

security continues still now. The significance of this Amendment should be appreciated as a new step for the modernization of the laws of security.

4. Family Law

Personal Status Litigation Law

Law No.109, July 16, 2003 (Effective on April 1, 2004).

Background:

In Japan, cases relating to matters of family affairs are largely divided into adjudgements of domestic relations and actions of personal status. Adjudgement cases mean the disputes where, providing that certain legal rights have existed among the concerned parties, the Family Court may decide the contents of such rights in the light of the effective resolution of domestic disputes, such as the distribution of marital properties, the determination of the person exercising the parental power, the estimation of child support or the partition of a deceased's estates. On the other hand, the actions of personal status mean the disputes that involve issues concerned with a fundamental personal status and those disputes should be resolved in the District Court though litigation.

The Family Court exists as a special court for resolving family affairs in Japan. The Court has expert staff, typically a family court investigator, and flexible procedures, such as adjudgement and conciliation in order to keep up with the nature of domestic affairs such as the reconciliation of human relationships, the scientific elucidation of cases and the protection of privacy about those concerned. However, the Family Court neither treats the litigation procedure, nor has jurisdiction for actions of personal status. Because the Constitution of Japan secures the right of access to a court, meaning in public, and then, the disputes concerning the fundamental personal status have to be resolved in a rigid litigation procedure. As a result, despite the fact that the Family Court has general jurisdiction for family affairs, personal status cases are excluded from its jurisdiction and have to be resolved in the civil procedure of the District Court.

Such a split in the jurisdictions of family affairs arises from the nature of family affairs and the purpose of establishing the Family Court system. However, it also has problems, such as that procedures under such a split in the jurisdictions become complex and unclear and the ordinary civil court is entrusted to hear and judge the family affairs, despite the fact that the Family Court should treat such matters as an expert institution.

For example, consider one divorce case. At first, either party of the divorce case has to make an application for conciliation in the family court, because, as for conciliation, Article 17 of the Law for the Adjudgement of Domestic Relations requires all cases of family affairs to attempt it. If the conciliation succeeds, the case will end. If the conciliation does not succeed, the parties will file a divorce action to the district court over again. In this way, one divorce case may have to pass two different courts and procedures. As a result, the procedure for divorce is cut into two parts and the parts are unconnected with each other. Moreover, although the law allows that the party can also make applications, such as the designation of the parent exercising parental power or the estimation of child support, together with the divorce action, if the party makes such applications, the district court also has jurisdiction for such matters that ordinarily should be treated in the Family Court. In these cases, the parties cannot enjoy the expert knowledge of the family court investigators.

These defects in the system for resolving family affairs in Japan have been recognized for a long time and many scholars have discussed the transfer of the actions for personal status to the Family Court. However, the suggested reform will lead to great changes in the Family Court system and also has some theoretical problems. The discussion concerning such reform had not developed. In recent years, nevertheless, people are recognizing the importance of the reinforcement of the justice function, while our society has become more complex and diverse. On this account, in 1999, the government set up the Justice System Reform Council under the Cabinet. And then, in 2001, the Council recommended reforming the justice system and making the basis for it. The report of the Council indicated three principles for the reform as follows: (i) the construction of a justice system responding to public expectations (coordination of the institutional base), (ii) how the legal profession supporting the justice system should be (expansion of the human base) and (iii) the

establishment of a popular base. In the report, the Council suggested the reform plans reviewing the prior justice system radically. The report also included suggestions concerning the reinforcement of the function of the Family Court, such as the consolidation in the Family Courts of actions related to personal status, the expansion of the family court investigator system and the introduction of a court councilor in the actions relating to personal status.

In response to this recommendation, the Minister of Justice set up a Council for the reform of the Law of procedure in Actions Relating to Personal Status (hereinafter called the prior law). The council discussed the issue and made a scheme for reforming the law in accordance with the report of the Justice System Reform Council. Depending on this scheme, the government made a bill for a Personal Status Litigation Law and, on July 9, 2003, the Personal Status Litigation Law was approved after discussion in the Diet. With the enactment of the Law, the prior law is replaced and abolished.

Main Provisions:

The Personal Status Litigation Law prescribes the exemptions of the civil procedure as to the procedure of the actions relating to personal status (Art. 1). The main provisions of this Law are as follows:

(1) Definition

The Personal Status Litigation Law provides a definition of the “action of personal status” that the prior law did not. Under this Law, the “action of personal status” means one that has the purpose to create a domestic relationship or to confirm the existence of it (Art. 2). This Law enumerates the following actions as examples of an action of personal status. In addition, this Law also stipulates actions for the confirmation of the existence of a domestic relationship as actions of personal status. Such actions are admitted only in cases and legal theories under the prior law.

1. As to the marital relationship: the action of nullity or annulment of marriage, action of divorce, the action of nullity or annulment of divorce by agreement and the action of confirmation of the existence of a marital relationship (Art. 2 (1)).

2. As to the parent and child relationship: the action of denial of legitimacy, the action of acknowledgment, the action of nullity or annulment of acknowledgment, the action of determination of paternity according to Article 773 of the Civil Code and the action of confirmation of the existence of a parent and child relationship (Art. 2 (2)).

3. As to the adoptive relationship: the action of nullity or annulment of adoption, the action of dissolution of an adoptive relationship, the action of nullity or annulment of dissolution by agreement and the action of confirmation of the existence of an adoptive relationship (Art. 2 (3)).

(2) Transferring the Jurisdiction of the Actions for the Personal Status to the Family Court

The Family Court has had only the authority to conduct adjudgement and conciliation for family cases since its establishment, but it has not had jurisdictions for litigation. This Law transfers the jurisdiction as the first instance for the actions of personal status mentioned above, from the District Court to the Family Court. (Art. 4, Para. 1). This is the most important point in this reform. However, in this reform, the Family Court treats such litigations while keeping a structure as a litigation, meaning that it is conducted publicly in an adversary manner.

(3) Expansion of the Family Court Investigator System

The family court investigator is an expert member of staff of the Family Court who has an expert knowledge of human behavioral sciences such as medicine, psychology and sociology, and conducts an investigation of the facts or counseling and so on. Under the prior law, the investigators were not concerned with family affair cases such as the distribution of marital properties or the estimation of child support, if these cases made an application together with a suit for divorce as incidental cases. Because the District Court did not have the authority to employ the investigators, despite the court having the authority to decide incidental cases that belonged essentially to adjudgement cases. So, this law allows the use of investigators for incidental cases in divorce actions (Art. 33, 34).

In addition, there has been an issue as to the investigation of facts conducted by the investigator under the prior law. Some argued that the concerned parties should be secured the right of access to the contents of the investigation in the light of procedural due process; others argued that

allowing the full disclosure of the contents of the investigations would diminish trust in the investigator and make the investigations difficult. Considering these arguments, this law set a provision regarding the right to read and copy the report of the investigation. The provision basically affirms the right of the concerned parties to ask to read the reports; on the other hand, it also requires the permission of the court if there is some threat infringing the interests of minors or the privacy of concerned parties (Art. 35). This provision has a purpose to harmonize the effectiveness of the investigation into the facts with the procedural due process.

(4) Introduction of the Court Councilor System

The Court Councilor, called a “Sanyoin”, means a citizen involved in the hearing of family cases by setting out his/her opinion based on his/her conscience or the practices in the particular community, in order to reflect the common attitudes of the people. Family cases need proper resolution considering not only the law, but also the emotions among the family members and common attitudes. Therefore, the court councilor system has existed in order to reflect the common attitudes of citizens, not those of career judges.

Although the court councilor system has been prepared only for family adjudgement cases under the prior law, this law introduces that system into the hearing of actions of personal status, too (Art. 9, Para. 1). Thus, the judge may order a court councilor to meet in a hearing or reconciliation and hear his/her opinion.

In addition, although the court councilor who is involved in the conciliation before an action may be designated as the court councilor in the action under the provisions of this law, the Regulations regarding this law provide that the court should refuse as far as possible to designate the same person as both the court councilor and conciliator in the same case.

(5) Improvement of the Procedure in Actions Relating to Personal Status

Although the prior law was enacted in 1898, it remained without fundamental reform for a long time. For this reason, this law reform broadly amends the prior law in various points such as the jurisdiction and competence of the court, the standing of parties and the procedure of the litigation. Especially, it is one of the most important amendments that this law stipulates the requirements and procedures for the cessation

of the publicity of the trial.

Among the actions of personal status, there are often cases where matters concerning the privacy of the family are subject to hearing. In such cases, the court cannot carry out a fair trial unless it has regard to privacy. So, some scholars have argued whether the hearing of an action of personal status may be conducted privately. However, there was a theoretical problem in connection with Article 82 of the Constitution. Since the Article provides the principle of the publicity of the trial, the trial for an action of personal status also has to be conducted publicly. But Paragraph 2 of the Article also provides that the trial may be conducted privately, where the court unanimously determines publicity to be dangerous to public order or morals. Therefore, if these criteria are met, the court may conduct the trial of an action of personal status privately. Nevertheless, since these constitutional criteria are very abstract, the court rarely ceases the publicity of the trial in fact. For this problem, this law intends to clarify the criteria for the cessation of the publicity of the trial in the action of personal status. With regard to this issue, although there was intensive opposition between the proponents and the opponents, finally, they agreed to set a provision that allows the cessation of the publicity under extremely strict requirements (Art. 22).

Editorial Note:

This law reform transfers the actions of personal status that had been formerly conducted in the ordinary civil court to the Family Court for the accommodation of the people accessing the court for family disputes, and amends the procedure for personal status cases that had operated rigidly before in order to give flexibility and to be able to hold a hearing suitable for the nature of family affair cases.

The Family Court of Japan has established its identity by preparing flexible procedures and expert staff, which is different from the court that operates with adversary procedures like litigation. However, as a result, the jurisdiction of the cases that should be resolved in litigation, such as divorce cases, belongs to the ordinary civil court in order to secure the right to access to justice provided for in Article 32 of the Constitution. Such a policy of the Family Court plays an important role to establish a dispute resolution system for family affair cases in Japan. But, on the

other hand, the policy also has sacrificed the accommodation that the concerned parties can get a total resolution of their all disputes in single procedure.

From this angle, this law reform may be described as creating a procedural basis where all concerned, such as parties, judges and other court staff, can concentrate their efforts on a comprehensive resolution of the disputes in the Family Court. On the other hand, there are some causes for concern. This reform transfers jurisdiction for an action of personal status while keeping its adversarial structure. So, some authors are concerned that the confusion of the identity of the Family Court may rise from the transfer and, the resolution of the family affair cases in the Family Court may be more difficult as a result of that. Indeed, there is a great distance between the philosophy of the Family Court and that of the procedure of an action of personal status. What changes the transfer will bring in the Family Court is still unknown. From now, the court will be required to make great efforts to establish a new identity for the Family Court as the court treats all cases relating to family affairs.

5. Law of Civil Procedure and Bankruptcy

An Act to Partially Amend the Code of Civil Procedure, etc.

Law No.108, July 16, 2003 (Effective on April 1, 2004).

Background:

The Code of Civil Procedure was revised completely in 1996, and enforced from 1998. “An Act to Partially Amend the Code of Civil Procedure, etc.” was enacted in 2003 and enforced from April 1, 2004. The social situation in which the demand for a more substantial judicial function has been increasing in our complicated and diversified society can be mentioned as a background to this amendment. The amendment was made for the purpose of making civil litigations more substantial and speedier, as part of the Judicial System Reform, which is considered as an important and emergent issue. Especially, on the point of “making civil