

Note

Women's Rights in Japan —In Perspective to the Recent Trends and Law Reform on the Marriage System* ** ***

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Introduction

I will overview the law reform on the marriage system in Japan from the point of view of the improvement of the status of women.

There is now no direct discrimination against women in family law in Japan. However, there is concern that the effects of some aspects of the law place women at a disadvantage.

There has recently been established a Legislative Council of the Ministry of Justice. The Family Law Sub-Committee of this Council

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is reviewing the law to ascertain whether there are still provisions which in practice discriminate against women. In particular, the Sub-Committee is concerned about:

- 1 Establishment of marriage.
 - Marriagable age; At present, the law sets the marriagable age for women at 16 years of age and 18 years of age for men. There is, however, a proposal to set the age at 18 for both women and men.
 - *Waiting period for women to remarry after divorce;*
- 2 Voidable marriage;
- 3 Surname of a couple after marriage;
- 4 Surname of a child between the couple;
- 5 Cancellation for the contracts between the couple;
- 6 Divorce by mutual consent;
 - Necessary agreement concerning the child custody;
 - Property distribution after the divorce;
- 7 Grounds for divorce;
- 8 Dissolution of marriage by judicial declaration of disappearance;
- 9 Cancellation of the judicial declaration of disappearance and guardianship;
- 10 Effects of intestasy;
- 11 Amendament of the family registration system;
- 12 Disposition of process;

On January 16, 1996, the Sub-Committee on Family Law of the Legislative Council of the Ministry of Justice announced the results of

its sessions concerning "A Draft Proposal for a Bill to Partially Amend the Civil Code." This has been an ongoing project that originally began in 1954 as an inquiry into the review and improvement of the Civil Code. It is the result of "Deliberations on the Review of the Legal System Concerning Marriage and Divorce." The reasons for review of this system is as follows:

- 1 A current international trend and a Japanese Government policy to review the legal system of marriage from the necessity to improve the status of women in society.
- 2 The need to review the significance of the surname and to resolve two important issues. One of the issues concerns women's increased involvement in society and societal disadvantages experienced by them arising from the changing of surnames for reason of marriage. The second issue concerns a hesitation in getting married arising from the annoyance of maintaining the family name for various family and societal purposes.
- 3 A need to adjust the present systems concerning the grounds for divorce, and guardianship of children after divorce and distribution of property. This discussion has also included problems concerning inheritance in the case of illegitimate children. Presently, the law permits an illegitimate child to inherit half the amount of a legitimate child. This issue was presented and discussed in the 1980's amendment of the Inheritance Law, however, at that time it was decided that there was no problem with this law. In 1995, however, the Tokyo High Court declared this law unconstitutional and now there

are problems even from an international viewpoint.

Since I am limited in time, it will be difficult to cover everything, so let me concentrate on just a few issues that are heavily related to women's status in Japan.

The Waiting Period Before Remarriage

The Japanese Civil Code, Article 733, provides that if a woman wishes to remarry after the dissolution or annulment of her marriage, she must wait for six months. It is argued that as there is no similar provision for men, the requirement is discriminatory.

Alternatively, it is argued that there is a rational basis for the provision. The waiting period concerns problems regarding children of a marriage and presumptions relating to the birth of legitimate children. For example, Article 772 of the Civil Code provides:

“A child conceived by a wife during marriage shall be presumed to be the child of the husband.

A child born two hundred days or more after the date of marriage, or born within three hundred days from the date on which the marriage was dissolved or annulled shall be presumed to have been conceived during the marriage.”

The question was considered recently in a case in Hiroshima where the District Court and subsequently the High Court ruled that the remarriage provision had a rational basis and did not violate the principle of equality.

I cannot agree with the decision of this case. I do not have enough

time to explain in detail as to why I disagree with this case, however, let me just mention one particular point. Formally, the principle declared in Article 733 may seem to have a rational basis behind it, but if one looks closer, one will find that there are Confucianist ideals hidden within this principle. In Japan, the Confucianists have a saying, "A faithful wife and two husbands don't mix." It is thought that a similar way of thinking previously existed in China.

What is a faithful husband?

Surname After Marriage

This is a very sensitive area in Japan since family connections are still extremely important. It is the usual practice, as in most Western countries, for the wife to take the husband's surname after marriage. Exceptions are rare, however, may for instance occur where there is no surviving male heir in the wife's family, and she succeeds her father as a head of the family and her husband takes her name to ensure the family name continues. A similar situation occurs also in Western countries where sometimes both names are hyphenated. A Japanese grave is made to memorialize those within a direct family line, which is signified by the use of the same name.

As the selection of a surname is by consent it is agreed that there is no discrimination or inequality. On the other hand, the social pressures are so great on the women to conform to the practice of adopting her husband's surname that, while there may be no formal discrimination, there may be practical inequality resulting in the women losing the name she used before marriage.

The Sub-committee is at present considering a system of selective surname for the husband and wife, but it would seem that the law can-

not provide an easy solution for a deeply entrenched social custom.

Article 750 of the Civil Code states that when married, the couple will take either the surname of the husband or wife. On formal grounds this is considered to represent the equality of the sexes. However, in actuality 98 percent of the cases the wife adopts the husband's surname, and as a result loses her name that she has used thus far.

In recent years, there have been an increasing number of couples that decide to formally register the husband's name but have the wife use her maiden name in the workplace, or registering the name change in the family register just to satisfy formal procedure, but ignoring it in real life because of the disadvantages that result from it or in some situations just not registering the name change at all. It has been said that the present trend in small families in Japan has resulted in many instances where the only son or the only daughter could not get married because of disagreement on which surname was to be adopted.

In Japanese society there are expressions that suggest a woman "marries into the husband's family," while a man "receives a bride." Therefore, there is nothing suspicious in adopting the husband's surname when getting married.

In February 1996, the Legislative Council of the Ministry of Justice submitted their recommendations to the Minister of Justice for "A Draft Proposal for a Bill to Partially Amend the Civil Code" which included a provision recommending "a system for selective surname." These recommendations never got to the Diet floor, and therefore never became law.

The opposition to these recommendations strongly declared that a system that enabled a selection of separate surnames would "weaken

the family bond," and "destroy family ties." There were some that said it would "promote individualism, destroy Japanese tradition, and cause disorder." Will having the same surname maintain the cohesion of the family? Or will separate surnames necessarily promote the destruction of the family bond?

It is probably difficult to answer the question of whether not having the same surname will destroy family bonds. Rather, it may be necessary to give the choice to the people involved, namely, the same surname should be chosen if the couple decides that it will maintain the cohesion of the family, while others that feel that separate surnames will maintain the family bond should be given the option to choose separate surnames.

During the drafting stage, three different ideas were presented. One approved separate surnames but established the same surname requirement as the principal system. The second idea was the direct opposite of the first idea approving the selection of the same surname while establishing the separate surname requirement as the principal system. The third idea simply legally approved the use of one's former surname. The final draft approved a selection system that enabled the couple to choose either the same surname or separate surnames when they decided to marry.

It is important to take note of the point that this is a recommendation for a system not to force separate surnames, but a proposal to approve a system that provides an opportunity for selection of separate surnames for those who desire it. The separate surname system is undoubtedly more popular with the younger generation. A realization of a system of selective surnames is desirable to provide a free choice to those getting married in the future.

Grounds for Divorce

There are four ways by which a marriage may be dissolved in Japan:

- 1 . divorce by mutual consent;
- 2 . divorce by mediation;
- 3 . divorce by judicial decree;
- 4 . divorce by trial.

Divorce by consent is a system by which the parties discuss between themselves the basis of their separation including matters concerning their children and the family property. After reaching agreement on all issues and agreeing on divorce, the parties file in the Ward Office for Notification of divorce. In this case, there is no intervention by the courts. About ninety percent of all divorces fall into this category.

From the remaining ten percent, about ninety percent of all divorces involving the Courts are divorces by mediation.

Mediation is a judicial procedure that requires a judge that has constitutional qualification to hear and judge law. However, from the consideration of eliminating the severity and harshness of the settlement of domestic relation cases, the Domestic Affairs Trial Law refers to these judges who reside over the judicial decree and mediation as “adjudicators”. Mediation of domestic relations is a system that involves a mediation committee, or as an exception, a single judge as an adjudicator that assists in mediating a dispute to bring into effect a long and rational agreement that can be independently resolved. A mediation committee consists of one judge who is called “adjudicator”, and two or more private citizens chosen as mediation committee

members. Disputes concerning domestic relations involve husband and wife, parent and child, and other family related problems. All of these problems require a settlement for the future. Therefore, it is considered more appropriate to resolve the problem by the actual situation and negotiating an understanding looking to the future, instead of resolving it in the manner of a normal legal suit by "a single slice of the sword." The character of the dispute itself is appropriate for mediation since none of the parties dominates in the mediation procedure and unlike that of normal civil procedure in that they are held behind closed doors in a mediation room. In expectation of the prior stated functions, a system that puts priority on mediation of domestic relations has been established. This mediation system is compulsory, and it requires all disputes concerning domestic relations to initially go through the process of mediation before going to judicial decree or going through the district court judgment.

Divorce by decree is very rare, but where the parties in dispute agree on the divorce but cannot agree on children and property distribution the Family Court may make a decree of dissolution.

About ten percent of divorces in the courts (about one percent of all divorces) proceed to trial. Article 770 of the Civil Code provides that a party to a marriage can bring an action for divorce only in the following five circumstances:

1. If the other spouse has committed an act of unchastity (adultery);
2. If one spouse has been deserted maliciously by the other spouse (desertion);
3. Where one spouse has disappeared and for more than three

years it has been unknown whether the spouse is alive or dead (missing);

- 4 . Where the other party is severely affected by a mental disease from which no recovery is expected (insanity); and,
- 5 . If there is any other grave reason which makes it difficult for the party to continue the marriage (marriage breakdown).

These grounds for divorce represent a mixture of fault and ir-retrievable breakdown of marriage.

One issue at present causing concern and promoting argument in the courts and among academics is whether the party at fault can sue for divorce. The courts have continually rejected the argument presented by the spouse at fault that a divorce is necessary because of breakdown in the marriage since normally the spouse at fault has caused the breakdown.

These earlier decisions were overruled by a decision of the Supreme Court on September 2, 1987. The case caused a sensation in the media. Sensational headlines appeared:

“Divorce by Spouse at Fault Approved!”

“Unfaithful Husband’s demand for Divorce Approved!”

It is said that following this decision many lawyers were approached by many male and female clients who admitted they were having affairs, and asking whether they could now divorce their spouses and live happily with their companion. Needless to say, many lawyers had to tell their hopeful clients that the solution was not as simple as they thought. Since the decision of the Supreme Court imposed three condi-

tions.

The first conditions required a long separation period. The parties connected in the Supreme Court case had been separated for 36 years. The second condition was that there must be no child involved. The third condition was that it had to be demonstrated that the other party was not severely affected by the divorce.

Not only did the Supreme Court require a complete breakdown of the marriage, but also the three previously mentioned conditions also had to be met. Most of the clients were not allowed an easy escape from their marriage.

The case I cited demonstrates that, apart from consensus between the parties reached informally or through court supervised mediation, divorce is not readily granted in Japan. Even where a breakdown is evident, the other conditions must be met before a divorce will be granted. Although men and women appear to be equally affected it is the women who probably suffer most from being compelled to continue living in the meaningless relationships of broken marriages. It must be asked whether, after there has been a complete breakdown of the relationships, there is any value in maintaining the outward form of the marriage. It would seem better to do away with a marriage that has in fact lost all substance. There is a strong case for an objective reconsideration of the grounds for divorce under Japanese law.

Presently, the Sub-Committee is considering to decrease the separation period to five years. If a five year period of separation is legally approved for grounds for divorce, one can probably expect an increase in divorces. This in itself does not mean that the women will be the only ones to be at a disadvantage. However, the Committee is also concerned at the generally unfavorable treatment of women in property

settlement after divorce.

The Sub-Committee's considerations fall short of problems that result from the raising of a child which is also an extremely important issue for women.

A recent newspaper article pointed out the serious living conditions of a divorced single parent home by titling the article, "Father Obligated to Provide Child Support." In many cases that involve minors, the mother is usually given guardian rights and custody of the child, however, child support from the divorced father is rarely achieved. According to the article, only fifteen percent of the mothers receive child support. And generally, the amount of child support is said to be about two to three hundred US dollars a month. This situation makes clear how serious the conditions are.

The issue that stands out at this time is that in many of the ninety percent of the divorces by mutual consent there are very few settlements concerning child support or distribution of property. And, in many cases they are not carried out. For this reason, new laws need to be established and old laws need to be amended to provide for a better system. The Japan Bar Association has periodically pointed out these problems and suggested answers, however, these problems are still left untouched.

While the position of women have unquestionably improved in Japan both legally and socially, they do not yet have the effective status of women in most western countries. The result of the Sub-Committee's deliberation on these matters will be of great importance to the status of women in Japan.

However, as I mentioned at the beginning of my paper, the results of the deliberations that were submitted to the Minister of Justice were

met with opposition, mainly by the conservative Liberal Democratic Party members, and never saw the light of day. In any case, it is hoped that the many issues that have been mentioned will be brought to the Diet floor for deliberations as soon as possible, and that an amendment to the law that will improve the status of women will be considered in the very near future.

Conclusion

I have attempted to outline trends in amendments to family law in Japan as they affect women. It is of course not possible to separate the law from the social system that supports it. There are many differences and similarities between countries represented at this FIDA Conference in the law, religion and culture as they affect family relationships. By examining similar issues and approaches adopted in different countries we can all improve our knowledge of family law and perhaps all gain some insights which may contribute to the improvement of our legal systems. If any of us are able to benefit in this way the Conference will have been a success. Thank you.