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Changes in the Concept of Family Justice in Japan:

The Impact of Modern Egalitarian Attitudes on Family Equality
in the Areas of Inheritance and Domestic Violence
(Including Murder of an Lineal Ascendant)

Keiko IRAKO

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I Family justice in Japan: a brief overview

The first major shift in the concept of family justice in Japan occurred in 1947. Up to the end of World War II, the primary unit of Japanese social organization was the household (*ie* in Japanese). The head of the household was always a man (unless there was no male in the direct line of succession). Family justice was based on the concept that the householder should protect the family, and successive generations clearly understood the family hierarchy and their social obligations to each other. However, at the end of the war, the main focus of the Allied General Headquarters was the reform of Japanese government, through demilitarization and democratization. The Constitution was amended in 1946; then family law and inheritance law in the Civil Code, which covered, was amended in 1947, to give equality to all family members. Thus the idea of justice embodied in family law was changed to a more democratic concept of equal rights, in the sense of fairness, for all family members.

The problem remained that these imposed changes occurred at too early a stage for Japan. Although the law had changed, society and people's attitudes had not. The fundamental concepts of the household and male supremacy survived to underlie the structure of modern Japanese society and, even now, are often adhered to in spirit, particularly in country areas.

However, recent evidence suggests that a significant shift in attitudes, away from the traditional model, is now occurring. As a result of this gradual change, attitudes have started not only to come into line with the spirit of justice in the 1947 Civil Code but, particularly since the late 1990's, to go beyond it. This more egalitarian concept of justice has been reflected, for example, in court judgments and sentencing patterns, which have reinterpreted aspects of the law appearing to conflict with the Constitution and with social reality. Such events have in turn led to amendments of existing laws and to a much more egalitarian basis for new laws.

This paper will look at the erosion of differential treatment before the law in two main areas of family relationships, which illustrates the increasingly democratic aspect of family justice in Twenty-first century Japan.

II Equality in the Japanese inheritance laws since 1947

In 1947, the Civil Code, which covered family law, was amended, to replace the traditional household system and to give equality to all family members. Yet, in spite of the 1947 amendment⁽¹⁾, the household system remains in many parts of Japan, and attitudes lag behind the law even now. This section of the paper highlights the major changes towards a more egalitarian distribution of inheritance brought about by the 1947 amendment, and some problem areas that remain.

1 Hereditary succession after the amendment of the Civil Code, 1947

The basic principal of the present Civil Code is that all people are equal before the law and all siblings can inherit their parent's property. Any person with property can leave a written will, or bestow part or all of their property on others whilst still alive, except that the heir's portion as laid down by law must go to the next of kin, should they wish to claim it. However, if the deceased dies intestate, all property automatically goes to the next of kin, shared proportionally by mutual agreement, or (if no agreement is reached) in the proportions laid down by law in Civil Code Article 900. The joint beneficiaries can then decide whether to share the property further and anyone can give up his or her inheritance. If the deceased leaves a will, the spouse and/or all the direct descendants (i.e. not the deceased's siblings) can contest it. Direct descendants can claim up to one third of the total property. In the case of the spouse or ascendants, up to half of the property can be claimed (Civil Code Articles 1028, 1029).

2 Hereditary succession prior to the 1947 Civil Law Amendment

As already mentioned, in spite of the 1947 amendment, the traditional Japanese

household system remains in operation in many parts of Japan even now. Therefore it is necessary to look at the historical context.

The system of inheritance under the old household system was, in fact, much more complex. Its main characteristic was the power and status accorded to the title of householder. Under the old Civil Law, there were two kinds of hereditary succession: succession to title and succession to property. Succession to title meant becoming the head of the household, in other words inheriting the status of the householder in that household. This included inheriting all the property of the deceased householder. Succession to property was the entitlement to inherit other family member's property in addition to that of the deceased. As the householder inherited all the deceased householder's property, other siblings could receive nothing.

The causes leading to a change of householder were as follows:

- the death of the incumbent
- resignation of the incumbent from the headship of the family
- forfeiture of the incumbent's nationality
- the incumbent's departure from the house in order to marry, or, in the case of an adopted incumbent, to revoke the adoption
- the marriage of a woman who was head of the family in default of male heirs (the status would automatically transfer to her husband)
- the divorce of a husband who had assumed his wife's surname in order to become the householder (the wife resumed the title in the reverse of the previous case).

There were three kinds of successor to a household: (1) householder by law, (2) householder by appointment, and (3) householder by selection. The method of establishing the succession to head of household followed certain steps, again laid down by law.

(1) Householder by law

The first method to decide a new householder was to follow the law as set down in the old Civil Code S.970, which said that the next of kin is the direct successor. If there is a man and woman in the same degree of kinship, the man takes precedence, even if born outside wedlock, providing the father has acknowledged him. However, if otherwise equal within the same degree of kinship, a legitimate child takes precedence.

(2) Householder by appointment

A second method of deciding a new householder is by appointment (Civil Code S.979-). The appointment may be made by the deceased's will or on application to the mayor of the city, town or village, on the householder's death or resignation.

(3) Householder by selection

If a new householder cannot be arrived at by either of these methods, the successor can be selected (Civil Code S.982) by the previous householder's father or, after that, mother or, failing that, by a meeting of the immediate family. If, however, there are no descendants, the ascendant automatically becomes the title-holder. If there are no ascendants, selection may be made by relatives other than the immediate relatives or by another branch of the family (e.g. the second son's family, which under the *ie* system would be recorded in a separate Family Register on his marriage).

3 Hereditary succession today

If we compare the situation before and after the 1947 Civil Code amendment, society prior to the amendment was, without doubt, an unequal, paternalistic society. Under the householder system of society, the householder succeeded not only to title and property but to responsibility; the householder had the same responsibility as a parent for a minor, and younger siblings would only be recorded in a separate Family Register on marriage. In modern society, every normal adult has the right to self-determination but must accept the responsibility that goes with it. Now, all children

are recorded in a separate Family Register on marriage.

Although the old household system has been completely superseded, there remain problems. The concept of householder is still in people's minds, which can lead to miscarriages of family justice. For example, the eldest brother sometimes puts pressure on other siblings to abandon their rights of inheritance. It takes a long time for attitudes to alter in this area.

III Equality of treatment in sentencing: the murder of a lineal ascendant

The second example of changes in the concept of family justice, a case from 1968, involves family relationships in the area of domestic violence. The case resulted in a significant change of approach towards sentencing a descendant, who murdered an ascendant. This would formerly have carried a far heavier sentence than if the victim was outside the family or of equal or lower status within it, due to the seriousness with which a crime against an ascendant has been traditionally regarded.

In 1968, a woman killed her father, who had compelled her to live with him since she was 14 years old. She gave birth to five children, two of whom died. The father was violent towards his wife (the defendant's mother) and drove her out. For the next 15 years, the daughter endured sexual harassment from her father. Every time she ran away, she was taken back to his house. However, at the age of 29, she began a relationship with a colleague at work, and planned to marry him. When the father learned of this, he attempted to prevent it by threats and abuse. He continued to abuse his daughter for ten days until, unable to bear anymore, she killed him and turned herself in to the police.

1 The District Court Decision⁽²⁾

The case was tried under the Criminal Code Article 200, which covered the killing of a lineal ascendant, rather than Article 199, which covers general homicide.

Utsunomiya District Court gave the following judgment in the case on 29 May 1969. Treating the act of killing a lineal ascendant as different from general homicide is against the Constitution Article 14 (1), which says that, "All people are equal under the law and there shall be no discrimination on political, economic or social relations because of race, creed, sex, social status or family origin". Therefore the defendant should not be judged under Criminal Code Article 200, the killing of a lineal ascendant, but under Article 199, general homicide. The court concluded the defendant's action exceeded reasonable self-defence, but took the circumstances into consideration, so although the verdict was guilty, no sentence was imposed.

The public prosecutor made an immediate appeal.

2 The High Court Decision⁽³⁾

As a result, the Tokyo High Court imposed a sentence in their judgment on 12 May 1970. They found that the defendant killed her father, even though he had compelled her to live with him as a married couple. The defence counsel had put forward the two arguments of legal self-defence, and that the defendant was mentally weakened after ten days of continuous harassment and violence from her father. However, the father was in a drunken stupor at the time of the murder, so the court did not accept these arguments. The sentence was seven years imprisonment, reduced to three and a half years due to the extenuating circumstances.

The defendant put in a final appeal. She was poor and could not afford further legal fees so she was given a court-appointed lawyer. However, the veteran lawyer Daihachi Onuki intervened to defend her voluntarily. Soon after she appealed to the Supreme Court, he was diagnosed with cancer, so his son, Shoichi Onuki, defended her in the Supreme Court.

3 The Supreme Court Decision⁽⁴⁾

The Supreme Court decision in effect reversed the High Court sentence; the defendant was sentenced to two and a half years imprisonment, but suspended for

three years. The summary of *ratio decidendi* is as follows.

Criminal Code Article 200 (finally repealed in 1995), which concerned the murder of a lineal ascendant, was not against the Japanese Constitution; however, the sentences of the death penalty or unlimited imprisonment laid down in Article 200 were deemed too heavy. The Article laid down the following possible sentences for homicide of a lineal ascendant: the death penalty, unlimited imprisonment, or from 3 to 15 years penal servitude (the latter term changed in 2005 to 5 to 20 years). Since these penalties were more severe than in the case of other murder victims, this was judged to be against the Japanese Constitution Article 14 (1) already quoted in the District court decision, “All people are equal under the law and there shall be no discrimination on political, economic or social relations because of race, creed, sex, social status or family origin”. In other words, although the criminal act should be judged under Article 200, the sentences under Article 200 were deemed to be against the constitution because they were more severe than in other homicide cases. Taking into account that the defendant was mentally weakened over the 10 days of continuous harassment and violence, that after the criminal act, she voluntarily turned herself in to the police, and that there was no possibility of a repetition of the offence, the court reduced the punishment to a suspended sentence of three years.

IV Changes in the concept of family justice in domestic violence: the Prevention of Spousal Violence and the Protection of Victims Act 2001

The final example, in which significant changes in the concept of family justice are evident, both in public attitudes, and in the law, is the Prevention of Spousal Violence and the Protection of Victims Act 2001⁽⁵⁾ (SV Act), enacted in April 2001. (The basic provisions came into force in October of that year, with the remainder in April 2002.) The aim of the legislation is to prevent spousal violence and to protect victims of both sexes and their children. The SV Act obliges the state and local governments to take responsibility for preventing spousal violence and protecting

Chart 1 Number of arrests for spousal violence (1997-2002)

(Total Japanese population = 127, 291,000 as at 2001)

Type of violence	1997	1998	1999	2000	2001	2002
Total murders	1,282	1,388	1,265	1,391	1,340	1,338
by spouse	155	189	170	197	191	197
by husband	101	129	105	134	116	120
% by husband	65.2	68.3	61.8	68.0	60.7	60.9
Total injuries	19,288	19,476	20,233	30,184	33,965	23,453
by spouse	365	295	403	888	1,097	1,250
by husband	340	273	375	838	1,065	1,197
% by husband	93.2	93.5	93.1	94.4	97.1	95.8
Total assaults	7,254	7,367	7,792	13,225	16,928	8,348
by spouse	32	35	36	127	156	219
by husband	31	33	36	124	152	211
% by husband	96.9	83.8	100.0	90.4	92.3	96.8

Sources: Cabinet office, <http://www.gender.go.jp/danjokaigi/bouryoku/houkoku/dv3/03.html>National Police Agency, <http://www.npa.go.jp/hakusho/index.htm>

victims (Article 2).

As well as responding to increases in reported domestic violence and protecting human rights, the act is significant in moving Japan towards gender equality. Chart I shows the number of arrests for spousal violence from 1997 to 2002, before and after the enforcement of the Act. Over a hundred wives are killed by their husbands every year in Japan. This figure peaked at 134 in 2000, which represents about 10% of total murders in Japan⁽⁶⁾. Cases of assault and injury have risen steeply in recent years. The number of arrests for spousal violence in 2007 was 192 for murders (107 by husband, 55.7%), 1,346 for injury (1,255 by husband, 93.2%) and 933 for assault (870 by husband, 93.2%)⁽⁷⁾.

Traditionally, and right up to the latter years of the 20th century, violent husbands were largely accepted or tolerated, with wives seeing little alternative to the situation. The increase in arrests up to 2002/3 suggests an increased awareness of and intolerance towards spousal violence; people are more willing to report it and the police are more likely to make an arrest. Thus, even before the SV Act, there was a growing general

acceptance that spousal violence is a criminal act.

1 Main changes

The most important change is that the Act explicitly states that spousal violence is a criminal act. It gives the police powers to enter a house and arrest an assailant and gives the local courts powers to enforce protection orders through fines and imprisonment.

The other major change is to set up a national support system, with clear procedures set out for victims to request help. This is a major step towards empowering women so that they have alternatives. Although men can also consult the new SV Centers, the figures show that women make up by far the greater number of victims. By treating both sexes equally, the support system is actually helping to redress the balance, which traditionally has favored men. In short, the new support system both recognizes that victims need help specifically from outside the family and also recognizes the right of women to be protected from domestic violence.

The latest amendment also protects child victims (amended Article 10, 2004). The 2001 Act did not originally cover children (although they were covered under a separate act on violence to children).

2 Sources of help

The three main sources of help within the new support system are support centers, the police and the local courts.

Support Centers

Two types of support centers are covered by the SV Act, which requires each prefecture to ensure that a Women's Consultation Center or other appropriate facility is established within its jurisdiction, together with a Spousal Violence Counseling and Support Center (Article 3 (1)). The Women's Consultation Centers provide counseling and temporary protection to victims, and offer information and other forms of

assistance in order to help victims achieve independence (Article 3(2)). Women's Consultation Centers evolved from centers established in each prefecture under the 1956 Anti-Prostitution Act (Article 34), which came into force in 1957, the aim of which was to protect and rehabilitate women prostitutes. Even before the SV Act, these centers had temporary facilities to protect women, and women counselors, who helped not only prostitutes but also women with problems of abuse, sexual harassment or other domestic problems.

In addition to the Women's Consultation Centers, new separate Spousal Violence Counseling and Support Centers have been established, which provide specific counseling for problems related to spousal violence⁽⁸⁾. Although these come under the jurisdiction of the Women's Consultations Centers, they are intended to help spouses of both sexes.

There are 180 Support Centers in all parts of Japan, as of April 1, 2008, and the number of counseling cases was 62,078 in 2007.⁽⁹⁾

The Police

According to the SV Act, when, through notification or other means, the police consider that there is a case of spousal violence, they should endeavor to take necessary measures to stop the violence and protect the victim. Necessary measures can include arresting the assailant (SV Act, Article 8), offering advice to the victim and explaining measures for their self-protection. This is one of key changes brought about by the Act, since previously police would rarely intervene in domestic disputes. Under the SV Act, main police stations, since 2001, have also had to set aside a space for counseling victims of domestic violence; the number of counseling cases in police stations in 2002 was 14,140; however, it had increased to 20,992 cases in 2007.⁽¹⁰⁾

Local Courts

The SV Act also specifies that the local courts should, in response to a petition from a victim, issue protection orders to prevent harm to the victim's life or person. The Act introduces two types of protection orders to protect victims, Restraining

Orders (Prohibition Orders against approaching the Victims) and Vacation of Domicile Orders:

- Where the offending spouse has already vacated the marital home, Restraining Orders can be requested to prohibit the spouse for a six-month period from approaching the victim's domicile, workplace or other location normally frequented by the victim. Moreover, from 11 January 2008⁽¹¹⁾, telephone/electronic contact can also be prohibited if the aim is to meet with, threaten or verbally abuse the victim. This new prohibition also covers the sending of mail/packages and other threatening or unpleasant items, defamation of character and attacks on the victim's sexual integrity through words/drawings or photographs. Children under 15 (or 15 to 20, if with their consent) are also protected from these acts, as are the victim's relatives.
- If the victim and spouse in question are still living together at the time of the petition, the victim can request a Vacation of Domicile Order requiring the spouse to vacate the marital home for a two-month period (SV Act, Article 10).

Violating a protection order is subject to imprisonment with labor of up to one year or a fine of not more than one million yen (SV Act, Article 29).

3 Implications of the SV Act (2001)

About seven years have passed since the SV Act came into force. The total number of petitions for protection orders received up till December 2007 (the latest figures available) is 13,834. Petitions seem to have increased significantly: the number of the first 18 months was 1,597, compared with 2,779 in 2007. Looking at the number of petitions granted over the same period, 10,971 protection orders have been granted, of which 5,125 were Restraining Orders. Only 32 separate Vacation of Domicile Orders have been granted but in 1,847 cases victims have been granted both Restraining Orders and Vacation of Domicile Orders⁽¹²⁾. These trends reflect a major shift in attitudes both on the part of the general public (the petitioners, who are

increasingly willing to come forward) and the courts, which grant the petitions in the majority of cases.

Under the 2004 amendment, children are also regarded as victims and therefore can be given protection under a court order. To date, 3,967 court orders have been granted for children (this includes both Restraining Orders and Vacation of Domicile Orders)⁽¹³⁾. This inclusion of children in the SV Act, which gives them similar rights and protections to adults, also shows a major shift in the view of family justice.

Until the 1990's domestic violence in Japan was treated as an internal problem within the family. It was not regarded as a problem that could or should be dealt with by law. The rights and protections accorded to both women and children under the new act are the result of a major attitude change towards family justice as being a responsibility of society, rather than the responsibility of each household. The emphasis of the act is also on the principle that each member of the family, whether male, female, adult or child has the right of protection.

V Conclusion: key points of change in the concept of family justice

The definition of justice is a difficult thesis. In the three instances discussed here, we can see clearly how both attitudes and the law have changed, in each case moving from the idea of 'fairness' based on a given social hierarchy to the idea of equality for all before the law, under which men, women and children, regardless of linear family relationships, can expect a much greater degree of equal treatment.

While the basic idea of justice, in the sense of fairness, has remained the same, what has essentially changed is the hierarchical background against which fairness is judged. In conclusion, I'd like to summarise how both the law and attitudes have changed in each case.

In the case of hereditary succession, the background was the social hierarchy of the household. Under the pre-1947 law, the concept of justice (balance or fairness) was that the householder inherited all the property, but with it, the responsibility for family members. However, under the post 1947 law, the basic principal of the present Civil Code is that family members have equal rights; therefore all siblings can inherit parent's property. Justice today is generally seen as realizing equality and protecting individual rights. However, although 60 years have passed, there are still cases where the eldest brother compels other siblings to abandon their rights, while in other cases, division of the property equitably remains extremely difficult.

In the case of a crime against a lineal ascendant, justice was originally seen as respecting the status of the victim as a lineal ascendant. The social hierarchy in this case is seniority within the family. To manifest this justice, the criminal law laid down a heavy punishment for the murder of a lineal ascendant.

In 1921, the government set up an Ad Hoc Registration Council to enquire into amending the Criminal Law. In 1926, general principles for amendment were presented and, in 1927, a preliminary draft amendment was published. In 1940, the provisional draft amendment was presented, but not adopted during World War II. Under the new Constitution adopted after the War, a second preliminary draft amendment was produced between 1961 and 1974 (the period of the patricide case discussed above), which included murder of a lineal ascendant and various similar types of aggravated crime, with increasingly severe punishments (desertion, injury of a lineal ascendant, bodily injury resulting in death, apprehension of a lineal ascendant, detention of a lineal ascendant against his/her will, detention resulting in death). However, the principle of crimes against a lineal ascendant being treated differently seemed to be against the concept of equality before the law, as laid down in Article 14 of the 1946 Constitution⁽¹⁴⁾. In fact, the judgements in the 1968 case clearly made the point that the sentence was in opposition to equality as laid down in the new Constitution. The Supreme Court passed judgement on the case in 1973, but Criminal Law Article 200

was not repealed until 1995. It took 22 years to redress the anomaly.

One reason for the time lapse was a lack of political and legal consensus. Following the 1973 judgement on the patricide case, the Registration Council published a bill of amendment to the Criminal Law, which was accepted by the Cabinet; however, it was opposed by the Committee on Judicial Affairs of the Liberal Democratic Party and subsequently lapsed. In 1981, the Ministry of Justice attempted a further plan for amending the Criminal Law, but also failed to achieve general agreement⁽¹⁵⁾.

A further example of this failure to reach a high-level consensus view was evident in the actual judgement on the 1968 patricide case. The Supreme Court did not judge Article 200 itself to be against the Constitution. In fact the court, made up of 15 judges, was somewhat divided: one judge supported Article 200 in its entirety while, on the other hand, several felt the whole of Article 200 was against the Constitution. But the majority felt only that the punishment was not just, in that such heavy punishment in comparison with general homicide was against the spirit of the Constitution.

Another reason for the 22-year gap was the slow rate of change in the concept of family justice among people generally; we can assume public attitudes at the time reflected the diversity of opinion found among the judges.

In the case of domestic violence, traditionally, acceptable behaviour was based simply on belief in the superiority of men. Therefore male violence was tolerated and the traditional view was that a woman able to endure was a good woman. There are examples across many cultures of male/female inequality: in the Bible, Eve was created from Adams' rib; while an old Japanese saying (with parallels in China and India) lists the 'Three Obediences': woman has first to obey her parents then, after marriage, her husband, and in old age, her child⁽¹⁶⁾. Under the new Spousal Violence

Act, obedience is not justice.

Changes in social attitudes have occurred at their own speed; they have not necessarily immediately preceded or reflected legal change. For example, the 1947 Civil Code was more a foreign import than the result of general attitude change, while the repealing of Article 200 took 22 years, even though the 1973 judgment legally recognised the anomaly. Since, relatively speaking, there were few significant changes in the law or fundamental social attitudes between the Taiho Criminal and General Law (701 AD) and the Meiji Restoration (1868), a period of over a thousand years, the traditional tenets of Japanese justice had a firm hold over social attitudes. During the eighty years or so from the Meiji Restoration to the end of the Second World War, change was major and relatively rapid, although social attitudes did not necessarily keep pace with institutional change. However, in the latter part of the Twentieth Century, and in particular from the end of the 1990's, change in social attitudes has accelerated and can now be said (for example, in the case of the Spousal Violence Act) to be driving institutional change. There have been two major changes: first, a shift in responsibility from private (within the family) to public (the law and public institutions); and secondly, and perhaps more importantly, a shift in values to the belief that all members of the family, whether senior or junior, man, woman or child, are entitled to certain basic rights. In this sense, modern egalitarian attitudes appear to have had a clearly discernable impact on the Japanese concept of family justice.

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- (1) The Civil Code 1898, Law 9. In 1896, General Rules, Real Rights, Obligatory Rights was enacted as Civil Code Law 89. The Family and Inheritance Laws were enacted in 1898. Laws 89 and 9 both came into effect on 16 July 1898.

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- (2) Utsunomiya Local Court Showa 43 (1968) (wa) No.278.
- (3) Tokyo Appeal Court Local Court Showa 43 (1968) (wa) No.278.
- (4) The Supreme Court Showa 45 (a) No.1310.
- (5) Prevention of Spousal Violence and the Protection of Victims Act 2001, amended 2004, Law 64.
- (6) Source: Cabinet office, <http://www.gender.go.jp/danjokaigi/bouryoku/houkoku/dv3/03.html>, National Police Agency, <http://www.npa.go.jp/hakusho/index.htm>
- (7) <http://www.gender.go.jp/whitepaper/h20/zentai/top.html>
- (8) *Outline of the Work for the Protection of Women*, Kanagawa Prefecture Women's Consultation Center, 2001, p.1.
- (9) Supra note at (7).
- (10) Ibid.
- (11) <http://www.gender.go.jp/e-vaw/law/dv/907.html/>
- (12) Supra note at (7).
- (13) Ibid.
- (14) Kinko Nakatani, The Amendment of the Criminal Law on Lineal Ascendant Murder: Effective Measures more important than Felony, *Horitsu Jiho* Vol. 54 No. 5, 1982, page 50.
- (15) Kinko Nakatani, The Social Background to Lineal Ascendant Murder, *Psychosurgery Mook* No. 14, pub. Kanehara, 1986, page 46.
- (16) ZENJYO Inoue TOKEIJI TO KAKEKOMI ONNA, *Yurindo*, 2001, p.148.