

The Bond between Children and Parents after Divorce*

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1 Change of Views on Divorce and Family

In modern industrial countries the family which consists of a married couple and their children has been regarded as the normal form of family since the end of the 19th century. But in reality the family form has been changing for the last few decades. In particular the increase of divorces today makes the so-called nuclear family insecure. Indeed most people desire the family life of husband, wife and children at the time they get married, but there is no guarantee that this desire will continue in the future. Japan is no exception to this tendency. The number of divorces in Japan decreased once at the beginning of the 1980s. But it has been increasing again since 1988, and it ran into about 180,000 in 1992. Nowadays divorce is not just another person's affair to every married couple. Such tendency cannot help effecting the family life based on a marriage. One family changes its form from a nuclear family to a single parent family and in some cases to a step family, as the couple divorce and remarry. Such a chain of changes in the family form has brought a new understanding to the meaning of divorce and its effect on a family life.

Until recently, it was our common view that divorce broke down a normal family unit because it brought the marital relationship to an end. The mother-children or father-children relationship remaining after the divorce has been termed the "incomplete family" or "rest family". That indicates our point of view clearly.

Under this point of view, the problems of divorce is directly that of family break down. So we expected our divorce laws to provide solutions which are based on the family break down. The main so-

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lution was the peaceful dissolution of the family, especially in how to distribute the stock that was accumulated during the marriage life. In this solution the object being one of the distributions not only covers the material stock but also includes the children. There is no difference between material stock and children except the latter is a person who needs care. So after divorce the children belong to either one of their parents.

In the 1970s, against such solution some critical views began to appear. They stated that the divorce dissolves only one important subsystem of family, the marital relationship, but not the other subsystem, the parents-child relationship. According to them, divorce is the stage which every family can experience. Indeed the divorce changes the form of a family but it does not break it down. Their point of view is often called the reconstruction model. In the reconstruction model, the family form is changable, so we cannot determine which form of family is normal. A divorced family is not a failed nuclear family now. It is only another one of the possible forms of a family. Divorce means the end of a family no more. It is a start in the reconstruction process of a family. A family must reconstruct the roles of the family members and overcome the burdens of the changing.

2 Burdens of Children and Role of the Law

Divorce burdens the family members heavily. Above all the children are affected too much. Children are not the parties of divorce but the innocent sufferers. In Japan there is a proverb "ko wa kasugai". That means the child is a bond between its parents. As this proverb shows, once the couples with little children were apt to hesitate in divorce. But recently the number of divorces of the couples with children is increasing. The number of divorces of the couples with children who are to be in their parents' custody was 122,000 in 1992. It accounted for 68% of all divorces.

From our experience the bond between a mother and her children does not break down after divorce. The Civil Code of Japan provides that father and mother shall determine one of them to have the custody of their children when they divorce. But in many divorce

cases with little children, the mother and their children live together. In Japan the number of the mother-children families was 630,000 in 1978. 240,000, namely 38% , was due to divorce. In 1983 the total number was 720,000, and 350,000, namely 49%, was due to divorce. The number increased much more in 1988. In that year the total number was 850,000, and 530,000, namely 62%, was due to divorce. The number of the father-children families was 170,000 and only 96,000 was due to divorce in 1988. We can find easily that the mother-children families caused by divorce get a overwhelming majority and are increasing remarkably even now.

As compared with mothers, the period in which fathers can spend with his children becomes shorter. In many divorce cases fathers and children do not live together. If the father wants to be the custodian of his children, the courts are apt to refuse his wish, because the bond with mothers is regarded very important for the children in their tender years. In most cases fathers living separately play only the role of financial supporter to their children.

These situations bring many burdens to the children. In the process of divorce children are involved in the conflict of their parents and caught in a dilemma of whom to give their loyalty. After the divorce comes into effect, the changes in their economic and social circumstances burdens the children heavily, for example moving from their family home, losing contact with their friends and close relatives, change of their school and community, and the decline in their standard of living due to their new economic situation. Of course we cannot miss the psychological influence of separation from one of their parents, either.

In principle removing or lightening these burdens on the children is a task for their parents. The law cannot remove or lighten these burdens directly. But we can expect the law to provide a system to keep the burdens of children to a minimum. For it is the duty of the law to recognize the rights and personalities of children and to protect their interests. The works for reform of the divorce and children laws today are based on these points of views more or less.

3 Contact between Children and their Parent

One of the most important problems for the divorce law is what a relationship between children and a parent who lives separately should be.

For children the divorce of their parents means a loss of daily contacts with one of their parents, mostly with father. It is said that for very little children the loss of contact with a parent does not effect them seriously. But it is also said that the loss of contact often becomes a trauma for the much older children.

Of course separation from children gives much pain to one of the parents who loves children. In particular fathers who had been shut out from sharing a life with their children began to demand improvements in their positions recently. Today it is insisted intensely that the proper contact between the children and the parent who lives separately must be maintained after divorce.

Until recently having contacts regularly was regarded as the natural right of the parents. But emphasizing the character of the parental right makes it difficult to refuse the improper claim of a parent. The parent who wants to have a contact with their children is apt to ignore the will and the interest of children. For the parent who does not have the custody, the contact with his children is only one program of his free time or week end. His association with his children is generous and he shows them only the beautiful side of life. He can behave at ease because he has no duty for the daily life of children. Permitting such an irresponsible contact may often have a bad influence on the stable bond between the children and a parent living with them. The contact with children should not be tried only on the wish or the convenience of the parents. Before anything else it must serve the interests of the children in having an active relationship with the person who has very important meaning to them. Also the United Nations' Convention of the Rights of Children provides "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interest (§9III)".

In Japan we have no provisions about such contacts after divorce.

So once the opinions about this type of contact were predominantly negative. But eventually the Family Court praxis accepted the contact as one of the matters necessary for the custody and that was approved by the Supreme Court.

In these circumstances, the proposal for the reform of the Civil Code announced by the Ministry of Justice in 1994 proposed that in case a father and a mother effect a divorce, they can determine the matters of the contact between children and a parent who has no custody by their agreement. Differently from the United Nations' Convention, this proposal does not express that keeping contact with both of parents is a right of children. But it emphasizes that the interest of children should be given the highest priority. Such emphasis means that the parents are expected to make a reasonable agreement which serves the interests of the children. If an agreement cannot be reached or is not possible, such matters shall be determined by the Family Court.

4 Joint Custody

From the so-called reconstruction model, it has been insisted that divorce does not dissolve the parents-children relationship and the responsibility of parents for their children continues after divorce. Following this point of view, claims for shared or joint custody for the parents after the divorce are eagerly made. Advocates of joint custody say that the single custodian system not only makes the parent who does not have custody escape from the responsibility of caring for his own children but also strengthens the feeling of victory of one who was granted the custody. And they say divorce indeed changes the form of family but does not break down all the systems of family. Parents can dissolve only their marriage bond, so they have to recognize the joint responsibility for their common children is remaining. Therefore the acceptance of joint custody supports the idea that both of the parents share in the responsibility of child rearing after divorce.

Contrary to this, it is said from a negative point of view that the joint custody system makes unreasonable demands on the parents whose bond has already been broken. Joint custody needs close

cooperation and communication between both the father and the mother. So joint custody should be considered as a useful alternative for those couples who think that the interests of their children should take priority over their own interests. But if joint custody is continued after divorce automatically even for those couples who are in conflict with each other seriously, there is the risk that the children may be involved in their parents' conflict. Every time a matter concerning the custody arises, clashes of opinions between the father and the mother occur. They say such circumstances prevent the stable growth of children.

When we face such a sharp conflict of opinions on the acceptance of joint custody, we cannot help realizing the distance which lies between the ideal and the reality. There is no divorce between parents and children. Divorce only changes the parents-children relationship during marriage into an after divorce relationship and therefore the responsibility of both parents for the children is not dissolved. So saying in ideal, it is normal that both the father and the mother share the responsibility jointly after the divorce, too. But in order to accept joint custody, as a matter of fact we have to solve some difficult problems.

The first problem is whether joint custody should continue automatically or not. The automatic continuing system squares well with the joint responsibility of parents. But if this system is accepted, there arises a fear that even a parent who neglects his daily duties of parenting for the children can interfere in the stable life between children and the other of the parents. As a result, the conflict between parents gets more serious and it delays the "conquest of divorce" of children.

If we accept another system on which father and mother can choose joint custody by their own agreement, there arises similar problems. In this system the father and the mother are demanded to decide what is the best interest of their children at the time of their divorce, namely at the peak of their own conflict. At this time most fathers and mothers are not in the appropriate situation to distinguish between their own interests and their children's interests calmly. The husband and wife compete with each other from various sides

during their divorce. Problems dealing with children cannot be an exception at this juncture. As a result, children are unnecessarily involved in the conflicts between their parents directly and are burdened furthermore.

The second problem is whether joint custody succeeds in practice. In order to succeed in joint custody, both the father and mother are required to sustain a strong interest in their children, to agree about the education and welfare of these children and to realize the necessity of cooperation and equal participation in daily care and support of their children. When there is a difference of powers between the father and the mother after divorce, the one who has the stronger power is apt to strengthen his influence. So in order to operate joint custody fairly, it is also necessary that both of the parents have maintained some social and financial independence to a certain degree. It is especially essential that both the father and mother respect the interest of their children more than anything else. But in practice how many couples can really satisfy these requirements?

The existence of these problems causes large obstacles in the successful introduction of joint custody. But in conclusion the road to joint custody after divorce should not be closed. If the father and mother are ready to cooperate, their intentions will be satisfied with the mutual acceptance of joint custody. And if both the father and mother can restrain themselves from persisting in their own interests, we can expect good lasting results from the joint custody. There is no clear proof that shows that the results of a good working joint custody system are always superior to the results of a good working single custodian system. But that cannot be the reason that only the single custodian system is enforced. As the United Nations' Convention states, it is an important right of the children to be cared for by both their parents (§7II). It is a denial of this right of the children to refuse them the usefulness and benefits of cooperative care even though their parents are divorced.

As I have said before, Japanese law does not accept joint custody. Recently the voices supporting the introduction of joint custody system have become stronger. But the reform proposal in 1994 leaves this problem to further examination in the future.

5 Problems of Agreement

In principle, the decisions about the ways and the contents of the contact with a parent who does not live together or the share in joint custody after the divorce should be left to the mutual agreement of both the father and mother. For this mutual understanding and cooperation of both the father and mother are necessary in insuring the smooth operation of these systems.

It is a difficult problem for the court to determine such matters when no independent agreement has been reached between the father and mother. Always to demand an agreement means to give a veto to each of the parents. If either of them refuses to make an agreement selfishly, the need of children can not be satisfied. If we construct the contact or joint custody solely based on the rights of children, both of the parents must satisfy the demands of their children regardless of their own wills or wishes. Also the reform proposal in 1994 proposes that such matters shall be determined by the Family Court if no agreement is reached or is possible. But in practice, if the contact or joint custody is operated without the agreement of parents, there is the fear that the peaceful operation will be disturbed and that the interests of the children are injured with the interference or noncooperation of either of the parents. So the parents are required to make every effort to reach an agreement.

When the father and mother determine the matters of contact or custody, they must recognize first that their interests are not the same as those of their children. Believing that they wish only for the happiness of their children, they often force their children to obey their judgments. Though a child may express that he wants to keep a close bond with one of his parents, the other who lives with him often judges it dangerous. As a result, the child loses the chance of building a useful relationship with this important person in his life. Secondly, the father and mother must recognize the particular circumstances of their children. Knowing the conflict that exists between the parents concerning the divorce, the children do not clearly express with whom they really want to live together, because they do not want to injure both of the parents. In such cases the words and the deeds of the children are often inconsistent. But unless the

parents deal with these inconsistencies between the words and the deeds of their children seriously, the children may be torn by loyalty to both the father and the mother. As I said before, in the process of divorce, it is very difficult to expect the father and mother to make calm judgments about matters concerning their children. For most of the fathers and mothers do not have enough composure to clearly separate their own conflicts from matters dealing with the future of their children.

So today, in order to examine the needs and the interests of children in perspective, the necessity of the help of a third party with an expert knowledge and technique is emphasized. This is the reason that conciliation or mediation intermediaries receive so much attention in many countries.

In Japan we have two divorce systems. One is the divorce by mutual consent and the other is the divorce in court. The former becomes effective only by mutual consent and notification thereof. The latter has three steps, namely divorce by conciliation, divorce by adjustment and judicial divorce. Divorce by conciliation and divorce by adjustment are under the jurisdiction of the Family Court. Divorce by adjustment is permitted when the agreement is not reached in conciliation and judicial divorce is permitted when the parties decline to comply to the adjustment of divorce. Among these, divorce by mutual consent outnumbers the others. In 1992, the number of divorce by mutual consent was about 162,000. It accounted for 90% of all divorces.

When a couple with underage children divorce by mutual consent, they must determine which of them has the custody and notify thereof. This means 162,000 couples reached agreement on the custodian after divorce in 1992. But in reality all these couples do not determine through serious talking with each other. The fact is that the custodian after the divorce is usually determined by the difference in power between the husband and wife, or through their indifference in matters dealing with the children, or in exchange for another interest of each party and so on. As what must be stated clearly on the divorce notification is only the named custodian after the divorce, other matters including the matter on contact with a

parent who does not have custody are not determined clearly in most cases.

If a couple cannot divorce by mutual consent, they can divorce in court. But the number of divorce in court is very low. In 1992 the number of divorces by conciliation was 15,000, that of divorce by adjustment was only 72 and judicial divorce was 1,600. In many cases of divorce in court, especially divorce by conciliation, the parties are in conflict not about the divorce itself but the matters resulting from the divorce. As a result, in conciliation the Family Court tries to make an agreement not only on the divorce itself but also on such matters related to the divorce. But against these systems it is argued strongly that the determination of divorce itself and that of the matters dealing with the children must be separated, or that the Family Court which is one of the judicatories should not take part in the conciliation process.

6 Conclusion

Divorce dissolves only the bond between husband and wife. There is no divorce between parents and their children. Therefore it is natural that the father and mother continue to undertake their responsibilities jointly after divorce. To keep a good relationship with both of the parents is one of the most important interests of the children. We should not deny these interests through their parents divorce. We can demand the law to allow the continued contact between children and a parent who lives separately and to secure the chance for joint custody. But the preparation of these systems only makes a framework where the father and mother may fulfill their responsibilities to their children. The true solution will not be successful until the idea that divorce is a start of reconstruction of a family penetrates into the minds of people in general including the potential parties of divorce. At that time when this idea has penetrated and we come to make the most of these systems, we can positively surmount our 19th century ideals in this important area.