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Author(s)	Aotake, Mika
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Problems in Divorce Law in Contemporary Japan*

Mika AOTAKE**

1. Introduction

In 1898, divorce by mutual consent was introduced into the Japanese Civil Code. Not influenced by Christianity, divorce by mutual consent was widely accepted in Japanese society[1)] as divorce did not have religious connotations, but was a private family matter. Divorce by mutual consent was based on the idea that divorce by litigation in open court was an embarrassment for the family and divorce should be completed outside the court, privately and secretly[2)]. After World War II, in 1947, the Civil Code was revised, and the divorce system was also changed, but divorce by mutual consent was not removed from the present Civil Code. This is still the current characteristic of Japanese divorce law and has led to some problems.

2. Divorce rates in Japan

As illustrated in Figure 1, although the divorce rate in Japan has decreased in

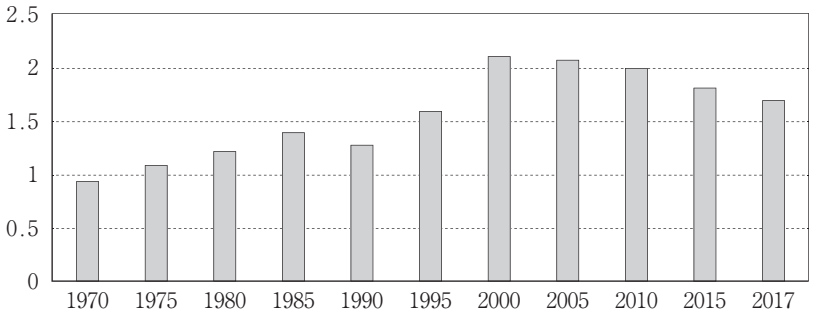

Figure 1. Divorce rate per 1,000 population in Japan[3)].

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* This essay is based on the manuscript "Family Law and Family Patterns in Contemporary Japan," which I presented at the "Internationales Mediationszentrum für Familienkonflikte und Kindesentführung" conference on January 25 2018, in Berlin.

** Associate Professor of Civil Law, Osaka University Law School.

1) Atsumi Kubota, Family Law, pp.86-88 (Japan, 2017).
2) Satoshi Minamikata, Family and Succession Law in Japan, p.80 (Netherlands, 2015).
3) Ministry of Health Labour and Welfare, 2017 survey of population dynamics, annual estimates, p.4, http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/suikei17/dl/2017suikei.pdf

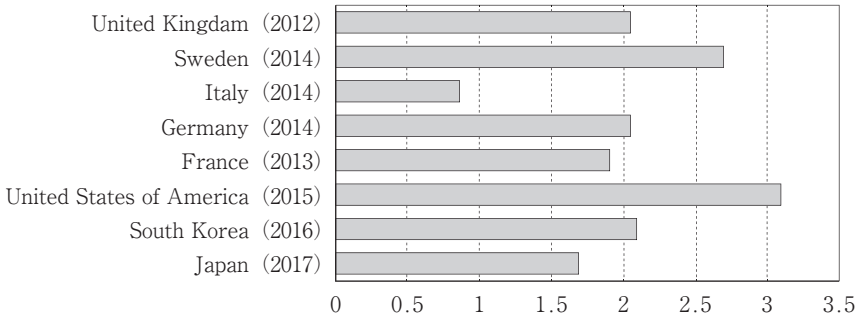

Figure 2. Divorce rate: International comparison[4].

the last 20 years, overall it has increased over the last 50 years. In 2017, there were 212,000 divorces, and this is a divorce rate of 1.7 per 1,000 population, which is not high compared to other nations, as illustrated in Figure 2.

3. The Japanese divorce system

There are five divorce methods in Japan: Divorce by mutual consent, divorce by Family Court mediation, divorce by determination of the Family Court, divorce by reconciliation, and divorce by litigation at the Family Court. It is very common in the Japanese divorce system that the parties divorce by mutual consent without the involvement of third parties. In this essay, three of these methods will be examined: (1) Divorce by mutual consent, (2) divorce by Family Court mediation, and (3) divorce by litigation at the Family Court. These were chosen because they are the more important divorce methods in respect of quantity and study. As illustrated in Figure 3, in practice most divorces are divorce by mutual consent. In 2017, the divorce rate by mutual consent was 87.2%, Family Court mediation was 9.8%, and litigation was only 1%.

(1) Divorce by Mutual Consent (87.2% of divorces)

For divorce by mutual consent, parties can divorce by agreement and by using a divorce notice form. After reaching an agreement on the divorce, as a formal requirement, the parties need to complete a divorce notice form indicating that both parties wish to divorce and that one party retains the parental rights and duties after the divorce. The couple is not required to state the reason for the divorce, and the divorce notice form is submitted to the family registration office. The two parties can divorce only by agreement and by submitting the divorce notice form.

4) Ibid. p.5.

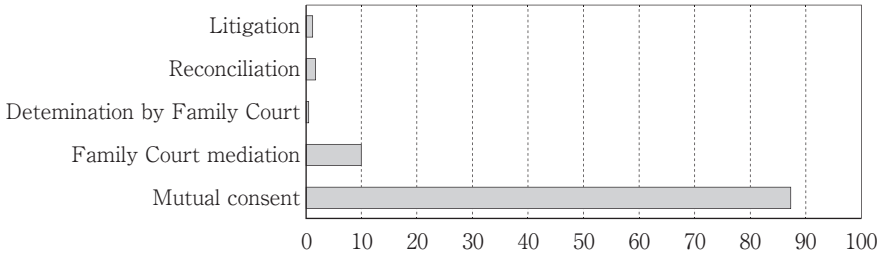

Figure 3. 2017 divorce rate classified by method[5].

The main advantages of divorce by mutual consent are that it does not require time or financial resources and so it is not a burden on the parties. However, at the same time, it does have disadvantages. There is a high chance that the parties agree to an unfair divorce because there is less involvement in the divorce and so there is also less of a chance of avoiding an unfair divorce. For example, the parties may get divorced but fail to decide on child-care expenses or division of property.

(2) Divorce by Family Court mediation (9.8% of divorces)

The parties can create a divorce agreement through divorce mediation, and the parties can apply to the Family Court for divorce mediation at any time. The mediator does not have the authority to determine the divorce, but its role is to assist the parties in reaching an agreement.

With Family Court mediation, the mediator is a third party involved in the divorce agreement. This solves, to some extent, the problems of divorce by mutual consent, in which the agreement is made only by the parties and leads to an unfair divorce. This means that mediation has an important role in avoiding unfair divorces. Mediators are expected to observe the divorce agreement process and other relevant issues such as child expenses, division of property, and the frequency of contact with children.

(3) Divorce by litigation at the Family Court (1% of divorces)

In the case that the parties fail to reach an agreement, they can bring their case, as litigation, to the Family Court. Before litigation commences, under Japanese law, the parties must undertake mediation; this is the rule of mandatory mediation prior to litigation. This indicates that dialogue as a first step is the best

5) 2017 survey of population dynamics, graph number 10.4, number and rate of divorce, classified method according to years, https: //www. e-stat. go. jp/stat-search/files? page = 1&toukei=00450011&tstat=000001028897

way of settling a divorce. Therefore the first stage of divorce without litigation should be attempted as much as possible.

During litigation, a judge at the Family Court can decide to grant the divorce or not. Divorces can be granted for five reasons under Article 770 Paragraph 1 of Japanese civil law:

i) The defendant has committed an act of unchastity.
ii) The defendant has deserted the plaintiff with malice.
iii) It is unknown for three or more years if the defendant is alive or not.
iv) The defendant suffers from serious mental disease, and there is no possibility of recovery.
v) There exist other serious circumstances that make it difficult for both parties to continue in the marriage.

The first and second reasons are the fault of the defendants, but the grounds as a whole are based on the fact that the marriage has broken down. However, for a long time the jurisprudence did not grant divorces when the marriage had broken down, and the plaintiffs were the cause of the breakdown, for example, when a husband committed an act of unchastity, and because of the unchastity the marriage fell apart, and the husband insisted on divorce from his side. The Supreme Court stated that these cases were against the principle of fairness and equality[6]. However, in 1987, the Supreme Court granted a divorce with conditions in the case where the plaintiff was at fault and caused the breakdown of the marriage.

4. The problems of divorce

After divorce, the financial circumstances of men and women vary. This is as a result of the different gender roles in married couples. However, the number of working married women is increasing. In 1980, the number of married couples with a housewife or househusband was 11,140,000, and the number of dual-earner couples was 6,140,000. The number of couples with a housewife or househusband was much more than dual-earner couples at the time. In 2016, the numbers had changed to 6,640,000, and 11,290,000 respectively, an almost reverse of the numbers, and the number of dual-earner couples is now much higher than couples with a housewife or househusband.[7]

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6) Decree of the Supreme Court, February 19 1952, Minshu 6-2-110.
7) Cabinet office, 2017 white paper on the countermeasures against declining birth rates, p.84, http: //www8. cao. go. jp/ shoushi/ shoushika/ whitepaper/ measures/ w- 2017/ 29 pdfhonpen/ 29 honpen.html

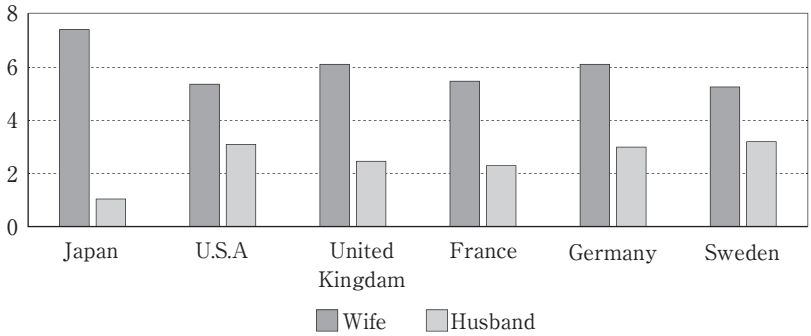

Figure 4. The time spent on housework per day[8].

While the number of working married women has risen, the gender roles of men and women have remained, and most housework is still done by women. The time spent on housework per day by married men and women with children under six years old in Japan is 7.34 hours for women and 1.23 hours for men, and this difference between men and women is very large compared to other countries.

One of the reasons for the retention of gender roles is working hours. In 2016, the proportion of workers working 49 hours or more per week was 28.6% for men and 9.1% for women, while male workers tend to work longer hours than female workers.[9] Another reason for the retention of gender roles is the wage differences between men and women. In 2017, the wage difference between full-time male and female workers was 26.6%.[10]

5. Children after divorce

(1) Joint-custody not allowed

In a divorce where children are involved, joint-custody is not allowed and either the mother or father acquires parental rights and duties. This rule is based on the idea that joint-custody after divorce would be confusing for children. However, as parents fight about parental rights and duties in many cases, this rule is not ideal for children[11]. The courts tend to respect the will of a child when they are older

8) Cabinet office, 2018 white paper on the countermeasures against declining birth rates, p.30, http://www8.cao.go.jp/shoushi/shoushika/whitepaper/measures/w-2018/30pdfgaiyoh/30gaiyoh.html

9) The Japan Institute for Labour Policy and Training, Databook of International Labour Statistics, Table 6-3, https://www.jil.go.jp/kokunai/statistics/databook/2018/06/p209_t6-3.pdf

10) The 2017 Ministry of Health, Labor and Welfare, survey of wages, p.4, https://www.mhlw.go.jp/toukei/itiran/roudou/chingin/kouzou/z2017/dl/13.pdf

11) Shuei Ninomiya, Family Law, pp.112-113 (Japan, 2013).

than ten years old, and so in practice, mothers normally acquire parental rights and duties. In fact, mothers acquire the parental rights and duties in approximately 80% of the divorce cases in which children are involved[12].

This imbalance results from the fact that mothers are normally more responsible for bringing up children, and mothers are evaluated as better parents than fathers. However, this evaluation is problematic from the point of gender equality[13].

(2) Single mother families

In 2016, there were 1,232,000 single-mother families and only 187,000 single-father families. That means that 85% of single-parent families were single-mother families. From this, 79.5% of single-mother families were as a result of divorce, and 75.6% of single-father families were the result of divorce[14]. Single-parent families tended to be poorer than families with two parents, and 50.8% of single-parent families with children were low-income families. This proportion is approximately 40% higher than families with children where there are two or more adults[15]. The poverty of children is a serious problem in Japan, and that is exacerbated by the poverty of single-parent families.

Single mothers tend to be in more difficult financial situations after divorce than single-fathers. In 2016, the annual income of single-father families was 4.20 million yen, while the annual income of single-mother families was 2.43 million yen[16].

As mentioned above, the main reason for the poverty of single-mothers is the wage differences between men and women. Another reason is the lack of child-care expenses received after divorce, as illustrated in Figure 5. The rate of single-mother cases in which the parents agreed on child-care expenses after divorce is only 45.9% and if we examine the data in detail, the agreement rate for divorce by

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12) Ibid. p.111.

13) Ibid. p.111.

14) The Ministry of Health, Labor and Welfare, report on support for single-parent families, 2016, p. 1, https://www.mhlw.go.jp/file/04-Houdouhappyou-11923000-Kodomokateikyoku-Kateifukishika/0000188136.pdf

15) The Ministry of Health, Labor and Welfare, lifestyle survey, p.15, 2016, http://www.mhlw.go.jp/toukei/saikin/hw/k-tyosa/k-tyosa16/dl/16.pdf

16) The Ministry of Health, Labor and Welfare, report on support for single-parent families, 2016, p. 1, https://www.mhlw.go.jp/file/04-Houdouhappyou-11923000-Kodomokateikyoku-Kateifukishika/0000188136.pdf

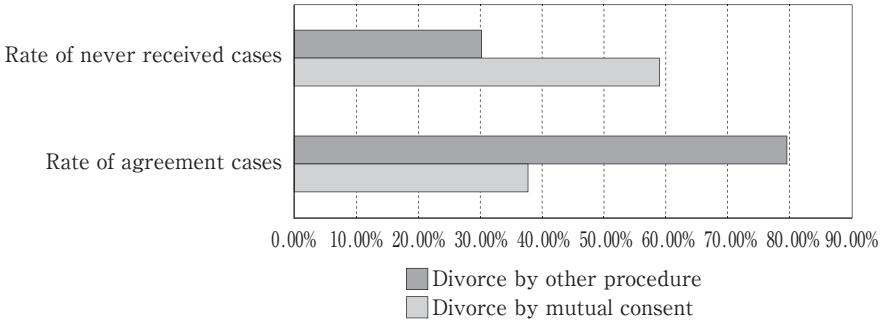

Figure 5. Child-care expenses in divorce—single-mother families[17].

mutual consent is 37.8%, which is lower than the average rate, and for cases of other procedures, such as divorce by mediation or litigation, the rate is 79.6%, which is higher than the average rate. The rate of single-mother cases where child-care expenses are never received is also very high. For divorce by mutual consent, the rate is 59%, and for other procedures such as divorce by mediation and litigation, the rate is 30%.

(3) Contact between parents and children after divorce

Until recently, an article about parental contact with children after divorce did not exist in the Civil Code. However, a judge had determined that contact with children was the minimum right of parents[18]. In 2011, contact with children was added to section 766 of the Civil Code. The various methods of contact included indirect and direct contact as accepted by the court, for example, e-mails and letters.

As illustrated in Figure 6, the problem is that there are many divorce cases in which parents do not agree on contact with children. In single-mother cases, 73.9% of divorces by mutual consent are without agreement on contact with children, and 45.3% of divorces by other procedures are without agreement on contact with children. This indicates again that similar to child care expenses cases, divorce by mutual consent without the involvement of a third party results in numerous problems.

However, there are many cases in which contact is not carried out whether the

17) The Ministry of Health, Labor and Welfare, the report of support for single-parent families 2016, pp. 53-58, https: //www. mhlw. go. jp/file/06-Seisakujouhou-11920000-Kodomo katei kyoku/0000188168.pdf

18) Determination of the Family Court Tokyo, December 14 1964, Kateisaiban-geppo 17-4-55.

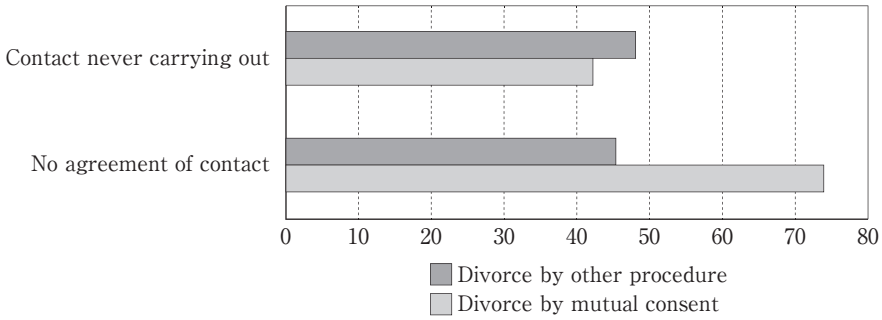

Figure 6. Contact with children in single-mother families[19].

divorce is by mutual consent or by other procedures and the proportion of single-mother cases in which contact is never carried out is 42.2% for divorce by mutual consent and 48.1% for divorce by other procedures.

6. Conclusion

We can easily see that the Japanese divorce system is problematic and many families suffer from poverty after divorce. One of the reasons for these problems from the point of view of divorce law is divorce by mutual consent without any involvement of a third party. Divorce by mutual consent has benefits for the parties involved as it is easy and free and the will of the parties is respected, and therefore, more than 80% of divorces are by mutual consent. However, at the same time, divorce by mutual consent makes it difficult, to deliberate on the important issues after divorce, such as child-care expenses, contact with children, and sometimes creates unjust divorces that do not positively impact on the welfare of the children involved.

19) The Ministry of Health, Labor and Welfare, the report of support for single-parent families 2016, pp. 65-70, https: //www. mhlw. go. jp/file/06-Seisakujouhou-11920000-Kodomo katei kyoku/0000190327.pdf