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Joint custody during marriage in Japan is just a formality and an "illusion".

-- Reform the custody system to achieve equal dialogue between men and women. --

The fatal flaw in the custody system has been known 75 years ago when the revision of the Civil Code was conducted after the World War II.

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Abstract You are probably aware that in Japan, with regard to the child custody system, during the marriage of the parents, the parents are supposed to exercise custody jointly. Furthermore, since Article 24 of the Constitution stipulates that "parents have equal rights" (paragraph 1) and that "laws ... concerning the family shall be enacted on the basis of individual dignity and the essential equality of the sexes" (paragraph 2), it should be legally believed that parents in a marriage possess equal rights and responsibilities with respect to the upbringing of their children. However, when parents separate for various reasons, it has become very difficult to guarantee equality between men and women through court procedures. In other words, inequality in the status of men and women during marriage has become the norm, despite the fact that the Civil Code provides for joint parental rights during marriage based on the essential equality of the two sexes as stated in Article 24(2) of the Constitution. We investigated and discussed what are the direct legal causes of this problem and why such a civil law has been created.

Keyword : System of parental authority, Joint custody during marriage, Sole custody system, Self-help, Gender Equal Parenting

1. Introduction

Article 818, paragraph 3 of the Civil Code stipulates that "Parental rights shall be exercised jointly by the parents during their marriage," and joint custody is the principle during marriage. Nevertheless, how many parents are aware of their joint parental rights when raising their children? Are we raising our children with consideration for the existence of the parents' agreement? Even if the parents are supposed to exercise joint parental authority over the upbringing of the child, there may be cases where the parents have widely divergent opinions on, for example, whether or not the child should enter a private school after taking an entrance examination for higher education. Whether or not to inoculate children with vaccines as a measure to prevent infection, or whether or not to send a child who is just fine at home to a rehabilitation institution or a support class when the school identifies a developmental disorder, are also very difficult issues, so it is natural that parents may disagree. From a social point of view, there is no such thing as a right answer either way.

A particularly distressing situation occurs when a couple considers separation for a variety of reasons. The question arises as to where the child will live and how the child's child care sharing time will be allocated. It may be possible for both parties to temporarily separate in order to cool down for the time being, not only in the case of divorce, but there is currently no provision for such a separation in Japan. Although Article 752 of the Civil Code stipulates the obligation of married couples to live together during marriage, there is no provision for separation, which is easily assumed to cause disputes. Even if they use force to move the child's residence or remove the other parent and monopolize custody (child rearing), they are not particularly regulated, and in the process of designating a parent or custodian in the court, a

decision may even be made to follow the status quo resulting from the use of force.

How can we solve this simple problem of parents raising their children? Some scholars argue that when parents disagree, the only solution is an immediate divorce, but do we want that form of solution in the first place?

This paper examines the reality and problems of the legal system from the perspective of the general public regarding the upbringing of children under joint custody during marriage, the historical background as to why the current problems are occurring, and what we, the general public, should be seeking to do about it.

2. Legal and social procedural status

* In the joint exercise of parental authority, there is no provision for adjustment in the event of disagreement between the parents, and the use of force (self-help), which is prohibited in principle by the rule of law, is virtually permitted within the family.

* Despite the fact that Article 24 of the Constitution provides for joint parental rights during marriage, as required by the "equal rights of parents" (paragraph 1) and the "dignity of the individual and the essential equality of both sexes" (paragraph 2), the acceptance of the use of force will ultimately result in the inequality between parents not being corrected.

Article 818, paragraph 3 of the Civil Code states, "Parental authority shall be exercised jointly by the parents during their marriage. However, if one of the parents is unable to exercise parental authority, the other parent shall do so." While joint parental authority is the principle during marriage, the proviso widely permits parents to exercise parental authority alone, and there is no provision for adjustment as to how disagreements should be resolved in the event of a disagreement.

There are many situations in real life that require the exercise of parental authority in terms of the content of child care and custody, and it is possible for parents to disagree on matters important to both parents and children, such as entrance exams and higher education, vaccinations and surgical procedures, the location of childcare, the time allocated for childcare (whether to travel or attend cram school on weekends or during long vacations), and religion. While it would be nice if a compromise could be reached through discussion, in practice, it can happen that the gap in opinion between parents cannot be bridged even through discussion. There is no provision in the Civil Code or even the Family Affairs Case Procedures Law for how to resolve such cases. Since there is no legal provision, there is naturally no procedure to resolve the problem with support organizations, courts, or other public institutions, and they are stuck in a situation where no one can help them. When such a situation arises, "separation with children" or "day running away" has also been seen, in which the child's residence is relocated by force without sufficient discussion and without the consent of the other parent. Otherwise known as "kidnapping" or "child abduction," these heavy-handed methods can create serious conflicts between parents. Such use of force is prohibited in principle in a country governed by the rule of law, but in Japan, self-help within the family has become virtually acceptable. There are cases in which relief is sought against the use of force through procedures in the family court after the fact, but even in "cases requesting the designation of a custodian and handover of a child" as an example of such a method, the judiciary functions only passively, even though the case should be heard from the perspective of the interests of the child, and the status quo is maintained except in cases of abuse or other poor child-rearing environments(It's called the "principle of continuity."). This is due in part to the fact that there is no provision for adjustment in the event of disagreement between the parents, and the content of the interests of the child that should be the standard for adjustment is unclear, making it impossible for intervention by state authority to correct the use of force between parents to function.

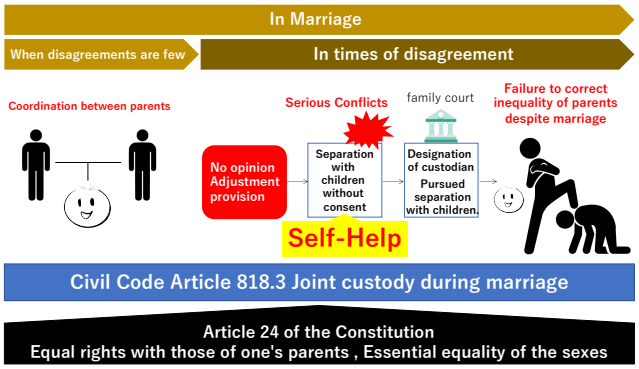

Fig1. A trend to allow self-help in the home

Even in cases where the parents do not agree, the act done in their joint name is valid in relation to a bona fide third party (Civil Code Article 825), so that in the end, the parents can effectively exercise parental authority based solely on the decision of one of the parents. Alternatively, it may be treated as an implied but consensual agreement. This may be one of the reasons why our society is filled with events in which only one parent can validly process a child under joint custody during marriage without confirming that one of the parents has explicitly consented to it. I would rather not see a procedure that requires the consent signatures of two parents. Procedures such as the parental column for higher education, legal representative for obtaining a passport,

and consenter for medical procedures can usually be completed with the consent of one parent.

How does the principle of joint custody during marriage function in reality? From a bird's eye view of the social situation, joint custody during marriage is merely a "pretext" or a "formality." In the past, during the Meiji Era, the sole custody of the father, whether during marriage or not, was the principle, and it may still be a vestige of this principle. The fatal flaw of the lack of a coordination provision that should be furnished by joint custody is brought to light.

3. History of creating legal defects

3.1 What can be learned from official documents

* There is an explanation for the removal of the adjustment provision in the event of disagreement between parents under joint custody during marriage during the first parliamentary question in 1947.

* In the records of the Legislative Council at that time in 1957, a provision for adjustment in the event of disagreement between parents was also raised as an issue.

Records show that the procedure for amending the Civil Code after the war began in July 1946. After the draft outline for the revision of the Civil Code was prepared, a draft amendment was prepared and submitted to the Diet after a Cabinet decision in July 1947.

The premise of this paper is the purpose of the joint parental authority during marriage. On August 29, 1947, Kenichi Okuno, Director of the Civil Affairs Bureau of the Ministry of Justice (now the Ministry of Justice), stated at a meeting of the House of Councilors Judiciary Committee that, "We thought that the parental authority system in the Meiji Civil Code was not appropriate in terms of equality of both sexes, and decided that if a couple was married, the parents would have joint parental authority.

Next is the provision for cases of disagreement between parents, which was already considered at the very early stage of the study of the draft outline. The draft outline for revision of the Civil Code (secretary's draft and Group C draft) dated July 20, 1946 states, "Article 877...Parental rights shall be exercised jointly by the parents (the parents shall consult and decide who shall exercise parental rights, and if they cannot agree, the court shall decide)." [*1]. Nagano, who prepared this executive director's draft, wrote in his recollections, "When parents jointly exercise parental rights, ... they attach two reins to the child, and the child will not be happy if he or she is pulled by both of them ..." [*1], indicating that he was aware of the issues that arise when the parents disagree in exercising parental rights. However, in the subsequent draft outline and the proposed amendment itself, the provision for adjustment in the event of disagreement between parents under joint custody during marriage was erased.

The reason for this can be glimpsed in the first round of parliamentary questions on the revision of the Civil Code. On August 29, 1947, at a meeting of the House of Councilors Judiciary Committee, Okuno stated the reason for enacting Article 818, Paragraph 3 of the Civil Code, which states that the treatment in the event of disagreement between parents is "simply 'to be done jointly by the parents' in the sense of leaving it to the appropriate handling between the parents of the couple. In addition, in his explanation, he presents an example from the Swiss Civil Code of the time, which had a disagreement provision. In other words, it can be seen that the adjustment provision was intentionally left out in case of disagreement between the parents.

Okuno explains that Article 825 of the Civil Code (effect of an act done by one of the parents in joint name) allows consent only by a decision of one of the parents in the event of disagreement, on the grounds that the other party with good intentions would be inconvenienced.

Furthermore, the 1957 document "Provisional Decision and Reserved Matters of the Subcommittee of the Civil Law Committee of the Legislative Council" states, "Should there be a provision for a remedy to resolve cases where parents disagree?" This indicates that the Ministry of Justice was aware of the growing problem.

3.2 What can be learned from recollections by civil law legislators

* The reason why no provision was made at the time of the revision of the Civil Code was that it was assumed that the mother would obey the father, and GHQ also questioned the lack of a provision in the event of disagreement between the parents.

* The issue was also raised at the 1957 Legislative Council, which was unanimous in its desire to establish a provision.

The Civil Code revision process and the memoirs of the Legislative Council in 1959 by civil law scholars Sakae Wagatsuma, who revised the Civil Code after the war, and Kenichi Okuno, Director of the Civil Affairs Bureau of the Ministry of Justice, are still available.

3.2.1 Postwar Civil Code at the Time of Revision

---Progress of Civil Code Reforms in the Postwar Period (1956) [*1]

“(Okuno) There was a question of what to do with the father if they did not agree, and I did not bother to write that down at all because I thought it would be such a hassle, but it was an issue that was raised at the command center.”
“(Wagatsuma) However, it may be necessary for the law of our country to provide that if the parents disagree, the family court will make a decision. However, as a practical matter, it is not clear whether the mother can be expected to apply to the family court to suppress the father's opinion.”

---Legal Times, Vol. 31, "(Roundtable Discussion) Revision of the Law of Relatives" (1959) *2
“(Ozawa) At that time, it is unlikely that they would not agree. Well, when it doesn't, it's okay to say that it can't be done because the situation is not in the best interest of the child.”
“(Wagatsuma) In the case of selling a child's property, even if the father says he will sell it, he cannot do so if the mother says she will not. In reality, however, the father will do it even if he disagrees.”
“(Ozawa) The command itself seemed very mystified that they could do without that provision (for disagreements). They wondered if that was okay.”

It is clear from these statements alone that at the time of the postwar revision of the Civil Code, it was assumed that the mother would obey the father, and the provision for the time of disagreement between the parents was intentionally left out. And it can be seen that the provision was not included even when GHQ pointed it out.

3.2.2 As of the 1959 Legislative Council

-- Legal Times, Vol. 31, "(Roundtable Discussion) Revision of the Law of Relatives" (1959) *2
“(Wagatsuma) The biggest problem is what to do when there is disagreement.”
“(Uta) A subcommittee of the Legislative Council agreed that some sort of relief provision should be established.”
“(Ozawa) It has been many years since the new Civil Code was enacted, and now that I think about it, I feel that some allowance should be made.”
“(Wagatsuma) The fact that the mother's will is now respected is a social progress, and we should be very happy about it.”
“(Nakagawa) One of the fundamental ideas is that a father who makes trouble for his children is a miserable man.”

This shows that 10 years had passed since the postwar revision of the Civil Code, and there was a growing awareness of the problem regarding the provisions in the event of disagreement between parents. The Legislative Council at the time was also trying to establish a provision. On the other hand, there are statements concerning men providing for and managing the family and respecting women's will, revealing the idea of a "division of gender roles" that is separate from the law.

3.3 Civil law scholars since the 1960s point out

* Civil law scholars have repeatedly pointed out the problem of the lack of provisions for cases of disagreement between parents despite joint custody.

This point has been repeatedly raised by civil law scholars since the 1959 Legislative Council. Examples.
--1960s
“There is no provision in the Civil Code for cases where the parents disagree, and therefore, if one of the parents disagrees, the exercise of parental rights becomes impossible.” (Obo Fujio: "Annotated Civil Code (23) Relatives (4)," p. 24, Yuhikaku Commentar, 1969)

--1990s
“If the parents disagree, there is no system established in the Civil Code to reconcile this disagreement, and parental authority cannot be exercised. This is a problematic point in terms of legislative theory.” (Takagi Takio and Matsukura Kosaku: " Clause Explanation Civil Code III: Kinship Inheritance Law, Revised Edition," p. 234, Sanseido, 1990)
“Traditionally, fathers and mothers have tended to be viewed only as "parents" as a whole, but today, as wives are becoming more autonomous, it is quite possible that fathers and mothers may disagree on the upbringing of their children. This problem is expected to become even more apparent in the future. In this regard, there are some deficiencies in civil law theory and legislation.” (Yonezawa Koichi: "Children, Family, and the Constitution," p. 294, Yuhikaku, 1992)

--2000s
“Unlike the laws of Western European countries, which have amended to joint custody and at the same time legislated a decision-making procedure in cases where joint custody cannot be agreed upon between the parents, it lacks an allowance for cases of disagreement between the parents.” (Mizuno Noriko: "Parental Authority Law," "Special Feature: Revision of Family Law - Focusing on Marriage and Parent-Child Law," Jurist No. 1384, p.58, September 1, 2009)

--2010s

“There is no provision regarding cases where the parents disagree on the exercise of parental rights. …It is necessary for the family court to grant one of the parents the right to make a decision, or to make other provisions for the adjustment of opinions.” (Nnomiya Shuhei: "Family Law (4th Edition)" p. 211, Shinseisha, 2013)

“It is understood that joint enforcement is intended to mean that a valid act cannot be performed unless both parties agree to it... Although there is no provision regarding consultation in the Civil Code or the Code of Procedure for Domestic Relations Cases, it may be problematic as a legislative theory.” (Omura Atsushi, "Civil Law Reader, Relatives" p.236, Yuhikaku, 2015)

Thus, despite the fact that civil law scholars have recognized and continued to point out the legislative inadequacy in the event of disagreement between parents under joint custody, no adjustment provision has been established even 75 years after its enactment.

3.4 Japan lagged behind since the 1980s

* Since the 1980s, countries have converted to joint custody systems and developed provisions for cases of disagreement between parents.

Omura says, "Japanese family law was a leader in practice until the 1970s. Since then, however, it has been left behind by changing customs." [*3] and Mizuno also states, "This revision to joint custody belongs to a very early period even from a comparative legal standpoint, "[*4] and the establishment of joint custody during marriage in the postwar Civil Code was a world first.

However, countries have since converted to joint custody systems, which allow the choice of joint custody without limiting it to the time of marriage, around the timing of the entry into force of the Convention on the Rights of the Child in 1990. Examples include the U.S., which began state-by-state in the 1980s, the U.K. in 1991, Germany in 1998, and Italy in 2006.

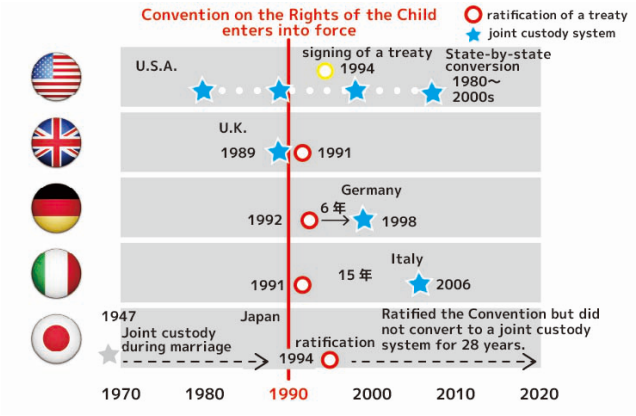

Fig.2 When countries converted to joint custody systems.[*5]

In the Swiss Civil Code (1907), which was cited in the first session of the National Diet, the provision regarding disagreements between parents is simple: "Parents in a marriage have the right of joint supervision, and if the parents disagree, the right of final decision belongs to the father. ” [*6]

Since then, countries have devised and developed provisions for disagreements in converting to a joint custody system. According to the "Overseas Legislation on Child Custody after Divorce of Parents (2020)[*7] conducted by the Ministry of Justice, 22 of the 24 countries surveyed (excluding India and Turkey) have adopted joint custody systems, and all of these countries have provisions for disagreements between the parents.

4. Ideal state of regulations

* Each country in the joint custody system has devised provisions for out-of-court adjustments as well as adjustments in the courts.

Based on the "equal rights of parents" and "individual dignity and the essential equality of the two sexes" as stated in Article 24 of the Constitution, a provision for adjustment in the event of disagreement between the two parents is essential for parents as husband and wife to manage the family on an equal footing. In order to be completed as a joint custody system, the existence of adjustment provisions is a prerequisite in order to accompany the substance of realizing equal parenting rights for both genders.

How do the joint custody countries define this coordination provision? Uera[*8] provides a typological explanation of the function of opinion coordination in each country. The broad framework states that "(1) out-of-court adjustments" will be made, and if no adjustments can be made, "(2) adjustments in court" will be made. The contents are also categorized, and under "(1) Out-of-court coordination," the following services are listed: "1-1 Consultation services and counseling," "1-2 Development of childcare plans," "1-3 Mediation," and "1-4 One-stop services. Under "(2) Coordination in the Court," the two types are divided into "2-1 Intervention by the judge" and "2-2 Transfer of decision-making authority." For example, in France, the adjustment corresponding to "2-1: Intervention by judges" has been made, and in Germany, the adjustment corresponding to "2-2: Transfer of decision-making authority" has been made. This means that each country has a coordination provision to make such adjustments outside of court and in the courts.

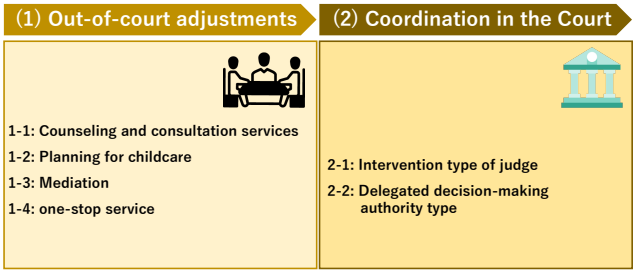

Fig.3 Types of opinion coordination as organized by Uera

Uera also points out the importance of a one-stop service function where various services can be given as appropriate prescriptions to troubled parents. The parents can then decide on the future of their children in an agreeable manner, and if they are unable to agree, they can receive intervention by the court. Only with such a foundation can the joint custody system function smoothly.

Koga[*9] also presents a model of the relationship between the custody system and the opinion adjustment function. The current Japanese system of joint custody during marriage (sole custody system) only respects the marital relationship itself, distinguishing it from other relationships between men and women, and refrains from providing support for the coordination of opinions between parents within the family, which results in the acceptance of self-help. In countries with joint custody systems, the state prepares a function to coordinate opinions between parents and thoroughly prohibits self-help.

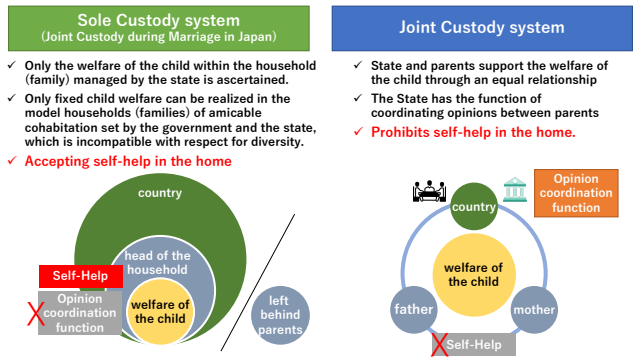

Fig.4 Relationship between the custody system and the opinion adjustment function as organized by Koga

In Japan, the court system is not something that the average citizen feels comfortable with, and some may even consider it an entity that they would prefer not to be involved with. While this in itself is a manifestation of the autonomy of the family and household in a space that is separate from the state, it also makes it easy to fall into situations where discipline is not in line with legal norms, the best example of which is the problem of ineffective public intervention, even against violence within the family. In order to ensure the best interests of the child, it is important to establish a system that respects the autonomous choices of the parents, with the concept of the child's best interests being established as the norm. However, as we learn more about the situation in other countries, we realize that in countries that have developed joint custody systems, the courts, as well as out-of-court coordination services, function organically as an institution that coordinates the views of the two parties while respecting each parent as a parent, and therefore may be more accessible to citizens, albeit in a sensible way.

Of course, the court's specific decisions on childcare matters may in fact undermine the autonomy of the family. Therefore, the joint custody systems in various countries have adopted, for example, a method in which the court grants one of the parents the authority to make decisions on specific child-rearing matters, in an attempt to find a practical solution while respecting the autonomous child-rearing by the parents. In the consideration of respecting diversity, not all matters related to childcare can be simply determined to be the only correct answer. While it is natural to prevent abuse that is clearly detrimental to the welfare and interests of the child, it is significant to carefully examine and make decisions from multiple perspectives, such as the decision of where to send the child for further education. The reality in countries with joint custody systems is that there is a widespread understanding that the realization of such positive child welfare can only be achieved through respect and accommodation of the respective opinions of the parents. Because of this understanding of the best interests of the child, joint custody has been institutionalized to the extent that it can be chosen even outside of marriage, such as after divorce, from the perspective that it should be enjoyed equally by all children, not just during marriage. In Japan, not only the lack of an option for joint custody outside of marriage, but also the problem of the lack of a function to coordinate the opinions of the parents themselves, which is crucial, while calling it joint custody during marriage, continued to be left unaddressed as a premise.

5. Consideration

In this discussion, we have introduced what happens when there is disagreement between parents in raising their children. And looking back in history, civil law scholars have continued to point out this problem since the time of the postwar revision of the Civil Code in 1947, 75 years ago, and the Ministry of Justice was also aware of it. Nonetheless, we found that the problem has continued to be neglected.

According to a 2021 Cabinet Office survey, "Public Opinion Survey on Divorce and Parenting "[*10], 77.4% of the public "knows" that both parents have joint custody while they are

married, and the majority of the public is aware of joint custody during marriage. However, 47.9% of respondents said they "know" that custody "including its contents," a decrease in number of nearly 30%.In this context, I wonder how many people are aware that the concept of decision-making between two parents under joint custody during marriage, as described in this paper, and the fact that there is no legal procedure for resolving disagreements between parents, have been considered a problem since the Civil Code was revised after World War II.

According to a survey*11 by the Personnel Bureau of the Cabinet Office reported in August 2021, 99% of male national public servants who had a child in the first quarter of FY2020 took maternity leave. The more men raise children, the more they will be committed to child rearing. In the case of junior high school entrance examinations, which have become so heated that the popular manga "February Winner" describes the junior high school entrance examinations as "the father's economic power and the mother's madness "[*12] , there are many decisions to be made, such as whether to enroll in cram school from the early elementary school years and whether to vaccinate children between the ages of 5 and 11 to prevent infection. In some social environments, parents are required to make important decisions for their younger children that have no correct answers, such as the decision of whether to send their child to a rehabilitation facility or a support class when a developmental disability is pointed out by an educational institution. Given such an environment, it would be natural for parents who are particular about raising their children to have disagreements.

The absence of such an adjustment provision in the event of disagreement between parents is a major factor in creating the serious social problem of "child abduction," and is a fatal flaw under joint parental authority during marriage. In other words, it can be said that even if there is what we call joint custody during marriage, it is only a "phantom" with no real guarantee. Those of us who continue to live in Japan are unaware of true joint custody, in which parents raise their children on an equal footing.

Now that it is commonplace for both men and women to work and raise children, there is no need to wait for reform of the custody system to include provisions for adjustments in the event of disagreement between parents to achieve gender equality in dialogue. And if we are to achieve a gender-equal society and child-rearing, we, the general public, must demand that the law be amended to a "true" joint custody system.

Epilogue

Atsushi Omura, chairman of the Family Law Subcommittee of the Legislative Council, which is currently underway, states in his book, "Considering Civil Code Reform.", “Even in the case of family law reform, it is necessary to uncover the potential interest of the public and actively provide opportunities to hear their opinions. For example, it is desirable to hold formal and informal (governmental and extra-governmental) briefings and public hearings at the central and local levels. To this end, the cooperation of the media is of course required. The media themselves are also strongly expected to actively present opportunities for discussion. It is desirable to have a long-lasting reporting system, as was the case when the jury system was introduced.”[*3] We look forward to the role the media will play in bringing about a revision of the Civil Code, now under discussion, that is in keeping with the times.

We would like to thank all those who have been involved in the preparation of this paper and all those who have considered this issue in the past.

Contribution

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Parents taking care of their children, parents communicating with their children's schools, parents and children going out together, etc., are all normal parent-child activities. From a legal standpoint, what legal basis does a parent have for each of these actions? We are not usually aware of this kind of thing, and we somehow think that because we are the "custodial parent," etc. So, if this is the case, what about the non-custodial parent, or is it really possible for a custodial parent to take the above actions?

In Japan, the legal basis for the above actions is completely unclear, and in fact, no one is quite sure. This puts Japanese parents in a very precarious position, whether they are married or not, whether they have custody or not. This is discussed analytically in this paper.

By "true" joint custody, we are not talking about extending the current phantom joint custody to after the divorce. What is needed is a legal foundation for parents and children to be parents and children.

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Reference

Reference 1 -- Current regulations

-- Constitution

Article 24. Marriage shall be solely based on the consent of both sexes and shall be maintained through mutual cooperation on the basis that husband and wife have equal rights.

(2) With respect to the choice of spouse, property rights, inheritance, choice of residence, divorce and other matters relating to marriage and the family, laws shall be enacted on the basis of individual dignity and the essential equality of the two sexes.

-- Civil code

(Consent of parents for marriage of minors) *Deleted in April 2022.

Article 737. The consent of the parents must be obtained before a minor child may marry.

(2) If one of the parents does not consent, the consent of the other is sufficient. The same shall apply when one of the parents is unknown, has died, or is unable to manifest his/her intention.

(Obligation of cohabitation, cooperation and assistance)

Article 752. The husband and wife shall live together and shall cooperate and support each other.

(Custodial parent)

Article 818. A child who has not reached the age of majority shall be subject to the parental authority of the parents.

(2) If the child is adopted, the child shall be subject to the parental authority of the adoptive parents.

(3) Custody shall be exercised jointly by the parents during their marriage. However, if one of the parents is unable to exercise parental authority, the other shall do so.

(Effect of an act done by one of the parents in joint name)

Article 825. In cases where parents jointly exercise parental authority, if one of the parents, in their joint name, performs a legal act on behalf of the child or consents to the child performing such act, such act shall not be precluded thereby even if it is against the

will of the other parent. However, this shall not apply if the other party was acting in bad faith.

Reference 2 -- Proceedings of the 1st Diet

-- House of Councilors, Committee on the Judiciary, No. 20, August 29, 1947.

(Okuno Kenichi) According to Article 877 of the current law, "A child shall be subject to the parental authority of the father living in the home" and "If the father is unknown, dead, has left home, or is incompetent to exercise parental authority, the mother living at home shall exercise it. However, this is not appropriate in terms of the equality of the two sexes, so we decided that if the couple is still married, the parents shall jointly have custody of the children.8 Paragraph 3 of Article 18. Of course, if the child is adopted, the adoptive parents have parental authority, but if not, the birth parents have parental authority. In this regard, the Swiss Civil Code states that in the event of disagreement, the father's opinion shall be the deciding factor, but this is not appropriate, so while there may be cases of disagreement, this should be left to the appropriate handling between the parents of the couple. However, when one of the parents is unable to exercise parental authority, when it is virtually impossible, or when parental authority or control has been lost, "the other parent shall exercise parental authority.

As I have just explained, Article 825 is a new provision. As a result, when a person with parental authority performs a legal act on behalf of a child or gives consent to a legal act of a child, the parents are supposed to perform the act jointly, so in many cases, the legal act will be performed in the joint name of both parents on behalf of the child. In such a case, if one of the spouses uses the joint name without permission and performs a legal act on behalf of the children, the other spouse may say that the legal act is invalid because the other spouse used the joint name against his or her will and ignored his or her will. Therefore, considering the protection of the other party, Article 825 provides that even in such a case, the validity of the agreement shall be valid and not prevented against a bona fide counterparty.

Reference 3 -- Tentative Decisions and Reservations of the Subcommittee of the Civil Law Section of the Legislative Council (1957)

(Custody)

39. There are various proposals on the existence or abolition of the concept or system of parental authority, which will be further discussed.

(i) Proposal to continue parental rights

Proposal A: Same as the current law

Proposal B: Proposal to strengthen the custody rights under the current Article 766

Proposal C: Parental rights shall consist essentially of personal custody, and if necessary, the right to manage property may be exercised by a person other than the person who has parental authority.

(2) Proposal to abolish the concept or system of custody

Proposal D: Abolish the unified concept of parental authority and divide it into personal custody and property management rights

Proposal E: Abolish the system of parental authority and unify it with the guardianship system

(Joint custody)

Article 40 The principle of joint custody during the marriage of parents (Article 818) shall be maintained, but the following points shall be further discussed.

(a) Should there be a provision for joint custody even when the adoptive parent and the birth parent are married?

(b) Should there be a remedy to resolve disagreements between parents?

(c) Should there be a provision to the effect that a single passive agent, etc. is sufficient?

(Custody in case of divorce or acknowledgment)

41 The following various points are still to be considered with respect to Article 819.

(a) Should it be possible to have joint custody?

(b) Should it be possible to divide the rights and duties concerning personal custody and those concerning property management between the parents by a trial (by mutual agreement or trial) (see Article 39)?

(c) Should it be possible for one parent to have custody of the child after the death of the other parent?