In the legal field it is characterized by the adoption of the Taiho Code of 701 A.D., an event of first magnitude in Japanese legal history. With it Japan entered the family of Chinese law where it was destined to remain for more than 1,000 years.¹

The Taiho Code did not draw a clear line of demarkation between morality and law or between private law and public law. Its aim was not to regulate private intercourse between individuals delineating their respective rights, but to preserve moral order and harmony in human relations. Great importance was attributed to the form of government, the hierarchy of offices, and the discipline of officials and subjects. Most of the rules, therefore, fall into a category which we would describe today by the term public law. The few provisions in the Taiho Code which we would classify as rules of private law deal mostly with family and succession. Order in the family was considered as part of the general harmonious world order; the family was not merely a relationship between individuals but a public entity. Therefore, the rules governing order in the family were part of public law. This approach also characterized the regulations governing succession within this public entity, much as the rules of succession in ruling houses are thought of today as rules of public law.

The second great wave of foreign culture in Japan started with the coming of the "black ships" under Commodore Perry in 1853. This, too, was significant. The first important consequences were the opening of the country to trade and shipping and the adoption of Western technology. The opening of the country, which had been cut off from

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¹ This era may be subdivided according to the presence of indigenous and especially feudal elements during certain periods.

the rest of the world for more than two centuries, necessitated the adoption of new laws, not only to meet new situations arising from the changing of a primarily agricultural, feudal society into an industrial, commercial one, but also to place Japan in a position which would enable it to obtain equal trade treaties and the abolition of extraterritoriality. The Western powers would not grant these concessions as long as Japanese law followed a pattern utterly alien to them. The new laws were based, principally, on the continental European legal system. With their adoption Japanese law entered the family of continental European law. The Commercial Code, particularly important under these circumstances, was based on the German Code, as was the Bankruptcy Law and the Code of Civil Procedure. The Criminal Code and the Code of Criminal Procedure were influenced by their French counterparts.

Compared with the quick adoption of these codes, the creation of a Civil Code was a long and drawn out affair. The first compilation commission was formed in 1875, but the entire Civil Code was not enacted until 1898. The delay was due to a major difficulty which beset the drafters, namely, to compile a satisfactory law governing family and succession. One group of legal scholars advocated the doctrine that law should be an expression of the national character and a product of the history of the nation and that, therefore, the Japanese legal tradition in the field of family law and succession should find recognition in the new code. Another group, however, demanded immediate enforcement of a draft which was for the most part based on French law. The controversies of these two groups not only tore asunder the Japanese legal circles of the day, but led to heated discussions both in the press and at public forums and to violent debates in both houses of the Diet.² The position of the first group, usually called the "postponement party" because it wished to postpone the enforcement of a draft adopted in 1890, was closely related to the moral and public law approach to the problems of family law, which may be traced back to the Taiho Code. In trying to maintain the family customs of the past against the onslaught of Western ideas, this group felt that it was not merely arguing a legal question, but defending national morality. In this period, character-

² For an interesting account of this controversy see *Reception and Influence of Occidental Legal Ideas in Japan* by Takayanagi Kenzo in *WESTERN INFLUENCES IN MODERN JAPAN* (University of Chicago Press, 1931) and *THE NEW JAPANESE CIVIL CODE AS MATERIAL FOR THE STUDY OF COMPARATIVE JURISPRUDENCE*, by Hozumi Nobushige (Tokyo, 1912). (Whenever Japanese personal names are mentioned in this article, the surname precedes the given name in accordance with Japanese usage.)

ized by the "restoration" of the emperor to political power, the relationship of the family system to the emperor system was increasingly stressed. These two systems were considered as identical social arrangements at different levels of society, family, and nation. Thus it was felt by some that those opposing a thoroughly Westernized family and succession law were acting as "the bulwark of the throne."³ The result of this debate was the enactment of a Civil Code which may be divided into two parts: one comprising the books regarding general provisions, real rights, and obligations, based mainly on continental European law, and the other comprising the books on relatives and succession, principally an expression of tradition and customs, integrated with some Western ideas.

It is this code which was in force at the beginning of the Occupation.

The developments of law in Japan since the beginning of the Occupation have been marked by an increased influence of Anglo-Saxon legal ideas. For example, future legal historians concerning themselves with the Japanese Code of Criminal Procedure may well find that a new period, the Anglo-American period, began during the Occupation.⁴ The revision of the Civil Code in 1947, however, would more properly be considered as the second step of the reform of civil law which began in the Meiji Era. It completes the transition of Japanese civil law to the continental European family of law⁵

The new Constitution establishes principles regarding marriage and the family⁶ Its adoption was, therefore, the first step toward a reform of the Japanese family law in the postwar era. It is not difficult to explain historically why matters which today are generally considered as belonging within the sphere of private law were included in the Constitution. Nevertheless, it is an interesting fact that matters of marriage and family are once again being treated in an instrument of public law—this time, however, not to maintain the moral order of the past, but to insure conformity with a new moral order based upon individual dignity and the essential equality of the sexes.

³ HOGAKU SHIMPO, No. 130 (1892), quoted in *THE JAPANESE FAMILY SYSTEM AS SEEN FROM THE STANDPOINT OF JAPANESE WOMEN*, by Hani Setsuko (Japanese Institute of Pacific Studies, Tokyo, 1948).

⁴ See Appleton, *Reforms in Japanese Criminal Procedure under Allied Occupation*, 24 WASH. L. REV. 401 (1949), for a general survey see Oppler, *The Reform of Japan's Legal and Judicial System under Allied Occupation*, 24 WASH. L. REV. 290 (1949) and Blakemore, *Post-War Developments in Japanese Law*, 1947 WIS. L. REV. 632.

⁵ With the exception of one article, the revision of the Civil Code in 1947 dealt exclusively with family law. This paper deals with only this revision and not with changes in the field of civil law in general.

⁶ See Article 24 of the Constitution of Japan quoted below.

II. THE FAMILY SYSTEM AND ITS IMPORTANCE

Under the family system, not the individual but the family was the basic unit of society. The family was a patriarchal organization in which the head had considerable powers and where all the members had their "proper place." In this respect it was a representation of the harmonious world order in microcosm. At a higher level of social organization the same order prevailed, the emperor holding the position of head of the nation. From this latter premise the family system in Japan derived its political significance, which was thoroughly exploited during past decades. The stress laid by Confucianism on filial piety and the ancestor worship characteristic of later Shintoism were instrumental for centuries in maintaining the hold of the family system on Japanese society. This concept remained unchallenged until the impact of Western individualism made itself felt.

Needless to say, the family system was not without its practical aspects. In an agricultural community where individual landholdings are small, it is desirable to keep the land together in the interests of the entire family and to prevent its breakup into fragments by passing it to one successor. Under the family system the undivided holdings were handed down from the head of the house to the person who succeeded him in that capacity, usually the eldest son. This system also fostered a strong and mutual sense of responsibility among members of the family which, despite the vicissitudes of life in a country devastated by internal strife, did provide some measure of security for the individual, who, if needy, relied upon support by the family unit.⁷

It appears necessary to mention all these facts because they explain the conservatives' heated and dogged fight against those who were ready to give up this time tested and honored system, a fight which was waged not only in the nineteenth century but also after the end of World War II.

However, it is also true that democracy and the family system are incompatible. This was clearly recognized by those who opposed its continuation. Democracy is based on individualism, an ideology which is the very antithesis of the family system. While one aims at developing individuality, the other would sacrifice it for the good of the unit;

⁷ Taking note of the gravity of the housing problem after the war, the Japanese Government urged the homeless to seek "protection in the family system." (MAINICHI, Nov. 17, 1946).

while one desires equality, the other believes that a rigid hierarchy is essential to order; one requires social consciousness, the other breaks society into exclusive fragments providing for its members social security which otherwise would have to be the concern of society;⁸ one is based on the idea of right and the other on the notion of duty

To obtain some understanding of the practical effects of the family system on the daily lives of the Japanese, it is necessary to realize that the family unit under this system was not that of the West—husband, wife, and unmarried children—but rather the “house,” a unit built around the vertical line of ancestry, having as a rule the eldest male as its head and consisting usually of a number of families in the Western sense. The interests of the house took precedence over those of the individual, and obedience to the head of the house, filial piety, was considered the foremost virtue. In the West, marriage is assumed to be a highly personal affair and is usually the outcome of courtship between individuals. In Japan, however, marriage took on the character of duty toward the house, and was usually arranged through the services of an intermediary between the two houses. The two prospective spouses were little more than the objects of this arrangement. Usually they met only once or twice at formal get-togethers called *mai*.⁹ The personal desires of the prospective spouses were no matter of great concern, and resistance on their part to an arrangement made by the family would have placed them under a social stigma. After the wedding, the bride joined the house and, if she married the eldest son, the household of her husband. Legally her marriage became effective after the marriage was entered in her husband’s family register. The consent of the head of the house was necessary to make this entry. The actual registration was usually delayed for a period of some duration while the wife was actually on probation. Her relationship to the ascendants of her husband became of decisive importance to her future happiness. If his family found that “she did not suit the ways of the house” or “did not serve the parents-in-law well,” or if she did not bear a child “for the house” during this period, she was “cast off” or “sent back,” and her prospects for future marriage were greatly impaired if not altogether destroyed.¹⁰ The wishes of the husband were also considered second-

⁸ Compare THE IDEA OF A FAMILY STATE AND SOCIAL CONSCIOUSNESS by Oshima Yasumasa (Chuto Kyoiku, 1946).

⁹ Hence the name *mai-kekkon* for this type of marriage.

¹⁰ HANI, *op. cit.*, *supra* note 3 quotes an old census official in a village near Morioka City as follows. “It is impossible to get the actual number of cases of marriages and

ary, and numerous are the cases where he meekly carried out the desires of his elders if they decided that he should divorce a wife whom they had found wanting.

The eldest male child in the family, as its prospective head, took precedence over the wife in almost all respects. This was apparent in the most trivial aspects of daily life: thus the eldest son would eat before his mother, precede her into the traditional hot bath, etc. After his father's retirement or death, he succeeded to the house and lorded it over his mother in his position as head of the house.

The paternalistic pattern of the family system extended very nearly into all human relationships and molded them. The relationships between government and citizen, teacher and student, employer and employee imitated the traditional relationship between the head of the house and its members. The political importance of this fact can hardly be exaggerated. The family system was extolled by the nationalists in power before and during the recent war as the "beautiful custom" of the nation and objections to it were considered objections to the "national polity." It is against this background that we must view the reforms of Japanese family law.

After the war, the main fight in the Diet for the abolition or retention of this system was waged in discussions regarding those provisions of the new Japanese Constitution which dealt with family matters. When they were adopted, the fate of the family system appeared decided. But discussions regarding the various provisions of the new Civil Code implementing the Constitution, both in the drafting Committees and in the Diet, saw the conservative forces in a last ditch stand. As will be shown, their endeavors were not entirely without success.

III. THE CIVIL CODE BEFORE REVISION

It is, of course, true that Japanese family life was not based upon the Civil Code alone but upon custom and tradition. However, the provisions of the Civil Code were the confirmation in law of certain aspects of the family system. Thus the old Civil Code, as well as related laws such as the Family Registration Law, were based on the

divorces in this district because brides are married to houses and, therefore, they are often divorced when they are not found satisfactory to the houses before their names are even entered in the family register. It is usual that their names are left unregistered for one or two years, so the village office is quite unaware of the actual number of divorces of such nature which take place during that period."

house and not on the Western style family. The latter law provided for a legal location of the house at the place where its family register (*koseki*) was kept.

Article 732 of the old Code stated. "Persons who are relatives of the head of a house and are in the house, and their spouses are the members of the house." The head of the house was legally bound to support the members of this house.¹¹ His consent was necessary for entrance into the house¹² and he had the power to expel recalcitrant members, if, for instance, they established their place of residence in opposition to his wishes¹³ or married or effected an adoption without his consent.¹⁴

It has already been pointed out that registration of the marriage was usually delayed. But even after proper registration the house head and the parents of the husband retained some power to destroy the marriage. A judicial divorce could be based on the grounds that the wife had grossly insulted her husband's lineal ascendants.¹⁵ More frequently, however, a marriage opposed by the family was terminated by a so-called "divorce by agreement," which was easily achieved because tradition considered submission a virtue on the part of the wife and no resistance was to be expected, once the decision to terminate the marriage had been reached.

The old Code set a definite double standard for sexual infidelity. Under its provisions, only adultery on the part of the wife was a ground for judicial divorce.¹⁶ If the husband had a concubine and desired to accept the offspring of this relationship into the family, he could effect this by acknowledgment. This established the legal relationship of mother and child between his legitimate wife (*chakubo*) and the illegitimate offspring (*shoshi*). Again a "good wife" was expected to resign herself willingly to this arrangement.¹⁷

¹¹ Article 747

¹² Articles 735, 737, 738, 741, etc.

¹³ Article 749.

¹⁴ Article 750.

¹⁵ Article 813-8.

¹⁶ When Prof. Takigawa of Kyoto Imperial University asserted the equality of man and wife in regard to their responsibility for illicit intercourse, he incurred the displeasure of government authorities. There were, however, cases in which the Supreme Court recognized through its decisions the obligation of a husband to be faithful to his wife. (See HANI, *op. cit.*, *supra* note 3 at 18 and 39.)

¹⁷ In the Taiho Code, jealousy of the wife was one of the seven grounds for divorce. In the Temporary Legislative Deliberation Council formed in 1919 for a review of the Civil Code, Dr. Sakatani said that "in view of the traditional practice in this country, which hinges on the family system, to allow the husband to keep a concubine, very often with his wife's understanding, in order to maintain his lineage unbroken, it was problematical to denounce this custom as an act of conjugal infidelity." (Quoted in HANI, *op. cit.*, *supra* note 3 at 17 and 18).

Great importance was attributed to the perpetuation of the house. Adoption has always been widely used for this purpose, and the old Civil Code included detailed and extensive provisions in this respect.

Succession was divided into succession to the headship of the house and succession to the estate. The latter was opened when a member of the house died. Succession to the headship of the house was possible not only upon death of the head, but also for other reasons such as his retirement or loss of Japanese nationality. In case a woman was the head of the house, her headship was usually terminated by marriage, because her husband who joined her house (*nyufu*) succeeded her to the headship unless a contrary intention was expressed at the time of the marriage.¹⁸

It was in keeping with the patriarchal character of the family system that the male members of the family were given precedence over the female. Married women were considered as quasi-incompetent and had to obtain the husband's consent to all legal acts of any importance.¹⁹ The husband managed the property of the wife.²⁰ Property of uncertain ownership was presumed to be the property of the husband.²¹ As has already been mentioned, adultery was a statutory ground for judicial divorce only if committed by the wife.²² When the parental power was exercised by the mother, it was subjected to certain restrictions.²³ In both types of succession mentioned above preferential treatment was given to male successors.

This bird's-eye view of the old Civil Code may suffice to explain why, in the fight against the family system and all its antidemocratic ramifications, the family law provisions of the Civil Code became a very important target.

IV THE CONSTITUTION OF JAPAN AND THE TEMPORARY ADJUSTMENT OF THE CIVIL CODE PURSUANT TO ITS ENFORCEMENT

As has already been mentioned, the adoption of the new Constitution set the pattern for the revision of the Civil Code. Article 24 of the Constitution reads:

¹⁸ Articles 736, 788 and 904.

¹⁹ Articles 14 and 16.

²⁰ Article 801.

²¹ Always excepting the cases where the wife was the head of the house. (Article 807).

²² Article 813.

²³ Article 886.

Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation 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.

It is not difficult to find the actual practices and the various articles of the old Civil Code at which this provision aims. Broadly speaking, it calls for abolition of the institution of the house as being contrary to the individual dignity of the house members²⁴ and for elimination of provisions which discriminated against the female sex. Since the new Constitution, enacted on November 3, 1946, was slated to become valid as of May 3, 1947, and since on that day all laws in violation of the Constitution were to become invalid,²⁵ there was not sufficient time for a thoroughgoing reform of the Code. It was, therefore, necessary to adopt a makeshift device for the period starting with the new Constitution's enactment until a revision of the Civil Code could be worked out and agreed upon. Such a device was created in the form of a "Law concerning Temporary Adjustments of the Civil Code Pursuant to the Enforcement of the Constitution of Japan," consisting of only ten articles, brief enough to allow a quotation in full:

Article 1. The purpose of this law is to provide temporary measures with respect to the Civil Code which are founded upon individual dignity and the essential equality of the sexes, pursuant to the enforcement of the Constitution of Japan.

Article 2. Provisions which, on the ground of the individual being a wife or mother, restrict legal capacity, etc., shall not be applied.²⁶

²⁴ This was by no means generally acknowledged at the outset of the discussions regarding the new Constitution in the Diet. It is interesting to compare the statements of the government spokesmen on this question, made at various times during the course of these deliberations. In the beginning it was planned to abolish only the rights of the house head, however by August 28, 1946, the government's views had crystallized sufficiently to allow a statement by Minister of Justice Kimura that it was planned to "eliminate the so-called family system centering around the head." For a more detailed description of the Diet proceedings, see *The Revision of the Civil Code of Japan*, FAR EASTERN QUARTERLY, vol. IX, February, 1950, No. 2, 174 ff. by the same author.

²⁵ Article 98 of the Constitution states. "This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript of other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity."

²⁶ This article, as well as article 5, par. 2, aimed at the revision of articles 14 to 16 of the old Code which declared married women as quasi-incompetent; of articles 801 and 807 which gave the husband the right to manage the wife's property and stipulated a legal presumption of his ownership in case of uncertain property rights; of article 886 which limited the parental power of the mother, etc.

Article 3. Provisions relating to the head of a house and members of a house and all other regulations of houses shall not be applied.²⁷

Article 4. An adult shall not be required to obtain parental consent for his or her marriage, divorce, adoption or dissolution of adoption.²⁸

Article 5. A husband and wife shall live together at a place determined by their mutual agreement.

The application of provisions concerning the regulation of the property of husband and wife which are contrary to the essential equality of the sexes shall be excluded. In cases where there are extremely unchaste acts on the part of either spouse, the other may bring an action for divorce on that ground.²⁹

Article 6. Parental power shall be exercised jointly by the father and mother.

If a father and mother are divorced or a father has acknowledged a child, the person who shall exercise parental power must be determined by mutual agreement of the father and mother. When a mutual agreement is not reached or when it cannot be reached, the court shall make the determination.

The court may change the person who exercises parental power in the interest of a child.³⁰

Article 7 Provisions relating to the succession of the headship of a house shall not be applied.

In addition to the provisions of Articles 8 and 9, provisions relating to the succession to the property shall be followed.³¹

Article 8. Lineal descendants, lineal ascendants and brothers and sisters shall become successors in the above-mentioned order. A spouse shall

²⁷ This article abrogated Chapter 2 of book IV of the old Code, entitled "The Head and the Members of the House," and required changes in a great number of provisions in the remainder of book IV and in book V.

²⁸ One of the provisions made ineffective by article 4 was that of article 772 of the old Code, which stipulated that a child, in order to marry, must obtain the consent of both its father and mother "in the same house" until the completion of its thirtieth year in case of men, or its twenty-fifth year in case of women. The words "in the same house" show again that marriage was considered a matter of primary interest to the house. As a result, if the parents were divorced and the child was living with the mother, it was not the mother (who had left the husband's house by virtue of the divorce), but the father who had to give his consent. The consent of the head of the house was required by article 750 of the old Code, regardless of the age of the prospective spouses. Other provisions of the old Code affected are articles 809 (divorce), 844 (adoption) and 863 (dissolution of adoptive relationship).

²⁹ The first paragraph of this article was directed against the provision that the choice of domicile of the members of the house was subject to approval by the head. As in the case of the above mentioned article 750, the sanction was expulsion from the house. Paragraph 3 eliminated the "double standard" which made adultery a cause for divorce only when committed by the wife.

³⁰ The principal provisions, abrogated by this article, are mentioned in the part of this paper dealing with parental power.

³¹ This article abolished the distinction between succession to the headship of a house and succession to an estate which had governed Japanese succession law.

always be an heir, and his or her share in the estate shall be determined in accordance with the following provisions

1. It shall be one-third, in cases where lineal descendants are also heirs.
2. It shall be one-half, in cases where lineal ascendants are also heirs.
3. It shall be two-thirds, in cases where brothers and sisters are also heirs.³²

Article 9 The total amount of the legally secured portions of heirs other than brothers and sisters of the deceased, shall be in accordance with the following provisions

1. One-half of the property of the deceased in cases where all of the heirs are lineal descendants, or all of them are lineal descendants and the spouse.
2. One-third of the property of the deceased in other cases.³³

Article 10. Provisions of other statutes which are contrary to the provisions of this statute shall not apply

Supplementary Provisions

The present law shall come into force as from the day of the enforcement of the Constitution of Japan. This statute shall lose its effect on and after the 1st day of January, 1948.

These temporary measures constituted a blueprint for the amendment of the Civil Code and gave a preview of the wide scope of the legislative work involved.

V THE NEW CIVIL CODE

1. *Its Creation*

In July, 1946, the Japanese government appointed a Temporary Legislative Investigation Committee under the Cabinet. The Justice Ministry, as the agency primarily concerned with the legal reforms, appointed a similar committee. These committees consisted of ministerial officials, judges, scholars, lawyers, journalists, representatives of both houses of the Diet, etc. An important feature was the participation of women—a vigorous participation which augured well for the future of the provisions aiming at the emancipation of Japanese womanhood. These committees worked on an informal basis together with Occupation lawyers in the Government Section of SCAP. In their

³² The substance of article 8 has been incorporated in articles 887 to 890, and 900 of the new Code. In the old Code, preference was given to male successors to the headship of a house and the surviving spouse inherited only if there were no lineal descendants.

³³ In article 1131 of the old Code, the legally secured portion of the spouse was the same as that of ascendants, i.e., one-third. The substance of article 9 of the "Temporary Measures" became article 1028 of the new Code.

joint meetings the Americans were very well aware of the ticklish problem of changing legislation in a field so intrinsically a part of the fabric of Japanese life. There was no endeavor on their part to push any reform which was not supported by those of their Japanese colleagues who had become convinced that the Civil Code was outmoded.⁸⁴ On the other hand, there can be no doubt that their support was helpful to the opponents of the family system, who a few years earlier would have considered open opposition dangerous and who would have had less than an equal chance against their more conservative fellow members. The draft finally adopted, while faithfully implementing the new constitutional principles, shows certain features which appear to be the outcome of a compromise between these two groups. After the draft was passed upon by the Cabinet, public hearings, which aroused considerable interest, were held in the Diet. The discussions on this legislation received wide coverage in the press and on the radio. The bill was passed by the House of Representatives on October 30, 1947, and by the House of Councillors, with one amendment, on November 21, 1947. Referred back to the House of Representatives, it was adopted by that House in its original form on December 9, 1947.⁸⁵ The Law concerning the Partial Amendment of the Civil Code (Law No. 222 of 1947) was promulgated on December 22, 1947, to become effective on January 1, 1948. In the wake of this amendment, it was necessary to change more than sixty other laws including the Family Registration Law, various tax laws and even such special statutes as the Law concerning Control of Fire Weapons and Explosives, the Electrical Industry Law, etc., most of which contained references to "members of the house."

2. *Echoes of the Family System*

Since an outline of the reform, showing its incisive character, has already been given in connection with the Temporary Adjustment Law, we may now note especially those provisions which retain traces of the family system—not in order to minimize the tremendous achievements of the revision, but to show its compromise character. Besides, these provisions are likely to be of more interest to the reader than those which have come to coincide with the family law and practices of the West.

Probably foremost among these echoes of the family system is the

⁸⁴ Oppler, *supra* note 4 at 290.

⁸⁵ The amendment referred to is described below in the chapter dealing with divorce.

innocuous-looking provision of article 730 which reads: "Lineal relatives by blood and relatives living together shall mutually cooperate."

This article was hotly contested by progressive Japanese legal scholars for a number of reasons. In the first place, it is not a rule of law but an exhortation or a moral rule. This fact was considered highly significant by the opponents of article 730 for reasons on which we cannot elaborate within the scope of this article. Suffice it to state that these scholars are opposed to such exhortations as a matter of principle, because they have convinced themselves that a law should contain only rules of law enforceable before a court of law, and that the insertion of exhortations, frequent enough in Japanese laws, is a sign of a feudalistic concept of the relationship between the government as the makers of law and the citizen who is governed by it. These legal scholars advocate a separation of moral rules from rules of law, each set of rules effective in its proper sphere of social life.

But beyond this consideration of legal philosophy, the substance of article 730 came under attack for two reasons: first, the opponents contended that, in stipulating the duty to cooperate only for lineal relatives, this provision stresses the vertical axis of the family system which distinguishes the Japanese house from the Western family. The other objection was directed against the stipulation that "relatives living together" shall cooperate. This objection derives its significance from certain facts of Japanese life which may require some explanation. In the West, the number of households consisting of more than one family (in the Western sense) is negligible. This is not so in many parts of Japan, however, where the family system retains its importance. Reference has already been made to the fact that the newly married couple frequently lives together with the parents of the husband. HANI Setsuko in her study on the "Family System as Seen from the Standpoint of Japanese Women" claims that the number of households composed only of husband, wife, and children represent only 30 per cent of the total number of households, and that in the majority of cases several married couples live together in the same household.⁸⁶ A survey recently conducted by the Public Opinion and Sociological Research Division, Civil Information and Education Section, SCAP, also shows that the number of households consisting of more than one

⁸⁶ HANI, *op. cit.*, *supra* note 3 at 13.

married couple is still considerable in nonindustrial areas.⁸⁷ On its face, the provision of article 730 aims at insuring a mutual feeling of obligation towards the other couple in such a household. In the light of the past, however, in which the older couple exacted subservience from the younger couple and particularly from the wife of the son who had "newly entered the house," it may be anticipated that this provision will perpetuate notions of filial piety, basic to the family system.

It is significant that the same phrase ("relatives living together") replaced the phrase "members of the house" in the laws which had to be amended pursuant to the Civil Code revision. A new unit, somewhere between the Western family and the house, has thus been introduced into Japanese law

3. *Choice of Spouse*

The new Code abolished the requirement of the consent of the head of the house to marriage of its members and the sanctions against marriages concluded without such consent. Parental consent is also no longer necessary unless the child is a minor.⁸⁸

It may be anticipated that this change will weaken the concept of marriage as a duty toward the house, underlining the traditional type of marriage (*mai-kekkon*). A comparison between the number of marriages based upon free choice of spouse (in Japan commonly called love marriages) and the number of *mai-kekkon* in equal periods of the prewar and postwar era, may illustrate the present situation. Statistics of the Population Research Office of the Welfare Ministry, compiled in 1948, show the following sample figures:

"Love Marriages"

	<i>Prewar</i>	<i>Postwar</i>
Yamanote District (Tokyo).....	10.0%	37.8%
Shitamachi District (Tokyo).....	15.3	40.0
Farm villages—Saitama Prefecture.....	8.0	10.5
Mountain villages—Saitama Prefecture	6.7	17.2

⁸⁷ For example, in Higashi-Toyonaga-Mura the ratio between one-family households and two-family households was found to be 21.7 to 63.0; in Shikai-Mura 17.6 to 59.1.

⁸⁸ Compare articles 750 and 772 of the old Code and article 737 of the new Code.

"Miai-Kekkon"

Yamanote District (Tokyo).....	123 couples	72 couples
Shitamachi District (Tokyo).....	49	14
Farm villages—Saitama Prefecture.....	70	28
Mountain villages—Saitama Prefecture	42	20
	284	134

These statistics show an increase of love marriages in the postwar period. On the other hand, they show that such marriages are still, by far, in the minority

Some typical elements of the present state of affairs are also contained in an interesting case which aroused much comment in late 1949. It appears that a female member of the House of Representatives, belonging to a leftist party, fell in love with a conservative colleague. In order to be free to marry her, this colleague divorced his wife with her consent. The woman legislator's father, to whose efforts her political career was largely due, was vehemently opposed to such a marriage and went as far as threatening her with his suicide. One of the reasons he advanced was that he, who had given his life for her political career, would lose face before the electorate if his daughter should marry a man of conservative leanings. The daughter, put in a grave dilemma, posed certain conditions for marriage to her colleague. She demanded, for instance, that he become a model son to her father and that he assume her family name. For a while the case seemed closed by a subsequent statement of the father that his daughter, of her own free will, had decided to obey him and to turn down the marriage offer.³⁹

The *Nippon Times*, commenting on the affair in an editorial on October 10, 1949, stated quite rightly that this story reveals the incongruous tapestry of life today in Japan and summed up the various elements as follows: "A lady legislator apparently modern enough to take up a leftist ideology, yet meekly submitting to the dictates of her father and killing her individuality; a father, progressive enough to believe in the political future of a woman, yet feudal enough to demand complete submission from his daughter and to threaten suicide; the wife sacrificing herself without complaint to further her husband's

³⁹ We may add that two months later the papers reported the marriage of the two legislators.

career; the leftist legislator's insistence that the man assume her family name; and the thought of both the father and the daughter of the electorate—one of the pillars of democracy”

4. *Family System and Family Name*

Some of the drafts contemplated by the Temporary Legislative Investigation Committee attributed great legal importance to the family name (*uji*). By way of example, we may trace the development of the provision regarding termination of the marital relationship by death of a spouse. Article 729 of the old Code stated that death terminates the relationship by affinity between the surviving spouse and the parents-in-law if the surviving spouse leaves the house. According to an intermediate draft of the revision, this relationship was terminated if the surviving spouse assumed his or her former family name. The similarity between these two provisions is easily apparent. Provisions of this sort aroused considerable anxiety that the house might be revived under the guise of the family name.⁴⁰ The provision of article 728 of the new Code, which was finally adopted, stipulates that the marital relationship is terminated by the death of either husband or wife if the surviving spouse declares his or her intention to terminate it. During the first six months of 1949, 6,498 persons declared such an intention.⁴¹

References to the family name were eliminated also in a number of other provisions of earlier drafts. However, article 750 of the new Civil Code is still of interest in this connection. It reads: “Husband and wife assume the surname of the husband or wife in accordance with the agreement made at the time of marriage.”

This provision, too, has to be viewed in the light of the law and the practices of the past. In Part III of this article, we have noted that the husband sometimes joined the wife's house in order to insure its continuance or to provide it with a male head. He was then called an “incoming husband” (*nyufu*). There is an obvious similarity between the case of a *nyufu* under the old Code and the case of a husband who assumes the wife's surname in accordance with article 750 of the new Code.

⁴⁰ That the family name under the old system was nothing but the external manifestation of the house is apparent from article 746 of the old Code: “The head and the members of the house assume the surname of the house.”

⁴¹ The ability to terminate this relationship is important because the Family Court may, under special circumstances, impose a duty to furnish support to relatives by affinity upon the widow (article 877).

Related to article 750 is article 767 of the new Code which reads:

A husband or a wife who has changed his or her surname by reason of marriage resumes, by reason of divorce by agreement, the surname which he or she had assumed before the marriage. [According to article 771, this applies also to judicial divorces.]

In this case, a parallel may be drawn to the provision of article 739 of the old Code that the divorced wife and the divorced *nyufu* return to their original houses.

It would be an interesting subject of research to determine to what extent these similarities between old and new provisions actually tend to keep alive the house concept in the mind of the population. A comparison between the number of *nyufus* before the revision and the number of cases in which the husband now assumes the wife's surname in accordance with article 750, for instance, would render an illuminating indication of the present strength of that concept.

5. *Divorce*

The new Code maintains the division of divorce into "divorce by agreement" and "judicial divorce," known to the old Code. As has been stated, "divorce by agreement" was frequently a disguise for an actual "expulsion of the wife" who had, for instance, failed to win the good will of her parents-in-law. Under the new law as under the old one, a divorce by agreement becomes valid by a simple notification to the keeper of the family register. The Family Registration Law provides that this notification has to be signed by both husband and wife. Nevertheless, divorce by agreement is still frequently imposed upon the wife. In this connection, Tanaka Kotaro, then a member of the House of Councillors and now the Chief Justice of the Supreme Court, stated before the House of Councillors on November 21, 1947

It frequently happens in Japan that a husband files a divorce without the knowledge of his wife, the latter being divorced before she is aware of it, and that a husband compels his wife to put the seal of her consent to a document for filing their divorce, the wife being turned out of home "naked," as the people put it. A helpless woman is, in practice, unable to contest the case by bringing action to have the divorce legally unlifted or to have the divorce legally cancelled, and she lets the matter drop, in tears. Of such pathetic instances, there is a countless number.

He proposed an amendment requiring the attestation of the court of

domestic relations for divorces by agreement before their registration.⁴² His amendment was vigorously supported by one of his female colleagues, Mrs. Oku Muneo, who based her argument for protection of wives against coerced "divorce by agreement" on the fact that, while in the law equality of sexes has been established, its realization in practice is yet to be achieved: "A new era characterized by the equality of the sexes is an abstraction found nowhere else than in the provisions of the laws." She contended that the question of divorces by agreement has to be viewed in the light of reality and asked: "Can we interpret this term in law in a different sense now that the law has been altered?"

The amendment was adopted by the House of Councillors by a vote of 102 to 75. It was defeated, however, in the House of Representatives by more than a two-thirds majority, the argument of the opponents being mainly that "freedom of divorce" should be as complete as "freedom of marriage."⁴³

Statistics indicate that the number of divorces by agreement has always been considerably greater than that of divorce by decision.⁴⁴ This is still true today. Thus Mrs. Ohama Eiko, a member of the Tokyo Family Courts Mediation Committee, opined in an interview on September 24, 1949, that the actual number of divorce cases in Tokyo has been ten times as great as the number of cases brought to the court.⁴⁵ Eighty per cent of the latter cases were presented by wives.⁴⁶ A survey of the Tokyo Family Court in 1949 showed that, during a period of three months, 300 divorce cases were accepted, of which 243 were brought by wives.⁴⁷ This is sometimes hailed as a sign that "the weaker sex is resorting to the equal rights clause under the new Constitution" and that Japanese women are "gradually liberating themselves from the feudalistic family system."⁴⁸ More skeptical observers, however, wonder whether the real reason for the great percentage of divorce suits by wives is not the fact that men still utilize

⁴² A similar proposal had previously been defeated in the Judicial Committee of the House of Representatives.

⁴³ OFFICIAL GAZETTE EXTRA No. 55, November 22, 1947

⁴⁴ An article on *Evolution of Divorce* by Kurashige Tetsuichi in the *Nippon Times*, January 13, 1950, states that in 1937 about 99 per cent of all divorces were divorces by agreement. The article continues: "In the light of the women's semi-bondage status, it would be interesting to speculate how many of these divorces were actually secured by mutual consent."

⁴⁵ Mrs. Ohama also believes that settlements by agreement between the families are usually to the disadvantage of the wife.

⁴⁶ *Nippon Times*, November 1, 1949.

⁴⁷ Kyodo, September 24, 1949.

⁴⁸ *Ibid.*

the simple and private expedient of a so-called divorce by agreement when they want to end a marital relationship.

Actual equality of women regarding divorce is closely related to their economic independence. Provisions concerning disposition of property and alimony are, therefore, of importance. The old Code contained no specific provisions in this respect. The Law for Temporary Adjustments was also silent on this point. Mrs. Yamashita Harue, a member of the House of Representatives, interpellated the then Minister of Justice Kimura on March 18, 1947, on this question. She stated that the economic position of men and women is unequal, and that because of this inequality women, divorced without guilt on their part, undergo great hardships when forced to shift for themselves. She asked whether the government was prepared to provide for a proper alimony claim of the wife. Minister Kimura replied that the government intended to introduce such a plan in the final revision of the Code.⁴⁹

The new Code contains the following provision. Article 768. "Husband or wife who have effected divorce by agreement may demand the distribution of property from the other spouse." This provision is applicable with necessary modifications to judicial divorce (article 771) Strictly speaking, this provision does not stipulate an alimony claim. Only by allowing the court to determine the mode of distribution, taking into consideration all circumstances, does it leave the door open for admission of such a claim based on the fact that divorce was caused by the other party and upon the need of the plaintiff. Actually in most cases before the Tokyo Family Court, the plaintiff simply demanded "a proper sum of money" without mentioning a specific amount.

As to the custody of children in case of divorce, the old Code stipulated in article 812 that in the absence of an agreement the custody shall vest in the father. In the same case the new Code leaves the decision to the Family Court as already outlined in article 6 of the Law for Temporary Adjustments.

6. *Parental Power—Family Council and Family Court*

The principles of the new Constitution also called for some changes in the chapter of the Civil Code which deals with parental power. Thus

⁴⁹ OFFICIAL GAZETTE EXTRA, No. 20, March 19, 1947

parental power ends now when the child reaches majority,⁵⁰ the requirement of the old Code, that the child must have an independent livelihood in order to attain majority, having been deleted. Under the old Code, parental power was a prerogative of the father, provided that he was "in the same house"; only when the father was unknown, dead, or unable to exercise his power, or when he had left the house was this power exercised by the mother. Now parental power is exercised jointly by father and mother.

The old Code restricted the parental power of the mother by requiring that she had to obtain the consent of the family council for certain important legal acts. This family council, which the old Code treated in a separate chapter, was appointed and convened by the Court. Among its functions were, besides the above mentioned consent to important legal acts of the mother who exercised parental power (article 886), appointment of a special representative on behalf of the child when the interest of the person exercising parental power conflicted with those of the child in regard to certain acts (article 888), appointment of a guardian and a supervisor of the guardian in certain cases (articles 904, 912), etc.

The entire institution of the family council has now been abolished. Supporters of the family system contended that the drafters of the Civil Code revision, in abolishing the family council, showed a regrettable indifference toward family ethics. They were in favor of settling family matters by a meeting of relatives rather than by outsiders.⁵¹ This sentiment is understandable. The question must be asked, however, whether this defense of the family council does not derive its true significance from the notions of semi-autonomy of the house inherent in the family system—a notion not conducive to the development of the social consciousness needed in a democracy

To the extent to which the functions of the family council were still necessary after the revision, they have been transferred to the Family Court. Since this court has been variously mentioned in the preceding pages, it may be well to sketch with a few words its history, organization and functions.

Plans for such courts of domestic relations were already contained

⁵⁰ We have already noted that article 4 of the Temporary Adjustment Law abolished the requirement of parental consent to marriage of children up to their twenty-fifth or thirtieth year respectively, for women and men, stipulated in the old Code. In addition, article 753 of the new Code stipulates that minors attain majority when they contract a marriage.

⁵¹ Vide, e.g., Nakata Kaoru, *The Amendment of the Civil Law and the Family System of Our Country*, HORITSU SHIMPO, 741.

in the recommendations of the Temporary Legislative Deliberation Council founded in 1919. In 1939 a system for mediation of family disputes was enacted. Such mediation is also a function of the new courts of domestic relations which were established simultaneously with the coming into effect of the new Civil Code on January 1, 1948. These courts, of which there are 279 at present, provide an inexpensive, nontechnical method of adjusting domestic problems. Their procedures are not public and are characterized by informality. They have jurisdiction in such matters as divorce, marital property, custody of children, parental rights, adoption, duty of support, inheritance, etc. Attached to the courts are conciliators and counselors who are selected every year from all walks of life. The court acts both as a mediation organ and a judicial organ, and in addition is open for counsel to those in domestic difficulties.

When the Court Organization Law was amended in December 1948, a special chapter dealing with family courts was inserted. These family courts which came into existence on January 1, 1949, took over the functions of the court of domestic relations but also were assigned certain juvenile court functions.⁵²

The importance of these courts in family matters is attested to by the great number of cases handled by them in 1949: they received 288,680 applications for judgment and 46,593 applications for mediation.⁵³

Cases concerning marital relations which are not brought to the family court are frequently settled in accordance with the accepted standards of the family system by the person who acted as go-between in the conclusion of the marriage. This is particularly true in agrarian districts. The great scope of the activities of the family courts is, therefore, a significant contribution to the actual democratization of Japanese family life.

7 Adoption

Professor Kawashima Takeyoshi in his book, *The Family Organization of Japanese Society*,⁵⁴ discusses a stage of Japanese society in which the house consisted not only of a number of married couples related to each other by blood or affinity and their descendants, but also of their slaves. At such a stage the line between members of the

⁵² Oppler *supra* note 4 at 307.

⁵³ Statistics in GUIDE FOR THE FAMILY COURT (Family Bureau, General Secretariat of the Supreme Court, Tokyo, 1950).

⁵⁴ *Nihon Shakai no Kazokuteki Kōsei*, Tokyo, 1948.

family and its slaves was often not clearly drawn, and to buy a child as a laborer was not well distinguished from adopting it as a member of the family⁵⁵

A Ministry of Justice Ordinance of early Meiji days⁵⁶ outlawed adoptions contracted in consideration of a sum of money as being actually a form of trade in human beings. In spite of this ordinance, it still happens in many areas outside of Tokyo, that geishas, who obligate themselves to lifelong service, are adopted by their masters, and succeed them in status and business. There is little doubt that adoption is often used as a disguise for child traffic in certain parts of Japan. Article 798 of the new Code, which requires the permission of the Family Court for adoption of a minor, aims at preventing this practice.

The principal function of adoption in Japan, however, has been for centuries the continuation of the house.⁵⁷ This explains certain provisions of the old Code, such as article 848, which allowed an adoption by testament, a device unknown in Western countries. Article 838 provided that a person having a male presumptive successor to the headship of the house might not adopt a male child except when the latter was to become the husband of his daughter. This article shows that the need for an adoption was not recognized where a presumptive male successor existed; an exception was allowed only if it was desired to keep a daughter in the house. With the abolition of the house, this article, as well as article 848 and others of a similar nature, had to be deleted.

In the continental European parent codes of the Japanese Civil Code, adoption is not considered primarily as a device for the continuation of the family, but as an artificial parent-child relationship entered

⁵⁵ Remnants of this stage still exist in today's Japan. Thus, Professor Kawashima cites the example of Tobishima Island where men engage in fishery while the farmland is cultivated by women. On this island there exists the custom to "adopt" boys of farm villages in order to use them as fishermen. Unless they hold the position of the eldest son, the "adoptive relationship" is terminated when they reach the age of twenty-one.

⁵⁶ Ministry of Justice Ordinance No. 22 of 1872, based upon Cabinet Order No. 295 of 1872.

⁵⁷ Adoption for this purpose was important not only because of considerations of ancestor worship, but also because under Tokugawa law "the estate of a person, dying without male issue and without having adopted a son is forfeited without any regard to his relations or connections." (Comp. Chapter XLVII of the so-called "Legacy of Ieyasu.") The practices, sometimes resorted to in order to secure the continuity of the house, may be illustrated by the case of Takano Nagahide, a forerunner of the restoration movement. Desiring to be free of family responsibilities, he decided not to marry the young woman to whom he was affianced. Instead, he adopted her as his daughter and then married her to a man, who entered Takano's house, becoming its head in the place of Takano Nagahide himself. Thus having cared for the continuation of his house, Takano could devote himself fully to the service of the country. (See Sansom, *THE WESTERN WORLD AND JAPAN*, New York, 1950.)

into in the interest of the adoptive parents, usually childless, and of the adoptive child who is to be provided with a good "parental home." Because of this approach, the European codes generally stipulate that there must be a certain difference in age between adoptive parents and child, usually 20 years. The new Code, however, follows the old Code in providing simply that no ascendant or person of older age may be adopted.⁵⁸

8. *Succession*

The outstanding feature of the revision of the last book of the Civil Code, which deals with succession, is the abolition of the succession to the headship of the house. A remnant of this type of succession may be found in article 897 of the new Code, one of the most contested provisions of the reform. This article excepts the ownership of genealogical records and utensils for religious rites and of tombs and burial grounds from the general rules regarding succession. It stipulates that these records, utensils, etc., shall evolve upon the person, who according to custom or according to the designation of the person succeeded to is to preside over the worship to the memory of the ancestors. True, this could be called a type of succession to the headship of the house only in a very limited sense. Nevertheless, the claim of opponents of this provision that it will tend to perpetuate one of the pillars of the family system, namely ancestor worship, may not be without justification.

We have seen that succession to the headship resulted in a type of primogeniture according to which the entire inheritance of the head was turned over to one person, usually the oldest son. As has already been pointed out, there is a certain justification for a system that keeps the inheritance together in case of small agricultural land holdings which are frequent in Japan. On the other hand, primogeniture was undoubtedly a pillar of the family system. This put the drafters of the new Code in a real dilemma. to maintain this type of succession meant retaining an important part of the family system; to give it up meant an unrealistic fragmentation of agricultural holdings.⁵⁹ They attempted to solve the dilemma by giving to the courts certain powers of discretion in partitioning the estate in the absence of a will or an

⁵⁸ Article 838 of the old Code and article 793 of the new Code.

⁵⁹ The problem of protecting small land holdings against impractical fragmentation by succession is not unknown to European lawmakers. While it is true that in these countries the question of the family system would hardly arise, there is, on the other hand, no doubt that endeavors to create special exceptions were always spearheaded by the less progressive elements in the legislature, the extreme being reached in the case of Nazi *Erbhofgesetz*.

agreement of the successors.⁶⁰ In addition, the government prepared simultaneously with the revision of the Code a "Bill for Special Exceptions Concerning Succession to Agricultural Property" This plan aroused fears that it would emasculate the reform, so the government's plan was postponed and the question is still under consideration. In the meantime, the inertia of social custom asserts itself: as a rule, the farmland is still maintained in the hands of the oldest son because the other heirs forego their succession rights. Thus, according to an investigation conducted by the Ministry of Agriculture and Forestry in six villages in Yamagata Prefecture in 1949, the oldest son inherited in 98 per cent of the cases. Among those who refused inheritance were 101 women as compared to 74 men.⁶¹ According to another survey of the same Ministry, conducted on a wider scale, the second son and other heirs are voluntarily forfeiting their claims in about 85 per cent of the cases.⁶² Applications for the waiver of the right to succession, especially numerous in rice producing areas, constituted almost one-half of all adjudgment cases before family courts in Japan in 1949 (143,508 out of 288,680 applications).⁶³

9 *Civil Code and Family Registration Law*

We have noted that the old Code provided that certain acts affecting the personal status become valid by notification to the registrar in accordance with the Family Registration Law (*Koseki-ho*).⁶⁴ In spite of some abuses—such as the delay in registration, leading to "marriages on probation" and the "divorces by agreement" forced upon the wife—no strong opposition to the retention of the registration system as such was voiced in the Civil Code drafting committees. The system is, therefore, retained in the new Code. It was, however, necessary to revise the Family Registration Law, which was based on the abolished house system, and the scope of this revision became the object of much controversy. Thus it was felt by some legal scholars that anything

⁶⁰ Thus the court, in effecting partition of an estate, may take into account the kind and nature of the things or rights constituting the estate, the profession of each successor and other circumstances. A person to be succeeded to may by will determine or commission a third person to determine the mode of partition or forbid partition for a period up to five years. If no determination in this respect has been made by the deceased and if no agreement can be reached between the successors, the court may, if special reasons exist, forbid partition of all or part of the estate for a fixed period.

⁶¹ *Asahi Shimbun*, Oct. 10, 1949.

⁶² *Nippon Times*, April 14, 1950.

⁶³ Statistics in *GUIDE FOR THE FAMILY COURT*, (Family Bureau, General Secretariat of the Supreme Court, Tokyo, 1950).

⁶⁴ Among these acts were marriage, divorce by agreement, adoption, dissolution of adoptive relationship, etc.

short of a complete overhaul of the law would tend to maintain the family system in the mind of the population.

Opposition was raised, for instance, against the provision that in case of marriage of a woman "appearing first in the family register," the husband who assumes her surname shall be entered in her family register.⁶⁵ In such provisions, the echo of notions of female househeads and *nyufu* marrying into the house is clearly perceptible.

Some scholars desired a change in the name of the law, for *Koseki-ho* means House Registration Law. As a matter of fact, however, the registration unit is no longer the house—as heretofore—nor the individual—as advocated by the above mentioned group of scholars—but the Western-type family of husband, wife, and unmarried children. When a son marries, a new register is set up for his family. However, the place of such registration, still called *honseki* as under the old law,⁶⁶ is the place where heretofore the house had its legal location. Thus sons and grandsons, who may have moved to the big cities in the wake of industrialization, remain tied to the location of their former house unless they apply in accordance with article 108 of the revised law for a transfer of the locality of their register. Statistics of the Attorney General's Office show that 132,282 persons availed themselves of this possibility during the period from January to June, 1949.

Another provision of the new Family Registration Law which came under attack as perpetuating the house system stipulates that the divorced wife returns to her original family register. In this case, too, the law gives her the possibility to set up her own register instead by a simple notification to the registrar.

This sketchy presentation of some points of the amendment of the Family Registration Law may have shown that the individual now has a wider margin for action in matters concerning his family status and family registration. The effectiveness of the reform will depend to a great extent on the utilization of this margin by a great number of people and, especially, by the younger generation.

VI. CONCLUSION

In connection with any reform endeavor, the question presents itself: Did it achieve its aims? It is difficult to give an unqualified

⁶⁵ Article 16 of the Family Registration Law (No. 224 of 1947).

⁶⁶ This term is usually translated as "permanent domicile" which does not do justice to the true meaning. Domicile involves a notion of dwelling or settling in a place. *Honseki* considers only the fact of registration. A verbal translation would be "main register."

answer to this question. If, in the case at issue, it means whether the family system is dead and buried, the answer must be in the negative. A system which has roots extending over more than a thousand years—even if it has undergone some changes during this span of time—can not be abolished by legislative decree. The actual practices referred to in this paper will corroborate this truth and show, particularly, that it is still too early to make funeral orations for the family system.

But the question regarding the success of the reform may also mean whether it will endure and become a part of the fabric of national life or be rejected as an element alien to the national culture. This question appears particularly pertinent in the light of the fact that the reform was carried out under a military occupation. Predictions of a short duration of the reform are usually based upon a static concept of the nature of civilization. In accordance with this concept, Japanese civilization is considered unchangeable, so that what was incompatible with it yesterday will be equally incompatible tomorrow. If civilization, however, is not static, but a particular set of responses to the problems with which life confronts a specific society, then the civilization of such a society will necessarily adjust itself to the changes of the external circumstances which require the solution of problems hitherto unknown or deemed insignificant. To give an illustration from the field of economics: what may have seemed a satisfactory response to the problems of a primarily agricultural society may be inadequate in many respects in a period in which the center of gravity has shifted to industry and trade. It is true that a society's response to new situations may be shaped by its historical experiences. The basic fact remains, however, that a civilization is intrinsically connected and changes with external circumstances.

Accepting this view, our question may be rephrased as: How does the system of family relations which finds expression in the new Code fit into the present stage of Japanese civilization? Is it more adequate to that stage than the former system?

The opinion that the family system had become outdated has by no means originated in the minds of postwar reformers. Even as far back as 1912, Hozumi Nobushige, an eminent authority in this field, realized that the family system was gradually weakening and that the old family was rapidly disintegrating. He envisioned the system of the old Code as suited for a transition stage, in which Japanese society was passing from the phase of the family unit to the phase of the individual

unit.⁶⁷ More recently another scholar, Nakagawa Zennosuke, explains this disintegration of the house by the shift in importance from group production to the productive activities of the individual.⁶⁸

An analysis of the existing trends and conditions in Japanese society would suggest that, while in rural districts the traditional family system is still relatively strong, this system was long felt as an anachronism among the intelligentsia and the middle and working classes of urban and industrial areas. It may be anticipated that a natural process of equalization will work in favor of the urban trend. While it has been pointed out that legislative changes alone do not bring about new social conditions, there is no doubt that the reform, in doing away with all legal sanctions against nonconformity, will considerably hasten the adjustment of the farmers and fishermen to the freer urban concept.

In conclusion, the reform of the Civil Code was in line with tendencies active in Japanese society for some decades. It has a *raison d'être*, recognized by a substantial, progressive segment of the nation and enjoys popularity in spite of the opposition of powerful conservative forces. Herein lies the guarantee of its survival and fruition.

⁶⁷ HOZUMI, *op. cit.*, *supra* note 2 at 8, 51-53.

⁶⁸ Quoted in HANI, *op. cit.*, *supra* note 3 at 38.