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Shotaro Hamura

kayama University of Science, Japan

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Liberalization of Grounds for Judicial Divorce in Japan: September 2, 1987 Decision

Shotaro Hamura*

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* Professor of Law, Faculty of Liberal Arts and Science, Okayama University of Science, Japan.

I. INTRODUCTION

An analysis of the history and development of Japanese divorce law indicates a recent shift from the doctrine of matrimonial offense to the doctrine of no-fault divorce. The doctrine of matrimonial offense arises when one spouse commits an act, such as adultery, which precipitates a divorce. The doctrine of no-fault divorce has been used in circumstances when a marriage suffers an irretrievable breakdown. After World War II, in 1947, the Japanese Civil Code moved towards a more modern philosophy of divorce law when it prescribed the following grounds for a judicial divorce:

1. Husband or wife can bring an action for divorce only in the following cases:
 - a. If the other spouse has committed an action of unchastity.
 - b. If he or she has been deserted maliciously by the other spouse.
 - c. If it is unknown for three years or more whether the other spouse is alive or dead.
 - d. If the other party is attached [sic] with severe mental disease, and recovery therefrom is hopeless.
 - e. If there exists any other grave reason for which it is difficult for him or her to continue their marriage.
2. Even in cases where any or all of the grounds mentioned in items 1-4 inclusive of the preceding paragraph exist, the Court may dismiss the action for divorce if it deems the continuance of the marriage proper in view of all the circumstances.¹

Before the recent decision of September 2, 1987,² the Supreme Court had rarely given a liberal interpretation of this provision of the Civil Code as a means of granting a judicial divorce when the petitioner for divorce is the spouse who has committed a matrimonial offense. Rather, the Court exercised its discretion to refuse a

1. MINPO (Civil Code), Law No. 89 of 1896 and Law No. 9 of 1898, Art. 770 at ¶¶ 1, 2 (2 EHS Law Bull. Series FAA 130) (translated into English by Fukio Nakane).

Copies of all materials cited in this article are on file at the offices of *The Transnational Lawyer*.

2. *Judgment on the Admissibility of Divorce Sought by a Spouse Responsible for the Ground For Divorce*, 41 MINSHU 1423; 23 *Series of Prominent Judgments of the Supreme Court upon Questions of Constitutionality*, 3-8 (translated into English by General Secretariat, Supreme Court of Japan 1989). See 1243 HANJII 3 (Current Case Reports) (published by Hanrei Jihosha).

In Japan, cases are identified by date, as a means of protecting confidentiality.

petition for divorce brought by the petitioner responsible for the matrimonial offense.

A Supreme Court decision dated February 19, 1952³ is an example of the case law by the Supreme Court that prevailed until the September 2, 1987 decision. This article focuses on the above-mentioned cases, attempts to explain how their facts were interpreted, and the rationale behind the Court's holdings.

II. A GENERAL OUTLINE OF THE JAPANESE MATRIMONIAL PROCEDURES AND CASE LAW UNDER THE JAPANESE LEGAL SYSTEM

Before looking at the Supreme Court's judicial interpretations of Article 770 of the Civil Code, it is necessary to have a general understanding of judicial divorce law propounded in the Civil Code and case law under the Japanese legal system.

One type of divorce in Japan is a divorce without, or prior to, obtaining a judicial divorce decree. The initial method of obtaining a divorce is through a mutual agreement between both spouses. If they agree to obtain a divorce (Article 763 in the Civil Code) and notify the Family Registration Law (*Koseki Ho*) of their agreement, then the divorce may be effectuated. Article 764 of the Civil Code, quoting Article 739, states that "[a] marriage becomes effective by notification thereof in accordance with the provisions of the Family Registration Law."⁴ Article 764 further states that this notification also applies to divorce procedures.⁵

This procedure for obtaining a divorce was also available under the prior Japanese Civil Code. However, since the previous Civil Code upheld the family system of male lineal descent and the unequal matrimonial status of women, the husband was able to coerce the wife into a legally fictitious, mutual divorce agreement.

3. 6 MINSHU (No. 2) 110 (Civil Case Reports by the Supreme Court).

4. MINPO (Civil Code), Law No. 89 of 1896 and Law No. 9 of 1898, Art. 739 (2 EHS Law Bull. Series FAA 124) (translated into English by Fukio Nakane).

5. More detailed information in English can be obtained from, *Guide to the Family Court of Japan* (published by the Supreme Court of Japan (1987)).

As previously stated, there is no judicial participation in this type of divorce.

If a husband and wife have failed to reach a mutual agreement for divorce, a second method of obtaining a divorce is available before resorting to a judicial divorce. Under this second alternative, the married couple must apply to the Conciliation Committee of the Family Court. Japan's present family court system came into existence on January 1, 1947, shortly after World War II. The Family Court's jurisdiction is restricted to the realm of matrimonial domestic matters and juvenile cases according to Article 31-3 of the Court Organization Law (Saibansho Ho) and Article 9 of the Law for the Determination of Family Affairs (Kajishinpan Ho). The Conciliation Committee of the Family Court consists of one judge and two or more Conciliation Commissioners. The Committee suggests certain arrangements which may resolve the differences and conflicts that precipitate the divorce.

If either party rejects these recommendations, the Family Court, at its discretion, may refer the case to the residing judge of the Family Court for his determination. Following the judge's determination, there is a two-week time period during which the determination may be rendered null and void by an appeal from either party. If this occurs, then one of the parties may take the final step towards seeking a judicial divorce based on one of the statutory grounds stated in Article 770 of the Civil Code. Under the Law of Procedure in Action Relating to Personal Status (Jinji Soshu Tetsuzuki Ho), either party may seek a judicial divorce by petitioning the Civil District Court to try the case.

In general, the judicial interpretation and application of holdings rendered by the Supreme Court form the legal authority and provide the guidelines followed by the lower courts in future trials of similar cases. Furthermore, case law can be changed by a Supreme Court decision, provided all fifteen judges are present.⁶

6. Japan has a system of written law as the source of law. Japan has no rules specifying the binding force of precedent on case law. Japan only has rules such as Article 4 in Court Organization Law (Saibansho Ho) that states, "[a] conclusion in a decision of a superior court binds courts below in respect of the case concerned," and Article 10 in Court Organization Law that prescribes:

These changes by the court may substitute different or opposite views for the established ones. In this respect, Japanese practice differs from that of England and the United States where a court generally abides by its prior decisions as binding precedent.

Article 770, Paragraph 1, Parts 1 through 5, give two categories of grounds for judicial divorce: those which can be concretely defined and those which are more difficult to define. Parts 1 through 4 list the causes of divorce that may be concretely defined. These causes may be further categorized into two subsets: "1. If the other spouse has committed an act of unchastity,"⁷ and "2. If he or she has been maliciously deserted by the other spouse."⁸ Both of these causes of divorce relate to the doctrine of matrimonial offense. The two remaining concretely defined causes are: "3. If it is unknown for three years or more whether the other spouse is dead or alive,"⁹ and "4. [If t]he other party is afflicted with a severe mental disease and recovery therefrom is hopeless."¹⁰ The latter two cases are more closely related to the concept of no-fault divorce.

Paragraph 2 of Article 770 gives the Court power to prevent the divorce. This paragraph prescribes that the court may dismiss

Regulations of the Supreme Court will determine which cases are to be handled by the Grand Bench and which by the Petty Bench; however, in the following instances, a Petty Bench cannot render a decision:

(1) Cases in which a determination is made of the constitutionality of a law, ordinance, regulation or disposition as a result of a contention of a litigant (excluding cases where the opinion is the same as that of a decision previously rendered through a Grand Bench in which the constitutionality of the law, ordinance, regulation or disposition is recognized);

(2) Cases other than those mentioned in, the preceding item when the unconstitutionality of a law, ordinance, regulation or disposition as recognized in the Constitution or of any other laws or ordinances is contrary to that of a decision previously rendered by the Supreme Court.

(3) Cases in which an opinion concerning the interpretation and application of the Constitution or of any other laws or ordinances is contrary to that of a decision previously rendered by the Supreme Court.

Quoted from the translation by the General Secretariat, Supreme Court, 3 (1981).

7. MINPO (Civil Code), Law No. 89 of 1896 and Law No. 9 of 1898, Art. 770 (2 EHS Law Bull. Series FAA 130) (translated inot English by Fukio Nakane).

8. *Id.*

9. *Id.*

10. *Id.*

the divorce petition if, after observing all the circumstances, it believes that there are adequate grounds to uphold the marriage bond. Additionally, the Court may dismiss the case even if grounds for divorce can be found in Parts 1-4 of Paragraph 1, excluding Part 5.

Part 5 of Paragraph 1 uses less specific wording to describe grounds for divorce which are more difficult to concretely define. Part 5 lists as a cause for divorce “. . . any other grave reason for which it is difficult for him or her to continue the marriage.”¹¹ In some cases in which the Court fails to find grounds for divorce in the categories covered by Parts 1-4, but where there has been maltreatment such as cruelty, insult done by the other spouse, or a mutual incompatibility of personality, the less specific wording of Part 5 may provide the necessary grounds for divorce. However, it remains uncertain precisely which circumstances “an irretrievable breakdown of marriage” encompasses as legitimate grounds for the termination of marriage. Also unresolved is the controversial question of whether or not an action for divorce can be instituted by a petitioner who is guilty of committing a matrimonial offense which constitutes a legal wrong-doing. To what degree is the petitioner responsible for the matrimonial offenses he or she commits, and what conditions are then imposed upon such a petition?

III. THE FACTS AND THE MAIN REASONS STATED IN THE DECISIONS OF THE SUPREME COURT

There are two quite contrasting though typical cases that exemplify the judicial interpretation and application of Article 770 Paragraph 1, Part 5 by the Supreme Court. In both the earlier case (February 19, 1952) and the recent one (September 2, 1987), divorce was sought by the husband who was the party responsible for the matrimonial offense.

11. *Id.*

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A. The February 19, 1952, Supreme Court Decision¹²

1. Background Information

In this case the parties were married in August, 1936 while the husband was serving in the military. No children resulted from this union, and the lack of a child caused a serious rift in the relationship. The husband eventually formed a liaison with another woman. His affair invoked numerous quarrels between he and his wife, who demanded that he break off his relationship with his mistress. The more serious quarrels were accompanied by violence on the wife's part toward the husband. Eventually, the husband left his wife, and began cohabitating with his lover who, on June 28, 1947, gave birth to a son. Finally, after more than ten years of marriage, the husband filed a petition for divorce in June, 1948. It was first dismissed by the District Court and later by an appeals court.

In an appeal to the Supreme Court, the husband asserted that the lower court had dismissed his petition for divorce on the grounds of Article 770, Paragraph 1, Part 5 ("... any grave reason for which it is difficult to continue the marriage")¹³ for the reason that it was the petitioner who had committed the matrimonial offense, thereby violating the duty of "faith and trust on the exercise of right and duty" established in the Civil Code.¹⁴ However, because there is no statutory authority for judging whether a petitioner under Part 5 is blameworthy, the husband argued that it was wrong for the Court to refuse his appeal. He also argued that the Court did not consider his wife's violent behavior toward him or the fact that the judgement had failed to affect the continuance of the marriage bond. Furthermore, petitioner complained that the judgement kept him in illegal cohabitation with his mistress, left his only child without the

12. 6 MINSHU (No. 2) 110 (Civil Case Reports by the Supreme Court).

13. MINPO (Civil Code), Law No. 89 of 1896 and Law No. 9 of 1898, Art. 739, ¶ 1, Part 5 (2 EHS Law Bull. Series FAA 124) (translated into English by Fukio Nakane).

14. MINPO (Civil Code), Law No. 89 of 1896 and Law No. 9 of 1898, Art. 1, ¶ 2 (2 EHS Law Bull. Series FAA 130) (translated into English by Fukio Nakane).

protection of the law, and burdened that child with the onus of illegitimacy.

2. The Holding and Rationale

On February 19, 1952, the Supreme Court upheld the Appellate Court's decision, saying there was no "grave reason" that the marriage could not continue except the petitioner's misconduct in leaving his wife and cohabitating with his lover. In other words, the petitioner's own decision to discontinue the marital relationship had brought about the present situation. Dependent upon the petitioner to break off his illicit relationship and return to his wife, the marital relationship must continue.

From the facts established in the lower court, the Supreme Court found that the respondent's violent behavior towards her husband was occasioned by her jealousy. The petitioner could remove the causes of jealousy and his wife's resultant behavior by returning to his wife and ending his relationship with his lover who could not be exempted from blame since she fell *in love with a man knowing that he was already married*.

The Court held that the petitioner's statement that nothing could be done to reestablish the marriage was self-serving and used as an excuse for having left his wife and home, and for his continuing to live with his mistress. The Supreme Court further upheld the lower court's decision that approval of this petition would cause further distress to the respondent, "adding insult to injury, as the popular saying goes."¹⁵ "Immoral and wilful conduct like the petitioner's should not be permitted under our system of justice."¹⁶ The judges observed that the law does not require that a petition by a party guilty of a matrimonial offense be dismissed; rather, a petition based on such an immoral and selfish claim cannot be allowed. The judges then concluded "[t]he most important purpose of the laws lies in upholding morality by

15. 6 MINSHU (No.2) 112 (Civil Case Reports by the Supreme Court).

16. *Id.*

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refusing to sanction immoral behavior. The Court must interpret all laws in accordance with this purpose."¹⁷

B. The September 2, 1987 Supreme Court Decision¹⁸

1. Background Information

In this case, the couple was married on February 1, 1937. In 1948 they adopted two girls. The marital relationship was compatible until 1948, when the wife discovered that her husband was having an affair. The husband subsequently separated from his wife and began cohabitating with his lover. The husband continued to live with his mistress up to the point when this case was heard, more than thirty-six years later. During the intervening years, the husband and his cohabitant had two offspring. The husband recognized these children as his own in 1954.¹⁹

After their separation, the wife, who experienced monetary difficulties, received the matrimonial house which she then sold. She subsequently moved into her brother's home. At the time of the trial the respondent was unemployed. The petitioner, on the other hand, was the director of two successful companies. In 1951, the husband filed a petition for divorce. This petition failed on the ground that the petitioner was responsible for the matrimonial offense. In 1983, petitioner was unsuccessful in his attempt to obtain a divorce by mutual agreement through the Conciliation Service of the Family Court. Under this unsuccessful agreement, the husband was willing to pay one million yen (and give respondent a painting) for the support of his wife. Finally, in 1984, he petitioned a second time for a divorce. At the time of the 1987

17. *Id.*

18. *Judgment on the Admissibility of Divorce Sought by a Spouse Responsible for the Ground For Divorce*, 41 MINSHU 1423; 23 *Series of Prominent Judgments of the Supreme Court upon Questions of Constitutionality*, 3-8 (translated into English by General Secretariat, Supreme Court of Japan 1989). See 1243 HANJII 3 (Current Case Reports) (published by Hanrei Jihosha).

19. *Judgment on the Admissibility of Divorce Sought by a Spouse Responsible for the Ground For Divorce*, 41 MINSHU 1423; 23 *Series of Prominent Judgments of the Supreme Court upon Questions of Constitutionality*, 3-8 (translated into English by General Secretariat, Supreme Court of Japan 1989). See 1243 HANJII 3 (Current Case Reports) (published by Hanrei Jihosha).

decision, the husband was seventy-five years old, and his wife was seventy-one.

2. The Holding and Rationale

In its decision, the Court noted that historically divorce in the Japanese legal system could be obtained either by mutual agreement, or should there be an irretrievable breakdown of marriage with an adversarial relationship existing between the two parties, advice could be sought through the Conciliation Service, or through a judgement by the Court. The Court ruled that an action for divorce may be brought by either party since Article 770, Paragraph 1, Part 5 does not restrain the petitioner-at-fault from filing a petition for a judicial divorce. However, when the party whose actions led to the breakdown of the marriage seeks the approval of the Court to achieve his purposes, the result is to deny the other party a freely determined part in the divorce procedures. Such a one-sided petition for divorce should not be admitted because such a judicial interpretation might weaken the institution of judicial divorce. The aim of marriage is mutual cooperation for life, with both husband and wife sincerely intending to remain united physically and mentally. But when either or both of the marriage partners refuse to cooperate to maintain the marriage bond, and any sincere intention to continue the relationship has been lost, then an irretrievable breakdown of the marriage has occurred. Such a marriage contributes little or nothing to society. To insist on the continuation of what is only the empty shell of a dead marriage is unreasonable.

In the September 2, 1987 decision, the judges went on to point out that divorce destroys the marriage bond which preserves the social and legal order. As a matter of course, a petition for divorce should not be against the principle of rightness and fairness, or against the social ethic. Furthermore, the judges pointed out that granting a divorce petition must be in line with the rule of "faith and trust" that stands as the leading doctrine in all aspects of the Civil Code, including family law. Judging whether or not the petition by the party who is exclusively responsible for the

matrimonial offense should be allowed, in light of the rule of "faith and trust," a court should keep in mind the modes and degrees of responsibility of the petitioner-at-fault, the party's intention to continue the marriage, and the other party's sentiments towards the petitioner. Additionally, in the event the court approves the divorce petition, it must take into account information concerning the mental, social and economic conditions of the other party. The court must also consider the well-being of children produced by the marriage, especially the education and welfare of minor children who need the court's protection. Furthermore, the court must consider the interests of other minor children born through a *de facto* marriage formed by one or both of the parties after the separation. A further factor to be considered is the length of the separation period, since the passage of time may significantly affect the circumstances, including shifts in social norms and values.

After applying those factors, the Supreme Court held that it was reasonable to conclude that the petition of the guilty party could not be dismissed solely because it was brought by the petitioner-at-fault. These factors included the fact that the husband and wife had lived apart for most of their married life, there were no minor children in their custody and no special circumstances existed that would lead to such extreme social, mental and economic distress towards the other party such that the approval of the petition would be contrary to the intent of the social justice system. In this case, little weight was given to arguments that usually prevail against granting the petition on the grounds of "other grave reasons" stated in Article 770, Paragraph 1, Part 5, such as the respondent's grave mental or social status. The financial disadvantages caused by this divorce could be settled by a distribution of matrimonial property, and compensation for mental suffering of the wife could be sought by an action brought at the time of the divorce petition or after the decree was made. By the end of the first oral hearing, the couple had been separated for thirty-six years. Thus, in the Supreme Court's own explicit conclusions concerning this petition for divorce, it is clear that

grounds for divorce could be found in Paragraph 1, Part 5, even though the petitioner, himself, was responsible for the cause.²⁰

C. Other Opinions

Although all fifteen judges of the Supreme Court agreed on the conclusion reached in the September 2, 1987 decision, there was one sub-opinion and one instructive opinion. The sub-opinion addressed the matrimonial property settlement and the compensation for mental suffering in order to ameliorate the other spouse's financial hardship and mental instability. The sub-opinion observed that, after the divorce decree is made, substantial security is necessary for the other spouse to settle her financial disadvantage. But, unless the other party makes a counterclaim or a motion for the distribution of the matrimonial property in accordance with Article 15, Paragraph 1, of the Law of Procedure in Action Relating to Personal Status²¹ at the time that the petition for divorce is brought, no settlement for the distribution of the matrimonial property can be obtained after the divorce decree is made. Article 768 of the Civil Code does not indicate which party is permitted to petition for the distribution of the matrimonial property, but it does state that if no agreement can be reached

20. *Judgment on the Admissibility of Divorce Sought by a Spouse Responsible for the Ground For Divorce*, 41 MINSHU 1423; 23 *Series of Prominent Judgments of the Supreme Court upon Questions of Constitutionality*, 3-8 (translated into English by General Secretariat, Supreme Court of Japan 1989). See 1243 HANJI 3 (Current Case Reports) (published by Hanrei Jihosha). In granting the divorce decree, the Court declared:

the lower court erred in interpretation and application of paragraph 2, Article 1 and item 5, paragraph 1, Article 770 of the Civil Code, because it rejected the claim without judging whether there exist such special factors and thus it is evident that this error may affect the main text of the judgment. Therefore, the Jokoku appeal has reason and the original judgment should be quashed. And, since it is necessary for the court below to consider further whether or not there exist any special factors, and it is proper to examine and resolve the matter of economic payments accompanying a divorce if the Appellee applies for it, the case should be remanded to the lower court.

21. The Law of Procedure in Action Relating to Personal Status, art. 15, ¶ 1, prescribes that at the annulment of marriage or the petition of divorce brought by the husband or wife, the court may have the power to make the distribution of their matrimonial property for the other according to the petition.

through their private efforts, either party can seek the judgement of the Family Court to settle the unsuccessfully resolved conflict.²² In addition, according to Article 15, Paragraph 1 of the Law of Procedure in Action Relating to Personal Status, a separate petition for the distribution of the matrimonial property in addition to this lawsuit is not required. The abstract form of motion without specifying the amount and method of distribution of the matrimonial property is sufficient to initiate Court proceedings. Thus, a reasonable and fair interpretation of the law is that the spouse who is obliged to supply the other's maintenance is permitted to file such a petition in the same divorce lawsuit.

The instructive opinion takes a more severe view of the guilty party's petition for divorce, stating that a petitioner who is mainly or exclusively responsible for a matrimonial offense should not have his petition approved, nor should a dismissal of his petition be overruled except in special circumstances. This is not an objection to the decision's conclusion, but instead, to the logical procession which led to such a conclusion. The judge who wrote this opinion stated that under an appropriate interpretation of the law the Court may deny the petition for divorce brought by the spouse responsible for the matrimonial offense. If the Court were to allow a divorce based solely on the irretrievable breakdown of marriage, or if the court were to freely admit a one-sided petition for divorce, then its actions would conflict with the legal system and the statutorily stipulated reasons for granting a divorce petition. If the court were to act in this fashion, the respondent might easily

22. Article 768 in the Civil Code prescribes:

1. Husband and wife who has effected divorce by agreement 1979, may demand the distribution of property from the other spouse.

2. If no agreement is reached or possible between the parties with respect to the distribution of property in accordance with the provisions of the preceding paragraph, any of the parties may apply to the Family Court for measure to take the place of such an agreement, however, this shall not apply after the lapse of two years from the time divorce.

3. In the case mentioned in the preceding paragraph, the Family Court shall determine whether any such is to be made or not, and if it is made, the sum of property as is acquired by the cooperation of the and all other circumstances.

MINPO (Civil Code), Law No. 89 of 1896 and Law No. 9 of 1898, Art. 768 (2 EHS Law Bull. Series FAA 129) (translated into English by Fukio Nakane).

lose the stability and benefits of marriage while the petitioner-at-fault would be quite free from any restraint. It is natural, therefore, that the Court should retain the power to decide whether or not a divorce should be permitted, and to interpret the law pertaining to judicial divorce in accordance with fairness, equity, social ethics and natural justice. This instructive opinion went on to hold that “. . . since marriage is the social and legal order based upon morality, the divorce which dissolves this relationship should also be justifiable in light of the morality and social norm, and should not damage human dignity and not contradict the equity of both sexes. And as the marriage is based only on the mutual consent of both sexes, we may basically require that the divorce which terminates marriage should be based on the consent of both spouses.”²³

A petition for divorce which is not in compliance with this rule of good faith should be forbidden by the Court. The legal system should make divorce difficult, and should secure the matrimonial well-being of the respondent. If the legal system were to make divorce easy, the social and economic security of the respondent would be left to chance. If the accessibility towards obtaining a divorce were to be widened by the Court, the petitioner-at-fault would be free, not only of moral responsibility, but also of economic and social obligations to the other party. “To begin with, in interpretation and enforcement of divorce law, we cannot disregard the social system of the country, especially the institution of family, economic regime, legal system, religion, climate and the national character, whereas I have doubt on whether our morality or sense of justice is generous for a responsible spouse who has created the cause for divorce.”²⁴ Therefore, the Court should

23. *Judgment on the Admissibility of Divorce Sought by a Spouse Responsible for the Ground For Divorce*, 41 MINSHU 1423; 23 *Series of Prominent Judgments of the Supreme Court upon Questions of Constitutionality*, 3-8 (translated into English by General Secretariat, Supreme Court of Japan 1989). See 1243 HANJII 3 (Current Case Reports) (published by Hanrei Jihosha).

24. *Judgment on the Admissibility of Divorce Sought by a Spouse Responsible for the Ground For Divorce*, 41 MINSHU 1423; 23 *Series of Prominent Judgments of the Supreme Court upon Questions of Constitutionality*, 3-8 (translated into English by General Secretariat, Supreme Court of Japan 1989). See 1243 HANJII 3 (Current Case Reports) (published by Hanrei Jihosha).

exercise discretion in determining whether or not a divorce is to be permitted.

It would, however, be excessive to deny all petitions from parties guilty of marital offense. Such a denial would also be an unethical distortion of Japanese law. Petitions brought by those who have committed matrimonial offenses may be allowed through an interpretation of the law that takes into account special circumstances which establish that the offense occurred after the breakdown of the marriage, or that it was induced by the other party's behavior. Other special circumstances to be considered include cases where the other spouse is willing to accept a divorce, or when objection to the divorce petition is based upon the respondent's desire for revenge on account of the petitioner's past misconduct for which he or she has already provided satisfactory compensation with regard to the respondent's and children's mental, social and economic hardship. Thus, the precedential case law that restricts the petitioner-at-fault from bringing an action for divorce should not be changed. However, when such extenuating circumstances exist, the legal system may exonerate the petitioner from his past culpable conduct, and grant the petitioner a divorce decree.

IV. COMMENTS AND CONCLUSION

In considering how the historical, cultural, and social environment in Japan influenced the legal decision-making process, it is significant that the former decision (February 19, 1952) was made by the Supreme Court shortly after the end of World War II. The latter decision (September 2, 1987) was made some thirty-five years later. During the twentieth century, Japan has undergone many political, economic and social changes, including changes in the way the legal system has been implemented. In order to understand these changes, one must consider their historical context. In contrast to the United States where the cultural and social climate has consistently reflected the democratic ideals established by the Declaration of Independence, the social and cultural climate in Japan has been marked by the blending of both

traditional values and those of the current democratic state. For many centuries, the Imperial Dynasty reigned supreme in Japan. A period of feudalism followed, lasting approximately three hundred years. That era was followed by the re-establishment of imperial power during the Meiji period in which imperial absolutism was consolidated through the Old Constitution.²⁵ But by the end of World War II in 1945, this system of government had been destroyed and replaced by the New Constitution which placed sovereign power in the hands of the Japanese people, and established the current democratic state.²⁶

The period following World War II has also been a period of remarkable social and economic transformation. During this era, the traditional values, deeply embedded in the social and cultural fabric of Japan, have been overlaid by the new democratic values imposed on Japan as a result of her military defeat. Consequently, in the current social, moral, legal, and political environment of Japan, old hierarchical and modern democratic values co-exist. This makes the Japanese experience uniquely different from its American counterpart. Unlike the United States which has an ethnically heterogeneous population and a long history of democracy, Japan has an ethnically homogeneous population and a long history of cultural uniformity, strongly influenced by her heritage of an emperor system and Confucianism. The sudden imposition of democracy on top of the old traditional values has created, especially in the period immediately following the War, a sense of confusion and uncertainty in the minds of the Japanese people. Feeling free from the old values, some individuals acted unrestrained in an attempt to enjoy life, even if this involved immoral sexual behavior.²⁷ During this period, there was a

25. For example, Article 1 in the old Constitution prescribed, "[t]he Empire of Japan shall be reigned over and governed by the Emperors unbroken for ages eternal." and Article 3 in the old Constitution decreed, "[t]he Emperor is sacred and inviolable." 1 *Japanese Government Documents* 136 (W. Maclaren ed.).

26. For example, Article 1 of the Constitution of Japan states, "[t]he Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power."

27. The judges of the Supreme Court in the former decision (Feb. 19, 1952) considered such immoral sexual behavior. See 6 *MINSHU* (No. 2) 112.

significant shift in the attitude towards family life, marriage, divorce, and other family matters. This shift was reflected in national policies concerning divorce.²⁸

For example, the ratio between arranged marriages and non-arranged marriages has changed markedly. In 1947, the percentage of arranged marriages was about seventy percent, while on the other hand, only thirty percent of all marriages were non-arranged marriages. According to statistics produced by a government survey, these figures had been reversed by 1984.²⁹ Recently, statistics also indicate that a husband and wife who are middle-aged are increasingly inclined to get divorced when their marriage life and obligations are close to a turning point, after their children have grown and become independent.³⁰

A useful comparison is between the number of divorces in 1952, at the time of the February 19, 1952 decision, and the number of divorces in 1987, at the time when the latter case was decided. The statistics in Japan for 1952 showed 79,021 divorces. This is equivalent to a ratio of 0.92 per 1,000 persons. In 1987 there were 158,227 divorces, a ratio of 1.30 per 1,000 persons. These statistics indicate that the number of divorces has been increasing at a significant rate. However, more recently the

28. See *infra* notes 24-25 and accompanying text (discussing the widely divergent legal values in Japanese society). Nowadays, Article 13 in the Constitution of Japan prescribes, "[a]ll of the people shall be respected as individuals. Their right to life, liberty and the pursuit of happiness shall . . . be the supreme consideration . . .," and Article 24 prescribes "[m]arriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with equal rights of husband and wife as a basis. With regard to . . . divorce . . . , law shall be enacted from the standpoint of individual dignity and the essential equality of the both sexes." Thus, these legal values have precedence in modern Japanese society.

29. See *Summary of the 8th Fertility Survey in 1982* 29 (Inst. of Population Problems, Ministry of Health and Welfare (*The Marriage and Fertility of Japanese Research Series*) (Mar. 25, 1983)).

30. According to a 1982 government survey, the number of divorces among women in their 30's and 40's dramatically increased. Ministry of Health & Welfare, Statistics & Information Department, Minister's Secretariat, *Divorce Statistics*, SPECIAL REPORTS OF VITAL STATISTICS 19 (1984) [hereinafter *VITAL STATISTICS*]. In 1986, the total number of women who became divorced was 109,759. The number of women over 40 years of age who had been married for over twenty years was 13,744. Table 6, Divorce by Age of Husband and Wife and Duration of Marriage [for divorces performed in 1986] 492 (cited in 2 *VITAL STATISTICS* (1986)). Also, the percentage of divorces where the wife was over 40 years of age was 12.4% in 1965; by 1985 it had increased to 27.4%. 1 *VITAL STATISTICS* 377 (1985).

number of divorces has slightly decreased from a total of 178,746 in 1984 to 166,640 in 1985, in contrast with a total of 179,150 in 1983.³¹

Approximately ninety percent of all divorces are made privately through the mutual consent of both parties, and about nine percent result from the mediation of the Conciliation Service in Family Court. Only about one percent of all divorces are made by the courts. The above-mentioned rates produced by the three kinds of divorce procedures have remained at about the same percentage levels for seventeen years.³² Although there has not been a significant change in the percentage breakdown of procedures, the

31. 1 VITAL STATISTICS 322-327 (1984); 1 VITAL STATISTICS 369, 371 (1985); 2 VITAL STATISTICS 490 (1986). According to the Ministry of Health and Welfare, there were 153,600 divorces in 1988. See 1 VITAL STATISTICS 373 (1988); *Divorce Statistics* in VITAL STATISTICS 38 & 42 (1984). Compared with a U.S. divorce rate per 1,000 population of 4.96 in 1985, and 4.80 in 1986, the rate in Japan was 1.39 in 1985 and 1.37 in 1986. See Statistics Bureau, General Affairs Board, (Japan), *Kokusai Tokei Yoran*, (Survey for International Statistical) 25 (1988) & 25 1988. See also U.S. DEPART. COMM., STATISTICAL ABSTRACT OF THE UNITED STATES 88 (109 ed. 1989) (the U.S. divorce rate per 1,000 population of 4.8%).

However, Americans may have a happier married life than do the Japanese. This is evidenced by a comparative analysis of the statistics on planned and attempted suicides in the two countries. In 1985, the ratio of planned and attempted suicides among Japanese wives was 17% and 5% respectively, whereas, it was only 2% and 3% respectively, among American wives. Furthermore, Japanese couples are more likely than their American counterparts to believe that their married acquaintances are happier than themselves. In 1985, 19% of all Japanese couples, as compared to 9% of American couples, believed that other married couples were more content than they were. On the other hand, 17% of American couples, as compared to 6% of all Japanese couples, believed that their married acquaintances were less happy than themselves. Hamura, Cargan & Sakai, *A Cross-Cultural Comparison on the Marriage-Life of Japanese and of Americans*, 24B BULL. OF OKAYAMA U. SCI. 166 (1989). These statistics corroborate the findings of a 1983 Japanese Government Survey which indicated that only 25% of Japanese wives were very satisfied with their married life, as compared to 66% of all American wives. See Secretariat Office of Prime Minister, *Fujinmodal nikanthuru Kokusaihihaku Chosaketsuka no Gaiyo* [The Outline for the Result of the International Comparison Survey on Women's Problems] 62 (1983). The results of these surveys seem to indicate that, compared with American wives, Japanese wives tend to remain in unsatisfactory marriages rather than take step toward divorce.

32. For example, in 1955 the percentage of divorce by mutual agreement was 92.8%, the percentage of divorce by the Conciliation Service was 6.4% and the percentage by judicial divorce was 0.8%. In 1984, these three kinds of divorce procedures produced divorce percentages of 91.3%, 7.6%, and 1.0% respectively. See 1 VITAL STATISTICS 327 (1984). According to the Ministry of Health & Welfare, from 1965 to 1982 the divorce rate by mutual agreement ranged from 89.4% - 90.4%, the rate by Conciliation Service ranged from 8.5%-9.6% and the rate by judicial divorce ranged from 1.0% - 1.2%. *Divorce Statistics* in VITAL STATISTICS 17 (1984). However, in 1952, when the former decision was made, the divorce rate by mutual agreement was 93.8%, by Conciliation service, 5.4% and by judicial divorce, 0.8%. *Id.*

increase in the sheer number of persons obtaining divorces indicates definite tendency towards an acceptance of divorce as a viable solution to irresolvable marital difficulties.

The general inclination of divorce law in modern times is to prescribe by relatively abstract grounds in order to relax the restrictions against divorce and consequently to grant divorce more freely. If, in general theory, the doctrine of the irretrievable breakdown of marriage is interpreted to mean that the petitioner-at-fault may bring a divorce action over the objection, and to the detriment of the innocent party, then there is no express restriction to bar such a petition by the petitioner-at-fault in our legal system. Because our legal justice should not allow such a petition in so far as it subverts the petitioner's matrimonial obligation (for example, the legal obligations of chastity, of mutual cooperation and support, and of matrimonial cohabitation)³³ we must resort to the general rule of "faith and trust," the "prohibition of an abuse of right" in the Civil Code,³⁴ an interpretation such as the rule of "equity," or to a realization that the approval of a petition by a petitioner responsible for his matrimonial offense is against the accepted social ethic.

The Supreme Court's decision of February 19, 1952, and decisions which followed that decision will now be examined. Needless to say, all the Supreme Court judges were born in the Meiji Age, representative of a sense of the old morals, values, and customs of the traditional Japanese society. In spite of their mixed feelings, stemming from their allegiance to the old way of life, these judges rejected all the legal values and laws which conflicted with the new legal system based on the new democratic Constitution of Japan, adopted in 1947. Yet, one could not expect a positive attitude towards an interpretation of the law that recognized the breakdown of marriage as grounds for judicial divorce under Article 770, Part 1, Paragraph S. As a result, the

33. Article 752 in the Civil Code prescribes the, "[h]usband and wife shall cohabit and shall cooperate and aid each other." MINPO (Civil Code), Law No. 89 of 1896 and Law No. 9 of 1898, Art. 752 (2 EHS Law Bull. Series FAA 127) (translated into English by Fukio Nakane).

34. *Id.* at art. 1, ¶ 2, 3.

thrust of the Supreme Court's decision strongly stressed matrimonial morals, ethics and order, stating, "[p]etitions based upon such immoral and selfish claims cannot be allowed. The most important purpose of our laws lies in upholding morality by refusing to sanction immoral behavior."³⁵ Furthermore, the Supreme Court criticized social behavior, noting "[r]ecently we worry about the sexual ill-behavior between both sexes being too excessive after the war."³⁶

By the time of this decision, the Court had already realized that Article 770, Paragraph 1, Part 5 in the Civil Code was essentially grounded in the new doctrine of "breakdown of marriage." The court admitted that there is no explicit provision to bar the bringing of an action by a petitioner-at-fault, but the Supreme Court was afraid to recognize a divorce petition which would permit the husband to remove his wife from their home without accusing him of matrimonial offense, as was the custom under the old divorce law.

The February 19, 1952 decision was the main method of supporting matrimonial morals and order. Here, the Court applied the doctrine of "faith and trust" in denying divorce petitions from petitioners who were mainly responsible for the matrimonial offense.³⁷

After the February 19, 1952 decision, the Supreme Court made a more exact interpretation of the petitioner-at-fault who was exclusively or primarily held responsible for the matrimonial offense. However, the breakdown of marriage is often caused by the destructive influence or negligence of both parties. Furthermore, in many instances, it is difficult to determine who the party at fault is.³⁸ In these latter cases, the divorce decree is obtainable by both parties. However, the petitioner who is mainly or exclusively responsible for the matrimonial offense is not omitted from this category of petitioner-at-fault, even though the

35. 6 MINSHU (No. 2) 112 (Civil Case Reports by the Supreme Court).

36. *Id.*

37. *Id.* at 121.

38. 10 MINSHU (No. 12) 1537. The Supreme Court's decision on December 11, 1956, was approved for the petitioner because both parties were found to be at fault.

other party may have partly contributed to the breakdown of the marriage.³⁹

In a later decision on May 21, 1971, the Supreme Court allowed an application by a petitioner-at-fault in a case where the matrimonial offense occurred after the breakdown of marriage. The court reasoned that there was no cause-and-effect relationship between the matrimonial offense and the marriage breakdown.⁴⁰ Until this decision, similar cases in the lower courts and in the Supreme Court had followed the former precedent -- although there were some cases where which the courts distinguished the facts from the 1952 decision.

I have already introduced the facts and main reasons set forth in the decision of September 2, 1987. This next segment examines the decision itself. The Supreme Court approved the petition brought by a petitioner-at-fault which the lower court had rejected. Without denying the effectiveness of the three kinds of divorce procedures (mutual agreement, arrangements made by the Family Court's Conciliation Committee and judicial divorce), the approach taken by the Supreme Court, from one point of view, depends on whether or not the judicial divorce is against the other partner's free will. Thus, the Supreme Court applied the general rule of "faith and trust" to this case, stating that, as a matter of course, a petitioner for divorce should not be against the ideas of rightness and fairness or against the social ethic. The Supreme Court's ruling was in alignment with the rule of "faith and trust" which stands as the leading doctrine in all spheres of the Civil Code, including family law. Consideration of whether or not the petitioner is the party exclusively responsible for the matrimonial offense is permitted in light of the rule of "faith and trust." Thus,

39. 15 KASAI GEPPU (No. 8) 56 (Monthly Bulletin on the Family Court) (1963). (The decision came on June 7, 1963).

40. 25 MINSHU (No. 3) 408 (The Supreme Court decision of May 21, 1971, was approved for the petitioner).

one should keep in mind the modes and degrees of responsibility of the petitioner-at-fault.⁴¹

The Supreme Court's application of this consideration indicates three concrete requirements for its utilization. The first factor to be considered is the length of the period of separation of the parties. In this case, both parties had been separated for a considerable length of time -- about thirty-six years. This period of time was compared with the period of time of their marital cohabitation (about twelve years) and with their ages at the time of the divorce suit. I do not believe that a separation of thirty-six years is necessary for the petitioner-at-fault to obtain a divorce decree, however, it remains uncertain what the minimum length of the separation period should be. Some decisions in the lower courts have approved divorce petitions by petitioners-at-fault whose circumstances were similar to those of the petitioner-at-fault in the September 2, 1987 case. These cases all have involved very substantial periods of separation (more than twenty years' separation in the judgement by the Tokyo High Court on May 29, 1980;⁴² thirty-six years' of separation in the judgement by the Sendai High Court on December 14, 1984;⁴³ twenty-three years' of separation in the judgement by the Tokyo District Court on December 24, 1986;⁴⁴ and more than twenty-seven years' of separation in the judgement by the Okayama District Court on June 30, 1987).⁴⁵

Besides these cases, there are other cases which have involved relatively short periods of separation. An eight-year period of separation, after five years of marriage, was sufficient for the parties involved to obtain a divorce in the decision of December 27, 1960, by the Nagano District Court⁴⁶ and about a five-year

41. *Judgment on the Admissibility of Divorce Sought by a Spouse Responsible for the Ground For Divorce*, 41 MINSHU 1423; 23 *Series of Prominent Judgments of the Supreme Court upon Questions of Constitutionality*, 3-8 (translated into English by General Secretariat, Supreme Court of Japan 1989). See 1243 HANJI 3 (Current Case Reports) (published by Hanrei Jihosha).

42. 968 HANJI 62.

43. 1147 HANJI 107.

44. 1223 HANJI 81.

45. 640 HANJI 237.

46. 115 HANJI 98.

period of separation sufficed in the decision of August 30, 1977 by the Tokyo District Court.⁴⁷ If a considerable period of separation is required, both parties will be very old by the time they obtain their divorce decree. In the September 2, 1987 case, the petitioner was seventy-five years old and the respondent was seventy-one. Needless to say, if a petitioner is young, the sooner the divorce is granted, the better, in order to enable "... the empty legal shell to be destroyed with maximum fairness and minimum bitterness, distress and humiliation."⁴⁸

The other two considerations indicated by the Supreme Court were whether or not the parties have any minor children in their custody and whether or not the non-petitioning partner will experience a great deal of mental, social or economic hardship after the divorce. In the September 2, 1987 decision the two adopted daughters were adults at the time of the decision. The Supreme Court was satisfied from the record that the wife would not experience grave mental, social or economical hardship after the divorce.

It is worthy to note how these matters have been treated in recent decisions by the lower courts. In the decision on May 29, 1980 by the Tokyo High Court the marriage had produced five children who had all become adults during a period of separation between the spouses which had lasted over twenty years. The Court noted that the wife would not incur any financial difficulties as a result of the divorce. The Court further mentioned that the parties had sincerely tried to reconcile their differences, and that the petitioner was not solely responsible for the matrimonial breakdown (although some suspicion about his sexual relationship with another woman was seen in the judgement).⁴⁹

The decision of December 14, 1984 by the Sendai High Court stated that there were five children. Two children had died and three were no longer minors. The Court noted that the parties'

47. 872 HANJI 85.

48. Her Majesty's Stationery Office, *The Field Choice: Reform of the Grounds of Divorce*, Commd. 3123, ¶ 15 (1966).

49. 968 HANJI 62.

relatives gave sufficient support to the wife to ensure a comfortable life-style even though she had no property or earnings.⁵⁰

The decision of December 24, 1986 by the Tokyo District Court indicated that there were no problems concerning the welfare of the children. At the time of the decision, the children were financially independent and the husband had already distributed the proper amount of his property to his estranged wife.⁵¹

Finally, in the June 30, 1987 decision by the Okayama District Court, the plaintiff (the husband) and the defendant (the wife) had no children in their marriage. However, the petitioner did have two daughters from his illegal union with a woman whom he had been cohabiting with for more than twenty years. The husband had previously resided with his wife for only seven months. Both daughters were no longer minors. The petitioner was fifty-nine years old and the respondent was fifty-five years old at the time of the court's decision. The defendant was expected to receive twenty-five million yen for her financial support as a result of the distribution of property after the divorce. The respondent's refusal of the divorce seemed to the Court to result from excessive feelings of reprisal or revenge. To approve this divorce was not against the rule of "faith and trust in the performance and exercise of the rights and duties" of marriage even though the plaintiff was solely responsible for the original matrimonial offense.⁵²

In their interpretation and application of Article 770, Paragraph 1, Part 5 in the latter decision of September 2, 1987, it appears that the Supreme Court moved towards the decisions of the lower courts which granted divorce in cases brought by the petitioner-at-fault.

Additionally, in a similar case on November 24, 1987,⁵³ the Supreme Court dismissed an appeal brought by the wife (respondent) against the appellate court's decision on December 15, 1986 approving the divorce petition by the husband (petitioner),

50. 1147 HANJI 107.

51. 1223 HANJI 81.

52. 640 HANJI 237.

53. SAIBANSHU (No. 152) 233 (1987) [Civil Case, Reported by the Supreme Court] No. 152, 233 (1987). See 654 HANJI 137.

thereby following the precedent established in the decision of September 2, 1987. In the November 24, 1987 case, the period of cohabitation was short (six years), but the period of separation was long (thirty years) so that, at the time of the divorce hearing, the parties were already of an advanced age. There were no minor children. Moreover, since there were no special circumstances, such as extreme bitterness or distress caused by mental, social or economic factors, the approval of this petition was not remarkable as being contrary to social justice. Thus, the Court concluded that the petition was properly approved. The Court based its conclusion on the rationale that the lower court should not dismiss a divorce petition for the sole and exclusive reason that the plaintiff is a petitioner-at-fault.⁵⁴

Likewise, in two later decisions, February 12, 1988⁵⁵ and April 7, 1988,⁵⁶ the Supreme Court again followed the precedent established in the decision of September 2, 1987. In the February 12, 1988 case, by the end of the oral hearing in the High Court, the period of separation had been about twenty-two years. In the April 7, 1988 case, the period of separation had been about sixteen years. In both cases, the Court was satisfied with the conditions which the Supreme Court had required in the decision of September 2, 1987. In each case, the High Court ruled that the petitioner-at-fault could not obtain a divorce, resulting in an appeal by the petitioner-at-fault. The Supreme Court stated that, in addition to the divorce case itself, another trial was necessary to reconsider whether or not there were special circumstances, and to determine the financial needs of the defendant. The Supreme Court overruled both decisions and remanded the cases to the High Court for reconsideration.

There are other theories by which a petition by a petitioner-at-fault can be approved. For example, the decision of December 14, 1984 by the Sendai High Court was based on the theory of

54. SAIBANSHU (No. 152) 233 (1987) [Civil Case Reports by the Supreme Court]. See 654 HANJII 137.

55. SAIBANSHU (No. 153) 335 (1988) [Civil Case, Reports by the Supreme Court].

56. SAIBANSHU (No. 154) 1 (1988) [Civil Case, Reports by the Supreme Court].

exemption from matrimonial offense in view of the parties' long period of separation.⁵⁷ On the other hand, from an academic point of view, the plea of "*clausula rebus sic stantibus*," normally applicable to claims in property contracts, might be applied to divorce cases. Furthermore, there is an interpretation for making a more lenient judgement in the case of a prolonged cohabitation by a petitioner-at-fault and his lover. In addition, a "no fault" interpretation was made in the Diet Discussion which preceded the creation of Article 770, Paragraph 1, Part 5 in 1946. This interpretation was not derived purely from the doctrine of marriage breakdown. However, the interpretation does seem to be against those opposing those who do not approve of petitions by the petitioner-at-fault.

In conclusion, a primary difference between divorce by the mutual agreement of both parties and divorce by the judicial divorce process is that the former is available for obtaining a divorce regardless of the reason or cause for divorce. The validity of this type of divorce is based on the parties' voluntary agreement and showing that there is absolutely no conflict. It might be said that this divorce by mutual agreement means not only "marriage breakdown" but also a "free divorce," or "dissolution of marriage."⁵⁸

On the other hand, a divorce by the judicial divorce process requires, as the minimum standard, a state-imposed divorce of an irretrievable breakdown of the marriage in question. Thus, at the judges discretion, it is enough to establish that there exists an irretrievable breakdown of the marriage. It should be noted that Article 770, Paragraph 2 provides that "in cases where any or all of the grounds mentioned in items (1) to (4), inclusive of the preceding paragraph exist, the Court may dismiss the action for divorce if it deems the continuance of the marriage proper in view of all circumstances."⁵⁹ It should also be noted that this article

57. 1147 HANJI 107.

58. I prefer the more neutral terms "free divorce" or "marriage dissolution" to the term "marriage breakdown," which has a strong and definite negative connotation.

59. MINPO (Civil Code), Law No. 89 of 1896 and Law No. 9 of 1898, Art. 770 (2 EHS Law Bull. Series FAA 130) (translated into English by Fukio Nakane).

does not apply to divorce under Article 770, Paragraph 1, Part 5: "... if there exists any other grave reason for which it is difficult for him or her to continue the marriage."⁶⁰ Thus, divorce petitions based upon these causes (Article 770, Paragraph 1, Parts 1-4) are practically limited to being brought to court by the innocent party. That is, they can only be brought to court if the other party has committed an act of unchastity (Part 1), or because of the other party's malicious desertion (Part 2), or on account of the other party's disappearance for more than three years (Part 3), or because of the other party's acquisition of a severe mental disease from which there is no hope of recovery ((Part 4) - which might be termed a dual no-fault divorce). These innocent party (or dual no-fault) petitions may be dismissed by the Court's utilization of the provision provided in Article 770, Paragraph 2. If an interpretation based on Article 770, Paragraph 1, Part 5 is opened in the widest scope (an irretrievable breakdown of marriage being the only basis to obtain a divorce decree with no conditions) it is easier for the petitioner, regardless of whether or not he is responsible for the matrimonial offense, to obtain a divorce decree under Part 5 than on any of the other grounds.

If the court were to apply Paragraph 2 to Part 5 in the same manner as applied to the grounds specified in Parts 1 through 4, then the Court might deny a petition under Part 5 from the petitioner-at-fault. The Court must make a more strict and careful interpretation when permitting divorce decrees on the provisions of Part 5. This view is nearly identical to the one expressed by one of the Supreme Court judges in his instructive opinion which supplemented the conclusion of the Court's decision in the case of September 2, 1987.⁶¹ A more proper and reasonable interpretation for Part 5 is that unless there are special circumstances which are opposed to social order, ethics, justice and equity, judging from all

60. *Id.*

61. *Judgment on the Admissibility of Divorce Sought by a Spouse Responsible for the Ground For Divorce*, 41 MINSHU 1423; 23 *Series of Prominent Judgments of the Supreme Court upon Questions of Constitutionality*, 13 (translated into English by General Secretariat, Supreme Court of Japan 1989). See Section III, 2C.

circumstances, the Court is allowed to grant a divorce decree in the following cases:

1. In cases where there is a counter-petition or a preliminary petition brought by the innocent party who has no objection towards getting a divorce decree.
2. In cases where the other spouse's refusal is due to a revengeful or malicious attitude towards the petitioner solely because of the petitioner's past misconduct for which he has already provided satisfactory compensation to the other party and their children, whose mental, economic and social well-being is not in jeopardy.
3. In cases where the matrimonial offense was induced by the other party.
4. In cases where the matrimonial offense has occurred after the breakdown of the marriage
5. In cases where the petitioner-at-fault has frequently and sincerely tried for reconciliation.

Of course, in addition to the foregoing, the ability to maintain the financial support payments to the other party and to the children in that party's custody who need such support must not pose a problem. However, we should keep in mind that all these cases were brought to court by the husband (a petitioner-at-fault), and not by the wife. The innocent partner's (wife's) intention to continue her marriage bond as a result of her responsibilities as a parent (if there are children) stems from a desire to maintain a stable economic condition.

Cases brought by the petitioner-at-fault that have been discussed here have involved petitioners who were elderly or near to being elderly.⁶² The long periods of separation appear to be excessive for such a petitioner who may be too old to enjoy his

62. In the approved cases mentioned in Section IVA, the Notification of Marriage Records give the following registration dates:

<i>Judgement</i>	<i>Marriage Registration Date</i>
Sendai High Court decision, December 14, 1984:	1926
Tokyo High Court decision, May 29, 1980:	1937
Tokyo District Court decision: December 24, 1986:	1943
Supreme Court decision, February 12, 1988:	1948
Supreme Court decision, April 7, 1988:	1949
Okayama District Court decision, June 30, 1987:	1959

remaining years by the time he obtains his divorce decree. If the other conditions are satisfied, a shorter period of separation may suffice for a petitioner-at-fault to obtain a divorce decree.⁶³

Currently, there are no provisions concerning the minimum duration of the period of separation needed to obtain a judicial divorce. Steps should be taken to create a more certain and shorter period of separation. This move would help to clarify the requirements in obtaining a judicial divorce under Article 770, Paragraph 1, Part 5.⁶⁴

63. In several different countries, the legislative organ that is reasonable for divorce policy has shown much interest in defining the length of the separation period, one year or two years or so, required for the granting of divorce. For example, in England, with relation to a "one year time-bar for divorce from the date of marriage" (The Matrimonial and Family Proceedings Act, Part 1 (1984)) it was discussed in the legislative process as a different yet relative reason (Parliamentary Debate [H.C.] Special Standing Committees 203-04, col. 83 (Mar. 22 & 27, 1984).

64. Note: There is further information for those interested in seeing the entire contents of the September 2, 1987, Decision. This has been translated into English by the Office of Supreme Court. See *Judgment on the Admissibility of Divorce Sought by a Spouse Responsible for the Ground For Divorce*, 41 MINSHU 1423; 23 *Series of Prominent Judgments of the Supreme Court upon Questions of Constitutionality*, 13 (translated into English by General Secretariat, Supreme Court of Japan 1989).

For additional information on divorce law in Japan, see the following materials: 1218 HANJI 193; Izumi, *Chushoteki Rikon Genin toshiteno Hatangenin* in 2 KONINHO NO KENKYU 266 Yuhikaku, (1976); Kaji, *Sekyokuteki Hatanshugi to Shokyokuteki Hatanshugi* in 2 KONINHO NO KENKYU 272, Yuhikaku (1976); Kuki, *Yusekihaigusha no Rikonseikyu* in 897 JURIST 56, Yuhikaku; Nakagawa, *Rikon Seikyuken Ranyo* in 2 KENRI NO RANYO 50, Yuhikaku (1962); Oota, *Fufu no Horitsu*, Yuhikaku, (1980); Oota, *Hatanshugi* in 3 KAZOKU MONDAI TO KAZOKUHO 247, Sakaishoten (1958); Rokuya & Hatsuyo, *A New Case on So-Called 'A Claim for Divorce from the Guilty Spouse'*, 40 KATEI SAIBAN GEPPU (General Secretariat, Supreme Court of Japan (1988)); Shimazu and Nakagawa, *Shinzoku Sozoku*, 96, Nihon Hiyoron Sha (1981); Uchiyama, *Rikon Seikyu Kikyaku* in 3 KAZOKUHO TAIKEI 194, Yuhikaku (1959); Uramoto, *Legal Theory on the Principle of Breakdown in Divorce and the Protection of Spouse*, 32 KUMAMOTO L. REV. 119-21; Wagazuma, *Shinzokuho*, 176, Yuhikaku (1968); Wagazuma and Tateishi, *Shinzokuho Sozokuho*, 150, Nihon Hiyoronsha (1961); Yonekura, *Sekyokuteki Hatanshugi de nazeikenainoka* in No. 893 JURIST 38 Yuhikaku; Yoshida, *Konin-Hatan no Genin no Nintei nitsuite* in 2 Gendai Kazokuho Taikai, 207 Yuhikaku, (1980).

