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NAIEN: ONE PROBLEM IN JAPANESE MARRIAGE LAW

Tadahiko KUKI*

Introduction

- I Why Naien arises?
- II How far the effects of lawful marriage should be given to Naien?
- III What legal measure should be taken in future for solution of Naien problems?

Introduction

One of the most important problem up to which our Japanese Marriage Law has been continually faced both in the past and at present is Naien or Naien-relation. Naien is the relation between man and woman which is not legally admitted to be the lawful marriage on account of the failure of the registration which is laid down by the Family Registry Act.¹⁾ The Naien problems have continued to exist ever since the middle of Meiji era when the Civil Code was enacted (1898, 31st year of Meiji). They, according to the author's opinion, can be grouped into three major issues as follows. Firstly, why such Naien arises? Secondly, how far the effects of lawful marriage should be given to Naien? Lastly, what legal measure should be taken in future for solution of Naien problems? Thus, the purpose of the author in this treatise is to consider, principally, three major points as indicated above.²⁾

I Why Naien arises?

- 1) Old provision of the Civil Code (§ 775—until 1947) provided:

‘The lawful marriage comes into effect in consequence of the registration requested by the provision in the Family Registry Act.’

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This provision is still reserved in the current code in spite of the post-war Revision of the Civil Code in 1947 (22nd year of Showa). Major theories take the view that the word 'come into effect' means 'come into existence'. And, they also comprehend that the registration has to be received by the official. In short, the lawful marriage comes into existence, in our marriage law, by the registration to and the reception of it by the Family Registry Office. Such a system is called the Principle of Registered-marriage. Old provision above mentioned adopted the different principle from the one which used to be found in our custom till that time or in the previous provision, and this introduction of the new simple-form principle, the Principle of Registered-marriage, was based on the idea of the drafters as follows:

'As the society has been regulated and progressed, the nation has been understanding the registration. And the registration is more familiar for the nation than the provision hitherto requesting complicated procedure or ceremony.'

Thus, the Principle of Registered-marriage was adopted, but the real circumstances hereafter in society were not in accord with the expectation. After then, in 1925, the conclusion of the Committee of the House of Commons intending to reform the principle was published, but was not made into action.

By the way, our custom was in the past and also at present as follows. Generally speaking, the spouses go through the process of the celebration of the marriage first, then the cohabitation. And most spouses make the registration after their cohabitation. Customary conception, however, is that man and woman become the formal couple by celebrating their marriage. Here lies the gap between our custom or general consciousness and the provision in the Act. Strictly speaking from the point of the law, the spouses, before the registration after the cohabitation, are in *Naien*-relation. Although most couples register their marriage soon or later, some couples neglect to register due to various reasons. This is *Naien* in the narrow or strict sense, which the author treats in this treatise as the very important problem. The parties to *Naien* are disadvantaged in the code in comparison to the parties to the lawful marriage. However treats the provision of the code to this disadvantaged, it cannot be denied that such a union as *Naien* arises in the actual society. Well, why *Naien* arised in the past? Why the registration was not observed? The author considers firstly this problem.

Before the Second World War, the marriage signified in most cases that woman entered into man's 'House' or that the name of woman was added to the family regis-

try of man's 'House'. 'House' is the feudal family corporation, is the organization consisting of 'the head of House' and his family, and is expressed in the family registry as one body. The family constituents have the same surname as the head, are commanded by 'the head of House'. 'House' is succeeded with its identity by 'the succession to House'. Accordingly, in the past time the marriage meant that a woman left her 'House' to which she formerly belonged and newly was added to man's 'House'. (a few reverse cases existed.) Under such a system, there are grounds which permits Naien; one is in the code itself, another in the consciousness of the people. The former is the provision of the code. That is to say, man and woman cannot get married legally in such cases as follows: when both are 'the apparent heir-at-law to House'; when both or each cannot get the consent of 'the head of House', or when both or each cannot get the consent of their parents in case of man is under thirty years of age or woman under twenty-five; when man and woman are coadulterers.

The latter is the consciousness of the people, which is also related to the basis of the provision of the code above mentioned. As previously mentioned, the parties cannot register their marriage unless they can get either the consent of 'the head of House' or their parents. The consent is made from the view point of the preservation of the feudal family system, and the Civil Code stipulated such provisions for such purpose. Accordingly, 'the head of House' or parents refuse his family or issue to choose as the spouse man or woman whom he ('the head of House') does not like or regard suitable to his family. His purpose of attempt is to preserve and strengthen the feudal family system, or to strengthen the joint of 'Houses' each other. Furthermore, the marriage has been meant to acquire the successor for the preservation of 'House' as the important purpose. Therefore, there was the tendency, among the people, not to let add a woman to the family registry as the lawful wife until she conceived or gave birth to her child. Again, on account of the absence of the legal consciousness, there were the people who regarded the registration troublesome. But the state did not inflict any punishment against the non-performers and did not make any positive endeavour to promote the observation of registration.

Points above mentioned are the grounds which allowed to arise Naien before the War. In short, the main and remarkable point was the maintenance and the strengthening of the feudal family system.

2) The current Civil Code revised in 1947, abolishes the feudal family system including former 'House'. It is founded on the modern system of nuclear family consisting of the spouses and their children as a unit. And, all the feudal legal requi-

rement as to the registration of the marriage which used to exist were removed. And, the present principle is that 'marriage shall be based on the mutual consents of both sexes' (the Constitution §24). The Principle of Registered-marriage, however, remains inspite of the Revision of the code, and the parties also at present have to register by the request of the Family Registry Act in order to be admitted as the parties to lawful marriage.

There was not a few critics against the Principle of Registered-marriage. And, on the discussion of this Revision in 1947, the assertion insisting to change it was made. But the government admitted the conclusion of Judicial Committee in the House of Commons as follows:

'There is a marriage which does not go through the ceremony, and it is difficult to decide the fact of cohabitation. Again, it is not distinct for the strangers to know when the parties got married. At present the registration becomes already customary, and is gradually being pervaded, therefore we have no great inconvenience. And, not only the confirmation-procedure of the Family Court incurs the increase of expence of the Court but it may run counter to the direction of marriage-liberalization. In short, the problem regarding the marriage-registration should be studied prudently, and be argued at the time of whole revision of the Civil Code.'

Nevertheless, there are not a few Naien-relation still at present. Why Naien arises at present? This is the next question.

Well, Naien being out of law, the inquiry as to it is forced to carry by questioning the Naien couples personally and getting their response. Such inquiries have been done by some scholars after the War and reports have been published. We can learn the actual circumstances as to Naien by them. General conclusions obtained are as follows.

As the feudal legal requirements of the past are not existing, there is no Naien-relation in such respect. Accordingly, the parties who could not get married before the Revision of the code by reason of such bars, can register at present. Nevertheless, the reports of the inquiry inform us the fact below. That is, there are many who are still bound with the consciousness of 'House' or the non-consents of parents (or 'the head of House' before) as in the past. The case of them being bound with the consciousness of 'House' is that the man or the woman had once been 'the head of House' or 'the apparent heir-at-law to House'. The tie between them and 'House' is still strong, so he (or she) refuses to enter into 'House' of the other party. It is not nec-

cessary to say that there is no 'House' existing at present, and the marriage is an act in which two persons make a new social unit. Nevertheless, there still exists such a consciousness, and it is founded on the fact that they shun to publicize such a union on the family registry — some people regard it as the symbol of 'House'. The same applies in the respect of the consent of parents. Though there is no legal impediment to a marriage of adults — minors need the consent of their parents —, it seems that there are many who are still affected by the feudal family ideas contained in the old code. The restriction by the code disappears, but the social restriction is at work.

Next, there is another ground of continuing *Naien*-relation, until the pregnancy or the childbirth. It is reported that in eighty-five cases out of one hundred actual *Naien*-relations, they have no children of their own. It must be admitted that the pregnancy or childbirth is the most encouraging factor in prompting the registration. It is true that one of the most important purpose of marriage is to get their own child. But, the registration stabilizes the legal positions of both parties, therefore those who fail to register cannot be free from the blame as being lazy persons.

The more important, however, is whether such old ideas — people regard the marriage as the way of getting their successors or the way of continuing 'House' as seen in many past cases, that is to say, the ancient idea of 'the wife being unable to bear a child must leave' — lurks or not. In this respect, we must be watchful to the short-time *Naien*-relation.

Next, there still are cases of neglecting the registration. The procedure of marriage-registration in our law is very simple: writing down the particulars requested on the forms laid down; signing and sealing on the paper; presenting the document to the Family Registry Office; complete the whole procedure. Mailing the paper to the Family Registry Office is also acknowledged. And, when the paper is properly received by the official, their marriage becomes complete legally. (In other word, the ceremony or the cohabitation is not necessitated in establishing the lawful marriage.) Rather troublesome is to get the sign and seal of two adult witnesses, but friend or acquaintance is good enough for this purpose, therefore it is not very troublesome requirement.

Judging from the above, we can possibly believe as follows; the non-performance of the registration means that not only the parties neglect to do so, but the external restriction behind them or their 'consciousness' mentioned above let them hesitate to register.

3) Those above mentioned, the author believes, are the grounds for *Naien*-relation. Now let us examine a case of which lasts to the time of pregnancy or the child-

birth and then transits into the lawful marriage. The inquiries above being the base for the report, were asked to the parties to Naien about the real reason of their being in Naien-relation. Similarly, facts of the pregnancy or the childbirth being the moment for transition from Naien to the lawful marriage, are confirmed by the inquiry at the registration filed. As mentioned before, the procedure to register in Japan is simple, but no legal compulsion is imposed on man to register his marriage. Some scholars have done the inquiries as to how soon the registration was being made after the celebration or from the beginning of their cohabitation. What we learn by them is the following table.³⁾

Period from the ceremony or cohabitation to the registration of the marriage.

Year (Showa)	R a t i o		
	Within 1 month (30 days)	Over 1 month within 6 months	Over 6 months within 1 year
1927 (2)	6.3	22.8	30.9
1940 (15)	11.6	18.9	46.7
1947 (22)	17.4	35.3	23.8
1949A (24)	18.7	27.6	25.0
1949B (24)	9.7	20.7	32.5
1952 (27)	13.2	46.1	17.7
1955 (30)	16.5	48.5	14.8
1958 (33)	17.4	53.5	13.8
1960 (35)	23.8	38.1	19.8

As pointed out by the table, not a few cases of registrations have been made long after the ceremony. And, judging from the figures of registration being made between six months to one year, in most cases the pregnancy or childbirth must be the moment for the registration. Again, it seems to the author there must be cases of the parties spending some months for the purpose of judging whether they can live together well and expect to keep an amicable cohabitation in future. In short, most marriages become to be lawful through such Naien-relation long or short. Here is one of the important problems of Naien-relation. The author is alarmed that whether the people are clearly conscious of the instability of their status due to the non-registration, and whether the consciousness of 'House' is abusing Naien-relation, and whether people are captured by the notion of the marriage for the purpose of getting the issues, or by the idea of 'woman without child must leave'.

II How far the effects of lawful marriage should be given to Naien?

1) It is an important problem whether to keep Naien outside of the legal protection. In property law, it will be good that one who does not observe the rules or fails to do the proceeding with some grounds is not given protection at all. In family law, however, there is a particular phenomena of 'the advance of the fact'. That is to say, whatever restriction being imposed by the code, a union of man and woman arises as a fact, and a child is to be born, and persons must die. We cannot deny the fact that a union of man and woman which is a substantial married life exists as a matter of fact notwithstanding the provisions of the code. Thus, Naien is the problem of the fact preceding the law. Even if law neglects Naien-relation, we cannot check it to exist, Naien couples to transact with the strangers, or them to get a child. It is not reasonable to neglect such a fact. At least law has to give protection to them in some respects. Bringing Naien as close to the lawful marriage in respect of the effect as possible, will give protection to not only the parties but also the strangers concerned.

2) The doctrine concerning Naien has been developed in two fields, namely in the case-law and in the special Act, not the Civil Code. And, it has been developed in the direction of giving the protection to Naien couples generally, with a few exceptions.

The author takes the liberty to review first the case-law.

In regard to the effect of Naien, the problem arising firstly and being of most important, is the one as to the damages rendered when Naien is breached wrongly. Until 1915 (4th year of Taisho) the judgements and the theories stood on the foot of the principle of 'no marriage, without registration'. And, they took the attitude to regard Naien being only a precontract leading to the lawful marriage in future and the parties thereto being not bound to perform such a precontract. Thus, no protection was given to Naien. In 1915, however, the Supreme Court (Taishin-in at that time) held that the parties to Naien was to be given protection. A man and a woman held the marriage ceremony and lived together for a few days. Then she came back to her native home, and when the man was hospitalized to care the disease, she never called on him. And she called at his house only once, and never called on their marriage-broker contrary to the custom of their place. So the man noticed her to dissolve their Naien-relation. She claimed against him for the damages on the ground of a tort. The Supreme Court, however, admitted his appeal from the High

Court where she had prevailed over him. The judgement of the Supreme Court was that she should bring her action on the ground of a non-performance of obligation not a tort. By the way, the importance of this judgement is in obiter dicta that:

'a precontract to the marriage is a contract with the purpose of entering into the lawful marriage in future; it is lawful and valid; though it is impossible legally to compel the parties to marry according to the import of the contract, when one party thereto breaches it and refuses to marry, he is obliged to indemnify the corporeal and incorporeal loss rendered to the other thereto suffering from believing the contract.'

Thus, for the first time an unreasonable breach to Naien was understood as a non-performance of a precontract to the marriage, and the damaged can recover the damages from the non-performer. Substantially, however, Naien is marriage itself and not a precontract to the marriage. Surely the judgement of the Supreme Court above was significant from the point that it founded the way to relieve Naien couples. But, though the precontract theory may be reasonable as to the relation between the parties to Naien, it cannot rule correctly the relation between the strangers and the parties, for the precontract binds only the parties. Therefore, if the solution is aimed according to the nature of fact, Naien should be deemed as the same relation as the lawful marriage, i.e., the quasi-marriage, and the unreasonable breach should be understood as a tort, that is, to let lose the post of wife in fact. Many theories asserted that the quasi-marriage theory was good and they criticized the judgement. Though, after then, judgements remained on the foot of 'the non-performance of precontract to the marriage' theory, but were affected by the theories, and some judgements showed the conclusion which could not be reached unless they stood on the foot of the quasi-marriage theory. There were, for instance, judgements as follows.

When a marchant who had supplied the necessities to Naien couples claimed for the lien of the whole sum of the necessities — if a Naien wife is not comprehended to be one of 'relatives living together to be supported by the debtor' in the provision (§310), the marchant can claim only half of the sum —, the Supreme Court admitted the plaintiff's claim on the ground of the Naien wife being regarded as one of the 'relatives living together' (Jun., 3. 1922, 11th year of Taisho). Again, when a Naien wife and child who had lost her Naien husband (or his father) in the murder, claimed for the damages against the murderer on the ground of the forfeiture to support, the Supreme Court held that they could recover the damages (Oct., 6. 1932, 7th year of Showa). These judgements stated distinctly that a Naien wife was identified with a lawful wife.

And it will be said that judgements were on the direction to deem Naien as the quasi-marriage. By the way, the Supreme Court (called Saiko-Saibansho) recently held as following (Apr., 11. 1958, 33rd year of Showa).

'So-called Naien is not different from the marriage-relation from the point of it being a union in which a man and a woman cooperate each other in making their life as husband and wife, therefore it is not prevented to consider Naien as the relation same as the marriage.' 'It should be regarded that one who was breached of Naien-relation unreasonably can claim for the indemnity for the loss against the other thereto on the ground of a non-performance of a precontract to the marriage, at the same time he can claim on the ground of a tort.'

Thus, in the case-law Naien is admitted as the quasi-marriage nowadays.

3) Secondly, Naien has appeared in some special legislations. The first Act which tried to identify Naien with the lawful marriage and to give protection to the parties thereto, was the Factory Act in 1923 (12th year of Taisho). The Act provided that; 'a person who are supported of his livelihood by the income of a workman or a miner, on the death of the workman or miner,' was added to the person who could claim for the allowance for the surviving dependents. The Naien spouses were also included in this provision, and they were given protection legally in enacted law for the first time. But, the expression in this Act was euphemistical and the protection by it was comparatively weak due to the fact that putting them in the later turn of the protected persons. After then, the Protection to Mother and Child Act in 1937 (12th year of Showa) provided clearly that:

'The person who shall be given the compensation for the surviving dependents, is the spouse of the labourer (including the person who is in fact in the same relation as the legally married spouse even if the registration of the marriage was never made).'

Social Acts which contain such expressions have increased since then. It should be noted that the protection to Naien couples by the enacted law appears in such special acts. One of the grounds for it, was that there were many Naien couples among the comparatively low-class people or the labour-class.

4) As the author showed, it is the settled opinion to regard Naien as the quasi-marriage nowadays. Now it becomes the important question how far the effects of lawful marriage should be given to Naien.

Naien is a phenomena derived from the Principle of Registered-marriage, and the

difference between *Naien* and the lawful marriage depends on the existence of the registration. Accordingly, the effects which are based on the registration, i.e., the common use of the surname, the legitimacy of the issues, and the origination of the affinity, cannot be admitted in *Naien*. The right of succession also is not to be admitted. But, the effects of lawful marriage substantial to the actual cohabitation must be admitted also in *Naien*-relation. The obligation to cohabit, to cooperate and to support, and the obligation of chastity, are admitted. About the above, there were judgements of the Supreme Court. A (woman) and B (man) entered into *Naien*-relation and lived together, then after they dissolved it by their mutual consent. Then, A brought an action against B claiming for the restitution of unjust enrichment on the ground that B got an advantages unjustly because of that A kept their house-work. The High Court held that: the cohabitation of husband and wife in married life is for the common benefit of the couple not for the benefit of husband only; it applies same in *Naien*; it should not be regarded that A was the loser while B was the gainer, for A kept the house-work for their common benefit. The Supreme Court also held the judgement of the High Court good. (May, 17. 1921, 10th year of Taisho)

Next, the relation between the parties mentioned above has to be protected against the strangers. There was the judgement of the Supreme Court (May, 12. 1919, 8th year of Taisho). A (man) and B (woman) were in *Naien*-relation. B begot her child after becoming intimate with C (another man). So A claimed for the damages against C on the grounds that A was defamed and suffered from mental pain. The Supreme Court held that the claim of A was good.

Furthermore, as regard to the relation about the property between the parties to *Naien*, the following provisions must be admitted, which fit for the actual circumstances of *Naien*-relation, cohabitation like in the married life. Provisions are: the mutual share of the expences in the married life (§760 — husband and wife shall share the expences arising from the married life in consideration with their means, income and all other circumstances); the joint liability to the obligation arising from the daily domestic affairs (§761 — when either husband or wife performs a transaction in the daily domestic affairs with a stranger, the other party shall jointly be liable to the obligation arising from that transaction); the assumption as to the reversion of the property indistinct of the owner (§762 II — the property which is indistinct of the belonging to either husband or wife, is assumed to belong to their joint ownership). And there was the judgement of the Supreme Court as to the mutual share of the expences in the *Naien*-life. A (woman) lived apart from B (man) due to her illness, and after her

recuperation they dissolved *Naien*-relation by their mutual consent. A asserted that B should share the expences for the medical treatment which A paid during her illness as 'the expences arising from the married life (§760)'. The Supreme Court held that B had to share the expences according to the purport of the section 760 (Apr., 11, 1958, *supra*).

5) The interesting problem is whether the provision regarding 'the distribution of property' (§768) can be applicable to *Naien*. The section 768 states:

(1) Either of those who have divorced by their mutual consent (same in the divorce by the judicial proceeding — §771) can claim for the distribution of property against the other thereto.

(2) When it is not able to be concluded or impossible to reach the agreement of the distribution of property according to the previous subsection, the party can claim against the Family Court for the disposal in substitution for the agreement, provided that within two years.

(3) In the case of the previous subsection, the Family Court shall decide whether or not let him (or her) distribute, the sum and ways of the distribution, in consideration with the sum which the parties have acquired by their cooperation, and with all other circumstances.'

That is to say, 'the distribution of property' is the delivery of property between the parties on their divorce, and this provision is an epoch-making one which was newly enacted in the Revision of the code in 1947. By the way, most theories have asserted that 'the distribution of property' must be applied to *Naien*-relation. Again, we can see some determinations in the Family Court affirming such. This problem had not been clear in the case-law since there had been no judgement about it in the Supreme Court and the High Court until June of 1963, when the Hiroshima High Court held in the decision that 'the distribution of property' was to be admitted also in *Naien*. This decision bears the important significance. So, the author will review this case and the system of 'the distribution of property' in detail.

The summary of the facts in this case as follows. A (woman) and B (man) held the marriage ceremony and cohabited as the *Naien* couples without the registration of the marriage. A was a hard worker compared with B, and earnestly attended to their work or business, the handicraft job. They endeavoured jointly to accumulate wealth. One year later they bought land with ¥400,000, and the next year built their house on it with ¥600,000. C (mother of B) and brothers of B lived together in their house. But A and C were hostile, and C regarded A was an unsuitable woman as B's wife and

wanted to let her return to her native family. B followed C's opinion. Thus, their *Naien*-relation was dissolved after the cohabitation of two years, without a distinct fault on the part of A. The total sum of the property including the chattels, etc., which they had earned, was about ¥1,300,000. A claimed for distributing of their common property that they had earned together and for recovering the physical and mental loss due to the unreasonable dissolution. The High Court held that:

'If *Naien*-relation means substantially the same married-life relation of husband and wife as in the lawful marriage, and is merely defect of the registration, it is not always unreasonable to treat *Naien*-relation legally same as the marriage, not so far as conflicting the purport of the Civil Code which provides the registration laid down in the Family Registry Act as the legal requirement of the formation of the marriage.' 'Although 'the distribution of property' is done on the dissolution of the marriage, it can be said that 'the distribution of property' regulates finally the married-life relation of husband and wife that had been existing, and it does not affect directly to the rights of the strangers. Therefore it is reasonable to admit 'the distribution of property' in *Naien*-relation.'

And the Court held that A was to be paid ¥450,000 from B as the settlement of accounts resulting from her work during their cohabitation and as the damages, that is, as 'the distribution of property.'

It seems to the author that this case signifies two remarkable points to us. First, this is one of the typical example as to the application of 'the distribution of property'. That is to say, A worked hard in order to be wealthy, different from ordinary wives who confined themselves only to the housekeeping, which became one important factor in the award of 'the distribution of property'. Secondly, the fact that they remained in *Naien*-relation and did not register, may be derived from the old idea of the feudal family system. The author dwells on those in detail.

Well, 'the distribution of property' is one of the most important effects of the divorce, and it has the important significance plays the important role from the point that it gives the strong protection to the spouses (especially wife) who used to be weak financially in most cases before the War. 'The distribution of property' is, in his opinion, the delivery system laid down for the purpose to solve on their divorce all the relation concerning their property. And it consists of (a) the settlement of accounts of common property in their married life, (b) the maintenance for the spouse who may be come destitute after the divorce, (c) the damages due to the divorce. There are,

however, no settled theory and judgement in regard to the nature of 'the distribution of property'. Especially, there are various opinions whether the damages is implied or not. This is owing to the fact that some room is left in the Civil Code to claim for damages apart from 'the distribution of property'. The Supreme Court held, as the author believes, that the damages can be included to 'the distribution of property' (Feb., 21. 1956, 31th year of Showa). But this judgement is not always clear, and some points remain dubious in regard to the application of this provision. In this respect, the author believes as follows: he cannot find the positive ground excluding the damages from 'the distribution of property' according to the construe of the section 768. It decreases the efficacy of 'the distribution of property' and opposes the benefits of the parties to exclude only the damages and to let him (or her) claim for it by another action. Moreover we have many mediation cases in the Family Court (most judicial divorce cases at present are dealt with this proceeding) which solved all the monetary affairs including the damages. So, the author thinks that it is reasonable that the damages is to be included in 'the distribution of property' as a part of it. As to the doubtful points above, the legislative solution will have to be done for the purpose of distinguishing that 'the distribution of property' is the complete solution in regard to the property between husband and wife.

As mentioned above in detail, the theories and judgements are not in accord as to the nature of 'the distribution of property'. But the theories agree that 'the distribution of property' is the final regulation for the married life of husband and wife. And they have asserted that 'the distribution of property' has to be applied on the dissolution of Naien-relation like in the marriage. The decision of Hiroshima High Court took the same opinion, and by this — regrettable that this is not the one in the Supreme Court — it seems that 'the distribution of property' was affirmed in Naien.

Next, there is the problem as to the relation between 'the distribution of property' and the succession. At present, one of the differences between the effects of Naien and of lawful marriage is in the right of succession. The author has an opinion in regard to the relation between 'the distribution of property' and the succession as follows.

The reason of the parties to Naien being not given the right of succession is that the right of succession is conferred exclusively on the basis of the record in the official Family Registry, which, as the author believes, is also reasonable from the point of the clear policy of the succession. Both the theories and judgements refuse to confer the parties to Naien the right of succession. The author agrees with it. But he has

something to mention as follows.

In the partial revision of the Civil Code in 1962, the provision of 'the distribution of the inheritance⁴⁾ to the specially concerned' (958-3) was added. That is, in case of no heir-at-law, the Family Court may confer in the discretion, on the application being made by the specially concerned, the whole or the part of the inheritance to them who 'were in the same livelihood of the dead'. Of course, the parties to *Naien* are included above, and they can receive in fact the property of the dead. This is the supplementary disposal when there is no heir-at-law, and the provision does not purport to confer the right of the succession to *Naien* couples. But it is clear that by this provision they will greatly be relieved. The purport of this provision has to be noted. Moreover, it has to be noted that many social legislations grant the compensation to the surviving dependents of the *Naien* spouses. Therefore the author thinks it desirable to consider that, on the dissolution of *Naien* by the death of either party, 'the distribution of property' is also to be granted. While they can receive 'the distribution of property' on the dissolution, can receive nothing — unless special favour by s. 958-3 — on the death of the opposite. It will lose a balance. And, the ground that the author does not confer the right of succession to them is as following. In succession many people are related to and in which their interests confront sharply. Therefore, it is most reasonable that only person whose existence is distinctly showed on the official record is to become the heir-at-law. Again, in succession, the property which the dead succeeded previously from others, is also to be included, that is the property which was gained without his or his spouse's labour or effort.⁵⁾ Reversely, in 'the distribution of property', the object of the distribution is principally the property which is produced by them and the value of labour during their married life. Accordingly, it must be understood that there is a substantial difference between 'the distribution of property' and the succession. In 'the distribution of property' there is no accidentality such as seen in the succession, and the purpose of 'the distribution of property' is to regulate only the parties concerned. Judging from the above, so far as we intend to appreciate the effort of the parties strictly, it is better and reasonable, also on the dissolution of *Naien* by the death, that the regulation of property between the parties is settled by 'the distribution of property'. But this problem being out of theme in this treatise, the author will not dwell long here. At any rate, it is reasonable also, on the dissolution of *Naien* by the death of the party, to relieve the disadvantages of the surviving spouse by applying 'the distribution of property'. 'The distribution of property' does not render unreasonable

disadvantages to the strangers. It returns one of the Naïen couples for his (her) effort hitherto and gives him (her) a stable life in future. Again, there may arise a case that the heir-at-law takes unreasonable benefit on the sacrifice of the effort hitherto of the party to Naïen, unless such a regulation is considered to rule. Thus, the author thinks that 'the distribution of property' should be performed on the dissolution of Naïen by the death of the party also — accordingly, in this case, principally the labour hitherto of the couples is to be considered. It will not be unreasonable to extent the protection to the Naïen couples upto this.

6) Another question shown in the decision of the Hiroshima High Court is as follows. Though the author can not learn all the circumstances of this case correctly and in detail, judging from the record published, the situation is: the dissolution of Naïen arose from the quarrel between A (Naïen wife) and C (mother of Naïen husband) which was brought by the disaccord of their characters. Moreover, the active persons who worked for the dissolution of Naïen were C and her relatives, and B (husband) only consented their conclusion, taking no initiative in regard to the dissolution of his own Naïen-relation. Again, A was forced to leave home on the ground that she was 'out of harmony with the family tradition' according to the statement of C to the judge. This, in old days, often used to be the ground for divorce by the mutual consent, and also it was a convenient pretext for the husband or his relatives. And, it must be noted that there was no child between them, which could also a good reason or a pretext for the divorce in old days. Thus, the author glimpses in this case a deep feudal conception. For their Naïen was the relation not between the husband and wife but 'House' and wife. Again, it must be noted, as we can guess, that such circumstances kept her remain as Naïen wife. That is, their cohabitation period lasted to see if she was fitted for the family tradition of 'House' or not, and when she was disqualified in the 'test', she had to leave 'House' without becoming a lawful wife, or without the registration of the marriage. It seems to the author that it was the idea of the feudal 'House' of mother and her relatives which managed and pressed the idea and manner of B. In this respect, the author believes, this is one of cases which include present-day important problems about Naïen.

7) Nextly, another big problem which is in heated discussion of late is whether a Naïen widow can assert to reside, after the death of her Naïen husband, in the same house where she used to live with him. As there is no provision to regulate this, the theories and judgements are diversified. This question is also related with the succession of the lease of house. Moreover, in order to be applied for specific cases, a

theory must be effective to any case of various situations. Many theories have been tried for the solution of this problem. And, as it is a very complicated problem, here the author will set up a typical example, and introduce the judgements and theories about it in turn.

Case: Naïen husband leased a house from a stranger who was the owner of the house, and lived in it with his Naïen wife. The husband was died. Can the widow continue to lease the house?

a) Firstly, the judgements are as follows. They all affirm the succession of the lease and they construe that: the lease of Naïen husband thereafter belongs to (1) his heir-at-law if any (2) 'the corporation for inheritance' if there is no heir-at-law. — And a Naïen widow can assert the lease against the lessor by the invocation of the right which belongs to the heir-at-law of the dead. The Supreme Court takes also this stand (in case of (2) above).

The way of those thinking, the author believes, will be right, for it is consistent with the provisions of the code. But it has weak points, for the invocation of the right belonging to the others is legally unstable, and it is unsettled as to how to solve it when the heir refuses the invocation. Moreover, 'the corporation for inheritance' exists only the period during which the existence of heir is not distinct, and when the non-existence of heir comes clear all the property principally belongs to the state-fund. And, exceptionally, 'the distribution of inheritance to the specially concerned' as above mentioned may be done. But, in this exceptional case, whether the lease belongs to Naïen widow through this process or not is the question which has to be settled in future. For, for this purpose, the succession of the lease must be admitted as a premise, but some theories deny the lease to be included in the inheritance. In short, this way of thinking faces to many difficulties. In most cases there are many heirs-at-law, therefore the widow must assert both, against the heirs and the lessor. This imposes her some difficulties. Accordingly, it will be better to confer her the right directly.

b) Various theories have been tried to solve this question. They can be classified into some groups.

i) Some theories deny the succession of the lease, and they construe that the lease of house can not be succeeded due to its particularity, but is to be transferred to the *Familiengemeinschaft*.

According to this theory, on the death of Naïen husband, a widow can continue to reside so far as she belongs to the *Familiengemeinschaft*. But this theory is criticized

from the following points: why the lease of 'house for residing' is excluded from the succession, or why it is not a right of property? It is not right to admit the right to belong to the *Familiengemeinschaft*, for the *Familiengemeinschaft* is not a legal person and it is inconsistent with the idea of modern civil law which admits the right to belong to the individuals.

ii) Some theories construe that: the lease of house can be an object of the succession; the heir succeeds it as a principle; but, though a Naïen widow is not the heir-at-law, such a person who is not the heir-at-law can assert the right of residing (*Wohnrecht*) against the lessor so far as she was implied in the lease-contract between the lessee (the dead man) and the lessor; and, if the heir requests to vacate the house against the Naïen widow without reasonable ground, it is the abuse of right; therefore the widow is given protection to some extent against the heir.

But this theory too requests the widow to claim for her residing in two relations. Furthermore, this theory construe that: if there are no heirs, the *Familiengemeinschaft* which was behind the scene, appears to the front; and the person who lived with the dead man and is now the center of the family activity thereafter (e.g. Naïen widow) resumes the lease. Therefore in any way the Naïen widow can continue to reside there. But, though supplementary, this theory also, has the defect of admitting the doctrine of the *Familiengemeinschaft*.

iii) It is the right of residing (*Wohnrecht*) theory which appears in order to overcome the defect in i and ii above. Its gist is as follows. The succession of the lease of house can be divided into two, the succession of the lease of building and the right of residing (*Wohnrecht*). The former is a right on the property law, and can be succeeded to heir-at-law together with other property of the dead according to the general rule of the succession. The latter is one of the right-for-existence and is a right on the social legislation which is on the different plane from the civil law. And not only the lessee of the house but his lodger⁶⁾ has the proper right of residing. In order, however, such a right of residing is to be given, only the necessity of residing at the house is not sufficient, but the lawfulness of residing is required. What is necessary for lawful residence is normally the presence of the lease-relation between the owner of the house and the lessee. And on the death of the lessee, if there is a heir-at-law among his lodgers, he succeeds the lease and fulfils in behalf of himself and his family the requirement for the lawfulness of the right of residing, but if there is no heir among his lodgers (e.g. in case of Naïen widow), the lodger's proper right, which is the right of residing, appears to the front. That is to say, Naïen widow can counter, with her

proper right of residing, to both the lessor and the heir-at-law of her dead Naien husband. So far as her residence being admitted to be worthy of protection (i.e. the presence of the necessity), the constructive lease-relation between the lessor and her can be admitted by the application of the provision of the Act.⁷⁾ This paves the way to the lawfulness of her right of residing. In this way she is given the right to continue to reside in the same house.

This theory overcomes the defect of the *Familiengemeinschaft* theory which is incompatible to the individual-doctrine of modern civil law, by means of establishing the conception of the right of residing proper to each individuals. This intends to give protection to a Naien widow who has no right of succession, without being inconsistent with the law of succession, by means of admitting the right on the social legislation. Though it is a hard task where we find the basis for the constructive lease-relation, at the present time when we have no distinct provision, this theory will be considered to be very appropriate for the solution of the problem.

8) The best way for this purpose, however, is to enact the statute, and the efforts have been tried in the direction of its realization. In December of 1959 (34th year of Showa) 'Project of the fundamental principles for the revision of the Lease of Land and House Act' was published. It has the paragraph as follows.

'No 42 — The succession of the lease on the death of lessee.

(1) In case of the death of lessee of the building for residing, on the death of the lessee, if a spouse of the lessee or relatives within two degrees of the same (including a person who is in the same relation due to Naien-relation with the lessee) live together in the building, the lodgers (when the building is used for the purpose of other than residence, the lodgers and the heir-at-law of the lessee) take jointly the right and obligation as to the locarium and the foregift before the death.

(2) When there are no lodgers (or the heir-at-law of the lessee) of the previous section, the lease comes to extinguish on the death of the lessee, and the right and obligation as to the locarium and foregift before the death of the lessee, belongs to the inheritance.'

The remarkable points in this 'Project' are: firstly that in respect of the lease of the building for residing, the building is excluded from the object of the succession, and is taken over by the lodgers; and in respect of the lease of the building which is used both for residing and non-residing purpose (in technical term a building for the combined use), the building is taken over by the lodgers and the heir-at-law jointly.

Secondly that the 'Project' has specified clearly who can be included to the lodgers. It states distinctly that the Naien spouse or relatives are to be included in 'lodger' and to be given protection. Thirdly that the 'Project' does not adopt the *Familiengemeinschaft* theory.

Thus, if this 'Project' is codified, the continued residence of Naien widow will no doubt be given protection.

III What legal measure should be taken in future for solution of Naien problems?

Finally, the author will mention as to the problems which are to be solved in future. It is more important to diminish the number of Naien-relations in any way in future than to give protection to the present Naien couples. Naien-relation is the product of the Principle of Registered-marriage, therefore it may be possible to extinguish Naien by the revision of the Principle of Registered-marriage. But it is not right, for in case we adopt other principles, we find some defects. The author will examine those principles in turn.

a) The Principle of *De fact*-marriage. This is the principle recognizing the substantial married life as the lawful marriage. According to this principle Naien-relation disappears absolutely, for Naien is a substantial married life and thus it is recognized as the lawful marriage. Therefore in this respect, this is a clearcut solution. But, the legal system as to the marriage does not merely aim at to extinguish Naien. The important purposes in the modern marriage law are to maintain the order of monogamy system, to promote the formation of the lawful marriage which is in accordance with the substantial legal requirement, and to adopt the system which can distinguish the parties and the date of the formation of marriage. Judging from the above, the Principle of *De fact*-marriage has some vital defects. First, it is not adequate for maintaining the monogamy, for the distinction between the lawful marriage and Naien may become obscure and there may be some room of the bigamy to arise. Second, the cases may arise in which the formation of marriage and its date are not distinguishable. Third, it cannot prevent the occurrence of the marriage between prohibited degrees or the marriage of infant which are in breach of the substantial legal requirement. Furthermore, if we admit the *De fact*-marriage as the lawful marriage, who is to acknowledge the formation of marriage, and when, how and in what way? Thus, though this principle can extinguish Naien, it helps to incur other

important questions, so it is not adequate.

b) The Principle of Marriage accompanied with the ceremony. This is to admit the formation of marriage by performing the ceremony in accordance with the custom in the country. This principle is in accordance with our custom or consciousness, and the supporters are not a few, and such conclusion of the Committee of the Government was published. But the defect about this is as to the parties who fail to perform the marriage ceremony. In this respect, some theories insisted to admit, in case of non-ceremony, the marriage to come into existence by the registration of the parties. But Naien may arise without any doubt when the parties fail to register.

The defect of this theory, however, may be fewer than that of the Principle of Registered-marriage, for persons who don't hold their ceremony or who fail to register may be few. Therefore the number of Naien-relation may decrease than that at the present time. But being unable to diminish absolutely the present defects, this principle is not always adequate.

c) The Principle of Civil-marriage like in modern Europe. According to this principle, when such steps as the publication of banns, the notice of celebration, the ceremony before the official registrar or in the registry, are taken, the marriage comes valid. However, we can easily imagine of the persons who fail to observe such procedure. Therefore this cannot be of any help to solve Naien problems.

d) At last we must come back to the Principle of Registered-marriage. Of course this has a defect to allow Naien-relation to arise. But we cannot deny that this principle is suitable to maintain monogamy, to prevent the formation of unlawful marriage and to ascertain the parties and the date of the formation of marriage. Accordingly, the author believes it the best to make effort to decrease the number of Naien following this principle. Next, let us consider the problems which exist in the Principle of Registered-marriage.

As mentioned above, the impediments to a valid marriage which existed before the War disappeared. But it is apprehended that the idea of feudal family still remains in the consciousness of the people. But on the other side, it seems that the transition to the new era has steadily been on the way. The idea of marriage on the equal and free standpoints and on their own responsibility, has gradually spreaded, especially among younger generations. The effort to spread the thought of modern marriage has to be made. It is regrettable, in this respect, to see the agricultural, mountain, or fisherly village where the new thought still weak.

Again, the technique or method of the registration will have to be amended. At

present, marriage ceremonies according to custom are various, for instance, they are held at shrines, temples, private buildings for celebration, official buildings and private houses, etc.. It is impossible to specify the places nor to impose the duty of registration upon, for instance, priest of shrine or superintendent of rite. But it will be one measure to impose him the duty to report to the public office, which serves on parties the notice to push the registration. So far as the parties have the intention to register, the registration will be performed earlier, and the gap of the time between the fact (actual date of marriage) and the legal recognition will become smaller. Again, there are some ceremonies in which the parties note down and sign in the register-paper, as a part of the procedure. It may be reasonable to orient the general attitude to such a way. At the same time, it is important to make the people understood the difference between the lawful marriage and *Naien* — difference of legal protection — and to let them recognize the importance of the registration. According to the investigation (to inquire which the people think most important among the celebration, cohabitation and registration), it revealed that the registration is not always recognized of its importance. Though, of course, registration is not ignored, but is belittled in respect of the fact it is the sole requirement for the legal formation of marriage. It is necessary and also possible to promote the registration by the active persuasion of the state. By the way, in this respect, there is a remarkable fact to show. As the statistic above showed (p. 14), the registration are performed earlier recently than in the previous time. For instance, comparing the figures in 1952–60 with that of 1940–49, the ratio of the marriage in 1952–60 which was registered within six months after the celebration or cohabitation was 59.3, while in 1940–49 42.5. It vividly shows that the modern thought of marriage has been widely spreading among the people and the consciousness about the registration is keenly awakened.

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Naien is an old and yet a new problem for us Japanese jurist. Numerous efforts have been instilled into the solution of the questions. And they have been solved steadily and in turn. *Naien* is the product of the Principle of Registered-marriage. This troublesome phenomena arised from the adoption of the principle which was not in accordance with the custom or consciousness of the people. But no absolute or better principle to substitute it regarding the formation of the marriage can be found. Again, it must be noted that most marriage ceremonies in our country, being different from that in other countries, are not related to the (religious) faith in which the parties

believe. Further, our marriage law and consciousness in the post-war time tell us that the origination of Naien can be prevented by means of diminishing the defects arising from the Principle of Registered-marriage following this principle. The orientation to this should be made strongly.

The differences between Naien and the lawful marriage are in some points; the right of the succession, the legitimacy of the issues, the common use of the surname, the origination of the affinity. The extinguishment of those, however, means the defeat of the Principle of Registered-marriage and the change to the Principle of *De fact*-marriage from it. The difference between Naien and the lawful marriage has gradually dwindled, that is, the protection to the parties to Naien has been strengthened. It seems to the author that the protection to Naien couples is close to its maximum limit. The solution of Naien problems is now on the final step, and to be done thereafter is, as the author believe, the reexamination and amendment of the Principle of Registered-marriage.

1) It should be noted that, as shown in this treatise, Naien is different from a intimate-relation of man and woman, or a concubine-relation.

2) We have many remarkable works written in Japanese regarding Naien. Though the author owes much to them in preparing this treatise, he will refrain from mentioning particular titles and names in every place. Again, we have the work written in English 'The validity of Naien' by Prof. Civisca, which treats principally the validity of Naien from the viewpoint of the ecclesiastical law.

3) a — This table was made by the author, arranging some reports published by scholars. And, those which are not necessary for the further description in this treatise, were omitted.

b — Places in which the investigation was made and numbers of case are various, therefore the intention of the author is to show the general inclination about the registration.

c — Investigations A and B in 1949, were made by different persons and in different cities.

d — Monthly divisions are based on 'Full month', except figures(*) of '52, '55, '58 which are based on the calculation of calender months (e.g., 'Within one month' means 'the same calender month').

4) As Japanese law of succession is different from the one of the Anglo-American Law in many respects, it is difficult to find the suitable word to its content. 'Inheritance' means all the property which belonged to the dead. Again, 'heir-at-law' below means the person who is entitled to succeed such property.

5) Of course, in succession the negative effort (preventing decrease of the property) can be imaginable, but it is clear that all the cases are not always as such, since there may be a case which may last for a extremely short time.

6) Though this word is used in this treatise for the convenience, it means correctly persons who have lived together with the dead lessee as a family.

7) Though some assert an analogical-application of the Lease of House Act s. 1-2, the opposite opinion exists.