

The Scope of Altruism

—patriarchy and the modern family under Japanese law and norms—

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Abstract

The reform of the Japan Civil Law in 1947 aborted the old patriarchal family system, and established the new “democratic” one. This reform established the gender equality in power, property, and inheritance under the law. During this half-century, such democratic family model have accepted by people. Nowadays there are few families following the old patriarchal family model.

While equality of basic rights has been achieved, great economic inequality has been remained within the family. In this paper, we examine the effects of social institution, such as law and norms, on economic inequality. We focus on the economic dependency within the family and the distribution of the capitals accumulated through household production. We take the theoretical perspective that inequality within the family would be determined by two factors: the scope of “altruism” and the legal provision on capital redistribution at the end of altruism.

Family sociologists regard the current Japanese family as a kind of the modern family, which is supported by altruism institutionalized by social norms. From the economic perspective, it has an important characteristic that the member’s welfare depends on each other’s welfare. So we can put an approximation that the family has the unitary utility function and equally distribute household production among the members.

However, this approximation has a problem that altruism often breaks in a short term. Families thus always face the risk of stopping guarantee equality. This risk can be partly reduced by legal actions to redistribute capitals among the family members when altruism ends, but the effect can be limited.

We have empirical and political questions: how and to which extent these factors determine equality within the family, and what is the possible measure to promote equality. We analyze Japanese law and court decisions to answer the questions.

Keywords: divorce law, marital property, financial settlement, human capital, alimony

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1 The Modern Family and Normative Altruism

The “modern family” is a sociological concept. The use of this concept is diversified. But there is a basic agreement on characteristics of the modern family [8].

- Small size (especially nuclear family) household.
- Emotional relationships such as love or romance.
- The sexual division of labor between male breadwinner and female housekeeper
- Sharing of the living standard among its members.

In Japan, such kind of family emerged among the urban white-collar class, in the late-19th century. They imported the new style of family life from the West.

There had been discourses justifying this new style of life, since the early-20th century. Here we see a famous example from writing by a legal scholar, Nakagawa Zen’nosuke, who is known as a drafter of the 1947 Civil Code.

Nakagawa [1] emphasized the unlimited special duty of spouses. He said that spouses must help each other's life, as if the other's life were one's own life. So that they must equally share even the last grain of rice or the last piece of meat.

Nakagawa's discourse serves as a good example of altruism enforced by social norms. We call such altruism as "normative altruism".

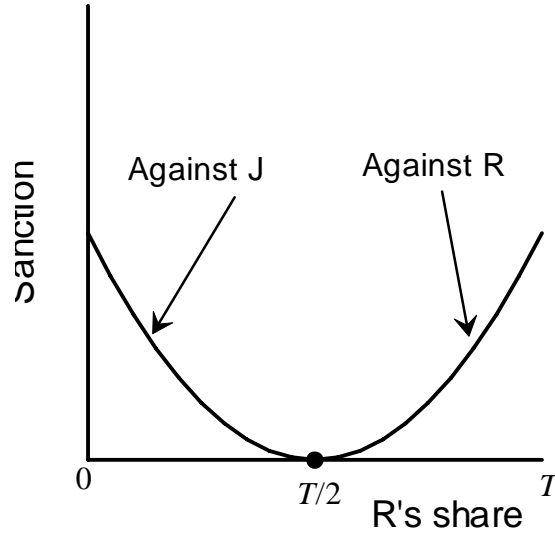


Figure 1 Sanction against R and J (on the Pareto-optimal frontier)

Under normative altruism, the social norm requires spouses to share the same living standards, as Nakagawa said. This means that sanction will be given if they adopt an unequal marital life (Figure 1). This will bend their utility function (Figure 2), which otherwise would be increasing monotonously.

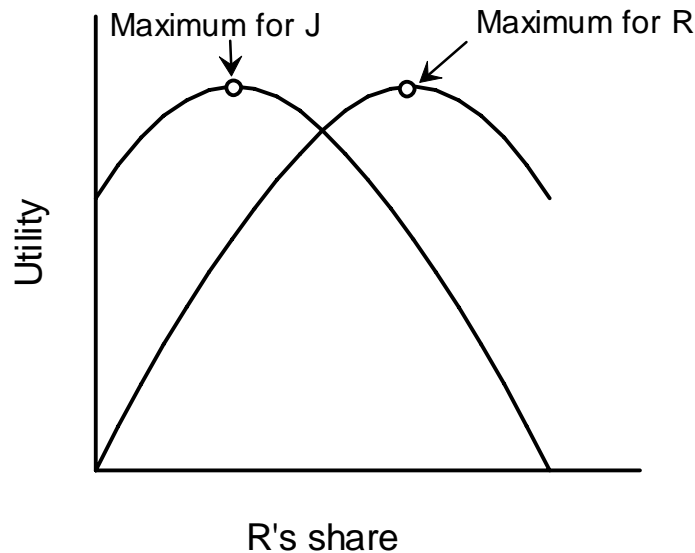


Figure 2 R's and J's utility function under normative altruism (on the Pareto-optimal frontier)

As a result, the area of solution for the bargaining between the couple will be restricted. The solution can exist only within the hatched triangle in Figure 3, close to equality [11]. This is how normative altruism achieves equality in marital life.

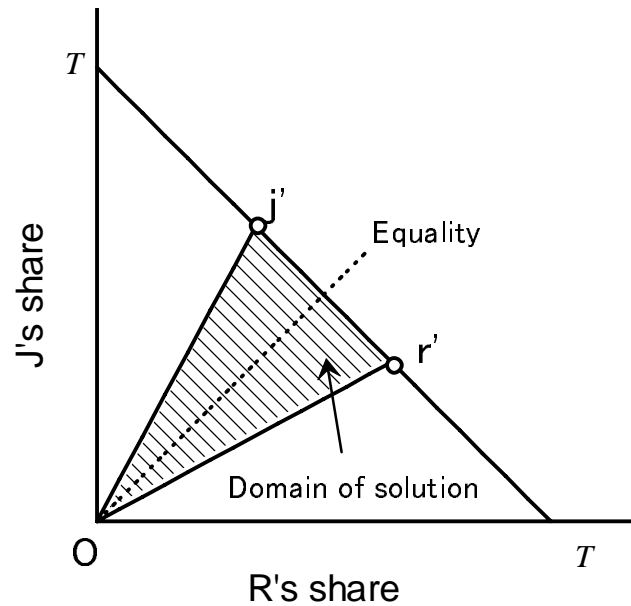


Figure 3 Bargaining under normative altruism

2 The Outside of Altruism

There is a problem remaining outside altruism. Marital life often breaks down, so that altruism also breaks. Normative altruism does nothing against the end of altruism.

The main source of inequality in the modern family is the division of labor between housework and paid work.

Housework and paid work are different in many aspects. It is more risky to specialize in housework than in paid work [4] [21].

However, family offers no return to those taking such a risk. Because of normative altruism, it is prohibited that one of the family members receives a premium. Although it is risky to invest in housework-related human capital, it brings no higher return.

The risk cannot be covered in marital life. The only measure to cover the risk is financial settlement at divorce.

3 Divorce and Financial Settlement before 1947

In 1898, the Civil Code (Law No. 9) passed the Imperial Diet. The Code provided two kinds of procedure for divorce: consensual divorce and judicial divorce.

In those days, more than 99% of all divorce cases were by consensual divorce.

The Civil Code had no provision of financial settlement on divorce. The only way to seek payment on divorce was to seek compensation for mental damage according to the general framework of penalty against unlawful act, for example, sexual misconduct, abuse, desertion, and so on. In 1929, the Supreme Court (大審院) ordered the guilty party in a divorce litigation to make payment for compensation. There had been several cases on which the court ordered payment for compensation. Motozawa [3] investigated such decisions and found that the courts considered many aspects of marital life. So Motozawa concluded that those payments were not only for compensation: The courts might thus have considered the duty to support post-divorce life.

We also focus on the concurrent debates on amendments of the Civil Code. The Government had prepared to amend the Civil Code. A draft prepared in 1927 had a provision on the duty of support for post-divorce life. In 1941, it added a provision of division of marital property. These drafts were not submitted to the Diet. But they would take shape in the postwar reformation in 1947.

4 Divorce and Financial Settlement under the 1947 Civil Code

In 1947, the Civil Code and other family-related laws were totally reformed, under supervision of the Headquarter of Allied Military Occupation.

4.1 Procedures of divorce

The 1947 Civil Code inherited the system of consensual divorce (協議離婚) from the 1898 Civil Code. It provides spouses can divorce if they mutually agree. This kind of divorce makes up about 90% of all divorce cases [22] today.

The Civil Code §770 provides five grounds for judicial divorce:

- sexual misconduct
- willful desertion
- missing for at least three years
- insanity
- grave difficulty to continue the marriage

Divorcing couples must use family court mediation (調停) first. A committee of a family court judge and non-professionals (female and male) will help them come to an agreement [22]. This is not a judgment, though a judge participates. This kind of divorce makes up about 9% of all divorce cases [22] today.

The family court can make a judgment (審判), if mediation failed to reach an agreement. This kind of divorce has been rare [22].

Otherwise, one of the couple can start litigation (裁判) to a district court. This kind of divorce makes up about 1% of all divorce cases [22] today.

The vast majority of divorce (almost 99%) is thus not under court decisions. Legal intervention had become somewhat powerful by establishment of family courts and mediation system. But it is still minor for Japanese to divorce under the supervision of legal professions.

4.2 Accountability and unpredictability

The 1947 Civil Code §768 provides that marital property should be divided at divorce. However, this is a vague provision. It offers no criterion to make divorce settlement. The result of divorce litigation deeply depend on the judges

In addition, there are many elements to be simultaneously considered in divorce settlement:

- Liquidation of marital property
- Liquidation of marital expenditure
- Support for post-divorce life
- Compensation for damage
- Child support

Courts often sentenced to pay a certain amount of money, with no detailed breakdown. So court decisions had been criticized for lack of accountability.

Recently, this situation has been improved. There has been increasing court decisions showing a detailed breakdown and the grounds of the decision [5] [10].

However, there has been a great variance in decision of payment [14]. This has been criticized because of the unpredictability for divorcing couples.

There are main two sources of this variance.

- (1) The difference in attitudes toward the “guilty” party effects the decision on compensation.

- (2) The difference in evaluation of contribution of spouses, especially of that of a housekeeper, effects the decision on the proportion of division of marital property.

These differences seem to have been lessened.

First, as no-fault divorce has been widely accepted, penalty on the guilty party has been lost its importance. Literally to say, the Civil Code itself does not deny the possibility of unilateral divorce, even if it is sought by a spouse at fault — that is, by those who is “guilty” for having broken down the marriage. But, in real application of the law, the courts had not granted a divorce in such a case, until 1987. The precedent was established in 1952 when the Supreme Court rejected the divorce litigation made by those who was guilty for sexual misconduct. Thirty-five years after, this precedent has been overridden in 1987 when the Supreme Court granted a divorce in a similar case, on the ground that long duration of separation suggested the complete breakdown of the marriage.

Second, it has also been widely accepted that marital property should be divided equally. There have thus been less needs to estimate how each spouse contributed for making property.

In 1990s, the Government prepared some amendments to the Civil Code [10]. The draft provided that unilateral divorce litigation by the party at fault can be granted if the couple has been separated for more than 5 years. It also provided contribution for making marital properties should be estimated as fifty-fifty, by default. The draft was not submitted to the Diet. But these points of the amendment have been accepted by the majority of law scholars.

4.3 What is marital property?

Current debates focus on what is marital property. The main issues to be debated are

- pension or retirement pay in future [2], and
- academic degrees or licenses for special professions

About future pension, there have been two decisions by district courts [13] [18] [19]. They decided that future pension can be included into calculation of divorce payment.

There have been no court decisions on license or academic degree. But scholars are on debate mainly referring divorce cases in some states of America [20].

5 To Incorporate Human Capital into Financial Settlement

5.1 Suzuki’s Criteria

In line of these debates, law scholars has attempted on new criteria for equitable redistribution of uncertain future income [12] [16]. Here let us focus on criteria proposed by Suzuki Sinzi [7]. These criteria are the most comprehensive and radical to redistribute future income.

While Suzuki’s criteria [7] cover many aspects, two are important from our perspective.

The first is fifty-fifty division of earning capacity gained during marriage. For a breadwinner with continuous occupational career, the earning capacity will increase by the time of divorce, in comparison with that at the time of marriage. Suzuki counts this difference as “marital property” to be subjected to fifty-fifty division.

On the other hand, a housekeeper who interrupted the occupational career to specialize in housework, loses earning capacity during marriage. The housekeeper has a right to receive payment to recover earning capacity through job training.

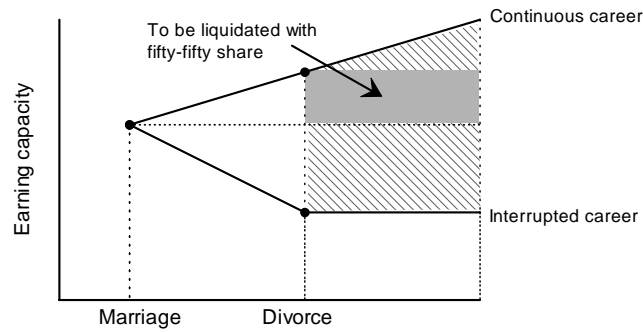


Figure 4 Liquidation of gained earning capacity

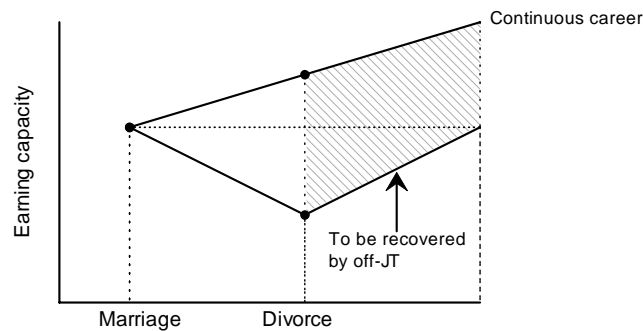


Figure 5 Compensation for lost earning capacity

5.2 Underestimation of earning capacity

Suzuki's criteria have been the most comprehensive and radical ones. But they have some insufficiencies in incorporating risk of human capital investment.

The criteria are based on difference of earning capacity between two points of time:

- at the time of marriage, and
- at time of divorce

However, it is debatable whether the breadwinner could maintain the level of capacity at the time of marriage, without contribution of the housekeeper. The baseline of comparison should be the expected earnings if there were no contribution of the housekeeper. In addition, the capacity could continue to grow, even after divorce. The possible area of earning capacity as marital property can be larger (Figure 4) than Suzuki counted. Likely, the housekeeper would have a right to gain the capacity, not to the earnings at the time of marriage, but to the expected earnings in case of continuous career (Figure 5).

I understand Suzuki did so to reduce uncertainty in estimation of expected earnings. But this could result in underestimation of both housekeepers' lost earnings and breadwinners' gained earnings.

6 The Final Version of the Modern Family?

We have witnessed progress of divorce law. Court decisions have been acquiring accountability and predictability. The priority has shifted from penalty on the guilty party to equitable liquidation of marital life. The law has been aiming at equal division of marital property.

The law is now moving toward equitable return for risky human capital investment. This reformation is critical to the attempt to achieve equity in the modern family system. This is still in progress now.

Appendix: History of Japanese Divorce Law

- 1870:** The Committee for Drafting the Civil Code (民法編纂会議) founded: Debates on post-divorce support (養料).
- 1890:** The Civil Code (民法, Law No. 98) passed the Imperial Diet: No provision on divorce settlement.
- 1892:** The Imperial Diet decided to postpone the enforcement of the Civil Code until 1896.
- 1898:** The Civil Code (民法, Law No. 9) passed the Imperial Diet: No provision on divorce settlement.
- 1927:** The Outline for Amendment of the Civil Code (民法改正要綱): The duty of post-divorce support is mentioned.
- 1929:** Decision by the Supreme Court(大審院判決 1929.10.28): Compensation for mental damage caused by unlawful acts by the guilty party of a divorced couple.
- 1941:** A draft for Amendment of the Family Book of the Civil Code (人事法案): Provision of division of marital property (§94)
- 1945:** Allied military occupation (until 1952)
- 1946:** The New Constitution (日本国憲法): Equality between both sexes (§14), equality in marriage (§24)
- 1947:** The Domestic Affairs Adjustment Law (家事審判法, Law No. 152): Provisions on the Family Courts
- 1947:** Amendment of the Civil Code (民法, Law No. 222): Provision of division of marital property (§768)
- 1952:** Decision by the Supreme Court (最高裁判所判決 1952.2.19): A divorce litigation by a spouse at fault was rejected.
- 1956:** Amendment of the Domestic Affairs Adjustment Law (Law No. 91): The family courts have competence to survey, demand, and order for fulfillment of charged duties (§15, §25-2, §28)
- 1987:** Decision by the Supreme Court (1987.9.2): A divorce litigation by a spouse at fault was accepted.
- 1996:** Draft of amendments of the Civil Code: Drafted but not submitted to the Diet.
- 1997:** Decision by the Yokohama District Court (1997.1.22): Future pension was considered in divorce settlement.
- 2001:** Decision by the Sendai District Court (2001.3.22): Fifty-fifty division of future pension was ordered.

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