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Democratization of the Family Relation in Japan

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FAR EASTERN SECTION

DEMOCRATIZATION OF THE FAMILY RELATION IN JAPAN

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AFTER THE WAR, that part of the Japanese Civil Code which relates to family relationships, i.e., Book IV, *Relatives,* and Book V, *Succession,* underwent a thorough-going amendment, the chief objective of which was to democratize the legal relations among Japanese family members. As the main features of this amendment of the Japanese Civil Code have been explained in detail by Mr. Kurt Steiner in *Postwar Changes in the Japanese Civil Code* in the August issue of this *Review,*[1] it appears advisable for the present writer to lay stress on the following two points: (1) public opinion on the amendment of the Civil Code, and (2) whether the amendment is actually changing the family life of the Japanese.

By way of introduction, it should be pointed out that the change was not so revolutionary as might first appear; at least there had been historical development which prepared the ground for the change. The old Civil Code envisaged a House System composed of a large patriarchial family, the head of which exercised a very great power and control over the members of the house. The house included many families as the term is used in the United States.[2] However, long before the war attempts were being made to revise the Civil Code to bring about a greater democratization of the family relation.[3] These attempts, both legislative and judicial, sprang in part from the fact

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[1] 25 WASH. L. REV. 286.

[2] On the house system in Japan see BURGESS AND LOCKE, THE FAMILY (American Book Co., 1945), pp. 18-20; TEIZO TODA, KAZOKUKOSEI (The Construction of Family) (Tokyo, 1937), pp. 209-222, 471-516, 533-534, S. WAGATSUMA, IE NO SEIDO (Institution of House) (Tokyo, 1948), pp. 183-250.

[3] From the Chino-Japanese Incident of 1937 or thereabouts the thought in Japan began to show a marked nationalistic trend, and with that the importance of the traditional family system came to be specially stressed. Thus, some of the jurists began to argue that the house system was not only a mere moral prop of the social structure of Japan but also must be its juridical basis, e.g., Seiichiro Ono, professor at Tokyo University, *Nihon-Koyūhōri no Jikakuteki-Tenkai* (Self-conscious Development of the Legal Doctrines Peculiar to Japan), Tokyo, 1942, Kenji Maki, professor at Kyoto University, *Nihon no Sekaikan to Ie oyobi Ū no Seishin* (Japanese View of Life and the World and the Spirit of "House" and "Roof"), Hogaku-Ronso (KYOTO UNIVERSITY LAW REVIEW), 1944, Vol. 1. An essay of the present writer entitled *Kazokuseido-*

that while the house as contemplated by the old Civil Code undoubtedly was a real and influential institution, yet the actual families of Japan were more and more tending to be small units much as they are in the Western countries. Thus the present revision of the Code is rather a leap in the direction of the revision which we had already been trying to effect for ourselves during the past fifty years. It is, of course, a bold leap, but its general direction had already been determined.

Public Opinion on the Amendment of the Civil Code

Most Japanese were taken aback when the draft for the revision of the Constitution was announced in the spring of 1946, as they found that it would entail a fundamental change in the governmental system of our country Many of the people, however, soon learned that such a drastic revision of the Constitution was indispensable for reconstructing Japan as a peace-loving, democratic nation. Thus, when the government proceeded to amend the Civil Code in conformity with the spirit of the new Constitution, most of the people thought it imperative to effect a fundamental renovation of the house system of this country Hence, the contents of the revision of the Civil Code were approved by many people.

But it is also an undeniable fact that some people, though small in number, were opposed to this revision, regarding it as too drastic. Shortly after the publication of the draft Constitution, the government appointed a Temporary Legislation Investigation Committee for the purpose of "preparing a draft of such laws as are necessary to enforce the Constitution and a draft revision of such existing laws as are inconsistent with the tenor of the draft Constitution." At its first general meeting a subcommittee, which dealt with the Civil Code, passed a resolution to the effect that the house system be abolished, and with this object in view the subcommittee, of which the writer was a member, endeavored to prepare the draft amendment of the Civil Code. Thus, concurrently with the deliberation over the draft Constitution in the Diet, consideration of the draft amendment

Horitsuron no Hensen (Vicissitudes of Juristic Theories of Family System) which is contained in the book cited above was written during the war in the belief that in order to criticize such nationalistic writers it was indispensable to clarify the concrete contents of the controversies on the family system at the time of the enactment of the Civil Code and thereafter, and the last part of it, in which a criticism of these nationalistic writers was contemplated, was not completed. It was, however, published with this last part unfinished.

of the Civil Code proceeded at the Committee, and it was found that among the members of both the Diet and the Temporary Legislation Investigation Committee there were those who asserted that elimination of the house system was too drastic a measure. Such an antagonistic attitude was particularly strong among the members of the now defunct House of Peers. In their deliberation of the new Constitution bill, these members criticized its Article 24 as stressing only individual dignity, in complete disregard of the ideal of the coöperative life of family members. They proposed an amendment to insert a paragraph providing: "The coöperative life of the family shall be maintained." Although this proposal for amendment failed to get the support of the majority at the committee stage, it obtained a majority vote at the plenary session. It failed to pass the House because the majority of two-thirds which was required for any amendment of the Constitution was not secured.[4] Thus it came about that some of these members of the House of Peers, who happened to be concurrently members of the Temporary Legislation Investigation Committee, exerted themselves to realize their object in the amendment of the Civil Code. It is to be noted that these persons did not necessarily seek to maintain the house system; they merely proposed to insert such provision as would embody the ideal of the coöperative life of the family, since they believed that, in neglect of that ideal, the original draft for the amendment of the Civil Code attached too much importance to individual dignity and the essential equality of sexes. But, their proposal having been stoutly rejected by the subcommittee that drew up the original draft, a heated discussion ensued at the general meeting of the committee, covering several days.[5]

[4] It is needless to mention that each of those who supported this proposal had his own reasons. Most of them, it is supposed, desired to maintain the traditional house system by it, while not a few who supported it construed "family" in the proposal as meaning small family and believed that the state ought to encourage wholesome family relations, both spiritually and economically. These latter often referred to Article 119 of the WEIMAR CONSTITUTION, and perhaps few persons ever dared to contradict their arguments themselves. The opponents of the proposal apparently believed that under the present conditions of this country it would probably tend to preserve the traditional House system in actual practice.

[5] One influential member among them made preparations for submitting a proposal as follows, but gave it up, judging that there was no possibility of its being passed. (a) "That a fundamental provision be made to the effect that relatives should make it their principle to live in harmonious coöperation with one another in the spirit of respect and affection, and especially that they should be in harmonious terms with one another in the sentiment of reverence towards their common ancestors", and (b) "That a provision be made to the effect that relatives who are living together or who are in such relation of common household economy as is tantamount to the living together should be under the duty of coöperating with one another in the spirit of respect and affection."

Finally, however, a compromise was made by inserting an article in Chapter I (*General Provisions*) of the Book of Relatives, which ran as follows: Lineal relatives by blood and the relatives living together shall mutually coöperate. (Art. 730)

There is no doubt that Article 730 of the revised Civil Code has scarcely any juridical significance at all. In the first place, side by side with this provision which says "lineal relatives by blood shall mutually coöperate," the revised Civil Code provides elsewhere that "The lineal relatives by blood and brothers and sisters shall be under the duty of furnishing support to each other" (Art. 877, par. I), and it is unthinkable that the former provision is invigorative of the latter. In the second place, it is clear that in saying "relatives living together shall mutually coöperate," Article 730 does not compel certain kinds of relatives to live together; it merely says that such relatives as are living together for economic reasons or otherwise must mutually coöperate. In short, it would not be too much to say that this provision is nothing but an exhortation or a moral rule. Some people, however, assert that the existence of such provision is of great significance, not only in showing the people the importance of coöperative family life, but also, in all probability, in serving as the standard of conciliation by the Family Court; others, however, hold this provision improper because it induces the people to regard the traditional house system as worth preserving. At any rate, it may be said that most people nowadays do not attach much importance to this provision.[6]

[6] In 1948 the writer gave a series of lectures on the new Civil Code to the third-year class students of the Tokyo University and in the examination asked the following question "Point out one article of the revised Civil Code that you think most satisfactory and another that you think most unreasonable, and give reasons for thinking so." Of the articles of the revised Civil Code pointed out as being most satisfactory and most unsatisfactory respectively in the 460 papers submitted by them, the three articles which were supported and the three others which were denounced by the largest number of students were respectively as follows

Articles	*Matters Provided For*	*Number of Students Holding Most Satisfactory*	*Number of Students Holding Most Unsatisfactory*
Art. 768	Right to demand distribution of property in case of divorce	128	3
Art. 890	Right of inheritance of surviving spouse	40	1
Art. 769	Disposition of utensils for religious rites in case of divorce	40	11
Art. 730	Mutual support of relatives	4	138
Art. 897	Succession to utensils for religious rites in case of owner's death	15	44
Art. 737	Requirement of parents' consent to marriage of minor	10	34

It must be added that there are even those who criticize the revision of the Civil Code as not thoroughgoing. Many of them are young scholars who condemn the recent revision as being ineffective in eliminating the house system from our society by reason of the fact that substantial maintenance of that system would be possible under the revised Civil Code. The main points of the criticism of these scholars are as follows:

The revised Civil Code, they contend, provides that ownership of genealogical records, of utensils for religious rites, and of tombs and burial grounds is to be inherited by a person designated by decedent as the leader of the worship of the ancestors (Art. 897), and it also provides that the legally secured portion of the children is one-half of the estate and that the decedent can freely dispose of the remaining one-half by his will (Art. 1028). Accordingly, in most cases parents will probably make their eldest son the virtual head of the house both by designating him the leader of the worship of the ancestors and by giving him one-half of their estate as a testamentary gift. Moreover, they aver that the provision of the revised Civil Code that "Husband and wife shall assume the surname of the husband or wife in accordance with the agreement made at the time of the marriage" (Art. 750) would substantially enable parents who have only daughters to accomplish the same result as the marriage with an incoming husband under the former law, if they succeeded in persuading the person who married their eldest daughter to assume her surname, designated him the leader of the worship of the ancestors, and gave him one-half of the estate as a testamentary gift. Lastly, they say, as the revised Civil Code does not require that adequate disparity of age exists between adoptive parent and child,[7] under the revised law a childless person might adopt his youngest brother and let him virtually succeed to the house just as under the former law

The younger scholars further criticize the institution of surname (*Uji*) under the revised Civil Code, contending that continuation of the word *Uji,* which represented the name of the house under the old Civil Code, does amount to veritable conservation of the house system. Still further, they oppose not only the provision allowing the husband to assume the *Uji* of the wife, but also the provisions making an adoptive child assume the *Uji* of its adoptive parent (Art. 810) or making a person whose *Uji* was changed by reason of marriage

[7] Article 793. "No ascendant or person of older age may be adopted."

or adoption reassume his former one in case of divorce or dissolution of adoptive relation (Arts. 767, 771, 861)

The contention of these young scholars is correct to a certain extent. In other words, not only do most of the articles of the revised Civil Code, pointed out by them, show its compromising character but also these provisions will be utilized by a considerable portion of the Japanese people, at least for the time being, as a means of continuing the house system.

The real questions, however, are whether all of the people would free themselves of the house system at once if these provisions were deleted or so amended in substance as to conform to the contention of the young scholars, and whether any legislation too disconnected from the actuality of the lives of the people is not only ineffective to ameliorate their lives, but also causes the people to contrive means to evade it.

The points most severely attacked by the young scholars are *Uji* and religious services performed to the memory of ancestors. But the desire to preserve the same surname eternally and to perpetuate the worship of ancestors by having offspring assume the same surname is a feeling deeply rooted in the bosom of the majority of the Japanese people today As has been stated, the majority of the Japanese people would no longer care to satisfy this feeling by means of the house system provided by the old Civil Code, but they do wish to gratify it by dint of a family consisting of the parents, the eldest son, his wife, and their children. It is in the effort to satisfy this desire that parents who have only daughters usually wish to adopt a male, to cause him to assume their surname, and to have him marry their eldest daughter; it is precisely the same desire which leads a widow with only a daughter to want the daughter to marry a man who will consent to assume the surname of the daughter. Likewise, behind the attitude of the Japanese people to regard it as natural for a person to reassume his former surname upon the divorce or dissolution of an adoptive relation lies the tendency to look upon the surname as befitting only those who belong to a continuous family, partaking in the worship of the same ancestors, and not merely as an identification of an individual. The same desire often causes the eldest son, who has no issue, to adopt his younger brother.

The writer does not think that ancestor worship is an excellent custom of Japan, nor does he look upon the house system, "famil-

ism,"[8] as being so basic that its extinction would imply the collapse of the Japanese social order. For himself, indeed, he believes that, even at its best, when realized through a small patriarchal family, familism is violative of the ideal of individual dignity which underlies democracy in that it regards as the unit of social structure not the individual but a group of persons called the family But, at the same time, he is convinced that such emotional phenomena as ancestor worship or the desire to have the surname of the family perpetuated cannot be easily eliminated or changed.

It is to be added here that the revised Civil Code avoids attaching legal effect to the surname. For example, the legal effect of the relation of parent and child remains entirely the same, even if they assume different surnames. The right of a child to inherit its natural parent's estate is not at all affected by the fact that he has assumed the surname of his adoptive parent or that a daughter has assumed the surname of her husband.

Similarly, if on divorce a woman reassumes her former surname, and if on a second marriage she assumes a new surname, both different from that of her child, the child may inherit her estate or share in it equally with the children of her second marriage. If parents are divorced, of course parental power is not exercised by both parents jointly, but by only one of them; but the opportunity of exercising parental power is entirely equal between the mother whose surname is different from that of the child and the father whose surname is the same as that of the child, because the question which parent should exercise parental power is determined by their mutual agreement or by a ruling of the Family Court (Art. 819).

The relationship by affinity between the widow and the father or mother of her deceased husband is worthy of note here. The original draft prepared by the drafting subcommittee provided that when a widow reassumes the surname she had before marriage, the relationship by affinity is terminated. This provision was criticized as improper in reminding one of the provision of the old Civil Code (Art. 729) that such relationship by affinity is terminated if the widow returns to the house to which she had belonged before the marriage. The similarity, however, between the provision of the original draft and that of Article 729 of the old Civil Code is merely a formal one, for, while under the old Civil Code a widow had to

[8] See BURGESS AND LOCKE, *op. cit., supra* note 2, at 69.

obtain the consent of the head of the house of her deceased husband (usually her father-in-law) in order to return to the house to which she had belonged before the marriage, under the original draft a widow could reassume her premarital surname wholly at her own pleasure. Furthermore, it is the common practice in Japan for a widow to continue to use the surname of her father-in-law so long as she lives with him and to reassume her premarital surname when she ceases to do so; it is unusual for a widow to continue to use the surname of her father-in-law after ceasing to live with him. Accordingly, the provision of the original draft was not really in derogation of the widow's freedom, and was in accord with the actual situation in Japan. Nevertheless, in order to avoid attaching legal effect to the surname, the drafting subcommittee replaced the foregoing provision of the original draft by a provision that the relationship by affinity between a widow and her deceased husband's blood relatives is terminated by her declaration of intention to terminate such relationship, irrespective of whether or not she reassumes her premarital surname (Art. 728, par. 27) By virtue of this provision, in most cases a widow will be obliged to make a declaration of intention to terminate the relationship by affinity in addition to going through a proceeding for reassumption of her prior surname. The subcommittee deemed this possible inconvenience a lesser evil than a provision which would be more reminiscent of the old Civil Code.

Perhaps the only instance in which legal effect is attached to a surname is the provision that if an adoptive child who has inherited the utensils for religious rites, etc., owned by its adoptive parent, or a husband who, upon assuming the surname of his wife, has inherited the utensils for the worship of ancestors, etc., owned by her, reassumes his former surname upon dissolution of the adoptive relation or divorce, he must transfer the utensils for religious rites, etc. to a proper person upon conferring with representatives of the adoptive parent or the wife.[9] It is, after all, for the purpose of securing freedom of divorce or dissolution of adoptive relationships that this provision has been inserted in the Civil Code. For example, a woman would hesitate to dissolve the adoptive relationship with her adoptive child who has inherited utensils for the worship of ancetsors, etc., or a wife would hesitate to divorce her husband who has assumed her

[9] Articles 769, 817 The same is provided for the case where a surviving spouse effects the declaration of intention to terminate relationship by affinity. (Art. 751, par. 2).

surname and inherited untensils for worship of her ancestors, etc., if the adoptive child or the husband would not consent to part with these utensils for religious rites, etc. By ensuring that in such cases, by intervention of the Court, utensils for religious rites, etc., will be transferred to a person agreed on by the parties concerned, the foregoing provision aims at removing obstacles likely to be put in the way of divorce or dissolution of adoptive relationship. One may contend that it is a wise policy for the law to keep hands off such religious articles as utensils for rites. Indeed, ancestor worship may be religious. But ancestor worship in Japan has, as its essential element, a private property of peculiar value in the shape of utensils for religious rites; and, as has been remarked repeatedly, it is a fact, which cannot be disregarded in present-day Japan, that this private property is transferred to the adoptive child or to the husband who assumes his wife's surname; and it is not infrequent that disputes arise as to the ownership of that property If this is the case, is it not to be regarded as inevitable that the Civil Code makes provision therefor?

Unrelated to the surname as such, the revised Civil Code contains an article with regard to the succession to utensils for religious rites, etc.[10] As has been stated, young scholars condemn this provision. But between an adoptive child and a natural child or between a younger brother who, living with the parents in the country, has succeeded to to the occupation of the family, and the elder brother who went up to the town to live on his own salary, there frequently arose a dispute as to who was to become the owner of the utensils for religious rites, etc. Although the house system has been eliminated by the provisions of the revised Civil Code, prompt disappearance of such disputes is hardly conceivable. The purpose of the revised Civil Code in making that provision is to prevent the occurrence of such disputes.

Some conservative members of the Temporary Legislation Investigation Committee contended that the child who succeeds to the utensils for religious rites, etc., should be accorded the privilege of acquiring, as a special share in the succession, certain property which may be necessary to perform religious rites. But their contention was rejected by the Civil Code Drafting Committee because they considered that it was the mission of the Civil Code to prevent the occurrence of civil disputes relating to ancestor worship, and not to encourage ancestor worship itself.

[10] Article 897

After all, there is no denying that the revised Civil Code is a compromise, but in the writer's opinion legislation is not the same as drawing an ideal picture on a blank sheet. Only such legislation as is at once reasonably progressive and compromising may be effective to ameliorate the lives of the people. In this sense, to legislate is to compromise.

Among the provisions of the revised Civil Code there are, indeed, some which the writer finds unsupportable. But viewed in its entirety, it is submitted that the revised Civil Code is sound and proper. It is not because the present writer was one of the members of its drafting subcommittee that he believes so. Dr. Shigeto Hozumi, Justice of the Supreme Court of Japan, formerly professor of Tokyo University, who, being an authority on family law in Japan, was an influential member of the Special Committee for the Consideration of Legal Institutions appointed in 1919 but who did not take part in the recent revision of the Civil Code by reason of his official duty as the educator of the Crown Prince, also says that, as a whole, the revised Civil Code is wholesome.[11]

How Is The Revised Civil Code Changing The Family Life of The Japanese?

Since family life is intrinsically influenced by tradition, Code revision, however compromising, does not bring about immediate change. However, the revolt of the younger generation against the house system having been quite strong even before the revision of the Civil Code, its effect seems to be unexpectedly great. The following are some of the more important innovations.

1. *Position of the Wife.* A remarkable phenomenon in regard to the position of the wife is the fact that the great bulk of the divorce petitions are filed by wives. Statistics from the Family Bureau of the Supreme Court show that the total of conciliation cases that came before the Family Courts throughout the land during 1948 was 32,384, of which 9,024 were divorce cases. In 1949 there were 39,229, of which 11,818 were divorce cases. Since a decision of the Supreme Court in 1915 it has been a rule of case law that if one of the parties to a marital relationship not entered in the House Register (so-called *Nai-En*) deserts the other party without reasonable excuse, that other

[11] Dr. Shigetō Hozumi is the eldest son of Dr. Nobushige Hozumi, the author of *Lecture on the New Japanese Civil Code* (2d ed., 1912), in Materials For The Study of American Law; by Blakeny, Vol. I (Tokyo, 1950).

party may recover damages in the form of solatium, and we may treat such cases as being virtually divorce cases. Cases in this category totalled 4,105 in 1948 and 4,902 in 1949 Classified according to petitioners, the respective percentages of the divorce cases are as follows (1949)

Petitioner	*Divorce Cases in Registered Marriages*	*Divorce Cases in Unregistered Marriages*
Wife	77.5%	86.4%
Husband	21.9	12.5
Both	0.6	1.1

Viewed by locality, both kinds of divorce cases received by the Family Courts during 1949 in the six large cities and in the six prefectures of the northeastern agricultural area are as follows:

Family Courts	*(A) Total of Conciliation Cases Received by Family Court*	*Divorce Cases*			
		(B) In Registered Marriages	*(C) In Unregistered Marriages*	*Total (B+C)*	*Ratio A. (B+C)*
Six Large Cities					
Tokyo	3,273	1,266	657	1,923	58.8%
Kyoto	568	175	52	227	40.0
Osaka	1,296	253	224	447	36.8
Yokohama	1,126	400	247	647	57 4
Nagoya	1,538	483	172	655	42.6
Kobe	1,090	360	145	505	46.3
Six Northeastern Prefectures					
Fukushima	1,110	385	149	534	48.1
Sendai	1,037	315	185	500	48.2
Yamagata	637	211	23	234	36.8
Morioka	696	185	55	240	34.5
Akita	697	142	47	189	27.1
Aomori	1,104	319	37	356	32.2

Divorces in Japan are numerous in farm villages, where patriarchal power is large, and few in urban areas, where patriarchal authority is small, because in rural districts, it is in the power of the head of the family to arrange the marriage of a member of his family and to expel the wife of a member of his family with whom he is not pleased. Dr. Burgess says[12] it is an interesting phenomenon that divorces occur more in the villages and less in the towns, the reverse

[12] BURGESS AND LOCKE, *op. cit., supra* note 2, at 628-629.

of the phenomena observable in the United States and other civilized countries. Dr. Toda also expresses a similar opinion and adds that since the termination of the Russo-Japanese War (1904-1905), when industrialization of the Japanese society began, the divorce rate in Japan has tended to decrease.[18] But it seems that this tendency is changing at present, especially after the Pacific war. The above statistics indicate that in Japan also, since the end of the war, the number of divorce cases received by the Family Court is rather increasing in urban areas. As to the divorce rate, there are no dependable statistical figures including the divorces in unregistered marriages. The following tables of the number of marriages and divorces entered in the House Register during the years 1947-1949 may, however, indicate that the increasing rate of divorces is larger than that of marriages, and this tendency is not so much different between six large cities and six northeastern agriculture prefectures.

	1947	*1948*		*1949*	
Districts	*Number of Divorces*	*Number of Divorces*	*Ratio to 1947*	*Number of Divorces*	*Ratio to 1947*
Six Large Cities					
Tokyo	4,661	5,169	1.11	5,813	1.25
Kyoto	1,750	2,081	1.32	1,759	1.05
Osaka	3,833	3,483	0.91	5,040	1.32
Yokohama	1,928	2,372	1.23	1,969	1.02
Nagoya	2,451	2,806	1.15	3,150	1.29
Kobe	3,254	3,547	1.09	3,458	1.07
Six Northeastern Prefectures					
Fukushima	2,181	2,739	1.26	2,706	1.24
Miyagi	1,273	1,566	1.23	1,588	1.25
Yamagata	1,534	2,019	1.32	1,684	1.10
Iwate	1,518	1,753	1.15	1,554	1.03
Akita	2,131	2,224	1.04	1,962	0.92
Aomori	1,197	1,533	1.28	1,597	1.37
Total throughout the Land	79,551	89,167	1.12	89,786	1.13

[18] TEIZO TODA, KAZOKU TO KON-IN (Family and Marriage), Tokyo, 1934, pp. 148-154.

Districts	1947 Number of Marriages	1948 Number of Marriages	1948 Ratio to 1947	1949 Number of Marriages	1949 Ratio to 1947
Six Large Cities					
Tokyo	49,800	58,391	1.17	52,834	1.05
Kyoto	18,294	22,193	1.21	18,047	0.99
Osaka	34,328	41,205	1.20	37,697	1.10
Yokohama	23,493	28,782	1.22	22,017	0.94
Nagoya	35,018	41,249	1.18	32,834	0.94
Kobe	32,971	42,736	1.30	34,274	1.04
Six Northeastern Prefectures					
Fukushima	26,598	32,031	1.20	28,401	1.07
Miyagi	20,088	21,385	1.07	19,274	0.96
Yamagata	17,599	20,155	1.15	18,040	1.03
Iwate	14,708	16,548	1.13	15,936	1.08
Akita	16,439	16,907	1.03	14,890	0.91
Aomori	14,487	15,988	1.10	14,808	1.02
Total throughout the Land	933,626	1,073,955	1.15	906,257	0.972

One of the reasons for this may be that the revised Civil Code provides that a person suing for divorce can request the other party to distribute a considerable amount of property But a greater reason, it is believed, lies in the fact that wives have awakened to the dignity of their own individuality It has hitherto been regarded as a womanly virtue by most wives to submit tamely to everything, even if their husbands were tyrants or committed adultery, or even if they were cruelly treated by their husbands' parents living with them.[14] But now, wives in such a plight are beginning to think it their responsibility to themselves to secure divorces and choose the way for a new and freer life. Needless to say, a wife when divorced cannot always obtain sufficient distribution of property It is also extremely difficult, under the present circumstances in Japan, for a divorced wife to support herself alone. Accordingly, not all the unhappy wives who are in such plight as might justify divorce dare to seek them. However, the fact that wives who heretofore have never dreamed of divorce are now at least thinking of it and coming into the Family Court to get advice may well be said to show the increasing con-

[14] As has been stated above, the Court received application for the dissolution of marriage submitted by a wife in case her husband has committed adultery to an excessive degree. Further, even under the old Civil Code cruel treatment of a wife on the part of the parents of her husband was grounds for divorce (Art. 813, item No. 7). But even in such a case it was quite seldom that a wife chose to bring an action for divorce, and usually public opinion would not support her.

sciousness on the part of the Japanese wives of their individual dignity

It goes without saying, however, that the fact that the great bulk of the divorce petitions received by the Family Court are filed by women does not necessarily mean that the majority of divorces in Japan are effected through the initiative of the wives. In Japan it was easy for the husband to compel his wife to effect "divorce by agreement." Perhaps it is not too much to say that the majority of divorces by agreement were nothing but divorces by expulsion. And to some extent such probably is the case even now

Widows, in common with divorced wives, find difficulty in making a living under the present circumstances of Japan. However, the revised law makes it possible for widows freely to reassume their premarital surnames and to remarry without the consent of anyone, as well as to take their children with them in either case. Likewise, it enables them to inherit one-third of the estates of their deceased husbands (Art. 890, 900).

These facts will not only make it easier for widows to support themselves, but will also give them more opportunities to remarry A widow needs the assistance of her parents in finding a new husband. It is, therefore, practically indispensable for her to return to the family of her parents and assume their surname in order to remarry Again, if a widow cannot take her child with her in a second marriage, she may be not a little hesitant in remarrying. Nevertheless, the old Civil Code required the consent of the head of the house of her deceased husband for a widow contracting a remarriage to take her child with her, and frequently such consent was refused. Therefore, the provision of the revised Civil Code which enables a widow freely to remarry, taking her child with her, will render her remarriage easier in the future.

The Japanese custom, however, that the eldest son and his wife live with his parents cannot be reformed easily, due chiefly to the postwar economic stringency and the housing shortage. In consequence, though it is provided in the revised Code that *ex lege* there is no duty to support each other between the wife of the eldest son and his parents, and that if there are special circumstances the Family Court may impose a duty to furnish support (Art. 877, par. 2), in actual practice many of these people are living together and supporting each other. In such cases there is no denying that the wife of the eldest son naturally undergoes many kinds of hardship in

being filial to the parents of her husband.

Then, what is the position of a wife as mother? Is she actually exercising the parental power jointly with her husband, the father? This seldom constitutes a matter of law As a matter of fact, however, it is remarkable that mothers are participating more and more in social and cultural activities, as for instance in parent-teacher associations. But there is no knowing exactly to what extent the mother's voice is strengthened within the family with respect to the custody and education of her child.

As indicative of the promotion of the social position of the Japanese women, something may be said about women councilors and conciliators in the Family Court established simultaneously with the enforcement of the revised Civil Code. According to statistics of the Family Bureau of the Supreme Court, the number of female councilors and conciliators classified in accordance with their occupation as on February 1, 1950 is as follows:

	Councilors		*Conciliators*	
Occupation	*Women*	*Total*	*Women*	*Total*
Public Officials	37	1,218	113	3,321
Educators	44	127	115	339
Company Employees	14	600	28	1,484
Lawyers	3	821	4	1,564
Doctors	13	148	36	274
Shinto or Buddhist Priests	7	302	26	819
Commerce	43	801	116	2,225
Agriculture	34	848	313	4,390
Fishery	2	77	4	193
Mining	1	99	3	324
No Occupation	589	949	1,538	2,588
Miscellaneous	87	368	196	1,046
Total	874	6,358	2,492	18,567

According to the writer's wife, who is councilor and conciliator of the Tokyo Family Court, as a rule a conciliation case is dealt with by one male and one female conciliator, so that female conciliators are obliged to work far more than the males. Generally the writer's wife spends two to five hours at the office three days a week, but some of the female conciliators attend every day

As will be easily suspected, settlement of a case by conciliation is apt to be affected by the ideas of the conciliators. Consequently, conciliation in Family Courts of rural areas not infrequently runs counter to the trend of the new era. The writer's wife is a member of a re-

search group (including women lawyers, judges, public prosecutors, etc.) which has been granted government research funds to investigate the conciliations effected by the Family Courts throughout the country, with a view to setting up reasonable standards for conciliation. This is an extremely difficult task, but if such an investigation is completed, disparities in conciliation throughout the whole country will be removed and the level of conciliation enhanced.

In the last place, how far is the equality of the duty of chastity between husband and wife implemented in actual practice? The writer does not have the temerity to aver that the revision of the Civil and the Criminal Codes[15] has caused every husband in Japan to maintain his chastity as meticulously as most Japanese wives have hitherto done. But, in view of the fact that concubinage had been officially acknowledged as a legal institution until the early years of the Meiji Era,[16] and that in the course of the following seventy years people had come to admit that a husband also had a duty of chastity,[17] there is reason to anticipate the advent in the near future of the day when, in consequence of the present amendment of the Civil and the Criminal Codes, Japanese husbands will become as continent as their wives, whose chastity is said to be matchless.

2. *Liberty of Marriage.* As has been stated above, under the revised law the consent of neither the parents nor the head of the house is necessary for marriage. But whether this legally awarded freedom has actually come to be enjoyed by all young men and women of Japan is quite another question. To tell the truth, there are very few young men as yet who select their spouses for themselves. In Japan a Confucian precept that "A boy and a girl must not sit together after they are seven years of age" has prevailed up

[15] The old provision of the Criminal Code ran. "If a married woman has committed adultery, imprisonment at forced labor for less than two years shall be imposed, the same shall apply to the other person who has committed adultery with her" (Art. 183, par. I), so that while a married woman was always punished for her adultery provided her husband made a complaint, a husband was punished for adultery committed with the wife of another person only when her husband lodged a complaint. There are two ways to remove this inequality between husband and wife, the one is to impose no punishment whatever upon the husband or the wife for committing adultery and the other to punish both equally for adultery. At the meeting of the Temporary Legislation Investigation Committee the question as to which of the above two ways should be taken was made the butt of considerable controversy, but the former way was adopted, with the result that Article 183 was deleted.

[16] Shinritsu-Koryo (Outline of New Criminal Law) enacted in the third year of Meiji (1870) treated a concubine as well as a wife as a relative of the second degree of the husband.

[17] So held by necessary implication from the rationale of a case decided by the Japanese Supreme Court on July 20, 1926, May 17, 1927

to now, making the opportunity very scarce for young men and women to select their spouses for themselves. So, even at present, in many cases it is not the sons and daughters themselves but rather their parents who select their spouses. This is especially true with daughters. Even in such cases, of course, parents pay regard to the wishes of their children, so that the selection is by no means solely at the parent's will. Of course, the degree of respect paid by the parents to the will of their children in seeking and determining their spouses depends upon the circumstances of each case. It is hardly necessary to mention that in an agrarian family the degree of respect paid to the will of the child is small, while in the family of the urban intelligentsia that degree is large; in the case of the marriage of the second or third son or of a daughter the child's will is taken into consideration to a large extent. Indeed, it cannot be denied that sometimes the parents stick to their selection, but even in such cases, at least in their subjective intent, the parents are thinking of the happiness of their children and not solely of the interest of themselves or of the family Yet it is undeniable that to a large extent parents are motivated by their own will with regard to the marriage of the eldest son or of a daughter (especially, the eldest one) if they have no son, because, in this case, the marriage of the eldest son or of a daughter does mean the selection of the person who is expected to perpetuate the family name, to take charge of the worship of ancestors, and further, in most cases, to live together with them. But in any case, as long as a child is courageous enough to refuse to contract a marriage arranged by his parents, it will not frequently happen that a child is compelled to contract marriage against his will. There are found in Japan only too many sons and daughters who do not have that temerity This is especially true with daughters. In the case of the so-called *Miai-Kekkon* (a marriage arranged by the parents), the usual practice is for the parents to find several candidates, have their child meet them, and determine one of them as the spouse, taking the preference of the child into consideration. In this case the child has, as it were, a veto power. In *The Family,* Dr. Burgess has cited a passage from *Daughter of Samurai,* an autobiographical novel written by a Japanese woman,[18] in which a widow and the family council select the spouse for the widow's thirteen-year-old daughter. The daughter acquiesces without even asking the spouse's

[18] BURGESS AND LOCKE, *op. cit., supra* note 2, at 400-401.

name. This must have been an exceptional case even at the end of the Meiji Era. Today such a case will hardly be found even in the farming villages. It may conveniently be added here that the practice of the parents' selecting an infant girl who is to become the spouse of their son and bringing her up in their family, a custom prevailing in China, does not exist in Japan.[19]

If such is the real situation of the so-called *Miai-Kekkon,* which is commonplace in Japan, it may well be said that a marriage initiated by the parents is nonetheless a marriage based on the "mutual consent" of the parties as provided by Article 24 of the new Constitution. But it is also undeniable that the practice of parents taking the initiative in their child's marriage because of the latter's inability to select his own spouse, is, in combination with the fact that in many cases children must get financial aid from their parents in early days of their married life, detrimental to the freedom of marriage in the true sense of the word.

Now that coeducation has been adopted in colleges of Japan and the number of girls working in offices is gradually increasing, it may not be a matter of the distant future that the young men and women of Japan will be able to select their spouses for themselves and get married quite freely

3. *The Concept of the House.* The concept of the house, the idea that the relatives form a group called the House, the head of which solely possesses the property to the exclusion of its other members and acts as the leader of the worship of their ancestors, may die hard. Indeed, as has been stated, the coöperative life of a group of relatives called a house which embraces a number of collateral relatives, as was provided by the old Civil Code, is not what the Japanese people desire now But it is inconceivable that the idea of a small patriarchal family, in the sense of the group of the parents, the eldest son and his wife and their children continuing their coöperative life, thereby perpetuating the same surname and the worship of ancestors, will readily be extinguished. Hence the actual practice commonly adhered to at present is that in case the father dies, the bulk of his estate is given to his eldest son as a testamentary gift and at the same time the latter is designated as the leader of the worship of the ancestors. It is undoubtedly true, indeed, that this practice is gradually disappearing among the salaried class and the

[19] *Id.* at 51 *et seq.*

intelligentsia, but in agrarian villages the concept of such familism is still deeply rooted in the minds of the people. Not merely does the father make provision conforming to the above-mentioned practice in case he makes a will, but even when he dies intestate, not rarely would his children deem it their duty to do what their father would have provided for had he made a will. In other words, in the overwhelming majority of farming families, it is customary for the daughters to renounce their right of succession to the estate of their father, and for the second or the third sons to be satisfied with a very small portion of the estate distributed by the eldest son for their support.

According to the statistics of the Family Bureau of the Supreme Court during the year 1949, of the 286,156 trial cases handled by the Family Courts of the country, 148,192 concerned renunciation of succession; and of these, 32 per cent were brought by men, 67.2 per cent by women, and .8 per cent by both.

These statistics show, upon further breakdown, that cases of renunciation of succession are numerous in agrarian districts and that the majority of them are petitions filed by women. But it will be easily presumed that in the northeastern farming area there are a great number of cases where, without taking recourse to the proper legal means, i.e., the renunciation of succession, the eldest son de facto acquires the whole of the agricultural property, with the other members of the family raising no objection. Of course, such cases are not reflected in the statistics.

As is well known, Japanese farming is on a very small scale, and if this small scale were rendered ever smaller because the farming estate is cut up into slices by succession, there would be no choice for Japanese agriculture but ruin. It is true, indeed, that equal succession among children does not require the distribution of the estate in kind, as it is provided in the revised Civil Code that "for effecting partition of estate, the kind and nature of the things or rights constituting the estate, the profession of each successor and all other circumstances shall be taken into account" (Arts. 906-908). But, even if the eldest son is allowed to succeed to the whole of the agricultural assets of the family, his burden would be too heavy if he were obliged to run into debt in order to distribute money Not only that, but at present the industry of Japan is incapable of absorbing all the second and third sons of farmers. Thus, with regard

to the succession in agricultural families we find ourselves in the dilemma that if the agricultural pursuit of the eldest son is to be guaranteed, the right of succession of the second and third sons as well as that of daughters will, as a matter of fact, have to be denied, while if the equal right of succession is to be secured to all of the children the agricultural pursuit will be endangered. Indeed, having been experienced in the past in Germany and France, such a dilemma is a "baptism," so to speak, which Japan, too, must receive sooner or later in order to enforce a modern system of succession. But this dilemma is felt especially in Japan, for she is faced with the urgent necessity of economic rehabilitation from the postwar misery on the one hand, and with the need of a prompt implementation of the ideal of equality between sons and daughters on the other. In contemplation of the solution of this problem, the government prepared and submitted to the national Diet at its First Session (1922) and Fifth Session (1949) a bill called "Special Rules Relating to Agricultural Estates Succession," which, however, has not yet passed into law.

Both drafts of the bill contained provisions to the effect that the agricultural estate be inherited *en bloc* by a child who succeeds to the operation of agriculture; the selection of the child to be made by the person to be succeeded to, or by agreement of the children or by the custom recognized by the Family Court; that the other children receive their shares of the estate in money

The two drafts differed in the details of how the monetary shares of the other children were to be determined and paid. However, each recognized that a serious burden would be placed on the successor to the agricultural estate and tried to devise means to lighten it.

The first draft failed even to pass the House of Representatives, while the second draft passed the House of Representatives but failed to pass the House of Councilors. Against the first draft, there prevailed a strong criticism to the effect that it was unconstitutional in destroying the equality between the children. Against the second draft, on the other hand, some people contended that it was unconstitutional because the capitalization of the agricultural estate in accordance with the profit value, which was very low, and the right to postpone payment for up to twenty years or to pay in annual installments likewise run counter to the ideal of maintaining equality among the cosuccessors, while others condemned it on the ground

that such draft would still throw the person succeeding to the agricultural estate into extremely necessitous circumstances, thus spelling ruin and decay to Japanese agriculture. And most of the scholars criticize the enactment of special law such as embodied in the first or second draft as being unwelcome, because, they aver, it tends to hinder democratization of agrarian families by strengthening the influence of the eldest son upon the second and third sons and daughters of the agrarian family, who are just beginning to awaken to their own dignity. They insist further that to cause the members of agrarian families to experience such difficulties in the operation of agriculture as may be brought about by the division of agricultural estates by reason of succession and to oblige them to contrive for themselves the means to conquer these difficulties, such, for instance, as the rationalization of agricultural operation, etc., are the effective means to bring about the democratization of agrarian families. Not a few of the scholars, however, counter such arguments by saying that once the tendency appeared among the members of Japanese farming families to cut up agricultural estates into slices, agriculture in Japan would fall into irremediable ruin. Thus, there emerges no unity of opinion from among the members of the National Diet, among the agriculturists, or among the jurists.

Conclusion

Is a law a spontaneous growth in the social life of a race, or is it a thing artificially created by the authority of the state? This may be a problem of legal philosophy for which no satisfactory solution has been found as yet. But it is the writer's conviction that a law is not either a spontaneous growth or an artificial production simpliciter, but includes both elements, and the ratio of these two elements within a law is variable according to the branches to which it belongs. The law concerning family life is one in which the element of spontaneous growth in the social life of a race is the strongest. It must, therefore, be regarded rather as a natural phenomenon that the actual family life of Japan has not been reformed immediately in response to the revision of the Civil Code.

As has been stated above, however, that very ideal which would stand opposed to the conventional house system and insist on individual dignity and the essential equality of sexes had already been generated to some extent in Japanese social life. The revision of the

Civil Code thus gave a boost to this already generated ideal. If so, then, despite the fact that the law concerning family life, which is primarily under the strong influence of tradition, is apt to resist the infusion of any new ideas, the present revision of the Japanese Civil Code must have a far stronger influence than in ordinary cases where no such ideal exists.

It is hardly necessary to say that the family is the unit and basis of all social relations. Unless it is democratized, we are convinced, one can never hope for the democratization of any social relationships whatsoever, be it the educational system, labor relations, economics, or government. With such conviction firm in mind, Japanese jurists who specialize in the Civil Law, the writer among them, are now making strenuous efforts in delivering popular lectures or in writing books intended for general enlightenment, with a view to diffusing the spirit of the revised Civil Code among the people, thereby promoting democratization of the family life of the Japanese people. It is our sincere hope and expectation that in the not too distant future these efforts will be richly rewarded.