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**WALKING THE BEATE: HOW ONE AMERICAN WOMAN HELPED
CHANGE JAPANESE MARRIAGE LAW FOREVER**

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I. Introduction

“Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.”¹

In 1945 Japan surrendered to the allied powers and World War II was brought to a close.² Following the surrender, Japan was subject to the American Occupation for seven years during which time the United States government through General Douglas MacArthur pushed the Japanese government to establish a constitutional democracy and create a constitutional document for the country.³ While the history of the collaboration and negotiations between the Americans and the Japanese on the subject of the Japanese Constitution is fascinating, one particular aspect inspired this paper: the presence of Beate Sirota, the only woman other than Ruth Ellerman – the note taker – on the constitutional committee.⁴

Beate Sirota was born in Austria in 1923.⁵ She grew up in Tokyo where her father worked at the Tokyo Academy of Music.⁶ Sirota moved to the United States for college in 1939 and when World War II broke out, her fluency in Japanese proved invaluable.⁷ During the war she worked several jobs with the government in Washington, D.C. including at the Office of War Information and at the Foreign Economic Administration.⁸ Those recruiting for MacArthur’s Tokyo staff discovered Sirota and convinced her to move back to Tokyo on Christmas Day,

¹ The Constitution of Japan, Art. 24 (1946).

² RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR 3 (2002).

³ *Id.*

⁴ BEATE SIROTA GORDON, THE ONLY WOMAN IN THE ROOM: A MEMOIR (1997).

⁵ RAY A. MOORE & DONALD L. ROBINSON, *supra* note 2 at 97.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

1945.⁹ Her potential was recognized immediately and she was quickly recruited by the Government Section and assigned to the drafting team on the subcommittee for the bill of rights.¹⁰ Needless to say, Sirota – who was only twenty-two at the time¹¹ – was pivotal in the implementation of women’s rights in the Japanese Constitution, particularly with the marriage provisions.

This paper will explore the influence of Sirota in the Constitution-making process and identify the change to Japanese marriage law that she inspired through the provisions she drafted. First, I will provide a brief overview of the historical roots of modern Japanese marriage law in the Edo Period. Second, I will outline the changes to traditional marriage laws made during the Meiji Restoration, including the family registration system and the Civil Code of 1898. Finally, I will look at the formation of the Japanese Constitution, including the role of Sirota, and the changes implemented after the way to comply with the new constitutional provisions regarding marriage.

II. Historical Roots of Modern Japanese Marriage Law: The Edo (Tokugawa) Period

The story of Modern Japan typically begins with the Edo – or Tokugawa – Period. During this time, Japanese society operated as a feudal system. There was little influence from the outside world as the Japanese government propagated and administered *Sakoku* (national isolation).¹² *Sakoku* meant Japanese society had no contact with the outside world – Japanese citizens could not leave and outsiders could not enter.¹³ Especially pertinent to this paper,

⁹ *Id.*

¹⁰ *Id.*

¹¹ BEATE SIROTA GORDON, *supra* note 4 at 106.

¹² Richard Tames, *Japanese History*, 3 TEACHING HISTORY 321, 321 (1974).

¹³ *Id.*

marriages between Japanese citizens and foreigners “were simply prohibited.”¹⁴

During the Edo Period, Japanese law was organized as a common law system. Under this system, like many others, the typical marriage was contracted between family units (*ie*) rather than between the individual spouses.¹⁵ The family units were larger than the typical nuclear family one thinks of in Western society and included extended family as well.¹⁶ In fact, the *ie* “consisted of all living lineal ascendants and descendants in a particular family.”¹⁷

Typically, a marriage broker (*nakodo*) negotiated with the heads of the respective households – usually the oldest male member of the family.¹⁸ Once a pairing was finalized, the families would organize the traditional Shinto *san-san-kudo* ceremony.¹⁹ The households would exchange “betrothal gifts” and the *nakodo* would facilitate the marriage contract between the household heads but with the consent of each spouse’s parents.²⁰ After the households entered into the marriage contract, divorce or termination of the contract was only possible through unilateral action by either the husband or the husband’s household head.²¹

In addition, special rules existed for samurai and for peasants who married across feudal lordships.²² For samurai – members of the military caste – the marriage contract required consent not only from the parents but also from the samurai’s lord.²³ Samurai were also required to

¹⁴ Rebecca Bailey-Harris, *Madame Butterfly and the Conflict of Laws*, 39 AM. J. COMP. L. 157, 162 (1991).

¹⁵ *Japanese Family Law*, 9 STAN. L. REV. 132, 133 n. 4 (1956).

¹⁶ *Id.* at 134.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 135.

²² *Id.* at 135 n. 9.

²³ *Id.*

inform their lords of their *san-san-kudo* ceremonies.²⁴ In the case of peasants – who were mostly farmers – the marriage contract required the additional consent of the feudal lords but only if the marriage was across two different lordships.²⁵

III. Marriage Law in the Meiji Restoration

The transition from the Edo Period to the Meiji Period resulted in a plethora of societal and legal changes. The Japanese government was focused on development and modernization of Japanese society and its economy. One of the major changes in the legal system more generally came with the shift from common law to civil law.²⁶

With the Meiji Era's efforts to develop and industrialize Japan came changes in the family law as well.²⁷ The Meiji Restoration abolished the isolationist policies of the Edo Period – including the ban on Japanese-foreigner marriage²⁸ – and with the influence of Western society began to encourage individualism in Japan.²⁹ However, individualist policies did not catch on in the way one might think, and the Meiji government redirected their attention to individual family units (*ie*). In this section, I will first examine the introduction of the family registration system of Japan (*koseki seido*). Next, I will discuss the changes to marriage law brought about by the Civil Code of 1898.

A. Family Registration System (*koseki seido*)

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Japanese Family Law*, *supra* note 15 at 133 n. 4 (1956).

²⁷ Richard Tames, *Japanese History*, 3 TEACHING HISTORY 321, 323 (1974).

²⁸ Rebecca Bailey-Harris, *supra* note 14 at 162 (“After 1873 such marriages were permitted with official permission; from 1898 this requirement applied only to foreign males marrying female heads of houses.”).

²⁹ WALTER EDWARDS, MODERN JAPAN THROUGH ITS WEDDINGS: GENDER, PERSON, AND SOCIETY IN RITUAL PORTRAYAL 11 (1989).

In 1871 the Meiji government created the family register system, which organized Japanese society into residential units (*ko*).³⁰ This was an attempt to move from the four-caste feudal system of the Edo Period.³¹ However, the *ko* of the Meiji Period had much in common with the *ie* of the Edo Period: both were organized under the patriarchal household head and both included ascendants and descendants in a hierarchal system.³² The family register system kept track of entire blood lines all organized under the household head with each family member recorded in relation to the household head.³³

Some have described the family register system as a method for the Japanese government to reach into the family life of its citizens. Indeed, one scholar describes the household head “almost as a member of the official bureaucracy – the farthest-reach arm of the government” allowing the government “to economize by providing a minimum number of public keepers of the peace and social policy makers.”³⁴ The theory of the government was to use the household heads and the register system as a “top-down” implementation of modernization.³⁵

B. The Civil Code of 1898

The Civil Code of 1898 replaced the marriage laws of the Edo Period but retained some of the basic organizing rules. Under the new Code the *ie* remained the central organizing unit of Japanese society.³⁶ Consent of the household head was still required.³⁷ However, parental

³⁰ Toshitani Nobuyoshi, *The Reform of Japanese Family Law and Changes in the Family System*, 6 US-JAPAN WOMEN’S JOURNAL 66, 67 (1994).

³¹ *Id.*

³² *Id.* at 68.

³³ *Id.* at 67.

³⁴ *Id.* at 67-68.

³⁵ *Id.*

³⁶ Rebecca Bailey-Harris, *supra* note 14 at 161.

³⁷ *Id.*

consent was only required if the potential wife was under twenty-five.³⁸ Moreover, the woman only needed the consent of any single parent belonging the household.³⁹ And unless the wife was herself a household head, she was adopted as part of her husband's household.⁴⁰

One of the major changes between the Edo Period and the Meiji Period was the process to formalize a marriage. Recall that under the law of the Edo Period, the marriage became official with the *san-san-kudo* ceremony.⁴¹ However, under the Civil Code of 1898, a marriage “did not take legal effect until the Registrar of Civil Status was notified,” either written or oral notice was sufficient.⁴² Specifically, the marriage had to be recorded in the Family Registration System (*Koseki*) discussed above.⁴³ And, indeed, if a couple failed to notify the government, the marriage was considered invalid.⁴⁴

IV. The 1946 Constitution and Modern Marriage

The 1946 Constitution of Japan was created between the American Occupation leaders and delegates from the Japanese government. The creation of the Constitution was extremely contentious and often times coerced. Indeed, especially the more conservative Japanese government officials did not care to include sex equality or women's rights in the Constitution. The same might have been said for some of the members of the American delegation as well. However, Beate Sirota, one of the only women on the American delegation, pushed valiantly to

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Japanese Family Law*, *supra* note 15 at 133 n. 4.

⁴² Rebecca Bailey-Harris, *supra* note 14 at 161.

⁴³ *Id.*

⁴⁴ *Id.* (citing *Family Registration Act* 1898, Arts. 106, 106).

include women's equality in the Constitution. The final product included two provisions on sex equality: Articles 14 and 24.

Article 14, the general sex equality provision, states “[a]ll of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status, or family origin.”⁴⁵ Article 24, specific to marriage, provides:

[m]arriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual co-operation with the equal rights of the husband and wife as a basis. With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of the individual dignity and the essential equality of the sexes.⁴⁶

Neither of these provisions is likely to have made it into the Constitution without the presence and insistence of Sirota. In this section I will first examine Sirota's hand in generating and inserting Article 14 and Article 24 into the Japanese Constitution. Then I will examine modern marriage laws that were implemented as a result of these Constitutional provisions.

A. Beate Sirota, Sex Equality, and The 1946 Constitution

The Occupation powers were given one week to draft a constitution that they would to present to the Japanese government.⁴⁷ Beate Sirota was assigned to the Civil Rights Committee, which was charged with creating the sections on civil rights in the draft constitution.⁴⁸ The head of the Committee, Col. Roest approached Sirota on the first day of drafting and asked ““You're a

⁴⁵ Constitution of Japan, art. 14(1) (1946).

⁴⁶ *Id.* art. 24.

⁴⁷ BEATE SIROTA GORDON, *supra* note 4 at 106

⁴⁸ *Id.*

woman; why don't you write the women's rights section?"⁴⁹ Sirota agreed and quickly gathered as many copies of constitutions as she could find from the surrounding Tokyo libraries.⁵⁰ In reflecting on what would be most important to Japanese women, Sirota concluded "[t]he most important unit in human relations...was the family, and within the family the most important element was the equality of men and women."⁵¹ Sirota modeled her draft section on the 1919 Weimar Constitution, which emphasized, "marriage as based on the equal rights of both sexes."⁵²

Sirota's gender influenced her immensely in the drafting of the women's rights sections. Years later she reflected "[a]s a woman, I felt that my participation in the drafting of the new Japanese Constitution would be meaningless if I could not get women's equality articulated and guaranteed with similar precision."⁵³ Sirota worked hard to include a long list of detailed rights for women, trying to address the problems she had seen growing up in Tokyo. The American Steering Committee, however, was concerned about brevity and proceeded "to dissect, minutely and critically, each of the articles [she] had contributed to the draft."⁵⁴ The Committee members were concerned the draft would be rejected with such strong protections for women.⁵⁵ She argued with the Committee members that the detail was necessary to keep the conservative government officials who would be drafting the Civil Code from deviating from sex equality.⁵⁶

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 108.

⁵² *Id.* at 110.

⁵³ *Id.*

⁵⁴ *Id.* at 115.

⁵⁵ *Id.*

⁵⁶ *Id.*

Eventually, though, she was overpowered and – through tears – attempted again trying to focus on more broad principles.⁵⁷

Even after Sirota’s revisions under the direction of the Steering Committee, her draft articles were exceedingly controversial in the negotiations with the Japanese government.⁵⁸ The Japanese delegates claimed, “guaranteeing women’s rights...was ‘inappropriate’ for the Japanese.”⁵⁹ Indeed for a moment it looked like women’s rights were going to be cut from the final draft. How articles 14 and 25 ended up remaining in the final version of the constitution is remarkable:

The Japanese had taken a liking to me, probably because I was a fast interpreter. Col. Kades, ever sensitive to nuances in people’s feelings, thought to take advantage of this to forestall further argument. “This article was writing by Miss Sirota,” he announced. “She was brought up in Japan, knows the country well, and appreciates the point of view and feelings of Japanese women. There is no way in which the article can be faulted. She has her heart set on this issue. Why don’t we just pass it?” There was a stunned silence from the Japanese, who had known me only as an interpreter. But to my delight, the ploy succeeded. “All right, they said, “we’ll do it your way.”⁶⁰

After thirty-two hours of negotiating, articles 14 and 25 remained in the final draft.⁶¹ It is clear from this recount that without Sirota, these articles would have been negotiated out of the final Constitution.

⁵⁷ *Id.*

⁵⁸ *Id.* at 123.

⁵⁹ *Id.*

⁶⁰ *Id.* at 123-124.

⁶¹ *Id.* at 124.

B. The Revised Civil Code of 1948

Largely due to the sex equality provision introduced by Beate Sirota into the 1946 Constitution, the Revised Civil Code of 1948 made many changes to the marriage law regime that bolstered women's equality.⁶² A small example can be found where the Revised Code requires parental consent for both men and women under twenty.⁶³ Recall that previously the requirement for parental consent was only to women under the age of twenty-five.⁶⁴ Other major changes influenced by the sex equality provision including the abolition of the *ie* system,⁶⁵ the reformulation of the taking of surnames,⁶⁶ and changes in divorce law and remarriage requirements.⁶⁷

1. Abolition of the *ie* System

First, the most significant change propelled by the sex equality provision was that the Revised Code abolished the *ie* system altogether.⁶⁸ The drafters of the revisions – Wagatsuma Sakae and Nakagawa Zennosuke – “argued that...the existence of the *ie* system was in fact a barrier to the realization of individual dignity and sexual equality within family life.”⁶⁹ In addition, the drafters hoped to encourage a culture shift toward individualism and rights through the legal regime and thus focused marriage law on the free choice of the spouses rather than on

⁶² *Japanese Family Law*, *supra* note 15 at 138.

⁶³ *Id.*

⁶⁴ Rebecca Bailey-Harris, *supra* note 14 at 161.

⁶⁵ WALTER EDWARDS, *supra* note 29 at 11.

⁶⁶ Toshitani Nobuyoshi, *supra* note 30 at 72

⁶⁷ Annette Marfording, *Gender Equality Under the Japanese Constitution*, 29 LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA 324, 331 (1996).

⁶⁸ WALTER EDWARDS, *supra* note 29 at 11.

⁶⁹ Toshitani Nobuyoshi, *supra* note 30 at 71.

the negotiations of the household head.⁷⁰ With the dissolution of the *ie* system, the family structure in Japan shifted to smaller, more nuclear-looking units.⁷¹

2. Surname Equality and the “Same-Name” Rule

Second, in order to promote sex equality, the Revised Code promulgated the rule that the couple may adopt the surname of either the husband or the wife. The couple decides which surname to use “in accordance with the agreement made at the time of the marriage.”⁷² While the formal legal regime forces the couple to actively choose a surname – forcing them to consider what a surname means and what a family looks like under different organizing principles – the practice in Japan to this day remains heavily in favor of patriarchal lineage and most couples adopted the husband’s surname.⁷³

Not only has the patriarchal tradition of the surname lived on, but also other laws have been promulgated that undermine sex equality in this area. The Civil Code contains a provision that requires “married couples to use the same surname in official matters.”⁷⁴ In 2011, sex equality advocates challenged this provision in court as a violation of Article 24.⁷⁵ They argued that the provision often resulted in the loss of a woman’s maiden name and disadvantages her in

⁷⁰ WALTER EDWARDS, *supra* note 29 at 11.

⁷¹ Toshitani Nobuyoshi, *supra* note 30 at 72. However, the smaller family units were not just confined to immediate family, as we would understand it in the US. Rather, the family units “incorporated an admixture of ‘lineal family relations.’” *Id.*

⁷² *Id.* at 73.

⁷³ Conversations with Ms. Tsunoda and Ms. Kazuko Ito at O’Melveney & Myers (Tokyo Office) on March 23, 2016.

⁷⁴ Tomohiro Osaki, *Japan’s top court upholds same-name rule for married couples, overturns remarriage moratorium for women*, THE JAPAN TIMES (Dec. 16, 2015) available at http://www.japantimes.co.jp/news/2015/12/16/national/crime-legal/japans-top-court-strikes-rules-divorcee-remarriage/#.Vx_IbKvsJVd.

⁷⁵ *Id.*

many aspects of her life – including professionally and psychologically.⁷⁶ In 2015, the Japanese Supreme Court upheld the constitutionality of the provision, acknowledging the disadvantages faced by women due to the provision but claiming “such hardships can be mitigated, since women are free to use their maiden names in daily life.”⁷⁷

3. *Changes in Divorce Law and Remarriage Requirements*

Under the new legal regime of the 1948 Civil Code, divorce law was completely revolutionized. Previously only the husband could initiate divorce proceedings and had complete control over any termination of the marriage contract.⁷⁸ Before, “[g]rounds for divorce included adultery on the part of the wife only and her grossly insulting her husband’s lineal ascendants.”⁷⁹ Now, both the husband and wife can mutually agree to a divorce.⁸⁰

As for remarriage, under the Civil Code women were required to wait six months after dissolution of a marriage to remarry – a vestigial of the Edo Period wherein there was concern about the paternity of children coming after a marriage has ended.⁸¹ However, in 2015, the Supreme Court of Japan struck down this portion of the Civil Code as unconstitutional under the sex equality provisions.⁸²

V. Conclusion

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Annette Marfording, *supra* note 67 at 328.

⁷⁹ *Id.*

⁸⁰ *Id.* at 331.

⁸¹ *Id.* See also, Tomohiro Osaki, *supra* note 74.

⁸² Tomohiro Osaki, *supra* note 74.

Beate Sirota was the only woman in the room at the time of the drafting and negotiations of the 1946 Japanese Constitution. Moreover, Sirota drafted the sex equality provisions in the Japanese Constitution herself. While the provisions were far from what Sirota had hoped, the story clearly reveals even these limited clauses may not have made it in or would likely have been negotiated out without Sirota's presence and insistence on women's rights. One might read this paper and think perhaps the marriage regime has not been changed so drastically. Indeed, it took until 2015 for the Supreme Court to strike down the remarriage waiting period requirement. However, I would encourage those doubters to think carefully about Japanese culture, the starting point of the marriage regime in the Edo Period, and the nature and business of the Supreme Court of Japan. In this context and with the potential catchall nature of the sex equality provisions in the Japanese Constitution, Sirota's work is truly revolutionizing.