

## Family in Prewar Period

### “IE-System” and Discrepancy between its Idea and Reality

The “*IE-System*” was a legal expression of the fundamental ideology of the Meiji government for a well-disciplined social order. This concept was gradually shaped out in the first stage of codification process of civil code, and had achieved once its accomplished form in the final version of “*Old Civil Code*”. After the suspension of this code, it was finally settled in the 4<sup>th</sup> and 5<sup>th</sup> Book of the revised Civil Code of Japan in 1898 (so-called “*Meiji Civil Code*”). This code contained following provisions:

#### I. Incompetence of Wife to Perform Juristic Acts

##### **Art. 14†**

The wife must obtain the consent of her husband for doing following acts:

1. all the acts which are listed in No. 1 to 6, Paragraph 1, Article 12 [= quasi-incompetent persons (คนเสมือนไร้ความสามารถ)];
2. Making or renouncing a gift or a bequest;
3. Concluding a contract which would place her under a physical bind exercised by somebody else.

##### **Art. 15†**

The husband may permit his wife to carry on one or several kinds of business. The wife, in relation to her permitted business, have a same capacity as an independent person.

##### **Art. 16†**

The husband may withdraw his permission for his wife to carry on business or put a restriction on it. This may not, however, set up against a *bona fide* third person.

##### **Art. 17†**

The permission of the husband for his wife to carry on business is not required in following cases:

1. if it is unknown whether he is alive or dead;
2. if he had left her;
3. if he was adjudged to be incompetent or quasi-incompetent;
4. if he is suffering from leprosy and put in confinement in a hospital or in his own house;
5. if he was sentenced to imprisonment of longer than one year.

##### **Art. 18†**

If the husband is minor, then he may grant permission for his wife only in accordance with Article 4 [with consent of his legal representative].

#### II. Dominant Status of “Head of Family”

##### **Art. 732†**

- (1) A family consists of all the relatives of the head of family and their spouses who live together in his household.
- (2) If a person succeeds to the position as head of family, then the ex-head of family and his family members constitute the family of the new head of family.

**Art. 747†**

The head of family has duty to support all the members of his family.

**Art. 748†**

- (1) Possessions of a member of the family which he acquired in his name belong to his own property.
- (2) If the belonging is not to clarify, then it is assumed that the property belongs to the head of family.

**Art. 749†**

- (1) A member of the family may not change his domicile against the will of the head of family.
- (2) If a member of the family changed his domicile in violation of the foregoing paragraph, then the head of family may be released from the duty to support this member.
- (3) In case of the foregoing paragraph, the head of family may, specifying a reasonable period, demand the member to return to the domicile which he determined. If the member will not obey the demand, then the head of family may expel him from the family, unless this member is still a minor.

**Art. 750†**

- (1) A member of the family may marry, adopt a child or be adopted only if the head of family consents to it.
- (2) In case of marriage or adoption in violation of the foregoing provision, the head of family may expel the member from the family or reject his or her reentry into the family register within one year from the day of the marriage or adoption.
- (3) If a family member was expelled by the foregoing paragraph because he or she had adopted a child contrary to the provision of the 1<sup>st</sup> paragraph, then this adopted child enter the new house of the member in question.

**Art. 762†**

- (1) A person who has established a new family may abolish it and enter into another family.
- (2) A person who has succeeded to the position as head of family through the succession of patrimony may not abolish his/her family, unless he/she has obtained the allowance by the Court for the reason of succession or re-establishing of the main branch of the family or for other due reason.

**III. Succession of the Patrimony****Art. 970†**

- (1) A lineal descendant of the person succeeded to will be a successor in the following order:
  1. the **nearest** descendant has priority to other descendants
  2. **male** descendants have priority to female descendants
  3. **legitimate** children have priority to other children [=illegitimate children]
  4. legitimate female children have priority to other children
  5. in case 4, the eldest [legitimate female] child has priority to all the other children
- (2) ...

## ◇ Some additional Comments to the Articles above

a) **Incompetence of married major women**

The first book of Meiji Civil Code provided four types of incompetence or limited capacity – minors, incapacitated persons, quasi-incapacitated persons and wives. In general, major single women could enjoy a full competence just like men, but they had to lose their legal capacity when they married. Married women were put under the control by their husbands just like minor children. Legal capacity of married women had to be narrowly limited in order to secure, so to say, the “supreme command” of their husbands in economic activities. However, it should be noted that such discriminating limitations of legal competence for married women were not “*unique*” provisions of “*Meiji Civil Code*”. They were rather “*common sense*” also in European countries.

b) **Head of family, a “supreme commander” in the house**

“*Meiji Civil Code*” of 1898 did not contain any article which defined the meaning of “*head of family*”. However, it is quite clear that this code silently took over the definition in the final version of “*Old Civil Code*” of 1890, namely “*supervisor of all family members*”. The head of family had duty and right to rule and maintain his family and house as *patrimony*. For this reason, freedom and rights of other members had to be put under restriction. Normally, the oldest male person was in charge of this position, and his eldest son alone should succeed to him. Other sons and female persons in the house had to stay in subordinated positions for their life time unless they separated themselves from father's house and found a branch house.

c) **Problem of marriage**

Such a dominant position of head of family caused sometimes serious difficulties and conflicts in the family if a member of family explained a will to marry someone and the head of family denied his consent to this marriage. Officially, they were not allowed to marry insofar as the head of family rejected to agree with it.

d) **“Illegitimate, but acknowledged children” and “fatherless children”**

“*Meiji Civil Code*” provided “*Monogamous marriage*” of course. However, it contained many articles which mentioned “*illegitimate children*”. Such children were categorized in two groups, namely children whom their father acknowledged as their children, and those who were fatherless. Compared to legitimate children, they had to live under harder conditions. In other words, “*Meiji Civil Code*” silently acknowledged the illegal practice of “*de-facto polygamy*” in the Japanese families.

**Development of Legal Protection of “*de-facto marriage*”**

Through the marriage, the female person had to leave her house and enter the house of her male partner. However, she could not leave her house if she was only child or the eldest daughter without any brother because she had to be the designated successor to the patrimony of her house. In such a case, the male person had to enter the house of the female partner. For this purpose, they proceeded in two steps. At first, the father of the female person adopted the male person as his child (this male person had to be free from charge to succeed to the head of family in his own house, in other words, he might not be the eldest son of his house). Now he became a family member of his female partner. Secondly, the father of the female person let them marry. The husband was officially put into the position to succeed to the head of family while the female partner was freed from this task and put under the control power of her husband. However, there was no possibility to marry if both of the partners were in charge to succeed to the head of family.

In such a way, many couples had to stay and live in so-called “*de-facto marriage*” (unregistered marriage), which led to several legal difficulties. The courts in Japan tried to solve these problems by way of judge-made law.

According to the result of a social research in 1925, 17% of men and 16% of women stayed “*unmarried*” in the family register under men and women who lived together in a single household (“*cohabitation*”). They did not

notified the official authority of their marriage even though they had begun to live together with their partners in a house, or they had already celebrated their wedding. This percentage increased to 20~30% in the lower social groups (industry workers, construction workers etc.). They lived in so-called "*de-facto marriage*". There were several reasons for this living style in Japan:

### 1) Cause 1 (Testing or trial period)

It was an established old custom among the Japanese that they did not notify the official authority of the marriage even if they had already celebrated their wedding. They waited and observed the new couple for 2~3 years. During this testing period, they tried to ensure that the new couple could really live together happily, or that the new wife could be well-adapted to the family relations of her husband, or they wanted to know even that she had really competence to bear children. After this testing period, they notified the authority of the marriage, or dissolved the "*de-facto marriage*" if the new couple could not pass this test. In the latter case, the family of the man let the woman return to her parents and gave her another opportunity to get married with another partner.

### 2) Cause 2 (Legal hindrance)

Some couples could not marry because both of them were head of family or in charge to succeed to it in each house. Some other couples could not marry because their families did not allow the marriage. According to the Meiji Civil Code, it was required to obtain consent of parents until the age of 30 years for man, 25 years for women. Furthermore, the consent of the head of family was always required.

### 3) Cause 3 (Social hindrance)

Under the lower social groups, as mentioned above, the percentage of *de-facto marriage* was extremely high. They did not have any time, any occasion to go to the registrar office to notify of their marriage. They did not know how to write the notification form and did not have any money for a judicial scrivener. On the other hand, they did not have any necessity to register their marriage because they did not possess any "patrimony"

According to the result of another social research in 1923, the half of the *de-facto marriage* was caused because of the legal hindrance. In such *de-facto marriage*, however, women were often disadvantaged. The courts had to develop some methods to protect interests of disadvantaged women in *de-facto marriage*:

#### a) Acknowledgement of Engagement as Contract

Japanese Civil Code does not have any provision about engagement. In this sense, a testing period after wedding ceremony could not have any legal meaning. In some cases, however, women were ejected from the family of their partners soon after this period even if they did not do anything wrong. They asked the Judiciary for protection of their rights. They insisted that the dissolution of the (de-facto) marriage was unjust, and accused their partners for damages arising from non-performance or breach of contract. In the first decade after the enactment of the Civil Code, the Supreme Court of Japan rejected their accusation because engagement was not provided as contract in the Civil Code.

- In 1911, in a case in which a man used a fraud act to persuade a woman to live together with him, the Supreme Court judged that the man was liable for damages because of *tort (unlawful act)*. In this judgement, the Supreme Court showed the concept that interests of women who were unreasonably ejected after the testing period could be legally protected insofar as the other side had used some unlawful methods. However, only a small part of cases could be covered by this concept.
- In 1915, in a case in which a woman was unreasonably ejected 2 days after the wedding celebration, the Supreme Court declared a new doctrine that an engagement was a true *contract* with intention to marry in future. If one party has breached this contract without any reasonable ground, then he or she is liable for damages. Indeed, the Supreme Court had long time hesitated to accept such a form of "cohabitation" because judges doubted whether it was contrary to the "*Public Order and Good Moral*" or not. Finally in this

judgement, the Court acknowledged this form of “*cohabitation*” in testing period as a legal relation which should be officially protected.

- In 1919, the Supreme Court slightly expanded the scope of protection with the new doctrine. In a case in which a man and a woman began to live together without any wedding celebration, the Court judged that it was not essential for the protection of engagement if any formal ceremony was celebrated or not. In another case in which the man was minor at the beginning of their “*cohabitation*”, the Court judged that it should be confirmed that both parties possessed intellectual capacity enough to act reasonably; but legal requirements for marriage (majority, consent of parents and head of family etc.) were not relevant to the engagement (!).

However, even this new doctrine could not cover cases in which parties did not have any intention to marry in future. Engagement could be legally protected just because it was a preparatory step towards legal marriage. “*de-facto marriage*” or “*cohabitation*” itself could not be legitimated by this doctrine of engagement. The other half of *de-facto marriage* cases, namely unmarried couples due to legal hindrance, were still put outside of judicial protection. But the Judiciary found some approaching points towards official acknowledgement of *de-facto marriage* itself as legal relation in certain cases:

- Already in 1919, in a case in which a woman in testing period had a sexual relation with another man, the Supreme Court judged that this person was liable for damages because of tort. This judgement confirmed the *duty to keep chastity* each other also in case of *de-facto marriage*, and implicitly acknowledged this form of marriage as a legal relation which could have certain legal effects against third person.
- In 1921, in a case in which a woman demanded return of “unjust enrichment” from her partner after dissolution of “*cohabitation*” under an agreement, the Supreme Court officially acknowledged that the both partners even in “*cohabitation*” stay under the *duty of mutual aid and corporation*. Furthermore in 1922, in another case, the Court confirmed also the *duty to support other partner* just like in legal marriage.
- In 1930, in a case in which a woman escaped the house of her partner because she was unbearably forced to work by the family, and in a case in which a woman was ejected because she terribly behaved and caused unreasonable difficulties to other family members, the Supreme Court judged that the cancellation of engagement (dissolution of *de-facto marriage*) had a reasonable ground and was lawful. The Court founded these judgements on No. 5, Article 813<sup>†</sup> (*Reasons for judicial divorce*) – “Husband or wife can bring an action for divorce if he or she was unbearably ill-treated or seriously libelled by the other spouse”.

Despite of such efforts of the Judiciary to legitimate *de-facto marriage*, there was no possibility of legitimation if one party of “*cohabitation*” – normally male person – was already married with third person (*de-facto marriage as bigamous marriage*). In such a case, the other party – normally female person – could not seek any protection by the Judiciary even if she was defrauded, unbearably ill-treated and misused, or unreasonably ejected. In other words, “*immoral conducts*” of men were protected by the Judiciary through its inaction. This was a serious paradox of the legal moralism which the Judiciary in Japan could not clear up under the Meiji Civil Code.

### ◇ Epilogue

*de-facto marriage* could be partially acknowledged rather in the social welfare than in civil law. The percentage of *de-facto marriage* was, as mentioned above, extremely high in the lower social classes. After the foundation of Soviet Russia, the Japanese government was very afraid of socialist influence and expansion of labour movement in these social sectors. The government realized that life styles of those people had to be officially confirmed.

### b) Reform in the Field of Social Welfare Law

In 1923, the Parliament passed the Act for the Reform of Factory Law. The new law gave *de-facto wives* the

right to receive financial support and compensation for damages if their *de-facto husbands* died from accidents or diseases in working place. However, they were positioned to the third rank after ascendant and descendants of husbands. Similar provisions were introduced also in other laws on social welfare, e.g. “Act on Financial Support for Mine Workers” (1926), “Enforcement Ordinance for the Act on Financial Support for Industrial-Accident Victims” (1931), “Enforcement Ordinance for the Act on Payment of Reserve and Retiring Benefits” (1936), and so on.

- In 1930s, Japanese society was rapidly militarized, and the Imperial Army expanded the front widely in China. Many soldiers left *de-facto families (wives and children)* in home country and were killed in war field. Such families often fell into poverty because they did not have the right to receive financial support for war victims. Also some members of the government, therefore, insisted that *de-facto marriage* should be equally treated to formal marriage in regard to financial support for war victims. But the military side denied such a measure in order to protect the “Honour of Imperial Army and Navy”. The government could enact merely the “Act on Postal Notification and Mandate of Notification of Marriage” (1940). According to this law, marriage could be notified also after the death of one spouse. After all, *de-facto marriage* itself could not be legitimated under the “Meiji Civil Code”.

Soon after the unconditional surrender of Japanese Empire in 1945, the GHQ (General Head Quoter of the Allied Forces) issued the order to totally revise the 4<sup>th</sup> and 5<sup>th</sup> Book of Civil Code (Law of Family and Law of Succession). All provisions about head of family had to be deleted in the new family law of 1947. The “I-E”-System was finally abolished, and the legal hindrance of marriage in regard to the consent of head of family disappeared. But the problem of *de-facto marriage* itself was not solved yet.

### c) Acknowledgement of *de-facto marriage as quasi-marriage*

In 1958, in a case in which a woman (*de-facto wife*) demanded payment for pain and suffering because her partner (*de-facto husband*) had unjustly dissolved the *de-facto marriage* after she became severely ill from hard work during the cohabitation, the Supreme Court confirmed his liability because of *tort*. According to the judgement, so-called “*de-facto marriage*” should be legally protected as one type of cooperative relations because it has almost same meanings for the parties as formal marriage except for official notification. For the first time, the Supreme Court declared the “*doctrine of quasi-marriage*”.

- In 1987, even in a case in which a *de-facto marriage between a woman and a married man* had to be dissolved because the man began with a sexual relationship with another woman (second *de-facto wife*), Tokyo District Court confirmed the accusation from the first *de-facto wife* and judged that the man and the second *de-facto wife* should pay compensation for pain and suffering because of tort liability. After the declaration of the “*doctrine of quasi-marriage*”, the Judiciary often protects also such bigamous cases *insofar as the formal marriage is already broken down*.

In general, the Judiciary uses the “*doctrine of engagement*” in order to settle disputes just between both parties of *de-facto marriage*, and it uses the “*doctrine of quasi-marriage*” in order to protect interests of parties against violation by third person. However, the protection of quasi-marriage is not possible if it is prescribed in laws or other regulations that the person must be a “*spouse*” or “*successor*”. This is a *fundamental limitation of “judge-made law”*.