Introduction to Interpersonal Family Law Studies[1]

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1 Introduction

According to Japanese private international law, marriage, divorce and other family matters are, in principle, governed by the laws of the country or habitual residence of one or both of the parties[2]. Today, in many countries including Japan, family law is almost completely unified by national legislation or case law. However, on the other hand, there are still many countries in which family law is not unified, and in which people belonging to different religion etc. are governed by different family laws. Thus, for example, when a wife and a husband belonging to different religions want to divorce, they (or the court) must determine which law governs them. These kinds of questions are becoming more frequently raised even in Japan because of a recent influx of people from Asian and African countries with plural family law systems.

In such cases, applicable law is determined through the application of a kind of choice of law rules, which we call "interpersonal law", particularly in the area of family law I call "interpersonal family law", although the latter is not so popular in Japan at least.

In this report, I will discuss three topics relating to interpersonal family law. The first topic is the necessity or importance of learning interpersonal family law. Following that, I will go into the substance of my study, the next two topics. The second one is an examination of the situation of interpersonal family law in the world today. I will introduce some countries which have plural family law systems as typical examples, and point out the three major patterns of interpersonal family law. I will also show that there are some countries whose interpersonal law is not clear making it difficult to understand the real situation of family law in them. The third and the last topic is the future of interpersonal family law studies. In particular, I will focus on the task of interpersonal family law studies in Japan.

2 Significance of learning interpersonal family law

According to Article 31 of Horei (Application of Laws (General) Act 1898 as lastly amended in 1989), if the laws of the country of the parties are not unified, the law designated by the rule (which means interpersonal conflict of law rule) of such country shall apply, provided that if there is no such rule, the law which has the most significant connection with the party shall apply. This provision was added in the 1989 amendment although the same rule as the former half of the provision had been widely supported by scholars and judges even before this amendment.

When we determine the applicable law through the application of this provision, we are faced mainly with the following three problems. Firstly, what is "the rule of such country"? In order to answer this question, it is necessary to investigate the interpersonal family law rules in countries all over the world. Secondly, what is "the law which

has the most significant connection with the party"? In this regard, we have to be careful enough not to undermine the purpose of this provision, that is, respect for the interpersonal law of the country concerned. Nontheless, when such law cannot be recognized at all, we have to determine the applicable law by means of application of Horei itself. And finally, haw can we accomplish this?

In the following, I will report the present situation of interpersonal family law in order to answer these problems as far as I can.

3 Present situation of interpersonal family law(3)

As I mentioned above, there are many countries throughout the world which have plural family law systems by religion, etc. The situation varies greatly from country to country reflecting the history and backgrounds of each society. However, as far as I know, there are mainly three patterns of interpersonal family law.

(1) The first pattern is one in which plural family laws coexist, none of which is directly designated as general law. This pattern is widely seen mainly in Asia and Africa.

In many of the countries which had formerly been colonies of Great Britain, interpersonal family law rules take the form of general provisions, and in the area of marriage law, self determination by the parties is respected. For example, in Nigeria(4), there exist three kinds of family law systems. These are English law "received" before independence, Nigerian legislation based mainly on English law, and a number of customary law systems. As for interpersonal family law rules in Nigeria, we have to distinguish between the rules applied in cases in which there is a conflict between a customary law and other law, and the rules applied in cases in which there is a conflict between different customary laws. When there is a conflict between customary law and other law, customary law shall apply among natives and, if the application of the other law will result in substantial injustice to either party,

also between natives and nonnatives. When there is a conflict within customary laws, the applicable law shall be determined by the intention of the parties. Similar examples of this pattern are also seen in Ghana[5] and Zimbabwe[6].

On the other hand, in some countries which had formerly been colonies of France, interpersonal family law rules take on a clearer form. For example, in Lebanon[7], marriage between a woman and a man belonging to different religions (interreligious marriage) are governed by the law of the husband's sect in principle, but the couple can select to be governed by the law of the wife's sect if they consent in writing. There are also some countries in which the husband's law prevails (such as Congo or Chad), the wife's law prevails (such as Senegal and Central Africa), or either the wife's or the husband's law prevails depending upon the wife's nationality (such as Niger)[8].

Although the historical background is quite different from these examples, Italy has a similar pattern of interpersonal marriage law. In this case, there are two sets of marriage law systems, secular law and canon law, and each couple can select one of them[9]. Canon law marriage has almost the same effect as secular law marriage, but there are some differences between them. For example, canon law marriage cannot be disolved by divorce, but the secular court can only terminate its effect on civil law.

(2) The second pattern is one in which plural family laws coexist, one of which is directly designated as general law, with other family laws applicable only in exceptional cases.

This pattern exists in many of the muslim countries in Asia and Africa. For example, in Egypt[10], there are law for Muslims, Christians and Judes, but Muslim law is the general law, and when the parties do not belong to the same non-Muslim religion, Muslim family law applies even if none of them is a Muslim. Similar patterns are also seen in other countries, such as Syria, Jordan and Iraq.

Although quite different from these examples, the People's Republic

of China has, in a sense, a similar pattern of interpersonal family law[11]. In its case, however, the general law is not Muslim law, but the law made by the government, Marriage Law Act of 1980, which succeeds the idea of the former Marriage Law Act of 1950. The Marriage Law Act is applicable to all the people in principle, but Article 36 thereof provides that local governments, such as self government districts, can legislate supplemental provisions for minority races to take the family situations into consideration.

In fact, in response to this provision, some local governments did make such supplemental provisions. Some of these provide the same rule as the Marriage Law Act, but some make exceptional provisions in relation to a certain minority race. For example, the Marriage Law Act provides that the minimum age for marriage is 20 for women and 22 for men, but according to the supplemental provisions in the Xinjiang- Weiwuerzu, Tibet, Ningxia Huizu and Neimenggu self government districts, the minimum age is 18 for women and 20 for men[12].

Among such supplemental provisions, there are also some interpersonal family law rules. For example, the supplemental provisions of the Neimenggu self government district provides that a child born from a mixed marriage (marriage between parties belonging to different races) shall belong to the race determined by the mutual agreement of the parents[13]. Such provisions are made only in part and they cannot solve all the problems of interpersonal conflict of laws. However, considering the position of the Marriage Law Act as the general law of China, although some problems may still remain[14], it may be possible to say that the Act shall apply unless the opposite is clearly provided for by any supplemental provisions.

(3) The third pattern is one in which only one general family law exists but other family custom is partially recognized mainly on a case by case basis.

For example, in Aotearoa (New Zealand)[15], there is a family law of general application based upon the western sense of value. In recent

years, however, New Zealand has witnessed a revival of interest in the customary law of the Maori people. There is a legislated code which expressly provides for respect of Maori custom, but generally speaking, recognition of Maori custom in the area of family law depends upon the exercise of judicial discretion.

Similar argument to the above, discretionary (or functional) recognition of customary family law, exists in the neighboring country of Australia[16]. But in this case, it seems that the relatively passive argument toward recognition of Aboriginal customary family law is relatively accepted.

4 Determination of "the law which has the most significant connection with the party"

It is not always clear what kind of interpersonal family law is applied in a certain country. The above three qualifications may, in many cases, lead us to the correct answer about the substance of such rules. In cases like the following, however, they are not always enough.

The first kind of cases are those countries in which interpersonal family law rules exist in the form of general provisions, just like many countries in Asia and Africa which had been colonies of Great Britain. In such countries, if the applicable law cannot be specified by the intent of the party or parties, judges have to consider "justice, equity and good conscience" in the course of choosing the law. Such consideration must be done by referring to legislation, case law and other materials, but these materials sometimes cannot be adequately obtained.

The second kind of cases are those countries in which legislative policy is changing. Such changes can be seen especially in muslim countries. In Pakistan, for example, family law was originally almost the same as that of India, at least before its independence. However, especially in recent years, Islamization of the legal system is taking place, and this trend has had some influence on interpersonal family law rules.

The third kind of cases are those countries in which some or most of the interpersonal law rules are unknown to us, such as Indonesia, Sri Lanka, or Israel. In these countries, there is or remains some vagueness in the relationship between one personal law and another[17], or between one interpersonal law rules and another[18].

The fourth and last kind of cases are those countries in which interpersonal law rules are based upon the intent of the parties. For example, imagine that a man claims, in a Japanese court, that he had been a Muslim in the past, but now he is not a Muslim any more because he has already abondoned his faith. In such a case, what shall we do in order to determine his religious belonging? When one or both of the parties in a case are nationals of such countries as above, determination of appliable law is quite difficult[19]. There are some possible choices, such as, (a) to deem that one of them had converted at the time of, or after, the marriage, considering the marriage ceremony or their everyday life after marriage, (b) to designate both laws as applicable laws, and thereafter, deny the result of application of one of them because of violation of public order in forum, or, (c) to apply both laws. However, each method has some difficulty and they are not always adequate for us. We must continue our studies in order to find the most appropriate answer.

5 Conclusion - Task of interpersonal family law studies in Japan

Based upon the above examination, I will conclude this article by showing two points which, as I think, need attention in interpersonal family law studies. In particular, I will focus on the situation in Japan.

The first point is that interpersonal family law studies have a close connection with private international law. Even today, many scholars in Japan still think that interpersonal law is nothing but a problem of interpreting foreign law. However, there are certainly some interpersonal law problems closely connected with private international law,

such as, treatment in the case of uncertainty with respect to interpersonal law rules, or determination of "common national law" between parties belonging to different personal laws. We have to be careful about this point.

The second point is that "interpersonal law studies" has not been established as a discipline. The fact that there are few scholars majoring in this area, and that it is hard to efficiently find the literature in this area is, in my opinion, two of the major results of, or shall I say the reasons for, the above. In fact, up until recently, there has been little need to study interpersonal law in Japan. However, as many people from counties with plural family law systems come to Japan, the need is becoming greater day by day. In order to improve our ability to cope with such situations, I think that we must pay more attention to interpersonal law studies.

notes

(1) This article is based on the talk given in a section meeting of the 1995 Annual Meeting of Research Committee on Sociology of Law (RCSL95).

(2) Article 13 to 27 of Horei (Application of Laws (General) Act 1898). Article 13 to 22 were substantially amended in 1989.

(3) Concering the following statements generally, see Y. Omura, *Jinsai Kazokuhou K enkyuu Josetsu* (Introduction to interpersonal family law), 9-2 *Chuo-Gakuin Dai gaku Chuo Kagaku Kenkyuujo Kiyou* (Bulletin of the Research Institute ChuoGaku i n University) 103ff (1994, in Japanese); and also see Z. Okamoto, 133 *Jurisuto Bessatsu* (Jurist, separate volume) 16-17 (1995, in Japanese).

(4) See H. Boparai, The customary and statutory law of marriage in Nigeria, 46 RabelsZ 530ff, at 531, 542-544 (1982).

(5) See K. Lipstein and I. Szaszy, Interpersonal Conflict of Laws, Int'l Encychl. Comp. L. vol.3, chap. 10, at 22-23 (1985).

(6) See T. W. Bennett, Conflict of laws - The application of customary law and the common law in Zimbabwe, 30 Int'l Comp. L. Q. 69 (1981).

(7) See A. E. El-Gemayel (ed.), The Lebanese Legal System 268-269

(1985) ; Okamoto, supra note 2, at 16-17.

(8) See Okamoto, supra note 2, at 17.

(9) In the middle of 1960's, almost 99 percent of all the marriages were canon law marriage (see R. Koike and C. Matsuura, *Itaria Shin Rikon-hou* (New Italian Divorce Act), 44-6 *Hougaku Kenkyuu* (Law Studies) 76 (1971, in Japanese)), but I do not have any recent information.

(10) See Okamoto, supra note 2, at 16.

(11) See Y. Nomura, *Chugoku Minpou Tsuusoku Shikougono Joukyou to Chibettono Kon'in Kitei* (Situation after enforcement of Civil Law (General) Act of China and marriage law in Tibet), 922 *Jurisuto* (Jurist) 43ff (1988, in Japanese) ; M. Kiyokawa, *Chugoku Shousuu Minzokuno Kon'in Kiteino Shomondai* (Some problems around marriage provisions of Chinese minority race), 23-2 *Sandai Hogaku* (Law Bulletin of Kyoto Sangyo University) 22ff (1989, in Japanese) ; M. Kiyokawa, *Chugoku Shousuu Minzokuno Kon'in Kitei* (Marriage provisions of Chinese minority race), ibid., 123ff (in Japanese) ; K. Nishimura, *Chugoku Shousuu Minzokuno Kon'in Kanshuuto Hou* (Marriage custom and the law of Chinese minority race), 42-2,3 *Handai Hougaku* (Law Bulletin of Osaka University) 165ff (1992, in Japanese)。

(12) See Article 5 of the Marriage Law Act, Article 2 of the supplemental provisions of the Xinjiang weiwuerzu self government district, Article 1 of the supplemental provisions of the Tibet self government district, Article 2 of the supplemental provisions of the Ningxia Huizu self government district, and Article 3 of the supplemental provisions of the Neimenggu self government district.

(13) See Article 5 of the supplemental provisions of the Neimenggu self government district.

(14) There is a problem whether in relation to the minority races which have no supplemental provisions of their own the Marriage Law Act shall be applied without any exceptions. Moreover, there are some words whose meaning is not clear enough (for example, "minority races within this self government district" in Article 10 of the supplemental provisions of Xinjiang weiwuerzu self government district).

(15) See B. Atkin and G. Austin, Cross-cultural Challenges to Family Law in Aotearoa/New Zealand (Report in the 8th world congress of the International Family Law Association 1994, not published).

(16) See Patrick Parkinson, Multiculturalism and the regulation of marital status in Australia (Report in the 8th world congress of the International Family Law Association 1994, not published).

(17) For example, relationship between Roman-Dutch law and other personal law in Sri Lanka, or between Jewish law and other personal law in Israel.

(18) For example, relationship between the Regulation on Mixed Marriages of 1898 and the Marriage Law of 1974 in Indonesia.

(19) For example, let us think of the following case. A Christian wife and a Muslim husband, both nationals of a certain country (X), are going to divorce. In X, christians and muslims are governed by different personal laws. Christians may not marry people belonging to any other religion, and they can only divorce by court judgement. Muslim men may marry Christian women, and they can repudiate their wives by means of a simple declaration (called "talaq"). Interpersonal family law rules are unknown. Now, what law shall apply to them?