# AN INTRODUCTION TO A COMPARATIVE STUDY ON JAPANESE–SWEDISH LEGAL HISTORY OF MARRIAGE

## —especially, on the Period of Modernization in both Countries—

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### I Preface

There have been many connections between Japanese Laws and French or German Laws since the Meiji Restoration (1868). The system of Japanese Civil Code is same as the system of the German Civil Code (B.G.B.) and many provisions are similar to those of the French Civil Code. So, many Japanese scholars have published comparative studies of Japanese Laws with French or German Laws. Such studies have had practical importances in Japan.

But, it is difficult to find the Japanese Laws have any connection with the Swedish Laws or the Nordic Laws, so, we have only few monograph about it. However, I wish to write on the comparative legal history of Japan and Sweden, now, and this is my first report.

Japanese civil laws differ from the Swedish. Japan has a Civil Code received from the continental Europe, but Sweden has not. But to compare the former with the latter is possible. Because, the comparision may be done not only about resemblances of institutions but about differences of them, and it is more important

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to research on causes of differences. Researching on socio-historic bases of legal provisions and its systems is such more important as comparing of about resemblances and differences of those.

The law of 1734 in Sweden has many important provisions. For example, the marriage law (Giftermålsbalken) has the provisions prescribing an adultery as a cause of divorce on the equal footing of the both sexes. In the same period, almost every country had uneqal provisions on the both sexes.[1] Japan was same. Now, I wish to compare the Swedish with the Japanese legal history in the period of modernization of both countries, and further I will research on the causes of differences of both legal forms.

I think that Sweden has developed his own legal system since 1734. To-day's legal system of the Swedish Empire (Sveriges Rikes Lag) is same as one of 1734, and it has completely embodied the equality of both sexes. Still more, now, it seems to root firmly in Sweden.[2]

Japan has embodied it after the Second World War, too.[3] But, now, this principle is faced to the great crisis. Then, it is necessary to study the legal history and to research the socio-historic conditions of differences of the both countries. And then we may recognize that — what conditions will guarantee the equality of the sexes, and what conditions will destroy it.[4]

## II Swedish Marriage Law in the Code of 1734 (the First General Code)

"Denmark, Norway, Sweden, and even Iceland have preserved a real treasury

1) On German nations..Karl von AMIRA "Grundriss des Germanischen Recht", Strassburg, 1913, S. 178.

2) Prof. Åke MALMSTRÖM said "No one will criticize the basic principle in the code, the equality of the sexes." ("Matrimonial Property Law in Sweden" «W. Friedman, Matrimonial Property Law» London, 1955, p. 429). And, above all, I could confirm women's situations in the real Swedish societies by my own eyes from 1964 to 1965.

3) For example, the Article 24 of the Constitution of Japan (1946) prescribes as follows:— "Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as abasis. With regard to choise of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes."

4) I could find and read many French or German translations of Swedish laws in Universitetbiblioteket and Juridicum of Uppsala and bilbliothèque nationale in Paris during the last one year, and I respect those extensively comparative studies of French and German scholars. Prof. AMIRA's work of Note 1) is already well-known in Japan.

of old Germanic Laws."[1] Indeed, there are some towns reserving the old Germanic names of institutions in Sweden, to-day. For example, Morgongåva in Uppsala län (province) and Sjuhundra in Stockholm län. The former means the Swedish (and the old Germanic) matrimonial property law, and the latter rises from the administrative unit of the medieval Germany. Now, I will limit my consideration to "the famous code of 1734, one of the oldest codes in the world still partly in force."[2] This was not a modern law but preserved the old Germanic institutions, and had some provisions of the inequality of both sexes. For example, the matrimonial property had been provided as "the property of both spouses became common through marriage. The property formed a single group, 'the joint estate of the husband and wife', which was administered by the husband but of which both husband and wife had a share called giftorätt. In the country, the husband's share was fixed at two-thirds, the wife's at one-third; in the towns, husband and wife had equal shares of the joint estate."[3] On such situation of wife, it is said that all were silent regarding women in Scandinavia up to the 18th century, too.[4] Indeed, there were other provisions of inequality of husband and wife. The marriage law (Giftermålsbalken) of 1734 had such a provision as follows:—

> "After a man and a woman married, he is a right guard, and researches her and defends for her." (GB 9 : 1)
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> ("Sedan man och qwinna sammanwigde äro, tå är han hennes rätte målsman, och äger söka och swara för henne.")

On such a provision, Prof. J.E. Almquist accounts for, this is similar to the regulation of Justinian, but he describes "on the other hand there are remains of old regulations from landlaw time (landslagenstid)."[5] Now, we may present the provision of "guardian" (giftoman) as an example of these remains of old regulations.

> "Maid of her is asked for as a guardian." (GB 1 : 1)
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> ("Mö af hennes giftoman begiara ..... ")

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1,) 2) Seve LJUNGMAN "Swedish Law" «Scandinavia, Past and Present» Odense, 1959, p. 95.

3) Åke MALMSTRÖM "Matrimonial Property Law in Sweden" «W. FRIEDMANN, Matrimonial Property Law» London, 1955, p. 410.

4) Mrs. E. Ewerlöf says "All was silence regarding women in Scandinavia up to the 18th century, when the cultural life began to be leavened by more enlightened ideas—but even so, there was hardly any question of equatlity. ..The French-woman, Olympe de Gonge's appeals for justice for women 1789 were drowned in the revolutionary storm which swept l'ancien régime." (Elsa EWERLÖF "Women's Rights in Scandinavia" «Scandinavia, Past and Present» Odense, 1959, p. 211)

5) Jan Eric ALMQUIST "Svensk Rättshistoria, II", Stockholm, 1958, p. 114

"A father is a guardian of his daughters, and a mother must give a advice. If a father were dead a mother would be a guardian with the nearest relatives." (GB 1 : 2)

("Fader är sine dotters giftoman, och moder må ther til råd gifwa. Är fader död; tå är moder med skyldasta fränders råd ..... ")

These seem to be old regulations. But, this does not mean any the reaction in development at all.[6] Because, this marrige law had provisions of the equality of both sexes as follows at the same time; at first, 1734 year's law provided in itself an agreement between a man and a woman.[7] For example:

"No one shall be compelled to marry; a woman can marry by her own will and her agreement same as of a man." (GB 1 : 5)

("Ej må någor til giftermål twingas; utan bör så qwinnas, som mannens friwillige ja och samtycke gifter målet fästa.")

This is a remarkable regulation not only in Sweden but in whole Europe in this period. Then, I shall continue to reserch on the equality of sexes in case of an adultery or divorce in the law of 1734.

According to the old Nordish laws, husband can part himself from his wife, almost by his will.[8] And in the old Swedish law, as in other many countries, an adultery (hor) of wife had been a cause of divorce (äktenskapsskillnad). It was a wife's adultery, only.[9] But, afterwards, an adultery as other obstacles of marriage was influenced by the Church.[10] Prof. Almquist said "the Church struggled against the Germanic institutions of divorce with the canon separation.....The situation of a wife was on the equal footing, so even husbands adultery might be a cause of separation."[11] But, the separation was not the divorce, and the canon law prohibited from the divorce.[12] Afterwards, the Reformation revived of the old interpretations on this point and made an adultery and a disappearance of the both sexes to a the legal causes of divorce.[13] [14] Thus the following provision was

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6), 7) J.E. ALMQUIST, ibid, p. 114

8) J.E. ALMQUIST, ibid. p. 182

9) J.E. ALMQUIST, ibid. p. 183

10) J.E. ALMQUIST, ibid. p. 132

11) J.E. ALMQUIST, ibid. P. 184

12) Gerhard HAFSTRÖM "Den Svenska Familjerättens Historia" Lund, 1964. p. 56

13) The bases of interpretations on divorce was researched in Matthew 5: 31-32 and 19:3-12 same as in Germany. G. HAFSTRÖM, ibid. p. 184

14) J.E. ALMQUIST, ibid. p. 184

introduced into the marriage law of 1734.

"If a husband commits an adultery and a wife does not permit, and if she has not had intimate relations with him since she was aware of his act, a divorce will be allowed and half of husband's rights will be passed over to a wife. If a wife commits an adultery, he will have the same right and besides she will lose her right from him (Morgongåfva). If both commit adulteries and the second adulterer does not reconcile, a divorce will not be declared." (GB 13 : 1)

("Giör mannen hor, och wil hustrun ej förlåta honom brott sitt, och hafwer hon ej haft sängelag med honom, sedan thet henne kunnigt blef; tå må skilnad i äktenskapet ske, och hafwe han til henne förwerkadt hälten af sin giftorätt i boet.

Giön hustrun thet; ware lag samma, thertil miste hon ock sin morgongåfwa. Hafwa the begge hor giordt, och enthera med then andra förut ej blifwit förlikt; tå må theras ächtenskav ej skiljas.")

In this provision the situations of the both sexes are regulated on equal footing. Such provision is remarkable one in the early of the 18 century. This may be compared with code Napoléon, which is a product of the Great Revolution and provided only wife's adultery as a cause of divorce.[15]

On such problems, I wish to compare with Japanese marriage law in the period of modernization of Japan.

## III Japanese Marriage Law in the Course of Formation of the Civil Code (1867-1898)

During the previous period of Meiji — the Edo era (1615-1867) — the feudal system had governed over the whole Japanese societies. In the feudal society, all marriage relations had served to the feudal family. A marriage was means of unit of two families, so spouses were selected by the both families. And the will of spouses was completely neglected. Senhime (千姫) who was the second daughter of the Shogun Hidetada Tokugawa married Hideyori Toyotomi — Tokugawa's rival — when she was 7 years old. Her tragedy was a model of all women's tragedies in this period, and these tragedies had often happened in the warror's (Bushi, 武士) societies.

And also, the feudal family had demanded the succession in the male line, and

15) "Les Codes Suédois de 1734" «traduits du suédois par Raoul de la Grasserie» Paris, 1895, § 13 : 1. § 229 of code Napoléon "Le mari pourra demander le divorce pour cause d'adultière de sa femme."

every family should keep one male descendant at least. So, if a wife could not born a male heritor, a warror had sown his seeds in other women. Sorai OGYÛ (荻生徂徠, 1666-1728), a scholar of Edo Government (Bakufu), wrote "a concubine (Mekake, 妾) is an indispensable being.....if he could not gain a boy, he would have a right to keep concubines." [1] So, a concubine was a legitimate being the same as a wife, therefore an adultery of husband could not exist. On the other hand, a wife's adultery was a grave offense. The representative criminal law compiled in 1742, Osadamegaki Hyakkajyô (御定書百箇条), had provided for wife's adultery as follows:

"A wife commited an adultery will be put to death. The party of an adultery will be so."

"Even if a husband killed an adulteress (his wife) and her party, he would not be accused of any punishment."

In the Japanese feudal societies, the wills of the parties in marriage had been neglected and the situations of women were the lowest. But in the world of people, the wills of parties could be recognized and situations of women were higher than that of women in warror's societies. Mrs. Ewerlöf's opinion as follows, is appropriate in Japan, too — "Although in ancient times they (women) had no rights from a legal point of view, the customs were much kinder toward them than the laws."[2]

After the Meiji Restoration (1868), the Meiji Government began to compile the Civil Code, the Criminal Code, the Procedure Code, etc. For the compilation of the Civil Code, the Ministry of Justice had collected the people's customs out of the whole country, and published "The Civil Customs Collection of the Whole Country" (全国民事慣例類集) in 1877 and 1880. In this book, we can't find parent's consent or the pressure of family in marriage, but we find a go-between (Nakôdo, 仲人). In the preface of chapter "Go-between", there is such explanation as follows:

"The office of go-between may be held by one person negotiating for both sides, or by two, each family having a go-between of its own. A person, usually of low rank and a friend of the family who conveys the messages for the family, is called the 'preliminary go-between'. After the marriage has practically been arranged, a person of high position and good reputation in the locality is often asked to perform the ceremony of the presentation of the betrothal present as

1) "Seidan" (政談, Lectures on Government, compiled in 1716—1728)

2) Elsa EWERLÖF "Women's Rights in Scandinavia" «Scandinavia, Past and Present» Odense, 1959, p. 211

well as to preside at the marriage ceremony. Such a person is called 'principal go-between'. The go-between must be present at the wedding ceremony, accompanied by his wife, and they must lead in the ceremony of exchange wine cups, so that a widower or widow is never asked to be a go-between. It is the go-between's duty to mediate in all disputes arising from the marriage, and in the case of a divorce, to see to the sending back of the wife's dowry and trousseau." [3]

And also, among the peoples, there were some parties without even a go-between and ceremony. Some examples out of "the Civil Customs"—

"In the province of Tôtômi, the district of Sano (遠江国佐野郡), a marriage without a go-between is censured as a violation of social ethics even if it is properly carried out in other respects." [4]

"In the province of Musashi, the district of Toshima (武蔵国豊島郡), the lower classes may sometimes arrange a marriage by themselves and may ask for the services of a go-between only during the wedding ceremony. However, even such a go-between, if he lives near the married couple, will feel obliged to mediate if quarrels arise later." [5]

The forms of marriage in the people were more flexible than that in the warror's society.

An adultery of a wife was a cause of divorce in reference to this "Civil Customs." For example:—

"In the province of Ise, the districts of Watarai, Shima and Tôshi (伊勢国度会・志摩・答志郡), the divorce instrument is written and sealed by the husband. If the wife returns to her original family on account of some fault on her part, a divorce instrument is withheld from her as a punishment." [6]

"In the province of Sagami, the district of Ashigara (相模国足柄郡), nothing but neglect of filial duties, adultery and theft can be made the ground of divorce."[7]

I think that such customes were originally formed in the warror's society and they had penetrated into the people's world.

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3) From Wigmore's translation. John Henry WIGMORE "Law and Justice in Tokugawa Japan, VII" Tokyo, 1943, p. 98

4) From Wigmore's translation, ibid. p. 99

5) From Wigmore's translation, ibid. p. 101

6) From Wigmore's translation, ibid. pp. 110-1

7) From Wigmore's translation, ibid. p. 111

The first draft for the civil Code in Japan was published in 1876. This draft denied the being of go-between, and provided parent's consents to marriage of their children before the son was 25 and the daughter 20 years old (§ 113), but this draft provided that the free wills of both parties were indispensable at the same time (§ 111). About an adultery, wife's adultery was a cause of divorce (§ 203), and husband's adultery was a cause of divorce only when he kept a concubine in his dwelling (§ 204). It may be said that this draft was influenced by the French Civil Code. [8]

The first Civil Code which was proclaimed in 1890 (but not enforced) provided parent's consents to marriage as 1876 year's draft, and provided that an adultery of both sexes was a cause of divorce. [9]

After the Meiji Restoration, Japan had walked into to modernization. And after 1897 Japan had entered into the age of the Industrial Revolution, and in this year the Yahata Iron Works was established. But, the Japanese family law was not modernized, and the Civil Code of 1898 had reserved and reproduced many feudal provisions as follows:

§ 750 If a member of a family desires to marry or enter into a relation of adoption, he must obtain the consent of the head of his family.

§ 772 I For contracting a marriage a child must obtain the consent of his parents in the same family. This, however, does not apply, if the man has completed his thirtieth year or the woman her twenty fifth year.

§ 813 A husband or a wife can bring an action for divorce only in the following cases:

2. If the wife commits adultery. [10]
3. If the husband is condemned to punishment for a criminal carnal intercouse.

This Civil Code had been enforced till 1946, and I think these provisions are reactionary in modernization of Japan. Why had such reactionary provisions appeared in the age of modernization?

Nowadays, under the system of the new constitution, free wills of parties in

8) And the Criminal Code of 1880 (was enforced to 1907) provided that an adulteress was condemned to major imprisonment from 6 months to 2 years.

9) But an adultery of husband was a cause of divorce only when he condemned to punishment for a criminal carnal intercourse (Chapt. "Person" § 81 I)

10) The Criminal Code of 1907 provided that only wife's adultery is a crime. (§ 183)

marriage are guaranteed, and causes of divorce are regulated on equal footing and husband's adultery is a cause of divorce as wife's. But, for a long time from the Meiji Restoration to the new constitution, the individual dignity and the essential equality of the sexes had not been established. We must research the reason why they were not embodied in Japanese societies. In the next chapter, we will research it, comparing with the Swedish socio-historic conditions.

## IV Japan and Sweden — Differences of their socio-historic conditions.

In the first place, I shall consider the socio-historic conditions in Sweden. Above all, I wish to research the reasons why Sweden could have such marriage law as chap. II in 1734. We find two reasons to account for them. The first is the Swedish Reformation, the Second is non-feudalism in Sweden.

It is important that the earthly power had struggled against the Church and a man had stroke a blow against the old analogical interpretations of law with the King's Permissions (Kungliga dispensernas). And the first example appeared in 1660. [1] And then, "permission's memorandums had been taken the form until 1730. Afterwards, courts had made a law to regulate a cause of divorce 'due to self-conscience'." [2]

But, the law of 1734 had not only been due to only the Reformation. Because Germany was the base of the Reformation, and she had not had such a law as the law of 1734 until 1794. [3] So, we must research another reason for enacting this law. I think it will be found in non-feudalism. It may be said that the accomplishment of the Reformation was depend on that the Cathoric power did not combine with feudal powers.

Some Swedishes pride themselves on that there was not feudalism in Sweden. And it is not only their prides, but also what scholars of other countries indicate. [4]

The period from 1718 to 1739 is called the Age of Freedom, and in this period the great legislation was accomplished. Then, what was the characteristic of this Age of Freedom? Prof. I. Andersson accounts for this age as follows:

"In the Age of Freedom the social problems were consciously brought out into

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1), 2) Gerhard HAFSTRÖM "Den Svenska Familjerättens Historia" Lund, 1964, P. 57

3) In 1794, "Allgemeines Landrecht für die preussischen Staaten" was enacted.

4) For example, a French historian indicates..."la société scandinave...ne connaît ni le servage ni la féodalité." (Pierre JEANNIN" Histoire des pays scandinaves" «Que sais-je?» 1956, p. 14

> the open and debated with more vigour than in the previous century. And now that a strong monarchy had ceased to function as mediator and leveller, and could no longer exploit the differences between nobility and non-privileged, these differences loomed even larger than before, and came up regularly for discussion. Although these social conflicts were sometimes overshadowed by party quarrels on foreign policy, they remained important through out this period." [5]

We may pay attention to this movement which the social problems between the nobility and the non-privileged were consciously brought out into the open. And this movement had brought the result of passing of the noble's estates into the peasants, and afterwards, the crown's territory passed into them, too. On this problem, Prof. Andersson continues "as a result of the rapid development in industry [6] and commerce, the unprivileged Estates, who were fully conscious of their importance in the new constitution, had acquired determined and experienced leaders. Attention was also drawn to inequalities in privilege by the fact that during the great economic upheavals a few of the privileged estates of the nobles had passed into the hands of unprivileged landowners; and it should be remembered, too, that both Charles XI and Charles XII had regarded merit and not birth as ground for promotion." [7] And "in consequence large areas of crown territory passed into the hands of the peasants." [8] [9] Of course, "about 75 per cent. of the population were still employed in husbandry and cattle-breeding." [10] But, the conditions of the peasants were different from that under the so-called feudal system. They having not feudalism, in Sweden, there was no or little necessity to have the feudal family system. And, Swedish societies did not demand the male heritor and unequal legislations. Then, the Swedish legislation could serve to a whole nation rather than breaking up the feudal system. We must pay our attentions to such explanation as follows:

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5) Ingvar ANDERSSON "A History of Sweden" «Hannay's translation», London, 1956, pp. 252-3

6) It is said "about 8.5 pen cent. of the population of Sweden was now occupied in crafts and industry (including mining)" (I. ANDERSSON, ibid. p. 257). In Japan, the population of industry still remained at 3.55 per cent. in 1873.

7) I. ANDERSSON, ibid. p. 253

8) I. ANDERSSON, ibid. p. 254., And from 1700 to 1772 the population of land owned by 'free' tax peasants rose from 31.5 % to 46.9% of the total number of homestead (I. ANPERSSON, ibid. p. 254)

9) A French historian writes, too "la propriété paysanne gagne pendent tout le siècle, par achat de terres de la couronne et même de terres nobles depuis 1723" (P. JEANNIN, ibid. p. 57)

10) I. ANDERSSON, ibid. p. 257

"The pietist revival which had taken place among the imprisoned Caroline soldiers spread rapidly, and a young priest called Erik Tolstadius began vigorously to attack the activities of the Church. A violent controversy ensued, and the outcome was the Conventicle Edict of 1726, which enforced orthodoxy and banned other religious sects. The spiritual legacy of the Caroline Age was also expressed in more positive ways. The mediaeval national code and town laws were superseded at the 1734 in Riksdag by a new law which restated the former codes in admirable conciseness and appropriate terms." [11]

The Industrial Revolution in Sweden was risen in the middle of the 19th century. [12] The law of 1734 had been firmly enacted far before the Industrial Revolution. So, there was few contradiction and promotions of humane legislations in this period. [13]

On the contrary, in Japan, the feudal system had continued for a long time. Undoubtedly, there were many trends going toward the individual dignity and the equality of both sexes in the world of the people. As for women, indeed, "they had no rights from a legal point of view, the customs were much kinder toward them than the laws." [14] The people, however, had no power of making laws in Japan, so the world of the people had stayed as the world of customs. And, the political power of the Meiji Restoration had taken off the peoples customs in the politics, and such tendency had appeared definitely in 1898. In 1897 the Yahata Iron Works was established, and in 1898 Japanese Civil Code was put in force. In short, in such period Japan had entered into the modernization. But, Japan was behind other countries in the industrialization and had her destiny to overtake them. In the purpose of conquering this destiny, there were many contradictions in the Japanese societies. [15] The negation of the individual dignity, the low wages and lower situations of women were indispensable for the industrialization and the modernization of Japan.

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11) I. ANDERSSON, ibid. p. 257

12) The great sawmill, especially in the costline of the Gulf of Bothnia, was established in 1851, and the railway was built in 1853 and the main line between Stockholm and Gothenburg was opened in 1862.

13) For example, in 1864, a new Criminal Code was adopted which bolished the old medley of obsolete and cruel punishments.

14) E. EWERLÖF, "Women's Rights in Scandinavia" «Scandinavia, Past and Present» Odense, 1959, p. 211 and note 2) p. 6

15) The Yahata Iron Works which is ranked in the 5th of the world iron producting power in 1964 was established as a semi-governmental company in 1897, and the Japanese Government had brought up it, earnestly.

This monograph is my first work about comparative studies on Japanese-Swedish legal history. And, I wish to continue this study. During the last year I could study the Swedish legal history in the Uppsala University, owing to kind advices of Prof. Åke MALMSTRÖM, Prof. Leif Ingemar MUTÉN, Mr. Ingemar REXED, Mr. Arne ROSENLUND and Mrs. Sonya KIHLGREN in Uppsala and Mr. and Mrs. Karl-Lennart SANDQUIST in Stockholm. I express my hearty gratitudes for them.