

研究ノート

## An Overview of the Japanese Family Law System

—Focusing on A Historical Survey—

Tomiyuki Ogawa

Abstract

Historical Survey of the Japanese Family Law System

- A. The Reception of Western Law
- B. The Meiji Civil Code
- C. Family Law and Succession in the Meiji Civil Code
- D. The Post War Civil Code
- E. Family Law and Succession in the Post War Civil Code.
- F. The Japanese Court System

### **Abstract**

In 1853 Commodore Perry of the United States of America arrived in Yokohama with the “Black Ships” to present a letter to the Japanese Emperor from President Fillmore. The letter demanded that

---

\* This article is one of several papers which were prepared for the purpose of presenting seminars when the writer was a visiting scholar at the University of Western Australia, Law School during the early part of 1992.

Japan open its doors to foreign countries.

Japan did open its doors to the outside world and concluded a treaty with the United States of America and later with the other Great Powers. Japan was at first in an unequal bargaining position which was reflected in unequal clauses in these treaties. One such clause provided that Japan did not have the authority to judge foreign people in Japan.

When the Japanese government later demanded the alteration of these unequal clauses, the U. S. A. and the other Great Powers required the Japanese Government to create a legal system comparable to their own as a condition for altering the treaties.

Law in Japan at that time was feudal law. It reflected the class structure of a feudal society. It did not recognize the rights and obligations of the individual and was not suitable to regulate the affairs of a commercial nation engaged in international trade.

Furthermore, the Meiji Period was a time of great social change, and the existing law was becoming increasingly inadequate to regulate the new relationships being forged by the growth of commercial activity within the society. There was, in fact, no legal system of the type that existed in Western countries. There was not even a distinction in the law governing civil and criminal behaviour.

Japan thus found it necessary to develop a legal system which would be acceptable to the Western Powers. At first, finding the English system of Common Law too complicated it chose the codifying legislation of France as its guide. However there were difficulties. The French legislation had its origins in the French Revolution and the fundamental principles of liberty, equality and fraternity, and the fact that France was a republic, made it inconsistent with the structure of Japanese society and the dominant position of the Emperor in that

society. So, instead, Japan turned to German law as its reference for the development of a modern legal system.

Following defeat in the Second World War a new constitution was imposed upon Japan by the Allied Forces. This constitution, for the first time, recognized the rights of the individual, and was an attempt by the Allies, particularly the United States to secure the principles of democracy within Japanese society. As a result of this it was necessary again to change the Civil Code to give expression to these principles of the Constitution.

In summary, the modern Japanese legal system has its origins in Continental European Civil Law and is therefore quite different from the Anglo-Australian Common Law legal system. In modern times, it has undergone two radical changes to reflect changing conditions crucially, however, despite these changes in many respects it is still a gloss over traditional customs and attitudes.

In this article I wish to explain the evolution of Family Law in Japan and its place in the Japanese legal system. I shall conclude with a summary of the Japanese court system.

## **A Historical Survey of the Japanese Family Law System**

### **A. Reception of Western Law**

Before the introduction of the Civil Codes in Japan in 1890, where necessary, the government ruled on separate matters as they arose. Such orders were called *Dajyokan Fukoku*. These orders contained some rules on Family Law and Succession. The set of orders relating to Family Law and Succession were called the *Kazoku Ho*. There was

at that time however, no organized Code of civil law.

After the Meiji restoration in 1868, the Japanese government pursued a policy of turning Japan into a modern state as a protection against, and to enable it to compete with, the powerful western states. During the Meiji era, from 1868 to 1912, Japan progressed from an isolated feudal country to one of the world's most powerful and dynamic nations. Every effort was made to modernize all aspects of Japanese life. In order to accomplish this objective and to redress the balance after the unequal treaties Japan had entered into with the western nations, it was thought necessary to establish a system of law which would be recognized by other states.

Japan chose the model of the five Napoleonic codes of France rather than the Common Law of England which it found too complicated. The French codes had already served as a model for other countries which were modernizing their societies.

From 1868 the government encouraged the study and translation of the codes. Eto Shinpei who was Minister of Justice rather too hastily conceived the idea of having the French Civil Code translated and applied as Japanese Law. He ordered Rinsho Mitsukuri, an intellectual with a good knowledge of French, to translate the Civil Code and all the other Napoleonic codes as quickly as possible. When he gave his order Eto is reported to have said, "Translate those codes as quickly as you can and don't worry too much about errors. You may just make France into Japan, and French people into Japanese people." Mitsukuri had difficulty in completing the translation because he did not have the use of a French to Japanese dictionary or the assistance and advice of French lawyers.

There was the further difficulty that because of the limited concep-

tion of law in Japan at the time there were just no equivalents in Japanese for some concepts expressed in the French codes. The translation of the legislation created some new Japanese legal words. For example right became “Kenri” and obligation became “Gimu”.

While the need to modernize the law was not limited to the field of civil law, it was in the drafting of the civil code that the difficulties of translation of European concepts were most felt by the draftsmen. The government decided to invite some French lawyers to assist in the work, and Gustave Boissonade and others came to Japan to assist in the drafting of a civil code. The Civil Code was promulgated in 1880.

The Civil Code, called *Kyu Minpou* or *Boissonade Minpou*, contained sections on:

- \* acquisition of property,
- \* credit and mortgage,
- \* evidence and
- \* personal affairs.

*Kazokuho*, Family and Succession Law, was divided between the two parts of the code. Family Law was included in the section on personal affairs and Succession Law was included in the section on the acquisition of property.

The draft code was a radical departure from the traditional customs and law which had governed family law and succession up to that point. The traditional approach was based on the “Ie” or the extended family. Succession was strictly on the principle of primogeniture, and the customs and law sought to preserve the Ie. The head of the Ie, the father, had great authority over other family members and they could not marry without his consent. The code was scheduled to come into force on January 1, 1893 (Meiji 6). Just before it came into force,

however, the draft code met with intense opposition on the grounds that the recognition of individual members of the *Ie* and the granting to them of a wide range of rights was against the *Ie* system which formed the basis of Japanese society. The draft code was condemned for failing to understand and respect Japanese customs and cultural values. The opponents insisted that the draft should be revised so that it would reflect Japan's "own splendid moral standard which is incomparable in the world."

There was then a great controversy which became known as "the Civil Code controversy". In the Imperial Diet the opponents of the draft code finally prevailed in 1892. The third session of the Imperial Diet voted to postpone the commencement of the Civil Code. As a consequence, although the Civil Code had been promulgated it never came into operation and was permanently shelved.

## **B. The Meiji Civil Code**

In 1893 the government established a council to study codification of the law. Within this council it appointed a Commission to draft a new civil code. The members of the Commission were Hozumi Nobusige, Tomii Masaaki and Ume Kenjiro all of whom were professors in the faculty of Law at Tokyo Imperial University (now Tokyo University).

Many foreign systems were consulted by the Commission, but particular reference was made to the German Civil Code (the B. G. B.). The resulting code drew largely from both French and German sources. The French code had already been translated, and on to this stock was grafted much of the detail of the German code.

The new Civil Code commenced in 1898. Since then it has been supplemented by statutes and case law.

The most important statutes were:

The statute on the registration of real property of 24 February, 1899.

The statute on the leasing of houses of 8 April 1921.

The statute on the leasing of building sites of 8 April 1921 and most significantly, The law of 22 December, 1949 relating to civil status.

This last statute led to the introduction of profound changes in Succession and Family Law in recognition of the principles of the new postwar Constitution.

### **C. Family Law and Succession in the Meiji Civil Code**

In the drafting of the last two books of the Meiji Civil Code, Family Law and Succession, care was taken to preserve Japanese family traditions, but at the time when they were drafted, in the last decade of the nineteenth century, the concepts were already out of date and did not reflect the reality of the structure and relationships of the average Japanese family of the time. Except for the aristocracy, and in remote areas for example in isolated mountain villages, the Japanese family in the 1890s was a nuclear family composed of parents and children. The code, however, sought to maintain the concept of the extended family system controlled by the head of the family (koshu) endowed with great authority who controlled the members of the family the "Ie".

Following the promulgation of the Civil Code in 1898, households which had been materially independent, were noted on the Civil Status Register as belonging to an Ie and under the authority of the head of that family. The system of succession called, Katoku Sozoku, devolved all the property of the former Koshu on one legitimate heir. Other members of the family did not have any rights of succession, but had to await the favour of the new head of the family if they were to share

in the inheritance.

The legitimate heir was the eldest son of the head of the family. Only where there was no son in the family could a daughter succeed. The system had the advantage of preventing excessive subdivision of rural land.

The legal position of the Koshu was highly privileged. Members of the Ie had to obtain the consent of the Koshu before they could marry even after they had reached the age of maturity. The Koshu could arbitrarily determine the place of residence of members of the family, and those who did not obey him could be expelled from the family.

Exclusion meant disinheritance, and it was this sanction of disinheritance that effectively enforced the law.

The Civil Code, however, reflected a family structure that had ceased to exist for most Japanese people even before it was promulgated.

#### **D. The Post War Civil Code**

After the second World War and before the promulgation of the new Constitution, a committee was established to draft a new code of Family Law and Succession to conform with the provisions of the Constitution, in particular the principles of the dignity of the individual and the equality of the sexes. Books four and five of the Meiji Civil Code were completely rewritten and the revised draft became law on 22 December, 1949.

The Civil Code is called Minpo. Min means civil and po (ho) means law. The Minpo is divided into five books:

- I General Principles;
- II Property Rights including leaseholds,  
bailments and ownership of chattels;



III Civil Rights and obligations including torts and contracts;

IV Family Law;

V Succession.

In Japan the Civil Law lectures are divided into four parts: General Principles, Property, Civil Rights and Obligations and Family Law including Succession.

### **E. Family Law and Succession in the post War Civil Code**

Book 4 of the Minpou is entitled "Shinzoku" (the family). According to articles 7 and 5, sinzoku includes blood relatives to the sixth degree, spouses and relatives by marriage to the third degree. The five chapters of this book deal respectively with: marriage, filiation, parental authority, guardianship, and the obligation to maintain members of the family.

Book 5 deals with succession. The revised code discarded the system of Katoku Sozoku. It deals with all property and all children can succeed to property. The book is divided into eight chapters:

Chapter I contains four general principles

Chapter II states who is eligible to succeed

Chapter III deals with hereditary shares and the division of property;

Chapter IV is called "The Effects of Succession";

Chapter V deals with the separation of patrimonies;

Chapter VI is concerned with the distribution of property where there is no heir;

Chapter VII relates to wills;

Chapter VIII deals with the reserved share.

Chapter IV provides the rules relating to the division of property

and hereditary shares. Subject to certain exceptions division is usually on the principle of equality.

This principle caused difficulty of course where rural property was to be distributed. The system of *Katoku Sozoku* avoided the fragmentation of rural property and the abandonment of the system, raised the possibility that arable land would be divided eventually into such small lots that they would no longer be economical to farm. Several measures have been taken to avoid excessive division of farming land, but none has been satisfactory. This has led to pressure by conservatives to return to the system of *Katoku Sozoku*.

In practice, however, the problem is not as serious as it appears to be. Those heirs who do not want to lead a rural life renounce their rights in favour of those who want the land, in return they receive an amount of money equal to the value of their renounced share.

## **F. The Japanese Court System**

Since 1947 Japan has had a unitary court system. All courts for civil, criminal and administrative matters are within a single, three-tiered hierarchy that has the Supreme Court at its head. All courts are called "saibansho" —the place where justice is administered.

There are two classes of courts: The Supreme Court and the subordinate courts established by the law.

The Supreme Court sits in Tokyo and is composed of fifteen members. It is the highest court and in principle its appellate jurisdiction is limited to decisions only on matters of law.

The second level of jurisdiction is formed by the eight superior courts (*koto Saibansho*), located in Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo and Takamatsu. Superior courts are primari-

ly courts of appeal which hear all types of appeal from judgment given at first instance.

The third level of courts are the District Courts (Chiho Saibansho). These are courts of first instance for civil and criminal matters. There are fifty District Courts in Japan; one in each prefecture, one in Tokyo included, and five in Hokkaido. Each District Court has branches. For instance, in Hiroshima Prefecture there are four branches and in those branches there are eleven District Court judges beside eighteen in Hiroshima District Court itself.

At every level of the hierarchy judges can decide cases on their own interpretation of the Code. They are not necessarily bound by earlier decisions or decisions of higher courts. However, while there is not a strict doctrine of precedent, earlier judgments and judgments of higher courts are highly persuasive and most judges do follow such precedents.

The Family Courts, called Katei Saibansho, constitute a special category of lower courts. They deal principally with family matters and cases of juvenile delinquency. These courts are specialized and do not have jurisdiction in other matters.

In dealing with family matters the court, at first, attempts to hear and settle disputes by mediation. If that is unsuccessful the disputes are settled by judicial decree.

In its juvenile jurisdiction, proceedings in the Family Court are adversarial. However in its family jurisdiction, the court is non-adversarial and evidence is tested only by the judge.

If parties attempt to start family proceedings in the District Court they are referred to the Family Court, but if there is an appeal against the decree of the Family Court the matter is litigated *de novo*, in the

District Court and then such proceedings become adversarial.

- \* This article will be followed by a comparative survey of the Japanese Family Law System. The next article will cover the following four topics, De Facto Relationships; Divorce; Property Distribution upon a Marriage Break down; and, Family Court Mediation.

### References

- Arthur Talyer, *Law in Japan* (Harverd University Press, 1963)
- Yoshiyuki Noda, *Introduction to Japanese Law* (University of Tokyo Press, 1976)
- Akio Morishima, *Introduction to Japanese Law: Cases and Materials* (University of British Columbia, 1980)
- Paul Heng-Chao Chen, *The Formation of the Early Meiji Legal Order* (Oxford University Press, 1981)
- Malcolm Smith, *UBC Japanese Law 393 Reading Guide* (University of British Columbia, 1983)
- De Vos George A., *Institutions for Change in Japanese Society* (Institute of East Asian Studies, University of California, 1984)
- Frank K. Upham, *Law and Social Change in Postwar Japan* (Harvard University Press, 1987)
- Fujiko Isono, *The Evolution of Modern Family Law in Japan*, *International Journal of Law and the Family*, v. 1, no. 2 (1988), pp 183-202.
- John O. Haley, *Law and Society in Contemporary Japan* (Kandall/Hunt Pub. Co., 1988)
- Carl Steenstrup, *A History of Law in Japan until 1868* (Leiden, 1991)