The Current Family Law in Japan

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I. Introduction

This paper focuses on articles published mainly in 1996 and thereafter, and court judgments regarding marriage and divorce. As to the proposed reform of the Civil Code in relation to Family Law in Japan, however, I shall not touch on the subject here because the introduction of a bill to an ordinary session of the Diet in June 1997 was given up and also because the contents of the proposal for reform of the Civil Code have already been explained in the journal[1] by Professor Yukiko Matsushima. Further, while there were many articles[2] on adult guardianship before the advent of the aging society, I shall not take up these articles but shall report in this Journal on the subject of the requirements for marriage, grounds for divorce, effect of marriage and parent-child relationships.

II. The Civil Law Following the Burst of the Bubble Economy

In the first place here, this research paper deals with the main question, special law, including the material civil law enacted or amended in the past one or two years and the amendment of the Civil Code, the principle of the change of circumstances and a suit for unlawful occupation and then points out the problem of marriage of the same sex, a problem, a likely subject for the 21st century, of the liability for a breach of promise of marriage and of the relationship between the cause of a divorce and compensations for a divorce and then studies the legal measures toward the 21st century.

In the former part, the paper takes up the important laws relative to the

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1) Y. Matsushima, Japan: Commentary on the Report Proposing Reform of Family Law, 32 *UNIVERSITY OF LOUISVILLE JOURNAL OF FAMILY LAW* 359 (1993-94); See also F. Isono and S. Minamikata, Family Law Reform and In-Court Mediation in the Japanese Family Court, *THE INTERNATIONAL SURVEY OF FAMILY LAW* 1994, 303-310 (1996).

2) For example, Dai Junikai Gakujutsu Taikai: Seinen Koken o meguru Shomondai (The 12th Annual Meeting: Guardian for protecting the Rights of the Elderly), 12 *KAZOKU<SHAKAI TO HO>(The Socio-Legal Studies on Family Law)* 48 (1996).

protection of consumers which are more or less related to the burst of the bubble economy and the principle of the change of circumstances and a suit for unlawful occupation, both of which are closely connected with the burst of the bubble economy and the question of the revision of the Civil Law. Though the revision of the Civil Law has no relation with the burst of the bubble economy, it is inevitable and important to deal with this matter as a major legislation event to be recorded in the history of Japan's Civil Code revised after the burst of the bubble economy. In this revision, the portion of "capability" in the section of the general provisions of the civil code was revised extensively and the portion of "guardianship" in the section of kinship was also revised on the basis of the new concept of respect for self-reliance and self-determination, making the most of the remaining capability and normalization and with reference to the revised law (1990) of the Province of Quebec, Canada, a law of French origin. Besides this legal guardianship system, a voluntary guardianship system is also established.

In the latter part, while the reform of the family law in various countries of the world is being progressed in a similar manner as a result of globalization of social conditions, a study is made of the current problem of the protection of marriage of the same sex, which will be a major issue in the 21st century also in Japan and the problem of compensations for divorce and further the liability for a breach of promise of marriage, particularly its present day significance.

III. Requisites for Marriage

Article 733 of the Civil Code provides that a woman is not allowed to remarry within six months of divorce. For men, however, there is no provision which restricts their remarriage. Then there were opinions that this Article 733 was in violation of article 14 (1) of the Constitution of Japan which provides for the equality of the sexes but the Supreme Court in its judgment[3] of December 5, 1995 held that the provision of a period of six months for restriction of remarriage only for women had a reasonable ground and was therefore not a violation of the Constitution.

Further, the Supreme Court in its judgment of March 26, 1996[4] held that a woman (a third party) who had sexual relations with a husband following a breakdown of conjugal relations was not liable to compensate a wife for damages for reasons of tort[5]. However, the Supreme Court interprets that a spouse (a wife, for example) may demand the compensation for damages from the party responsible for an act of unchastity (a woman who was the other party in a husband's fickleness, for example). On that

3) Judgment of Dec. 5, 1995, Supreme Court; 1563 *THE HANREIJIHO (A Review of Court Precedents)* 81-102 (Jun. 21, 1996).

4) Judgment of Mar. 26, 1996, Supreme Court; 48-9 *KATEI SAIBAN GEPPO (Monthly Bulletin on Family Courts)* 34 (Sep. 1996).

5) The reason given was that the obligation for chastity ceased to exist after the breakdown of marriage and that peace of married life was not disturbed.

point, I think the other party should not be held responsible for an act of tort unless the sexual relations are the result of violence, fraud or intimidation on the part of the other party.[6]

As an article on the issue of marriage, there is a paper entitled "Same-Sex Marriage in the Conflict of Law" by Professor Herma Hill Kay, Dean of the University of California at Berkeley School of Law.[7] This article reviews "the Defense of Marriage Act" bill presented to the US Congress in May 1996. This article was contributed by Professor Kay to *The Civil Law in the 21st Century-Festschrift* published on the occasion of my 60th birthday. Therefore, I feel somewhat self-conscious in taking up this book but, since the table of contents and some of the articles printed in this book are in English, I would like to quote some of the articles of the book in the following discussion.

IV. Grounds for Divorces

In Japan, there are four types of divorce, namely, divorce by mutual agreement, divorce by conciliation, divorce by adjustment and judicial divorce. Of these, divorce by mutual agreement account for about 90%, divorce by conciliation 9% and judicial divorce 1%. In 1996, 206,966 couples divorced (795,040 couples wed in the same year).

The divorce by mutual agreement is effected by mutual consent between husband and wife and by giving notification. But to obtain a judicial divorce, one must always apply to a family court for reconciliation (Article 18 (1) of the Law for Adjudgment of Domestic Relations). If reconciliation is not awarded, then the matter must be taken to court. At the court, a divorce is granted only if the other spouse has committed an act of adultery, or if he or she has been deserted maliciously by the other spouse, or if it is unknown for three years or more whether the other spouse is alive or dead, or if the other party is afflicted with severe mental illness and

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6) K. Ono, Kazokukan ni okeru Fuho Koi (Intra-Family Tort), in 1 *KOZA GENDAI KAZOKUHO (Lecture Course: Present-day Family Law)* 79 ff, (K. Kawai et al.ed. 1991 Nihon Hyoronsha).

7) H. Kay, Same-Sex Marriage in the Conflict of Laws: A Critique of the Proposed "Defense of Marriage Act, in *"NIJUISSEIKI NO MINPO (The Civil Law in the 21st Century): Festschrift in Honor of Koji Ono on the Occasion of His 60th Birthday* 902-916 (Publisher: Hogakushoin, Tokyo, Dec. 7, 1996). Hereafter, this book is cited as "*THE CIVIL LAW IN THE 21ST CENTURY*".

A paper reviewing the possibility of whether a homosexual marriage is recognized under laws of Japan, there is S. Hoshino, Wagakuni ni okeru Doseiaisha o meguru Kazokuhojo no Shomondai (Problems connected with Homosexuals viewed in the Light of the Family Law in our Country) 69-3 • 4 • 5 issues *HORITSU RONSO (Meiji Law Review)* 237-259 (Feb. 28, 1997); Introducing a draft bill prepared by a council of the Swiss confederation regarding the establishment of a marriage, etc. is K. Matsukura, Kon-in Seiritsu tou ni kansuru Kyujugonen (95) Suisu Renpo Sanjikai So-an (Kariyaku) (Über den Revisionsentwurf zum schweizer. Eheschliessungsrecht vom 15, Nov. 1995), 20-2 *NANZAN HOGAKU (Nanzan Law Review)* 247-276 (Sep. 1966).

recovery therefrom is hopeless, or if there exists any other grave reason for which it is difficult for the marriage to continue (Article 770 (1) of the Civil Code). In this respect, the law in Japan is different from the No-Fault Divorce Law of the State of California.[8] In Japan, the state of "the Disposal Marriage"[9] as described by Judge Duncan of the State of California has not been found and there is no record that half of the married couples end up in divorce.[10] The court precedents in Japan are certainly inclined toward the positive corroboration though with conditions attached.[11] Also, the Ministry of Justice is now proposing a bill to reform the Civil Code to grant a divorce if a married couple live separately for five years or more and unless the other party or his or her children are not placed in extremely hard conditions including economic conditions as a result of a divorce.[12]

V. The Effects of Divorce

To begin with a court precedent, in the case of a wife, who, after returning to her country (the People's Republic of China) demanded that her Japanese husband paid consolation money for divorce (Civil Code, Article 709), a high court ruled that the amount of consolation money should be computed not on the basis of the price level in China but on the basis of the price level in Japan, the place where the divorce took place.[13] There are many opinions which support such a conclusion from the viewpoint of the principles of fairness.[14] The size of distribution of matrimonial property at the time of divorce (Civil Code, Article 768) is small in Japan and the average of the amount determined by all family courts is only ¥4,050,000 even including the consolation money. So, the Ministry of Justice is making a proposal for dividing the matrimonial property into halves for settlement

8) S. D. Sugarman, Current Controversies in American Family Law, in *THE CIVIL LAW IN THE 21ST CENTURY* 917 (1996).

9) R. Duncan, Status of Divorce in the U.S.: A View from the Trial Court, in *THE CIVIL LAW IN THE 21ST CENTURY* 924 (1996).

10) Ibid.

11) See J. Nakagawa, Kyakkanteki Hatanshugi Hanrei no Kiseki (The Principle of the Objective Rupture in Divorce Law and Formation of Case Law), in *THE CIVIL LAW IN THE 21ST CENTURY* 808 (1996).

12) Judge N. Taguchi says "If this proposal for reform of the Civil Code is legislated, granting a divorce will be easier than before but this will not affect greatly the admissibility of the divorce sought by a spouse at fault", Yuseki Haigusha no Rikon Seikyu to Minpo Kaisei Shian ni okeru Kakoku Joko ni tsuite (On the Claim for Admissibility of the Divorce sought by a Spouse responsible for the Ground for Divorce and the Severe Articles in the Tentative Draft of the Bill Revising Civil Code), 47-9 *KATEI SAIBAN GEPPO* 36 (Sep. 1995).

In the United States, there seems to be a movement to "put fault back into divorce," in contrast with the tendency in Japan (Duncan, Supra Note 9, at 928).

13) Judgment of Jan. 19, 1996, Sendai High Court Akita Branch; 48-5 *KATEI SAIBAN GEPPO* 66-75 (May 1, 1996).

14) See S. Furuta, Shogai Rikon ni tomonau Isharyo Santei (A Study of How to Estimate the Amount of Alimony for Divorce in an International Marriage), in *THE CIVIL LAW IN THE 21ST CENTURY* 423 (1996).

at the time of divorce.[15]

Next, regarding the visitation between a parent and child after divorce, the following examples of trials may be cited. On October 9, 1995, the Tokyo Family Court, in the case of a father, an American national, versus a mother living in Japan, with the former seeking visitation rights with his child, passed judgment that the applicable laws in this case were laws of the State of Texas, the personal law of the applicant. The court then held that the family law of the said State had a provision of restricting visitation to a child even by a parent under specific circumstances and that the matter under trial corresponded to that case and on that ground the court did not grant the visitation rights.[16] Also, the Kyoto Family Court, in the case of a French father seeking the visitation rights to his child living in Japan, ruled that the court could not accept the judgment of a French court approving the visitation within French territory.[17]

While there is no provision of the Civil Code regarding visitation, the Supreme Court acknowledges the possibility of the right for visitation, though indirectly, and the practice of family courts follows this rule. Partly because of social and cultural difference in child rearing, however, visitation in the form adopted by the West is not accepted in Japan.[18] In any case, the decision on visitation must be made after considering whether such a decision serves to the best interest of the child.[19] The responsibility for supporting children after divorce in Japan is a serious problem. The amount of the cost of child rearing paid by a parent not having the custody of the child is extremely small.[20] As such, there is frequent reference to foreign laws which provide a more advanced compulsory means of fulfilling the

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15) See N. Nagaya, Seisanteki Zaisan Bun-yo ni okeru Seisan Wariai no Nintei (The Recognition of the Percentage of the Portion in the Liquidative Distribution of Matrimonial Property - Taking a View of the so-called One-Half Rule in the Tentative Draft of the Bill Revising Civil Code), 38-3 *KATEI SAIBAN GEPPO* 1-55 (May, 1996). See also Konen Fufu no Rikon Chotei Jiken (A Case of Divoree Mediation for an Aged Couple) 246 *KEISU KENKYU* (*Case Studies*) 53-87 (Feb. 2, 1996).

16) Trial of Oct. 9, 1995 Tokyo Family Court, 48-3 *KATEI SAIBAN GEPPO* 69-76 (Mar. 1996).

17) Trial of Mar. 31 Kyoto Family Court, 1545 *THE HANREIJIHO* 81-84 (Dec. 21, 1995).

18) See T. Kajimura, "Ko no tameno Mensetsu Kosho" Sairon (Reconsideration of the Parental Visitation in the Best Interest of the Child), in *THE CIVIL LAW IN THE* 21ST *CENTURY* 438 (1996).

19) Regarding the difficulty of clarifying the objective standard of "children's best interest," for example, See Z. W. Falk, Right and Autonomy or Best Interest of the Child,in *THE CIVIL LAW IN THE* 21ST *CENTURY* 980-968 (1996); See also A. Yano,Amerika Rikonho ni okeru "Ko no Sairyo no Rieki no Igi (The Best Interests of the Child in American Divorce Law: What is the Concept or the Standard?), 57 *HIKAKUHO KENKYU* (*Comparative Law Journal*) 79-84 (Dec. 1995).

20) It is said that there are "deadbeat dads" also in the United States (Sugarman, Supra Note 8, at 921). Further, regarding the present state of payment of child support awarded by family courts in Japan, See K. Tachibana, 113 *MINJIHOJOHO* (*Private Law Information*) 45-54 (Feb. 10, 1996).

obligations for payment of the cost of child rearing[21] as compared to Japan. In particular, the paper written by Professor Nigel V, Lowe at Cardiff Law School of University of Wales[22] should contribute greatly to the legislative work in Japan.

VI. Parent-Child Relationships

In Japan these days, there is an increasing number of persons who marry foreigners, particularly women of Asian origin or men of American origin with the resultant dispute over parent-child relationships. In 1995, the Nagoya Family Court, in the case of a Japanese man seeking denial of legitimacy of a child born to a Colombian woman, who was said to be a legitimate child in the record of official family register, concluded[23] first that the laws of Japan, which were the laws of the applicant's own country and the laws of Colombia, which were the laws of the mother's own country, constituted the applicable laws, It then passed judgment that legitimacy was presumed under the laws of respective countries but that legitimacy of the child could be denied.[24] Also in Japan these days, use of DNA has become increasingly important for determination of the existence of the parent-child relationship and Jurist No. 1099 published a special edition on this topic describing the present state of DNA identification in Germany, Switzerland, France, Great Britain, and the USA.[25]

Futher, the recent development of medical technology regarding assisted reproduction is spectacular. In Japan, since the birth of the first AID (Artificial Insemination by Donor) child in the hospital of Keio University in August 1949, the number of AID children has now reached 7,000 in that hospital alone. With the addition of children born by in vitro fertilization numbering about 10,000 throughout the country, the number of children born by artificial insemination in Japan is said to exceed 20,000. In Japan, a child birth through such means as in vitro fertilization using another person's gamete, embryo transfer and surrogate mother is not accepted by medical associations but there is no legislation to prohibit such acts as yet. Now, because of an increasing number of couples who receive such

21) For example, K. Ono, Kodomo no Fuyogimu to sono Kyosei (Obligations for Child Support and Compulsory Measures-Cases of the USA and UK-), *KOREISHAKAI NO OYAKOHO* (*Parent and Child Law in Aging Society*) 265-285 (M. Arai and T. Sato ed. 1995).

22) N. V. Lowe, The English Children Act 1989:—Five Years on. Is it working out as expected?—in *THE CIVIL LAW IN THE 21ST CENTURY* 933-959 (1996); See also K. Niijima, Igirisu ni okeru Rikongo no Ko no Yoikuhi no Rikoho Kakuho Seido no Mondaiten to Kaizen no kokoromi (Issues on the Child Support System in the United Kingdom and its Reform-The Child Support Acts 1991 and 1995-), in *THE CIVIL LAW IN THE 21ST CENTURY* 670-689 (1996).

23) Trial of May 19, 1995 Nagoya Family Court, 48-2 *KATEI SAIBAN GEPPO* 153-156 (Feb. 1996).

24) MINPO (Civil Code), Article 774.

25) 1099 *JURISUTO (Jurist)* 29-98 (Oct. 5, 1996).

treatments in the USA or South Korea, academic circles have begun to take interest in this issue, publishing a number of papers and books regarding this question.[26)]

The question of whether brain death should be recognized as the criterion for death of man has been argued for a long time in Japan. On June 18, 1997, the law concerning organ transplants, which recognizes brain death as death of man only for the purpose of organ transplants, was finally enacted. Heart or liver transplants from those declared brain dead is now also possible in Japan when supported by a declaration of intention of the donor and the consent of the family of the deceased for donation of organs.

VII. Generative Medical Treatment Technology and Legal Countermeasures

1. *Present legal countermeasures*

The development of medical treatment technology related to the reproduction of human is remarkable in these days, thus making the artificial fertilization, ectosomatic fertilization and the delivery by a surrogate mother possible now. In Japan, however, there are no laws to meet this situation and only the artificial fertilization with the sperm provided by a third party is authorized self-control imposed by the Japan Obstetrics and Gynecology Association. Recently, however, there have been instances of deviation from this control. The law concerning the control of human clone technology was promulgated on December 6, 2000 and will be enforced effective June 6, 2001.

2. *Present state of fertility treatment*

Use of ovulation inducers:	165,500 cases
Artificial fertilization:	35,500 cases
Ectosomatic fertilization:	17,700 cases
Microscopic fertilization:	14,500 cases
Others:	51,600 cases
Total	284,800 cases (as of 1999)

The number of children born by IVF•ET, GIFT and ZIFT in 1998 was 11,119 and the total number of children born by the said treatment after 1989 to date is 47,591.

26) N. Higuchi, Jinko Seishoku to Oyako Kankei (Artificial Reproduction and Parent-Child Relationships), 1059 *JURISUTO* 129-136 (Jun. 1, 1995); K. Kinjo, *SEISHOKUKAKUMEI TO JINKEN* (*Reproduction Revolution and Human Rights*) (Feb. 25, 1996); K. Ono, Jinko Seishoku ni okeru Oyako Kankei (Parent-child Relationships in Artificial Reproduction), 248 *KEISUKENKYU* 2-35 (Aug. 25, 1996).

3. *Draft of final report of the Expert Committee, Welfare & Science Deliberative Council*

"The expert committee on reproduction supplementary medical technology" of the Welfare & Science Deliberative Council (an advisory organ of the Minister of Welfare) compiled a draft of the final report on December 12, 2000, the essence of which is given below.

(1) To authorize the use of sperm, ovum and fertilized ovum from persons other than a married couple only for the sterility couples without sperm or ovum.

(2) To ban the practice of a surrogate mother and the intercession for the purpose of profit-making by law with penal provisions.

(3) To keep the provider of sperm or ovum anonymous in principle but to disclose the personal information to the child to the extent that the provider cannot be identified.

(4) To provide specifically by law that the person who gave birth to a child shall be regarded as the mother of the child and that the person who agreed to the medical treatment shall be regarded as the father of the child.

(5) A public organ is to control all information on medical treatments and on the providers of sperm and ovum.

(6) To complete the legal system related to the above within three years.

4. *Instances of trial*

(1) Decision by Osaka district court on December 18, 1998

An action raised by a husband against the legitimacy of an AID child whom his wife gave birth after artificial insemination without obtaining the consent of her husband (Articles 772 (1), 774/775 and 776 of Civil Code) was approved.

(2) Decision by Tokyo High Court on September 16, 1998

An AID child born to the wife who received sperm from a third party with the consent of the husband is a legitimate child equal to the assumed legitimate child (Articles 772 (1), 819 (5) of the Civil Code) and therefore the wife cannot asset that there is no parent-child relationship between the husband and the child.

Additional note:

This paper contains extracts from the dissertation featured in "The International Survey of Family Law 1996" (issued 1998, published on behalf of the International Society of Family Law, Martinus Nijhoff Publishers) and records of the lecture given on February 14, 2001 at University of Wales, Cardiff law School, in addition to explanations about the legal situation in Japan in 1996 and thereafter.