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上智大学法学会

## 研究ノート

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# Discrepancy between law and practice: Family strategies in Japan

Kiyoko Nishi

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## 1. Introduction

Modern laws are not always in agreement with customs. Certain discrepancies between laws and customs exist. Since Japan hastily made laws based on the Western laws, the discrepancies between laws and customs were inevitable.

Japan adopted its modern Civil Code in 1898, approximately 100 years after the appearance of the Napoleonic Code. However, it was not until after the Second

World War that people began confronting problems associated with discrepancies between the Civil Code and the inheritance customs. Why did these conflicts not arise in approximately 50 years after the appearance of the Japanese Civil Code? What types of conflicts arose in the post-war era? How were these problems resolved, and do they still remain unresolved? Until now, these issues have not been the target of subjective debates in Japan. Although research focusing on specific regions in specific times has been conducted, no comprehensive research has been conducted thus far. As various issues that were not under consideration of the Civil Code arose, such as rising in land prices and the need for care for elderly parents with increasing life expectancies, researching the discrepancies between the Civil Code and inheritance customs became an increasingly important social issue.

This article presents a general survey of inheritance customs in Japan prior to the adoption of the modern Civil Code (2.) and divides the relationship between the Civil Code and inheritance customs into four periods (3., 4., 5. and 6.) and analyzes the characteristics of each period. Finally, the paper attempts to explore the future of inheritance law (7.).

## 2. Pre-modern inheritance law and inheritance customs

Nakagawa argues that the youngest child was given inheritance rights (Ultimogeniture) prior to the 6th century when there was no law <sup>(1)</sup>, but others argue that appointed inheritance was followed, where the father of the family selected the heir according to his wish <sup>(2)</sup> or the will of God <sup>(3)</sup>. After the 7th century, the Chinese law was used as a reference to make a law, and it was decided that in principle, the eldest son solely inherits the status or the title. With regards to the inheritance of property (including slaves), the eldest son was initially given the priority (*Koryō-Ōbunjō*), but later the inheritance share became practically equal (*Yōrō-Ryō*). However, daughters' share of inheritance was half of the portion given to legitimate sons. Mistresses were

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(1) Z Nakagawa 'Masshi sōzoku no genshisei [Primitiveness of the ultimogeniture (Inheritance by the youngest children)]' (1937) 6 (12) *Journal of law and political science* 1486.

(2) K Nakata *Hōseishi ronshū* [The collection of papers on legal history] vol 1 (Iwanamishoten, 1970) at p 64.

(3) S Takigawa 'Jōdai Bokujo sōzokukō [Inheritance by augury in ancient times]' (1933) 35 (12) *Review of law and political sciences* 1120, 1122.

given the same inheritance right as daughters, but the spouse was not given any inheritance rights because it was assumed that she would be supported by her own legitimate son <sup>(4)</sup>. It should be noted that these laws were only applicable to the cases where the wishes of the decedent were not explicit, and as a principle, the decedent could freely allocate the property.

Around the 12th Century, changes occurred in the inheritance of the warrior classes in power at the time. In warrior class families, military strength and leadership abilities were required, and eldest sons without such abilities could not inherit the status or the title, and in some cases, these were inherited by another child. Retirement system was also utilized to actualize this logic. With regards to inheritance of property, it was not desirable to divide the land or the army upon every succession, but since the customs of equal inheritance could not be ignored, the problems resulting from the subdivision of the land and army was avoided by the continuance of equal inheritance, and by giving *Sōryō* (head of clan) rights to manage and govern the entire land and army <sup>(5)</sup>. Normally, the child inheriting the status or the title became the *Sōryō*.

By the 16th Century, the eldest son began to solely inherit not only the status or the title, but also the family assets. Initially the daughter's inheritance was limited to one generation <sup>(6)</sup>, then the daughter's inheritance was prohibited all together, and finally the eldest son began to inherit everything solely. In the end, primogeniture was prescribed during the Edo period. Some suggest that during this period, the successor (mostly the eldest son) supported all his brothers, and his sisters were supported by their husbands' families <sup>(7)</sup>. However, some households continued to choose equal inheritance, and daughter's inheritance rights were recognized for one generation <sup>(8)</sup>. A recent research has shown that daughters were given some property by

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(4) H Ōtake 'Sōzokuhō no rekishi [The history of inheritance law]' in M Aoyama, A Takeda, T Arichi, I Emori & H Matsuhara (eds) *Sōzoku to Keishō* [Inheritance and Succession] (Kōbunsha, 1974) p 17 at p 20.

(5) Some point out that this system closely resembles to the 'parage' system in France (see R Ishii *Chōshi sōzokusei* [Primogeniture] (Nihonhyōronsha, 1950) at p 79 and Nakata, above n (2) at p 10).

(6) The inheritance was given back after the death of the inheriting daughter.

(7) If the husband deceased, the wife was given a portion as his widow (see I Takamura *Shōseikon no kenkyū* [The research of adoption of the groom into the bride's family] (Kōdansha, 1953) at p 1067.

(8) Y Tabata, *Nihon chūsei no josei* [Women of Middle Ages in Japan] (Yoshikawakōbunkan,

her father while he was still alive even if in the case of primogeniture, and they were not subjected to only the discretion of their husbands' families<sup>(9)</sup>.

In comparison, the inheritance laws were not applicable to the populace. Within merchant class households, blood relations were considered important, but under appointed inheritance, parents chose the inheriting person whom they acknowledge as capable of continuing or developing the family business, regardless of whether the child was the eldest son or not. The inheriting person was chosen from the parents' children and relatives. Boys were given priorities, but girls were not necessarily excluded from the candidates<sup>(10)</sup>. With regards to the farmer class families, specific laws restricting the division of lands were enforced to avoid the ramification of such division. Within these families, the eldest son's sole primogeniture was more popular than other types. However, there were many regional differences. Inheritance by the youngest son's, first-born child regardless of gender, or equal inheritance only by boys were adopted in some areas, whereas in some farming or fishing villages in the Tōhoku and Kantō regions (north-eastern and eastern Japan), even if there were sons, the first-born child was daughter, the husband of the first-born daughter became the successor (*Ane-katoku Sōzoku*)<sup>(11)</sup>.

Outlining the above argument, it is clear that equal inheritance was the mainstream method used by all classes until the Middle Ages. In early Modern Ages, however, the sole primogeniture gradually spread from the warrior class.

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1987) at p 89.

- (9) M Gotō 'Nanbokuchō/Muromachiki no jōsei no shoryō sōzoku [Feudal estate inheritance of the woman in the Nanbokuchō and Muromachi period]' in K Nagahara & A Yoshie (eds) *Sōzoku to kasan* [Succession and patrimony] (Yoshikawakōbunkan, 2003) p 25 at pp 42-3.
- (10) H Katakura 'Edo Machikata ni okeru sōzoku [Inheritance of the merchant and artisan classes in the Edo period]' in K Nagahara & A Yoshie (eds) *Sōzoku to kasan* [Succession and patrimony] (Yoshikawakōbunkan, 2003) p 89 at p 112.
- (11) Z Nakagawa & T Shioda 'Ane-katoku Sōzoku [Succession by eldest daughter's husband]' in S Hozumi & Z Nakagawa (eds) *Kazoku seido zenshū shiron hen* [Complete series of family system: History] vol 5 (Kawadeshobō, 1938) p 165 and A Fukuda 'Kinsei zenki minamikantō ni okeru bunkatsusōzoku to ie [The divided inheritance and the family in south-eastern in early modern times]' in K Nagahara & A Yoshie (eds) *Sōzoku to kasan* [Succession and patrimony] (Yoshikawakōbunkan, 2003) p 47.

### 3. Inheritance customs built into the modern Civil Code : The establishment of the Meiji Civil Code

The first task for the new Japanese government established in 1867 was to enact the modern Civil Code by using the Western European model. In 1890, a French legal scholar Professor G. E. Boissonade (Université de Paris II) wrote the Draft Civil Code of Japan (Old Civil Code or Boissonade Civil Code), which resembled the Napoleonic Code. The family law and inheritance law portions of the Code were drafted by a France-educated Japanese member of the draft committee who took account of Professor Boissonade's opinions when writing the draft <sup>(12)</sup>. The original form of the 'ie system' (explained later) was included in this draft. The draft was criticized for merely emulating the Napoleonic Code and not accounting for Japanese traditional customs and practices. Because of these criticisms, a different Japanese drafter produced another draft in 1893, and the Civil Code was finally enacted in 1898 (Meiji Civil Code). However, *half* of the contents of the inheritance law were the inheritance system simply adopting the essence of the Napoleonic Code such as the principal of equal inheritance. For example, the Code stipulated that lineal descendants be the first heir, spouse the second, lineal ascendants the third and the household head the fourth (Article 996 of the Meiji Civil Code). If there were several persons with the same rank, the inheritance was equally divided (Equal inheritance, Article 994 of the Meiji Civil Code). The Japanese Code ranked spouses higher, distinguishing it from the Napoleonic Code.

How about the other half of the Japanese inheritance law? Meiji Civil Code stipulated the *Katoku sōzoku* (succession to the head of the household) system in addition to the inheritance system based on the Napoleonic Code. *Katoku sōzoku* system became the crucial system supporting the *ie* system and the key for understanding the relationship between the Meiji Civil Code and the inheritance customs.

Before going further, the *ie* system should be briefly explained. The *ie* system is defined as 'the family group controlled by the person who possesses the rights

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(12) K Nishi 'De la réserve héréditaire' (in Japanese) (2007) 124 (10) *Journal of the Jurisprudence Association* 2309, 2314.

of the household head obtained by the patrimonial inheritance'<sup>(13)</sup>. The *ie* system is modelled after the Edo period warrior class families. *Ie* is a linear family consisted of the household head (head of *ie*) and his family members. Family members belonging to the same *ie* share the last name (Article 746 of the Meiji Civil Code), and they are listed under a single family register (Old Articles 18 and 19 of Family Registration Act)<sup>(14)</sup>. Under the Civil Code, the household head is placed at the top and is obliged to protect or control the family members by exercising the rights given. The rights of the household head include the rights to decide the residences of family members (Article 749 of the Meiji Civil Code) and the rights to give permissions to the family members' marriages and adoptions (Article 750 of the Meiji Civil Code). The household head also bears the extremely heavy duty of supporting the family members belonging to his household (Article 747 of the Meiji Civil Code). The *ie* system had many meanings and functions, but it is particularly important in three ways. First, the *ie* system had some political functions. The government wished the *ie* system to stabilize the political power at the basis of the society, in which the emperor heads the absolutist political system (Figure 1). In other words, the emperor's control over the citizens was equated with the household head's control over the family members. The government's view was that the emperor would care for citizens in the same manner the household head cared for the family members, and citizens would obey the emperor as they obeyed their household heads (Familial State Perspective). Thus the *ie* system functioned as an ideology. Second, the *ie* system also functioned as a social security system. Such social safety net mechanism was underdeveloped when the inheritance law was stipulated, and it was necessary to ensure the protection of vulnerable citizens within the large-scale families controlled by household heads. Finally, the *ie* system had some economic functions. Japan at the time had many small-scale farming households, and productivity was increased by many farmers working without pay under the supervision of knowledgeable elders.

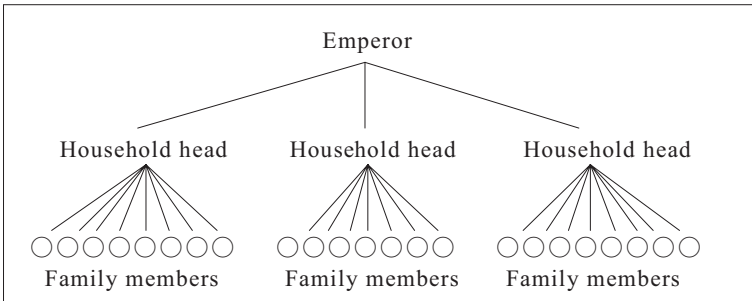
The *Katoku sōzoku* began with the death or the retirement of the household head, and the new head succeeded to all the applicable rights including the rights to

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(13) E Hoshino *Kazokuhō* [Family law] (Hōsōdaigakushuppankai, 1994) at p 37.

(14) Japanese family register (*Koseki*) is an equivalent of the identification register in foreign countries. After World War II, the family register included only a couple and their unmarried children. In present Japan, the members of a three-generation family household are not listed under a single family register.

**Figure 1 Emperor and *ie* system**



inherit household assets and to worship ancestors. In other words, the *Katoku sōzoku* was equivalent to the replacement of the head of *ie*.

The first in line for the succession of the *Katoku sōzoku* was a lineal descendant, and the priorities were given to the person with closer family lineage over the person with further lineage, to a boy over a girl, to a legitimate child over an illegitimate child and to an older person over a younger person (usually the eldest son. Articles 964 and 970 of the Meiji Civil Code). If the wife did not give birth to boys, but the mistress did, then the mistress's boy became the successor (Article 970 of the Meiji Civil Code). The second in line was the spouse (only if she was a child of the *ie*), the third in line was the brother, the fourth in line was the sister and the fifth in line was the lineal descendant of a brother or a sister (Article 982 of the Meiji Civil Code). Usually, the wife did not become the successor. There was a fundamental assumption that *ie* will continue, so that the successor was not allowed to renounce the right of succession. In some regions where the youngest became the successor, the Disinheritance system was used (Articles 975 and 976 of the Meiji Civil Code). Disinheritance system was originally intended to be used when the presumed successor abused parents, was physically weak or blotted the family name. However, it began to serve a different purpose. It began to be utilized as a method of disinheriting all children other than the youngest child and to continue the system of youngest child inheritance<sup>(15)</sup>. Also, it

(15) M Takei 'Minpō no kyōdōsōzokukitei to sōzoku no genjitsu [Joint inheritance in the Civil Code and reality of inheritance]' in *Mourning for Professor Zen'nosuke Nakagawa: Gendai kazokuhō taikai* [Family law collection] vol 4 (Yūhikaku, 1980) p 15 at p 19.

should be noted that the household head could freely allocate the household assets through gift or will, as long as the legally reserved portion (normally 50%) was untouched. Often parents gave some property to a boy other than the eldest son to start his own business or establish his own household (Branch families). Girls were often given dowries when they married. Other families sometimes adopted boys who were not the eldest sons. Some children who left *ie* after getting a small sum of money from their parents became the major source of labour force supporting the rapid industrialization of Japan at the beginning of the 20th century by going to the cities and working in factories with low wages.

What was the relationship between the *Katoku sōzoku* system and the inheritance system stipulating the equal inheritance system imitating the Napoleonic Code? The *Katoku sōzoku* system was applicable when the household head died or retired, and the inheritance system was applicable when a person other than the household head died. Considering the number of inheritances that occurred, the inheritance system would presumably be more important. In reality, however, persons other than the household head were often without any properties because the household heads solely inherited all the property belonging to the household. Because of this, the inheritance system was not used often and was considered insignificant. It was the *Katoku sōzoku* system that came to carry social significance.

In other words, the Meiji Civil Code was based on the Napoleonic Code with the inheritance system stipulating the principle of equal inheritance, but the Code was 'modified' by adding the Japanese custom of *Katoku sōzoku* system. By restricting the applicability of the inheritance system, the collision of the Civil Code and the inheritance customs was successfully avoided. Accordingly, the Civil Code instead supported the continuation of the inheritance customs. There was no subdivision of land by inheritance <sup>(16)</sup>, and parents did not need to intentionally control birth <sup>(17)</sup> (Figure 2).

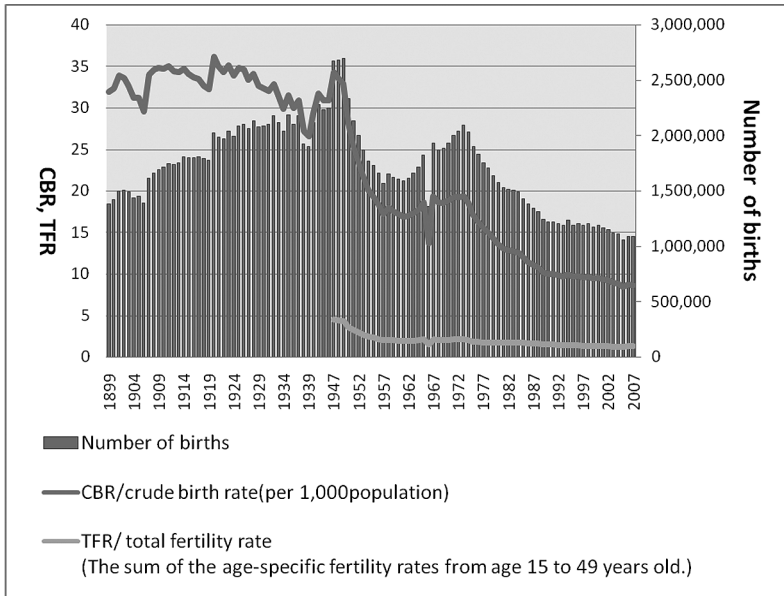
This clever arrangement by the drafters of the Civil Code gave the impression to ordinary Japanese people without any knowledge of modern codified laws that the laws do not destroy social customs but solidify them. This also made it easy for Japan to join other nations ruled by law.

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(16) Cf. F Le Play *La réforme social en France*, t.2 (6<sup>e</sup> éd, Alfred Mame et fils, 1878) at pp 193-260.

(17) Cf. F Le Play, above n (16) pp 52 et s..

Figure 2 Birth rate



Source: Ministry of Health, Labour and Welfare *Jinkō dōtai chōsa* [Vital statistics] 2007, accessible via [www.mhlw.go.jp/index.shtml](http://www.mhlw.go.jp/index.shtml)

#### 4. Emergence of the discrepancies between the Civil Code and the inheritance customs and the victory of customs without battle: From post-Second World War till mid-1960s

By the order of the Allied Forces mainly consisting of the United States, the New Constitution of Japan was enacted in 1946. Following the declaration of men and women's equal rights and the respect for individuals in family lives (Article 24 of the Constitution), the family law and the inheritance law were amended in 1947. The *ie* system was abolished and the *Katoku sōzoku* system was removed from the Civil Code. Following these changes, the inheritance system originating in the Napoleonic Code, which has been considered insignificant until this stage, became the solely surviving inheritance system. In other words, equal inheritance became the basic principle of the new system. Equality between men and women and the realization of women's rights

progressed<sup>(18)</sup>. In particular, the new system gave the spouse the permanent status as an heir (Article 890 of the Civil Code).

The order of inheritance changed. After the changes, the first in line of inheritance are the lineal descendants, second in line are the lineal ancestors and last in line are siblings (Articles 887 and 889 of the Civil Code). When more than one person ranked the same, the assets are equally divided<sup>(19)</sup>.

Some point out that the *ie* system had already started to dissolve and changed during the development of capitalism, industrialization and urbanization<sup>(20)</sup>. However, the tradition of *Katoku sōzoku*, with which the eldest son inherited most of the household assets, supported and cared for his siblings and parents, and continued the worship of ancestors, was deeply embedded within the Japanese society during this period. Accordingly, there was a possibility that the Civil Code with the principle of equal inheritance and the inheritance customs would have serious conflicts. The committee revising the Civil Code and the members of the parliament were afraid of people's resistances to the abolishment of the *ie* system and the *Katoku sōzoku* system, and were especially concerned that the ramification on farming lands would lead to the deterioration of agriculture<sup>(21)</sup>. It was precisely due to this concern that the system of Renouncing the Legally Reserved portions (Article 1043 of the Civil Code) was newly introduced when the Civil Code was revised in 1947<sup>(22)</sup>.

However, it ended up being a groundless fear. In fact, the discrepancy between the Civil Code and inheritance customs did not surface, and the sole inheritance of the entire asset was naturally continued to be accepted in both cities and farming villages. In farming villages in particular, the transfer of real estate was not

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(18) For example, the abolition of the mistress system, the liberalization of divorce, and the parental authority granted father and mother equally.

(19) However, illegitimate children are only entitled to 50% of the portion given to legitimate children (Article 900 (iv) of the Civil Code).

(20) H Nakano 'Minpō no kyōdōsōzokukitei to sōzoku no genjitsu [Joint inheritance of Civil Code and reality of inheritance]' in *Celebrating of 60<sup>th</sup> birthday of Professor Zen'nosuke Nakagawa: Gendai kazokuhō taikai* [Family law collection] vol 6 (Yūhikaku, 1960) p 131 at p 135 and Hoshino, above n (13) at p 43.

(21) In order to continue farming households, a special system similar to Germany's One-Child Inheritance was proposed several times to Parliament, but it was not accepted.

(22) S Wagatsuma (ed) *Sengo ni okeru minpōkaisei no keika* [The history of amendments of the Civil Code in the post-War period] (Nihonhyōronshinsha, 1956) at p 190.

registered before the death of the household head, but the actual management of ancestor worship and assets were sometimes inherited to the successor during the lifetime of the head, in a similar way to the retirement practices during pre-second world war period <sup>(23)</sup>. In fact, according to a farming household inheritance survey conducted in 1951–1954 (Survey by Japan Association of Private Laws), sole inheritance was the most popular among all systems, and 237 out of 241 farming households adopted this system <sup>(24)</sup>. Couples had many children for a few years after the war, but children born after the eldest son could make sufficient living. Parents did not intentionally control birth in order to prevent the ramification on their lands. Japan entered a high economic growth period from around 1955, and many of these children became city workers.

It is believed that the inheritance custom survived regardless of the variations among regions and classes because of the following reasons. First, many citizens were ignorant of the provisions of the New Civil Code, and it was impossible for them to apply the inheritance rules under the Code. Thus, the inheritance practices were naturally based on the inheritance customs. Even the few citizens with the knowledge of the New Code did not claim their equal inheritance rights because they were accustomed to respect their parents and understood the importance of continuing the family business because of their education as well as the pressure from those surrounding them.

Through certain enlightening activities, it was claimed that the will is the basic principle of the inheritance under the modern law, and the use of a will was widely encouraged <sup>(25)</sup>. Since equal inheritance was only applicable in the absence of a will, the advocates of the use of a will thought that a similar result to that of *Katoku sōzoku* could be achieved by a will stating that the entire asset be inherited by the eldest son. People began to expect 'the compromise between the inheritance system and

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(23) T Miyazaki 'Nihon ni okeru kazoku nōgyōkeiei ni sorewo oginau soshiki ni tsuite [Family farm management and the organizations which support family farm in Japan]' (1994) 29 *Nōgyōhō Kenkyū* 125, 126.

(24) Z. Nakagawa, I. Katō, T. Taniguchi & K. Sonoda 'Shinpōka niokeru sōzoku no jittai [The actual condition of inheritances under the new Code]' (1956) 15 *Journal of private law* 2.

(25) H Suekawa *Suekawa Hiroshi hōritsu ronbunshū* [Collection of papers of Suekawa Hiroshi] vol 4. (Iwanamishoten, 1970, first published in 1952) at p 421 and T Kawashima *Katei no hōritsu* [Laws of family]. (Iwanamishoten, 1981, first published in 1955) at pp 137–8.

reality' to be achieved by the will <sup>(26)</sup>. Parents concerned about the factors preventing sole inheritance because of the legally reserved portions could use the newly created system of renouncing the legally reserved portion to ask non-successors to renounce such portions (Article 1043 of the Civil Code). If the legally reserved portions are renounced before the inheritance, the court's permission is required. Because the court gave permissions in 90% of cases, there were no problems. Furthermore, parents could take the legally reserved portions by disinheriting children who abused or insulted them, or had behavioural problems (Article 892 of the Civil Code). The court may also reject claims demanding the legally reserved portions on the grounds of the abuse of rights (Article 1 of the Civil Code). In fact, the will did not gain popularity for decades after the Second World War (Table 1), and these systems under the Civil Code were not applied often.

Accordingly, the following legal systems captured attention as alternative methods when there was no will and the principle of equal inheritance was applicable. First of such methods is the renunciation of inheritance system (Article 915 of the Civil Code). This system is originally designed to avoid inheriting the debts owed by the decedent. In reality, this method was used to realize sole inheritance by the proactive renunciation of inheritance by persons other than the successor <sup>(27)</sup>. The second method is the flexible inheritance division system (Articles 906 and 907 of the Civil Code). Because the inheritance does not have to be divided according to the legally entitled portions, it was often solely inherited as a result of the agreement among heirs. The third method is the special benefit certificate. There is a provision that reduces the inheritance share to persons who in the past received some special benefits from the decedent. Because of this provision (Article 903 of the Civil Code), heir without such benefits could issue a certificate claiming the receipt of such special benefit, and could reduce or eliminate their share of inheritance. Among these three methods, the renunciation of inheritance system was the most frequently used.

These systems suggest that even after the amendment of the Civil Code in 1947, it was possible to award the inheritance according to customs by using some systems under the Civil Code. A legal scholar pointed out that "the inheritance laws not responding to the practical needs are ignored, circumvented or used for purposes not

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(26) Wagatsuma, above n (22) at p 189 and Suekawa, above n (25) at p 419.

(27) Nakano, above n (20) at p 142.

originally intended”<sup>(28)</sup>. In post-Second World War Japan, equal inheritance system was placed as the pillar of the inheritance system, but in practice it was ignored or was extremely limited in its application. Because of these reasons, equal inheritance has always been a target of criticism, but there was no need to legislate the abolishment of this system either.

**Table 1**                      **Number of wills**

	Will by holograph document and Will by sealed and notarized document (Number of Probate of Will)	Will by notarized document
1949	367	–(no data)
1955	640	–
1965	971	–
1975	1870	23427
1985	3301	41541
1995	8065	46301
2005	12347	69831
2008	13626	76436

Source: I Shimizu ‘Igon kōseishōsho kanren shiryō [Datas related to wills by notarized document]’ (2005) 142 *Kōshō*, 115 and Supreme Court (ed) *Shihō Tōkei nenpō 3: Kaji hen* [Annual report of judicial statistics vol 3: Family cases] (Hōsōkai, 2009)

## 5. Maintenance of inheritance customs and the emergence of new inheritance attitudes: From the end of 1960s

From the middle of 1960s, there were some changes in inheritance practices with the backgrounds such as changes in industry structure, the rising value of real estates as a result of land price increases, rising awareness of equality and rights, and the new problems of elderly care due to the ageing of the society. Certainly, sole inheritance without the division of real estate assets seemed to be the continuation of the past practices on the surface. However, when carefully examined, the new practice was distinguishable from the earlier inheritance in the following ways.

First, the attitudes towards inheritance of farmers in villages became

(28) Takei, above n (15) at p 16.

different from those of city workers. Within farming households, the *inter vivos* inheritance, or the gift given while someone is still alive, became the general type of inheritance. On the other hand, the inheritance gradually came to be recognized as a type of compensation for the care and support of parents in cities (*Taikateki Sōzoku ishiki*).

In farming households, which even after 1960s maintained the attitude that the inheritance was for the continuation of *ie*, the successor of the farming business often solely inherited assets. According to the National Farming Household Inheritance Surveys<sup>(29)</sup>, the proportion of the households choosing sole inheritance was 58.4% in 1962<sup>(30)</sup> and 71.3% in 1968<sup>(31)</sup>. When there was no will, sole inheritance was realized by Renunciation of Inheritance (Article 915 of the Civil Code) or by agreement for division of inherited property (Articles 906 and 907 of the Civil Code). However, it should also be pointed out that more and more *inter vivos* gifts were given to children other than the successor. According to the National Agricultural Household Inheritance Survey, the proportion of the households giving *inter vivos* gifts was 78.3% in 1962, 88.3% in 1968, 73.0% in 1978<sup>(32)</sup>, and 22.1% in 1979<sup>(33)</sup>. In other words, there was a clear change from the past in the way that sole inheritance began to be enforced with the assumption that children other than the successor were given *inter vivos* gifts. According to the 1978 survey<sup>(34)</sup>, in 27.8% of the households the portion of the inheritance solely inherited by the successor was approximately the same as the portion

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(29) T Kawashima (ed) *Nōka sōzoku to nōchi* [Farmhouse inheritance and farm land] (Tokyodaigaku syuppankai, 1965); T Miyazaki 'Nōka sōzoku [Farmhouse inheritance]' in *Mourning for Professor Zen 'nosuke Nakagawa: Gendai kazokuhō taikai* [Family law collection] vol 4 (Yūhikaku, 1980) p 35; H Nakamura 'Jittai chōsa kara mita nōchisōzoku no mondaiten [The problem of the farm land inheritance observed from the surveys]' (1981) 15 = 16 *Nōgyōhō Kenkyū* 19; and T Shimamoto 'Nihon ni okeru nōka sōzoku no genjō [The present conditions of farmhouse inheritance in Japan]' (1982) 17 *Nōgyōhō Kenkyū* 27.

(30) This survey (Representation: Professor T. Kawashima) was conducted on 660 farming families in 11 prefectures.

(31) This survey is the follow-up survey of the 1962 survey.

(32) This survey was conducted on 1510 farmers who succeeded within 3 years before the survey. The family that inheritance was renounced except the successor is 47.6% and an agreement was made by heirs is 19.3% (Nakamura, above n (29) at 24).

(33) This survey was conducted on 5989 farming families in 26 prefectures.

(34) Nakamura, above n (29) at 25.

given to other persons. However, agriculture was hardly affected even in the cases of divided inheritance. The successor was often the eldest son, but in southwest Japan, the youngest child often became the successor. In some cases, the child best at farming became the successor.

On the other hand, for company employees or other industry workers in cities whose parents are expected to live longer due to extended life expectancies, the inheritance became the last resort of parents rewarding their child and his spouse for their contribution to the family business and for providing support and care<sup>(35)</sup>. For children who reached mature ages when inheriting assets from their parents, the inheritance was not for making living after their parents' death, but it was gradually recognized as a late payment of rewards for providing support and care to their parents. As a result, in many cases, children who provided support and care inherited the land and the house, and the movable assets, savings and cash were divided among other children. Some argued that these inheritance attitudes and the *Katoku sōzoku* were in fact connected<sup>(36)</sup>, but such perspective is one-dimensional. It was because the inheritance based on the perception of the inheritance as compensation did not assume that the eldest son solely inherited assets, and all children were given equal chances. Some households equally divided all real estates, savings and cash, but such practices were not popular.

The second distinguishing feature, which related to the first, was the dropdown in the numbers of three-generation-family households (Figure3). Although the sole inheritance custom continued, the number of large-scale families like the *ie* dramatically decreased, and there were increasing numbers of nuclear family households.

The third feature was that with some variations in scale, more and more spouses (mostly wives) solely inherited assets or inherited portions more than statutory share in inheritance. If children including the eldest son left the farming household with little income to relocate to cities where they could earn higher income, there was no other person but the wife to solely inherit the farming land<sup>(37)</sup>. Moreover, because of the shift in children's attitudes, wives who were uncertain about depending on their

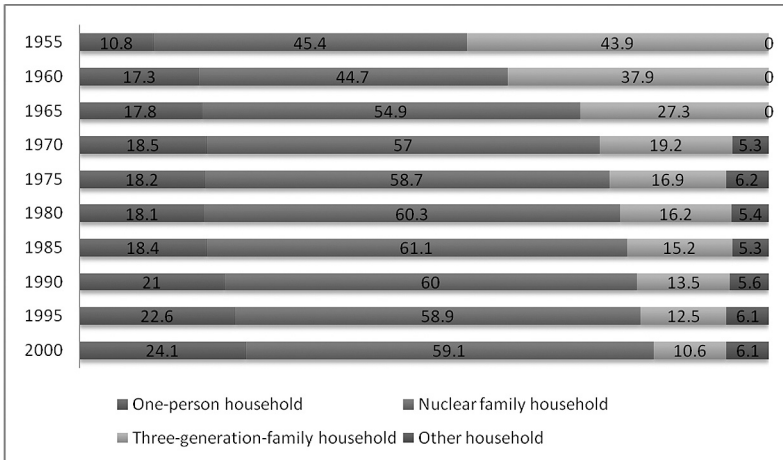
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(35) Takei, above n (15) at p 24.

(36) S Itō *Sōzokuhō* [Inheritance law] (Yūhikaku, 2002) pp 9-10.

(37) Takei, above n (15) at p 22.

**Figure 3 Trend in percent distribution of household by structure of household**



Source: Ministry of Health and Welfare (ed) *Kōsei rōdō hakusho* [Health and welfare white paper] (Gyōsei, 2004)

children for their lives in their elderly years began to aggressively assert their inheritance rights. Furthermore, the Japanese Civil Code separated the accounting of husbands and wives (Article 762 of the Civil Code), and the spouse's inheritance rights originally also meant the liquidation of the marital property. More and more husbands wished that their wives inherit most of the assets including liquidation of their potential co-ownership shares, a late compensation to reward them for their unpaid domestic labour and their livelihood security.

## **6. The Civil Code's concessions to inheritance customs: Since 1980s**

The Civil Code amendments and the dramatic increase of wills after the 1980s are worthy of particular attention.

First, the contributory portion system was newly established in 1980. The background behind this system was the wide acceptance of the idea equating the inheritance with compensation in both cities and farming villages (Attitude Survey Concerning the Inheritance<sup>(38)</sup>). The contributory portion system is a system

recognizing more inheritance rights for the so-called compensation to heir who provided labour for the family business or who cared for decedents when there was no will of the decedent (Article 904-2 of the Civil Code). When the contributory portion system was introduced, the spouse's portion was increased to 50%. This amendment was designed to strengthen the livelihood security of wives, but some point out that it was also aimed for indirectly encouraging wives to provide care for their husbands<sup>(39)</sup>. These two amendments was a response to people's attitudes and the inheritance customs. They also gave the impression that the legal scholars feared people's continued ignorance of the equal inheritance system of the Civil Code due to the deep-rooted inheritance customs, and these scholars attempted to popularize equal inheritance through these amendments.

Next, 1980s also saw the rapid popularization of wills (Table1). There were also changes in the contents of wills. Whereas wills were once created to ensure that the successor such as the eldest son inherited the entire assets, wills began to be created in order to leave the entire portion or a bulk of the inheritance to the child who provided support and care, or alternatively to bequeath the inheritance to the wife of their son who undertook the actual care instead of their son. The attitude regarding the inheritance as a type of compensation was also evident here. Also, some notary public pointed out that more and more wills began to be written nation-wide to ensure the inheritance to the wife or a child with disabilities<sup>(40)</sup>. According to a recent data of a

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(38) This survey was conducted on 2450 elderly people aged 60 and over in 1979 (Naikaku sōri daijin kanbō rōjin taisakushitsu [Cabinet Secretariat] 'Shisan sōzoku ni tsuiteno ishiki chōsa [Attitude survey concerning the inheritance]' 63(11) *Monthly welfare* 84, 86).

Q.11) 'What is the most desirable form of inheritance for your children regardless of the current Civil Code?'

- Sole inheritance by the eldest son: 43.2% (In farmers, 63.0%)
- Inheritance of much property by the child who looked after parents: 35.1% (In higher educated people, 40.8%)
- Equal inheritance: 12.1% (In higher educated people, 17.7%)

Q.12) 'Isn't it necessary to leave property to the child who does not look after parents?'

- Not necessary to leave: 53.2%
- Should leave: 19.1%
- It depends: 20.3%

(39) S Harada 'Fuyō to sōzoku [Support and inheritance]' in K Okuyama, M Tanaka & A Yoshie (eds) *Fuyō to sōzoku* [Support and inheritance] (Wasedaigaku shuppankai 1998) p 167 at p 217.

large city (*Ōsaka*), 23% of holographic wills were created for leaving the entire assets to the wife <sup>(41)</sup>. In sum, wills are no longer written to continue *ie* or the family businesses.

## 7. Future prospects

Will the inheritance customs change? Will the equal inheritance be popularized?

Perhaps sole inheritance based on the attitude of inheriting *ie* is destined to disappear eventually. However, inheritance based on the perception of the inheritance as a type of compensation will not be less popular. In other words, unequal inheritance will be the general type of inheritance adopted. The child who cared for the parents solely inherits the major assets of the land and the house, and other children inherit the movable assets, savings and cash. Of course, more and more parents are cared for in the facilities for senior citizens and do not receive their child's care. In some cases, the land and the house are sold <sup>(42)</sup>, and the cash obtained by the sales is equally inherited. However, equal inheritance has not yet become mainstream in Japanese society.

Various convenient mechanisms of the Civil Code are available for unequal inheritance as previously noted. However, the system of legally reserved portions is now widely recognized and people are more aware of their rights, and more and more persons claim their legally reserved portions. In order to deal with these, the use of asset transfer systems by methods other than the applications of Civil Code provisions, such as trusts and life insurances, are beginning to capture people's attention <sup>(43)</sup>. For the inheritance of small to medium size enterprises, special provision

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(40) T Mori 'Teidan: Igon no ikashikata [Tripartite talk: How to make use of wills]' (1987) 881 *Jurist* 6; I Shimizu 'Kōseishōsho igon no keikō to jitsumu [The trend and practice of wills by notarized document]' (2000) 126 *Kōshō* 38, 45.; and Y Oda 'Jihitsu igon shōsho no jittai [Actual condition of wills by holograph document]' in T Kuki (ed) *Igon to Iryūbun* [Will and legally reserved portion] vol 1 (Nippon hyōronsha, 2001) p 83 at p 90.

(41) Oda, above n (40) p 83 at p 90.

(42) Sometimes it is inevitable because of the obligation to pay the inheritance tax.

(43) The life insurance is not included in the inheritance as a basic rule (Judgment of the Supreme Court, February 2, 1965 (19 (1) *Minshū* [the Supreme Court Reporter (Civil Cases)] 1)), and there are no restrictions on the legally reserved portions either (Decision of the Supreme Court, November 5, 2002 (56 (8) *Minshū* [the Supreme Court Reporter (Civil Cases)] 2069)).

Act (Act on Facilitation of Succession of Management of Small and Medium Sized Enterprises) easing sole inheritance was stipulated in 2008.

Majority of people now support the principle of equal inheritance. However, in practical situations, many consider the strict equal inheritance unfair. People's perception is that it is more equal if their contribution to their parents, such as their support and care, are taken into consideration and reflected into the differences in inheriting portions, rather than simply dividing the inheritance equally. In sum, people feel that the 'actual equality' of the former is more equal than the 'formalistic equality' of the latter. Of course some criticize that recognizing the inheritance as a type of compensation may result in the care for the sole purpose of getting more inheritance share. Others argue that such recognition may prevent the socialization of elderly support and care by concentrating the parents' care to a single inheriting person. Despite these criticisms, people will continue to recognize the inheritance as a type of compensation unless people's attitudes change.

Then what is the future direction of the inheritance law? Will the equal inheritance system be abolished? Or should it be abolished? The author does not believe that it should. It is because of the Japanese history and *raison d'être* of the legal code. The legal code has some declaratory and symbolic *raison d'être* equally or more significant than the dispute resolution functions. It could be argued that the inheritance law is an ideal type. Moreover, the equal inheritance system is the 'modern' system with the background of 'equality', the major spirit of the modern civil law. More practical solutions should skilfully use the civil code systems in order to prevent the functioning of the equal inheritance, to stipulate exceptions, to use some practical knowledge, and to attempt the resolution of disputes by appealing to emotions.

Inheritance based on the current recognition of inheritance as a type of compensation is significantly distinct from the past inheritance (*Katoku sōzoku*) even if the results of both are the same. And yet there is also the possibility that legal scholars are determined to maintain the equal inheritance system even if such system continues only superficially, because sole inheritance system reminds people of the oppressive *ie* system and the defeat of Japan in World War II. In Japan, there is not likely to be any large-scale amendments to the inheritance law at least for next several decades.

## 8. Conclusion

In 1989, the first modern Civil Code was compiled in Japan by emulating the Napoleonic Code, and for approximately fifty years until the end of World War II, it continued to function as the supporting mechanism for the inheritance customs because of 'certain modifications' performed on the Civil Code. The drafters were afraid of the possibility that the discrepancies between the Civil Code and the inheritance customs become problematic. In order to avoid such a problem, they added *Katoku sōzoku* (succession to the head of household) system in the Code by taking account of the inheritance customs at the time, and decided to give priorities to such system. Because of such clever arrangements by the drafters, the custom of eldest son's sole inheritance, or 'primogeniture', continued to survive as the pillar of the *ie* system, and the Civil Code provisions on the principle of equal inheritance became a dead letter.

After the Second World War, the *Katoku sōzoku* system was abolished and equal inheritance system was put forward instead. The discrepancies between the Civil Code and the inheritance customs emerged from this shift. However, for approximately twenty years after the War, few citizens claimed the rights for equal inheritance because of factors such as ignorance of the law, respect for parents and the pressure from those around them. Moreover, the Civil Code contains many useful systems for realizing sole inheritance, such as Renunciation of Inheritance (Article 915 of the Civil Code), Disinheritance of Presumed Heir (Article 892 of the Civil Code) and the flexible criteria of division of inherited property (Articles 906 and 907 of the Civil Code). Therefore, the discrepancies between the Civil Code and the customs did not surface. In sum, the inheritance customs won over the Civil Code without any conflict. The ramification on farming lands based on inheritance did not become a major issue, and no self-effort was made to adjust childbirth in order to avoid the subdivision on lands.

The subsequent 15 years (from the end of 1960s until 1980) saw social problems of rise in land prices and care for elderly parents, because of the longer average life expectancies. It was also the era where the equal inheritance system and its significance became widely recognized and the number of people claiming their rights of inheritance increased. In particular, for office workers in cities, inheritance began to be recognized as the compensation or consideration for the support and care of their elderly parents, and not as a mechanism of connecting *ie* to the next generation. Due to

this new attitude, people who took care of their parents began to solely inherit the land and the house belonging to their parents. It appears as though the traditional sole inheritance has simply continued, but in fact, its significance has changed and should be recognized as a new trend. The trend of perceiving inheritance as a type of compensation gradually became obvious, and in 1980, although trifling, an amendment was finally added to the Civil Code's equal inheritance principle. This suggested that the Civil Code gave way to the inheritance customs.

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