

## Two Speeches on Japanese New Family Law.

Aoyama, Michio  
Professor, Faculty of Law, Kyushu University

<https://doi.org/10.15017/1475>

---

出版情報：法政研究. 30 (4/5), pp.75-100, 1964-04-10. 九州大学法政学会  
バージョン：  
権利関係：

# Two Speeches on Japanese New Family Law \*

Michio Aoyama

## I THE REVISION OF THE FAMILY LAW IN POST-WAR JAPAN

It is an honor and a great pleasure for me that I was given a chance to read my paper before the distinguish audience, by the kind invitation of the Czechoslovak Academy of Sciences. I chose as the theme of my paper : "The Revision of the Family Law in Post-war Japan", because this concerns the main field of interest of my academic researches.

Up until the Meiji Revolution of 1868, the Japanese people did not have a systematic statute law which can be properly called a "civil code". But the task of the newly-born "Meiji government" was to create a modern state under the slogan of the "equality of castes". Consequently, for the first time in our history, the problem of drafting a systematic civil code, imitating those of European countries, and especially "Code Napoleon" was taken up on the agenda. The circumstances at that time may be regarded to have some similarity to the situation arising after the French Revolution. The Meiji Revolution, however, did not carry out the tasks of a bourgeois revolution so completely, as the French Revolution did. Maybe, the driving force of the Meiji Revolution must have origi-

\* The speeches were delivered at Institute of Law, Czechoslovak Academy of Sciences at Prague, 24th, August, 1962.

nated in the bourgeois class. But it is the peculiarity of the Meiji Revolution, that its leadership lay in the hand of the lower stratum of samurai class (warrior class), and this situation prevented it from becoming a thorough-going bourgeois revolution. The French Revolution had completely done away with the absolutism. But it was not the case with the Meiji Revolution. Although it had some undeniable features of a bourgeois revolution on the one hand, it had at the same time created an absolutist regime on the other. I am not a specialist in the history of the Meiji Revolution but I think we can define the nature of that revolution like this: The feudalistic regime of the Tokugawa Shogunate was destroyed, and the Meiji Government stepped in in its place, but it was a bureaucratic government under an imperial (Tennô) absolutism, which was controlled by the representatives of the lower samurai class. Under this regime, Japan could not liquidate various feudalistic elements in its society, and the Japanese capitalism developed in a distorted way. And this situation did naturally have a strong influence upon the drafting of the civil code in the Meiji Japan.

I can not today go into the details of the history of the codification of civil law in the early years of the Meiji era. The full-scale work of codification, however, was started from 1880 under the guidance of professor Boissonade an eminent French jurist who was then a legal advisor to the Ministry of Justice. In its various aspects the draft thus prepared took the French Code Civile as a model. The code was promulgated in 1890 and was supposed to take effect in 1893. This is what we call the "Old Civil Code" or the "Boissonade Civil Code".

Just at that juncture there arose in the conservative circles a

strong objection to the effectuation of the code. A heated controversy developed between those who demanded a postponement on the one hand, and those who are for an immediate effectuation on the other. This controversy is known as a "Postponement Campaign", and it must be noted that it had not only an academic, but also a political meaning as well. In the end, the argument of the opponents carried the day in the Diet, and the Old Civil Code was killed once for all.

Now there were a number of reasons why the opponents did not like the "Boissonade Civil Code". First of all, the Code was an imitation of the French Code Civile which was based upon liberalism and individualism, and consequently, so the opponents maintained, it contradicted the basic principle of the Constitution of the Great Japanese Empire, which defined that the sovereign power rests with the Emperor. The second reason, which was closely related with the first, was that the "Book of Persons" providing for the family relations was strongly colored by individualism and liberalism, having as its keynote the Christian monogamistic system. The opponents of the code argued that it is contrary to the traditional Japanese family system with the rule of "family-head" (Koshu) as its mainstay. Judging objectively from the viewpoint of today, it is highly doubtful if the opponents had correctly understood the "Old Civil Code". Those who opposed and denounced the "Old Civil Code" were the jurists of the conservative and bureaucratic school, and their objection was motivated not only by their concerns over our family system. In the last analysis their objection was nothing more than the opposition to the so-called "freedom and human rights movement", the democratic

demands of the Japanese people at the time, and it was aimed at the consolidation of the Tennô absolutism.

This was how the Old Civil Code was shelved forever, but the Meiji government was in a hurry to codify the civil law. A commission of Japanese jurists was appointed for that purpose, and a code was drafted, taking this time as a model the first Draft of the Civil Code of the German Empire. And this Civil Code was put into effect in 1898.

This one adopted, just like the German Code, the "Pandekten System" and was composed of five parts: that is, Book One "General Provisions". Book Two "Real Rights". Book Three "Claim", Book Four "Relatives", and Book Five "Successions". It must be pointed out that this Civil Code was based upon a Principle which was diametrically opposite to that of the former Code. Of course, we can not say that the anti-democratic viewpoints of the afore-said conservative, bureaucratic jurists did materialize to the full extent. Particularly in the field of property law which was covered by Book One to Book Three, the principles and rules of European laws were adopted as they were, and in this respect the Code had the characteristics of the civil law of a capitalist bourgeois society. But it was different with Book Four and Book Five, which provided for the family relations. Here, a modern family law as a category of the bourgeois law did not materialize, but the codified law rather tried to consolidate a patriarchal family system, with a "house" under the rule of the house-head right as its center. This is very important, for that very system of the "house" ruled by the house-head was the expression of the policy of the bureaucratic jurists who wanted to strengthen the Tennô absolutism.

Those jurists looked upon the patriarchal family system of the feudal society as the basic pattern of the family of Japanese people.

I think that, for you now present here, the concept of a "House" is an extremely difficult one to understand. Of course it does not imply any kind of a building. Furthermore, it is not a family as a group. As one of our specialists of the Civil Code gave a definition that "a House as referred to in our Civil Code is a body consisting of a house-head and his family and registered in the census register," it is nothing but a body existing on the pages of the census register. This fictional body had to be submitted to the rule of a house-head, no matter whether this body did really conform to the family life of the people or not! So you may naturally ask a question: why they found it necessary to incorporate such a "House-system" in the Civil Code? Here is my answer to that question: As I pointed out before, our conservative bureaucratic jurists, who were eager to consolidate the Tennô Absolutism, invented a concept of "Family-State" for that purpose, and then they found it fit to plant that same concept also in the Civil Code.

I am afraid that the word "Family-State" too may sound very odd to you. But Hegel is said to have found this type of a state in ancient China, which he called "asiatic absolutist state". This form of state structure is characterized by an hierarchically stratified system of power. In this pyramid-like structure, the summit is represented by the power of the Tennô, and the bottom is formed by the "house", which is ruled by the "house-head". In this way, the rule of the Emperor over the people and the rule of the "house-head" over the family were regarded by those reactionary jurists as being essentially identical, because these two

have their common origin in the national religion of ancestor-worship. Dr. Yatsuka Hozumi, one of the extremely conservative constitutional jurists who defended the Tennô absolutist regime most energetically in the Meiji era, once defined the concept of the "Family-State" as follows : "The concept of the house and the concept of the state are one and the same, and there is no difference between the two. A house is a state in a smaller scale, and a state is a house in a larger scale."

I have not enough time to go into the details of their argument, but I think it hardly necessary to point out that, from scientific point of view, the state and the family are completely different entities. To take for example the viewpoint of modern sociologists, the state is a body based on territorial tie, whereas the family is a body based on blood tie. Therefor, the "Family-State"-theory is nothing more than a shameless subterfuge. Dr. Watsuji, one of the outstanding ethicists and philosophers of Japan adopted this viewpoint when he criticised the "Family-State"-theory. In his famous book "Climate" he wrote :

The family is the alpha of all human communities, as being a unit of personal, physical, community life ; the state is the omega of all human communities, as being a unit of spiritual community life. The family is the smallest, the state is the largest unit of the union. The building up of the connection is different in each. So to regard family and state in the same light as human structure is mistaken. (Climate, p. 148) . Dr. Watsuji pointed out the logical inconsistency of the "Family-State"-theory in this manner, but on the other hand he admitted that there was an adequate historical reason for this kind of

peculiar interpretation of state. In my opinion, his contention that what is logically inconsistent can be justified by historical considerations could be supported only in the case when one approved the existence of Tennô-System.

Now let me turn your attention to the concept of the "house" as a tool for strengthening the feudalistic, patriarchal family system. In this system a special emphasis was placed on the authority of the husband in the conjugal life and on that of the parents, or rather of the father in the parent-child relations. Further, the law of succession was not based on the equal right of children, but on the principle of primogeniture. However, it must be noted that the right of primogeniture had never been an established custom since ancient times in Japan. This specific system of succession was consolidated for the first in the feudal society of the Tokugawa era, and only for the warrior class.

There were various reasons why this specific usage adopted by the samurai class was incorporated into the Meiji Civil Code. But a readily understandable one is that the majority of the members of the drafting commission belonged to the former samurai class. While supporting the idea of "Family-State" in respect to the state structure on the one hand, they tried to introduce their own custom of feudal society into the modern family system on the other. Pretending that the custom and ethics of their class are only legitimate ones, they despised and neglected those of the common people.

In any case, the Japanese society, although it was filled with many contradictions under the Tennô absolutism, developed as a capitalist society, and ultimately stepped into the so-called impe-



rialist stage of capitalism. And since the Manchurian Incident in 1931 it entered into the period of general crisis, and finally a Fascist rule of the militarist clique was established since 1936. The Tōjō Government then started a desperate war against democratic powers, as a result of which Japan had to receive a severe judgement of the whole world.

After the surrender Japan adopted a new constitution in order to make a fresh start as a democratic nation. It is true that the original draft of the constitution was prepared by the Occupation Authorities, but I don't think that this problem should be taken so seriously. More important is the fact that it had been approved in the Diet after a long discussion, and it is based upon the principles of democracy and pacifism. First of all, the Tennō system, so far as it implied that he possessed a sovereignty, was abolished, and it was declared that the sovereign power rests solely with the people. Secondly, the new constitution enlarged the basic human rights to the full extent. And thirdly, it redefined the fundamental principles of the family law on the basis of individual dignity and essential equality of the sexes. It is stated in the Article 24 of the new Constitution that :

Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.

With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

Persuant to this article of the Constitution, all stipulations of the Meiji Civil Code which contradicted these democratic principles was subjected to a thoroughgoing revision, and for the first time since the Meiji Revolution our nation came to possess a family law, which can justly be called a statute of a bourgeois society.

What, then, are the characteristics of the new family law? First of all, they consist in the fact that it abolished the "house" ruled by the "house-head" as well as the "succession to the headship of a house".

You may be perhaps interested to know what reasons were given by the Japanese scholars for the abolition of the former institutions. Most of them who belonged to a Codification Committee had a tendency to emphasize that the "house" ruled by a "house-head" did not coincide with the realities of family life. Professor Wagatsuma, one of the authorities on civil law in Japan, for example, wrote as follows.

"With the progress of the economic system of capitalism, the formalistic "house" as stipulated by the Civil Code has become more and more removed from the realities of the community life of relatives in the present time. As a consequence, the exercise of the power of a "house-head" tends too often to become an abuse of right, ..... this power simply turns into nominal authority without sanction of moral. As for the institution of the succession to the headship of a house, the right of the eldest son to the undivided inheritance of the family property, more and more increases the inequality among several children who live in separate households, and makes the situation unbearable."

An explanation like this one, certainly tells a part of the truth, and I don't say it is incorrect.

To take the right of a "house-head" for instance : Historically such a right existed in Ancient Rome, and it was called "patria potestas". In this case, a large number of family members lived in community, with a patriarch as family head, in which sometimes even slaves were included as family member. And the entire family was engaged in common production. In such a large family, the right of a family head was indispensable. In the same manner, a system of house-head existed in Ancient Japan. But ever since such a large family has disintegrated into smaller units including only the husband and wife and their children, that is, into "nuclear families" as defined by Murdock, there is already no *raison d'être* for a "house-head". According to the National Census carried out in 1920, an average family in Japan was made up of 4.5 persons, and this shows that the rule by the "house-head" has become completely meaningless. Therefore, Professor Wagatsuma was certainly right when he stated that the right of a "house-head" had become nominal, and even its abuses were to be feared.

In my opinion, however, it is not enough to explain the abolition of the right of a house-head simply by the reason as mentioned by Professor Wagatsuma. I think it is important to keep in mind the close relationship which had existed between the house-system of the Civil Code and the Tennô-system of absolutism. The point is this : as far as the New Constitution abolished the Tennô-system and substituted it with the sovereign power of the people, the concept of the "house" in the civil law, which was contemplated as a fundamental structure of a "Family-State" with the Tennô at

its summit, has completely lost its *raison d'être*.

Now let us see what are the main features of the revised family law :

We have already several precedents in the world, of legislating separate family laws after the war, as in the case of Soviet Union and People's Republic of China, and as you know such is the case with Czechoslovakia too. But in the case of the revision of the Japanese Civil Code, such a drastic change was not yet contemplated. Consequently, there still remains a problem of separating the present Civil Code into two independent statutes, that is, into a civil law which stipulates the exchange of commodities exclusively and an independent family law. But this is a problem to be solved in future.

Anyway, the revised family law of Japan is made up of the following chapters :

- Chapter one : General Provisions
- Chapter two : Marriage
- Chapter three : Parents and Children
- Chapter four : Parental power
- Chapter five : Guardianship
- Chapter six : Support

And the entire law is constructed around the "family" which really exists, that is, a family composed of husband and wife and their children. Therefore, the major subject of the law is the marriage, or husband-wife relations together with the parent-child relations. I can not go into the details of these provisions, but I will try to show you the main aspects of our revised law.

As far as the marriage is concerned, these are the main points

of the revision : First, monogamy was recognized definitely as the legitimate form of wedlock. Second, the principle of "marriage by mutual consent" was established, and thus freedom of marriage was sanctioned. Third, equal rights of both sexes in conjugal life was recognized.

It is true that, even before the revision, the Code recognized in theory that monogamy was the basic form of marital relations. But that was not the monogamy in a strict sense. In his "Origin of the Family, Private Property and the State," Friedlich Engels criticized monogamy in the bourgeois society by pointing out that, although it is a monogamy for women, but it is not so for men. This same criticism could be applied not only to our former Civil Code, but also to the former Penal Code. With regard to the duty of chastity, there was a sharp distinction between husband and wife, so that, in the Civil Code only an adultery committed by the wife was recognized as a rightful cause of a divorce, and in the Penal Code only an adultery of the wife was punishable by law. But the revised Civil Code treats the chastity of husband and wife on an equal basis, an act of unchastity on either side being regarded as a rightful cause of divorce.

Aside from the principle of monogamy, the principle that the marriage must be based upon mutual agreement of free wills of free persons is another pillar of a modern marriage law. From a legal point of view, this problem of recognizing the freedom of will of the parties in marriage is reduced to a problem of an extent to which can be allowed the right of consent and dissent on the party of the parents in regard to their children's marriage. In this respect, the revised Code followed the example of the family laws

in most European countries, in stipulating that such a parental power can be recognized only when their child is a minor. When we consider that in the former law a man within the age of thirty and a woman within the age of twenty five could not get married without a consent of parents, this is a very great change.

As regards the equal rights of man and wife in conjugal life, the revised law stipulates: "Husband and wife shall live together, and shall cooperate and aid each other." And regarding the expenses of conjugal life, it says: "Husband and wife shall share the expenses of the married life with each other, taking into account their property, income and all other circumstances." In addition, the practice of incapacitation of wife resulting from marriage has been abolished.

There are very interesting points concerning the divorce system, but since I am going to discuss it in another paper, I shall content myself by mentioning the following two points: First, the principle of "divorce by agreement or by mutual consent" was established in the revised law, so that, at present, about 90 % of the total number of divorces in Japan are ones by mutual consent. Second, the legal causes for judicial divorce are now applied to both sexes on an equal basis.

When we say that the family is the basic unit of social organizations, we include in the concept of "family" not only the marriage relations but also parent-child relations. And of course the one as well as the other actually exist as social institutions. Therefore, the conditions as to how the parent-child relations are defined by law, or how strong or weak are the ties between parent and child change as the society changes. For instance, looking

back the history of human society, we have patriarchal societies which we find distinctly different from matriarchal societies.

In a democratic society, a parent-child relations based upon the equality of persons must be provided for also by law. This viewpoint was of course adopted by the revised family law of Japan, and the feudalistic parent-child relations as stipulated by the old law were completely abolished.

Generally speaking the legal aspects of the parent-child relations fall into the following three categories :

The first is "parental power", which concerns the relationship between parent and minor. Because the word "parental power" itself can hardly fit into the present-day conditions, essentially it had better be called a parental duty to bring up a child to a sound maturity.

The second is "support" on which the revised law says : "The lineal relatives by blood and brothers and sisters shall be under duty to furnish support each other" (877) . In recent years Japan has made some progress in the matter of protection of the poor by state under the so-called Livelihood Protection Law. But this protection by state is of a secondary nature. The primary responsibility is placed on those who are stipulated by the Civil Code as being responsible for support.

The third is "succession." The succession to the headship of a house as sanctioned by the former law was abolished, and the succession right is now recognized for all children on an equal basis. Therefor, in case a deceased father has three children, each of them can inherit the father's estate equally, regardless of one's sex. Nevertheless, it is to be regretted that there is still a

discrimination between a legitimate and illegitimate child, because the share in the succession of the latter is a half of the share of the former.

The question of how to harmonize the respect for monogamy with the protection of an illegitimate child is indeed a difficult one. In the feudal society of Japan, and especially for its samurai class, to get a male successor was a matter of prime importance. Therefore, a male illegitimate child was given priority to a female legitimate child, provided that he was recognized by his father, and this same practice was incorporated into the Meiji Civil Code. It was only too proper that the revised law abolished this practice, but we have still to re-examine the discriminating provision concerning the share in the succession.

I shall close my paper with just a few words on the practice of "adoption". Japanese society had developed in the past a very complicated system of adoption. But the protection of an adopted child was taken up for the first time by the revised Civil Code, in which a stipulation was made to the effect that, in order to adopt a child, the foster parent was required to get an authorization by the Family Court. But it is my belief that there are still many legal problems concerning adoption, which must be submitted to a full-scale re-examination sometime in future.



## II ON JAPANESE DIVORCE LAW

The Japanese Civil Code follows the so-called Pandekten-System, and the provisions concerning divorce are given in Book Four : "Relatives". The pre-war Civil Code was first put into effect in the 31st year of Meiji, or in 1898, but after World War II it was submitted to a thoroughgoing revision. The revision was made especially in Book Four "Relatives" and Book Five "Succession". And of course the Divorce Law too was completely rewritten.

But before going into the details of this new Divorce Law, I should like to explain the social implication of the divorce law in general, and also to cast a glance to the history of that law in Japan.

As an ideal, the married life must be a life-long union between man and wife. But in the realities of human life, we do not always have such an ideal married couple. Regrettable though it is, there are too often cases, where parties concerned find it impossible to continue the married life from various reasons, such as disharmony in temperament. Therefor, although divorce is a action not so agreeable or desirable, it is looked upon as a "necessary evil" in our society. However, divorce is a kind of social institution, just as marriage is a social institution. Therefor, whether divorce is prohibited strictly or dealt with leniently, and also in what manner, or form, divorce is effected, is determined by mores, religion, and custom of respective societies, so that the legal aspect of the problem too differs with each society.

Generally speaking, in a male-centered society where the so-

called "patriarchal family" prevails, the husband has usually a unilateral power to divorce his wife, but in a society where the equal right of both sexes is respected, it is a rule that divorce is made upon the mutual consent of the free will of the spouses. In this sense, the history of divorce can be called a history of progress of the women's status in society.

I believe that you know for better than I do about the history of divorce system in Europe, but the most interesting factor in it to a Japanese scholar like myself is that it has been very strongly influenced by Christianity. That religion used to have an extremely strong inhibition against divorce. Although I have but a meager knowledge about theological problems, at least I can understand that the principle of indissolubility of marriage of Christianity had, at the time when the religion was just born, a certain social meaning, because it had a function of protecting the wife from a tyrannical power of the husband, and thus prevent a family from falling apart. However, the Catholic Church of the Middle Ages had already forgotten the original meaning of that principle, and forbade divorce very strictly solely for the purpose of strengthening its authority. I think that it was quite natural that, at the time of Reformation, Luther and Calvin attacked this stand of the Church which was in complete disregard of human right. Then the French Revolution freed marriage from the authority of the Church by turning it into a "civil contract". Also the Soviet Revolution in Russia freed men and women from the rigorous divorce system of the tsarist time. When we look back the whole history of divorce system in Europe, we can call it a history of how the people acquired freedom of divorce through

the battle with the religious authority.

On the contrary, we did not have such a strong influence of Christianity or any other religion in the history of Japan. Therefore, the freedom of divorce in our country had simply meant the emancipation of women from the tyrannical power of the husband in a patriarchal family. In the Japanese history, throughout the ancient as well as the medieval times the wife did not have the right to ask for divorce, but the husband was able to divorce his wife unilaterally. The oldest written statute in Japan was the Taihō Code in 702 A. D. which copied after the model of the Chinese Code of Tang period. In that Code, the grounds for divorce are mentioned as "grounds for abandoning a wife" and if a wife did not bear a male child, it was thought to be a fair reason for divorcing her.

Further, in the Tokugawa era there was no written law, but simply a customary law, by which the husband could divorce his wife by handing her a written announcement, without bothering to give any ground for the act.

Although the husband would in this manner very simply divorce his wife if he did not like her, it was not permissible for a wife to ask for a divorce on any ground whatsoever, whether she was maltreated by her husband, or he had an illicit intercourse with another woman. This must be called indeed a sheer disregard of the human right of the wife.

In spite of the feudalistic morality which recognized an absolute power to the husband, such a practice appeared to be too inhuman even to the eyes of our people in the Tokugawa era.

So they invented a remedy : an ill-treated wife would run into a

buddhist nunnery called an "Enkiridera" that is a "marriage-breaking cloister", and under the protection of this nunnery she could get divorced. But so far as we know, there were only two such nunneries all over Japan, which played a part of sanctuaries for suffering wives. Therefor, it is very questionable how far such an institution could salvage them. Just as the late Professor Hozumi said, in "Old Japan Divorce was the privilege of the husband only, as in the Mosaic and other primitive laws".

However, the Meiji Revolution in 1868 gave a signal for an emancipation of the wife who suffered under such an oppression. Although the Meiji Revolution was by no means a thoroughgoing one as the French or Russian Revolution, it must be mentioned that it tried to raise the status of the wife. At first, in the 6th year of Meiji, that is, in 1873, a law was enacted, which granted a wife with a right for demanding a divorce from her husband. This law had still defects, because it did not acknowledge complete equality between the parties in marital relations, nor did it treat the wife as an independent person. But compared with the feudal times, it meant a remarkable progress in that it tried to protect the wife from the viewpoint of right of freedom.

The Civil Code of Japan, which was put into effect in the 31st year of Meiji (that is, 1898), divided the forms of divorce into "divorce by agreement" and "judicial divorce", the former being effected by mutual agreement of the spouses, while the latter is sanctioned by a court of law on the several grounds specified in the Code. Therefor, as far as the outward form is concerned, the Code made provisions for divorce on the basis of equal right of the parties in marriage. However, as for the "divorce by agree-

ment", under its beautiful name, the husband was still allowed to abandon his wife, while in the case of the "judicial divorce", the wife was not treated equally with the husband with regard to the grounds for divorce. The wife was, it can not be denied, distinctly on an inferior position.

Now the revised Civil Code has completely abolished the inequality between husband and wife in the provisions concerning divorce. The revision has left, however, more or less a problem in that it still contains the provisions for "divorce by agreement."

I do not want to accuse the practice of recognizing "divorce by agreement" as a legal form of divorce, so far as it is effected in an ideal way, without any kind of abuse. Premier Zahle, the originator of the "divorce by agreement" system in Denmark is reported to have stated that "Those who are to be united by free will and sentiment, should be disunited as well by free will and sentiment, and solely in such a way like this either the marriage or the divorce can be looked upon as being truly moralistic".

Also Pollard, a fervent advocate of divorce by agreement in Great Britain, called it "a most intelligent as well as decent way of getting divorced" and "a natural outcome of a standpoint which value the dignity and freedom of man". It must be noted that in this manner the support for divorce by agreement has recently become stronger in Western Europe. In my opinion, however, as a prerequisite of reliance on "the free will and sentiment" as well as on "the freedom and dignity of man" as a basis for decent divorce, it is necessary that the equality of sexes has been practically attained in our society. It is no wonder in this sense, that the French Code Napoleon, though it had provided for divorce by

agreement at first, but later abolished it in 1884.

Further, the problem of freedom of divorce has an aspect more or less different from that of freedom of marriage. While the freedom of marriage concerns a creation of a new community (Gemeinschaft) of man and wife, the act of divorce means a destruction of the community which has many-sided functions as a social institution, so that the social consequences of the latter is much more greater than that of the former. If we take this point into account, we must admit that the practice in most of the western countries which does not legally recognize divorce by agreement, does in effect serve the purpose of guaranteeing equity in the matter of divorce, and of protecting the interest of wife and children as well. There are indeed many problems concerning the practice of divorce by agreement. But this problem should not be determined metaphysically, but in the realities of the respective society from the viewpoint of purpose and working of a divorce law.

Now let us go back to the divorce by agreement as stipulated by the Japanese Civil Code. The formalities prescribed by law are very simple, because the parties have only to present a signed document to the mayor of the municipality. Or the parties may notify the divorce orally to the municipal authorities. In either case the notification must be made by both parties and testified by two or more witnesses of full age. The presentation of the document, however, can either be made personally by one of the spouses, or by mail. Therefore, there have been discovered quite a number of cases, where the husband forges a document and sends it without telling it to his wife. Of course such a notification

of divorce is ineffective, but since the wife must go through legal formalities in order to invalidate it, the conditions are very disadvantageous for her.

It is my opinion, therefore, that although there is nothing objectionable in divorce by agreement in itself, measures must be taken to confirm the will of the parties in advance of the notification. This can be done by making provisions for the formalities to be taken before a legal authority, a family court for instance, in order to attest that both parties wish to get separated. Such a proposal was actually made while we were revising the Code, but it was not adopted. The argument against it was that, if we make the procedure for divorce by agreement too complicated, it will lead to more harmful effects, in that the people will choose to get divorced in fact, but without going through legal formalities. But I can not agree to this argument. My reason is this : Neither the husband or the wife can get re-married unless he or she is legally divorced, and it is unthinkable that either of them will prefer to stay in such a disadvantageous position.

Next I shall explain about another form of procedure, that of judicial divorce.

With its provisions for grounds for divorce which were favorable to husband, but disadvantageous to wife, our old Divorce Law was considerably feudalistic in character, and was against the principle of equality between sexes. This was revised by the new law, and the scope of the specified grounds for divorce was both enlarged and given elasticity. The provisions concerned are like this :

“Husband or wife can bring an action for divorce only in the

following cases :

- (1) If the other spouse has committed an act of unchastity;
- (2) If he or she has been deserted maliciously by the other spouse ;
- (3) If it is unknown for three years or more whether the other spouse is alive or dead ;
- (4) If the other party is attacked with severe mental disease and recovery therefrom is hopeless ;
- (5) If there exists any other grave reason for which it is difficult for him or her to continue the marriage."

The grounds for divorce are thus specified concretely in the clauses from (1) to (4). But the main point is the word "grave reason" in clause (5). When a wife brings an action for divorce on the ground of cruel treatment by her husband, the case will be decided in her favor, if the court judges it as a "grave reason". Not only in the case of cruel treatment, but in reference to all other instances in the actual relations between the spouses, the court can take up such reasons as appropriate grounds for divorce.

Only it is not to my liking that there is a stipulation to the effect that the court can dismiss the action for divorce, in case it finds the continuance of the marriage proper "in view of all the circumstances". Consequently, because the court can make an erroneous judgement, it may lead to an unreasonable decision, even though there is justifiable reason for divorce. An assumption that the court is unreliable, of course, is not a very desirable one for me. But I don't think it proper that the court can prevent divorce as far as there is just reason for it.

In spite of this much of shortcomings, I think the grounds



specified for divorce are as a whole satisfactory;

Then it is characteristic of the revised law that it has a couple of new provisions, like these :

First, if the spouses have children at the time of divorce, they must make agreement as to which party is to take the custody of them. In the case of divorce by agreement, if the parties can not reach an agreement on children's custody, they must apply for decision by the family court. In the case of judicial divorce, on the other hand the court of law shall give the decision.

Second, the new law sanctioned the distribution of property between the spouses. It is stipulated that "Husband or wife who has effected divorce by agreement may demand the distribution of property from the other spouse". Of course the distribution of property can applied also in the case of judicial divorce. Although the text of the law says that either the husband or the wife may demand the distribution of property from the other spouse, the reality in Japan is that in the overwhelming majority of the cases the demand is raised by the wife.

It is an important factor in the legislation of modern divorce laws, how the protection of children and the livelihood of wife after divorce is effected by its provisions. In this sense, these two provisions as I mentioned here are decidedly a progress, although they are not as yet satisfactory enough.

In Japan a Law for Adjudgement of Domestic Relations was enacted at the same time with the revision of the Civil Code. Under this law, the party who wants to bring the action for divorce must, prior to it, present the case to the family court for conciliation. Therefor, in a considerable number of cases, a settlement

is reached in the family court.

Now let us have a look at the statistics of divorces in Japan. Japan is famous, just as the United States, by its frequency of divorces. But the statistics show that the number of divorces in Japan is much smaller than that of the U. S. These are the statistics for 1959 :

Total.....	72,455
in which ; (a) divorce by agreement.....	66,316
(b) divorce by conciliation by family court	5,430
(c) divorce by decree by family court	44
(d) judicial divorce	665

In this way, the cases of divorce by agreement form by far the greatest part.

Next we shall look at the statistics concerning reasons for divorce with regard to divorces by conciliation (by the family court).

In the table the cases brought by the husband and those brought by the wife are shown in different columns. This is the statistics for 1952, because those for more recent years are not available.

As for the reasons for divorce referred to by the wife, the largest item is "unchastity of husband":

(1) unchastity of husband	2,487
(2) cruel treatment	2,037
(3) disharmony in temperament	1,103
(4) desertion	703
(5) prodigality (wastefulness)	756
(6) financial failure	651

(And some other reasons of minor frequency)

The largest item among the reasons for divorce referred to by

the husband is "disharmony in temperament" :

(1) disharmony in temperament	884
(2) unchastity	455
(3) disease	248
(4) discord with in-laws	152

(And some other items of smaller size) .

The total of the cases brought by wife was 9,348 and the total of those by husband was 2,770, making a sum total of 12,118 cases of divorces by conciliation. As you see, the cases brought by wife was more than three times as large in number as those brought by husband. But I warn you not to jump to a hasty conclusion, that in Japan it is the side of wives that takes the initiative for effecting divorce. The matter is not so simple. That is because the number of divorces by conciliation is less than 4 % of the total number of divorces, and the largest number is represented by that of divorces by agreement. As for the problem of which side of spouses takes the initiative for divorce, we have a recent report showing that in a greater number of cases the wife took initiative. But since it was the result of an inquiry made about only 1000 cases, it is too hasty to believe that this represents the general tendency. However, it is an undeniable fact either, that after the war women of Japan are showing more and more spirit of independence, that is a aspiration for freedom from the oppression of husbands.