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Relation between family and state after world war II in Japan

Japanese civil code is based on nuclear family (small family) after world war II, 1947.

The old civil code had regulated Japan from 1898, since Meiji era. This was based on the large family (patriarchal Family).

This large family was constructed from "Ie", "Haus". It meant the relationship, which connected "Koshu" with another family members, by law. "Koshu" was the patriarch of "Haus". He could rule all family members, as far as they had not established a new branch haus and they had not left their haus.

Only eldest son had the succession right of status and the property of "Koshu". Another sons and daughters had not those rights. It was named primogeniture.

And then the married woman was disable in the legal act and had no succession right (§§14, 15, 16, 17, 990 of old civil code).

They were unequal and hierarchic in "Haus".①

The scope of the relatives was very broad.

Article 725 of old civil dode said: The persons mentioned below are relatives.

(1) Relatives by blood up to the sixth degree of relationship;

(2) Spouses;

(3) Relatives by affinity up to third degree of relationship.

The state had entrusted the important matters inside such a patriarchal family to this broad relatives. It had aimed to strengthen the Haus-institution by such a relationship. This was a private autonomy in old family law.

In pararell with "Haus" we had emperor system. The emperor had governed all the japanese people. He has corresponded to "Koshu". The japanese society was hierarchic.

The constitution of the imperial empire of Japan, which had continued from 1890, was abolished in 1945. The new constitution has been enacted in 1947.

Article 24 says:

(1) 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 a basis.

(2) With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertainig to marriage and the family, laws shall be enacted from the standard of individual dignity and the essential equality of sexes.

Nuclear family in the new constitution new is construted from husband, wife and then infant(minor). When the infant completes the full twenty years of age, he leaves his family and the parental power of his father and mother. He can establish further his new nuclear family.

It is the private autonomy that rules this family. It means the freedom of personality, property and contract. This principle protects us aginst state. It is different from the old civil code.

Nuclear family is a intimate group, but a weak organization. Individuals have a more important role than in the pariarchal family. It can be broken easily.② So our new civil code sets up the same scope of relatives in Article 725 with it of the old civil code. Such a relationship supports this family and then strengthens it. This scope substitutes the

controling power of "Koshu".

I show some articles as follows;

Article 7 says: (Adjudication of imcompetency)
A person in a habitual condition of mental unsoundness may be, adjudged incompetent by the Family Court on the Application of such person, the spouse, any relative within the fourth degree of relationship, the guardian or the curator, or of a public procurator.

Article 744 says: (Annulment of marriage-unlawful marriage)
(1) In case of a marriage effected in contravention of the provision of Article 731 to 736 inclusive, an application may be made to the Court for its annulment by either party thereto, any of each party's relatives or a public procurator; however, a public procurator may not make such an application after death of either of the paties.
(2) In case of a marriage effected in contravention of the provisions of Article 732 or Article 733, the spouse or the former spouse of the party may also apply for its annulment.

Article 877 says: (Persons under duty to furnish support)
(1) The lineal relatives by blood and brothers and sisters shall be under duty to furnish support each other.
(2) If there are special circumstances, the Family Court may impose a duty to furnish support as between the relatives within the third dgree other than mentioned in the preceding paragraph.
(3) If, after the decision pursuant to the provisions of the preceding paragraph had been rendered, any change has taken place in the circumstances, the Family Court may revoke the decision.

The duty of our state to furnish support is subsidiary (Article 4. II of livelihood protection law).

And then we take the conciliation for adjudgement of domestic relations.

Article 1 of law for conciliation of civil affaires (1951)

This law is to aim at effecting a settlement consistent with reason and benefitting actual circumstances by mutual concession of the parties concerned in respect of disputes relating to civil affaires.

Article 17 of law for adjudgement of domestic relations (1947)

The Family Court shall effect the concilliation for any suit case regarding personal affires and other cases relating to family: Provided that, this shall not apply in such cases as mentioned in (A class) of Article 9 paragraph 1.

Article 18 of Ibid. (Conciliation-first principle)

(1) Any person who desires to bring a suit in respect of a case that may be conciliated in accordance with the preceding Article shall, at first, apply for conciliation in the Family Court.

(2) In case a suit has been brought without applying for conciliation in respect of the cases as mentioned in the preceding paragraph, the court shall commit such cases to the Family Court for conciliation. Provided that, this shall not apply in case the court deems it unsuitable to commit it to conciliation.

At the conclusion of my paper: state entrusts the solution of important matters of domestic relations to the private autonomy of family. State does not stay at first position, but subsidiarily.

(1) Shigeto Hozumi, Family law, 1941, p.100.

(2) Joachim Gernhuber, Lehrbuch des Famirienrechts, 3. Auflage, 1980, S. 3. Gernhuber/Coester-Waltjen, Lehrbuch des Famirienrechts, 4. Auflage, 1994, S. 4.

(3) Vgl, Takashi Yoneyama: Über die Entwicklung und die Funktion des gewillkürten Erbrechts, keizairiron Nr.139.140, S.35 f. (1974), (Wakayama Universität)

Derselbe: Über den Prozess der Modernisieerung der Erbfolge vom alten japanischen B.G.B. zunm neuen japanischen B.G.B.

(1) Keizairiron Nr.154. S.80 f. (1976),

Ibid: (2) Keizairiron Nr.157. S.95 f. (1977),

Ibid: (3) Keizairion Nr.161, S.116 f. (1978)