An Essay of Legislations on the Prevention of Domestic Abuse
– The Law and Economic approach to Family Regeneration –

Although family violence and abuse have been suppressed and dealt with within communities and large families, with families becoming smaller and communities weakening, there is now a call for intervention by public organizations. In many foreign countries there are numerous laws related to domestic abuse, and in Japan there are the Child Abuse Prevention Law, the Elder Abuse Prevention Law, and the Domestic Violence Prevention Law (hereafter referred to as the DV Law) by lawmaker-initiated legislation.

While domestic abuse usually goes unreported, with the active intervention of public organizations having a substantial system of case reporting, the frequency of abuse may be greatly reduced if the abusers are severely punished. However, if the abusers are severely punished, the lives of victims will likely be threatened, so in the long run the Government should undertake measures for life security; meanwhile, due to strict punishments it is getting more and more difficult to detect abusive treatments. An active intervention into family abuse will cost the Government from both of the above viewpoints. Thus, one should always be aware of the limits to Government intervention.

If we look at the intervention of public organizations regarding domestic abuse from the economical perspective, we will see that while in the case of the abuse of children and the elderly such intervention serves to compensate gaps in the negotiation ability of the parties involved, the intervention in DV (Spousal Violence) cases works to prevent inadequate negotiations within the family, both characteristically different. The concept of family regeneration through the correction of offenders has been considered within the abuse of children and the elderly, where there is difference in the power relationship between the victim and the victimizer, but it is more important to consider the concept within the latter case of the abuse of women, where there is basically no difference in the power relationship. The enforcement of personal contract such as a marriage is normally dealt with through the negotiation of parties involved, the role of the administration should only be to offer immediate protection of the abuse victim and provide external resources necessary for the negotiation. The best method for resolving contract troubles in situations like domestic abuse is for the party causing the problem to realize what they have done and abide by the contract, and a central concept is necessary in the legislations where the priority should by all means be set on the promotion of individuals' awareness of the matter.

1. Introduction

Since ancient times there have been a considerable number of serious domestic violent acts and abuses. Many of these problems have been inhibited within communities and large families, while the government have intervened only in cases where severe injuries were inflicted.

However, since families have shrunk in size and communities weakened, the mechanism to effectively inhibit problematic behaviors is now diminishing and consequently. For example, Table 1 shows that the processing number of child abuse consultation increases year by year.
Table 1. Processing number of child abuse consultation

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<tr>
<th>Year</th>
<th>Number of Consultations</th>
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<tr>
<td>Fy.199</td>
<td>1000</td>
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<tr>
<td>Fy.1992</td>
<td>2000</td>
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<td>Fy.1993</td>
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<td>Fy.1994</td>
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<td>Fy.2015</td>
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As a result, the police or the government are called upon to fulfill that function. Since an abuser is usually treated as an offender according to the criminal law, the police respond to a case temporarily, before public organizations intervene directly into the family. However, as domestic troubles are easily concealed and the relationship between the victim and the victimizer continues even after the abuse has become evident, a preventive system to protect the victim from further abuse is necessary. For this reason, in many countries like Japan or South Korea, and in many states in the US, there are special laws stipulating how public organizations should intervene when an incident of abuse occurs, and how protection orders should be handed down by the court.

Despite that, there remain many questions concerning the intervention of the government in domestic abuse cases. In order to prevent abusive behaviors, the most effective way is to establish all sorts of reporting systems for the police and the government to actively intervene even in doubtful cases, in addition to punishing the victimizers severely according to the law. However, fearing police intervention, the abuse may become more concealed, with the cost of discovering the abuse running high and the punishment inevitably bringing the family to a collapse. Particularly in cases where the victims of abuse are the weak, such as children and the elderly, the punishment of the abuser would immediately threaten the lives of the victims, rendering it difficult for the government to tackle. As a result, the stricter it is, the costlier it would become for the government. Given the fact that intervention and protection costs are paid through tax, it will be necessary to opt for the best intervention method that will prevent further abuse, in which case we must think very seriously about the meaning and limitations of intervention.

In the US, methods of Economics and of Law and Economics have been introduced into family studies, while describing the significance of legal intervention in the family from an economics perspective. In contrast to that, most of the law and economics studies in Japan advocate the alleviation of regulations for reasons of efficiency, while the adoption of economics in the field of family studies is limited to women’s employment and the bearing of children. For that reason, the field of the understanding of each of the legislations concerning particularly the family is still an uncharted frontier. Nevertheless, in order to realize effective and less expensive measures in persisting domestic abuse, which may border on being a criminal act, economic viewpoints such as law and economics and cost-benefit analysis will be necessary.

Through such viewpoint, this paper aims to provide a new perspective on legislations concerning domestic abuse in Japan. The composition of this paper is as follows. In Section 2, the concept within economics of the intervention of the law in family matters is briefly summarized. In Section 3, examples of legislations in foreign countries are introduced. Due to

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1 Protection Order is an order the court issues to prevent abuse. In the US protection orders include one stipulating no further abuse, the Stay Away and No Contact Order, the Vocate Orders, limitations on negotiation meetings, payment of alimony, payment for medical and legal expenses, compulsory counseling, handover of guns, and so on (Kojima 2002, P93) .
the limitation of space, while introducing abuse related regulation in the U.S. and Britain, this paper will give a general but somewhat detailed introduction on regulations on domestic violence in South Korea, as a reference for Japan, while looking from the enactment of an overall legal act on domestic violence and the gradual application of it. In Section 4, the marriage contract in Japan and the intervention regulation on the child-parent relationship considered to be a pseudo contract will be examined with examples, and from the economic standpoint of many foreign countries. Section 5 serves as a conclusion of the paper, where an ideal method used to intervene in families in abuse incidents shall be discussed.

2. The significance of intervention in the family

(1) Marital relationship

A family is established by the marriage which is fundamentally a contract between a pair of human beings. In neo-classical economics, both spouses participate, each as an economic unity, in the negotiation for the division of labor and the distribution of resources within their family, and achieve some balance according to the form of their negotiation. Since within a family a member may not usually act hostilely, the Nash Bargaining Solution is chosen. In the Nash Bargaining Solution, the bargaining power and threat points that indicate the power relationship between two parties become important.

In economics, domestic violence between the husband and the wife is fundamentally considered to be one form of negotiation in the above-mentioned family situation. Although Wolters (2003) defines it as a private execution system which guarantees the execution based on a marriage contract, Farmer and Tiefenthaler in a series of papers demonstrate a different model, where the victimizer chooses the level of violence to maximize its effect as long as the victim cannot escape, while the victim on the other hand decides what actions to take upon comparing the effect attainable from escaping from home with the effect attainable from remaining at home. The fact that victims leave their homes is a sign that they have reached near the limits of domestic violence within which they can endure. Therefore, the existence of the various services, including shelters which support victims temporarily staying away from home and domestic violence laws, are necessary for the negotiations between the spouses even if such services are not used. Such services also indicate the possibilities, similar to having an income or usable resources outside married life, to enhance the wife’s bargaining power and thus decreasing incidences of domestic violence. In particular, Farmer et al. (2000), who explain that there has been a remarkable decrease of DV in recent years with factors such as the threat effects of divorce, the improvement of various services responding to DV, and the enhancement of economic conditions of women thanks to increased job posts for women. They propose the following as effective anti-DV measures: 1. further expanding of services responding to DV issues; 2. assistance measures for the improvement of women’s educational level; 3. initiatives for diminishing gaps in salaries, as an incentive to improve women’s employment opportunities and their income.

For researches on this subject, it is fundamental in the negotiation of resource allocation between husband and wife that the wife negotiates with the husband by using leaving home as a threat point. Thus, assuming on the premise that the wife is unable to leave home – unable to use such a threat point – then negotiation will be completely different. Based on an interview survey conducted in a remote district of India on domestic violence common in the area, Bloch et al. (1997) observe the following facts and show that domestic violence there is institutionalized as a means of negotiation of asset distribution between the husband’s and the wife’s families. The facts they have discovered are: 1. Marriages are determined by parents; 2. Divorces are extremely difficult; 3. The wife leaves home, goes and lives with the parents of the husband; 4. Violence is more severe in the case where the husband receives low income and the wife comes from a rich family; 5. The husband’s family as a group also participates in the domestic violence against the wife. Bloch et al. thus maintain that DV has become a system as a way of negotiation on the distribution of property between both families of the husband and the wife. It is concluded that DV itself is a system of keeping the wife hostage as a way of extracting as much asset as possible from the wife’s family, and is an example of systematized domestic violence explained by the selection model, where a husband and his family choose to be satisfied with a dowry and acquire social reputation, or to use violence as a family to

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2 Waite et al. (2000) said “two kinds of domestic violence exist: common couple violence and patriarchal terrorism.” In this paper, I don’t consider the latter case.
benefit of additional funds.

The meaning of marriage is generally interpreted using concepts of Law and Economics. In Law and Economics, the legal system and the social norm are explained using concepts in a contract, such as informational asymmetry and the signaling theory. The family is viewed as a privity of contract in the same context, and various problems are described as problems in contract privity. Since a marriage is the contract where sufficient positive investments (expressions of love, allocation of housework) and no disinvestments (problematic actions such as violence and extramarital affair) are performed between the parties concerned, domestic violence is considered to be an opportunist behavior in the marriage contract which is a long-term contract.

E. Posner (2000) explains that the essence of marriage is that it forms an exclusive relation with two specific people in the long run, and is a contract that maximizes the assets of both the husband and the wife, with “the surplus by marriage” obtained through the observation of the marriage contract by the parties concerned. Observance of such a contract is a marital duty, and making an effort to observe the contract will demonstrate to the community that the persons in concern are "good citizens". However, the opportunist behavior within the family, such as violence and neglect, and the opportunist behavior outside of the family, such as extramarital affairs, not only threaten a family's stability, but also spoil the stability of a community. Consequently, besides family negotiation, the community takes upon itself to enforce some kinds of control over the situation without depending on the law. Since for the individual one of the greatest purposes of being married is the desire to obtain a high reputation within a community through building a family, the community’s actions are effective in controlling opportunist behaviors. However, punishments carried out by such a community becomes a hotbed for problematic behaviors, such as charivari which is a kind of brutal punishment on a family whose standard the community does not accept, and discrimination against illegitimate children. Moreover, even if the persons in concern have come to an agreement with each other, such form of marriage will not be accepted by the community intolerant of its kind. Thus, as punishment by the community fundamentally carried a tinge of private punishment, it was gradually replaced by the divorce law as the modern state emerges. In addition, Posner maintains that, although in the usual contract law the content, format and the termination of the privity of contract are left to the freedom of the persons under contract, the form of the marriage law as a regulation of the marriage contract is strictly controlled. Posner makes a particular mention of the reasons for the implementation of strict regulations when entering and canceling a privity of contract, saying that apart from the ease of law intervention, a standard form needs to be established in order that members of a community may be able to recognize opportunist behaviors.

(2) Parent-Child Relationship

While a marriage is a contract with sufficient quantity of positive mutual investment and without disinvestments, similarly it can be considered that a parent-child relationship is also an implicit contract between the persons concerned. Brinig (1999) describes that, the classical meaning of parent-child relationship has changed today; from the kind of contract where parents rear, protect, educate, train and provide financial aid to their children while children care and protect their parents as they become old, to one where the execution of the contract is no longer fully guaranteed. Regardless of whether a parent faithfully executes the contents stated in the parent-child contract and makes sufficient positive investments or not, as the child has no way of knowing due to limited ability, even if the investment by the parent is insufficient, the child has no way of rectifying the situation through direct negotiation or trial. Therefore, while only the incentive of parental love and the child’s future financial care of the parent can guarantee that the parent would make sufficient positive investments such as sufficient education for the child and not conduct disinvestments such as abuse and negligence of the child, since various social securities sever such relationship, the possibility of child abuse may arise.

Brinig also explains elder abuse using this scheme. As with a franchise system, when the parent’s generation has a property which the child desires, it has the effect of the parent having control over the child’s actions. In this model, since

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3 Posner (2000) expresses that “the replacement of social or parental control by law, compared to a community crowd who can become morbid, reflects that opting for judicial officials who serve to provide good social order and correct judgments is a rational choice of regulation system.” (p.128)
the parent-child relationship continues with the parent threatening not to let the child inherit the property, the relationship between an aging parent and their child is dependent on whether or not the parent holds onto the property which they would pass on to the child. If there is property available there may be a family feud over it, when there is no property to speak of, the implicit contract of watching over the parent may be broken and abuse may then occur.

In the case of such parent-child relationship, the relation in which the parent invests in the child and the child returns the favor in the future, and which conventionally suppressed problematic behaviors implicitly, one can no longer expect the guarantee of sufficient positive investment and the inhibition of disinvestments simply with only family love. As a result, when problematic behaviors break out, the intervention of the government is then necessary as a body assisting the execution of the contract between the parent and the child.

3. Example of Domestic Abuse Laws in Other Countries

(1) Laws related to abuse in the U.S.

Regarding domestic violence in the U.S., several federal laws were enacted, with the Family Violence Prevention and Service Act in 1984, the Violence Against Women Act in 1994, and the Keeping Children and Families Safe Act in 2003. Since specific regulations relating to abuse are state-level laws, the federal laws are enacted under the set budget expenditure allotted mainly to the state and private sectors carrying out prevention programs. I would like to explain the outline of the California Family Code and the California Penal Code as examples of state laws. The former regulates the various orders concerning domestic violence, while the latter regulates criminal and punishment procedures concerning domestic violence.

1) Orders

Within the orders there are the emergency protection orders and the protective orders, among others, totaling to about 200,000 orders per year. These orders are issued by the judges in order to mitigate the imminent danger faced by victims.

2) Punishable acts and the punishments

Acts of abuse that are punished include battery, traumatic condition, and violation of a protection order. While malicious acts are punished as usual criminal offenses, the punishment can be reduced to probation and a suspended sentence provided that certain conditions are met. The conditions set to this effect require that the victimizer participates in a batterers program at their own expense, and normally if they finish a one-year course they can avoid charges against them. Such diversion program is widely applied in also drink driving cases, and it is an effective sanction method for the prevention of recommitment of offence; the reason being it places a large burden on the victimizer to do social services, such as cleaning and processing of waste materials, and participating in corrective programs at their own expense (where the cost is relatively high even for the first meeting and skyrockets when repeated); another reason is that it also places the victimizers under supervision even after the program has finished, thus giving them a disadvantageous position in various situations.

(2) Abuse-related laws in Britain

In Britain there are the Domestic Violence and Matrimonial Proceedings Act in 1976, the Domestic Proceedings and Magistrates Courts Act in 1978, and the Matrimonial Homes Act in 1983. Thereafter the Family Law Act was enacted in 1996 for securing the effectiveness of the procedures, making it possible for the court to issue the two orders known as the Occupation Order and the Non-molestation Order.

1) The Occupation Order

This order is issued by the court for the removal of a victimizer from the dwelling in concern in consideration of the health and safety of the persons and their children involved, as well as their assets.

2) Non-molestation Order

This order prohibits molestation of people having certain relationship with the party in question and of the children related to the said party. By molestation, it not only includes violence, but also stalking and threats.
(3) The outline of two domestic violence measures in South Korea

In South Korea, two laws known as the Prevention of Domestic Violence and Victim Protection Act and Special Act for the Punishment of Domestic Violence were passed in December, 1997. The two laws were established to provide methods for the protection and intervention in family violence cases in general. The main contents of the Law on Punishment of Domestic Violence Crimes are reference with Appendix 4.

While there are also laws in other nations established to stipulate the intervention in family violence and abuse acts, a considerable number of them aim at separating the offenders from their victim(s), as well as the reeducation of the offenders. The two South Korean family violence related laws prepares four steps of barriers, from emergency measures, temporary measures, probation, to the usual criminal code procedures. These laws seek the possibility of self-reflection and the character reform of the offender in all stages, basing on the strict treatment of the offenders as criminals implemented within the numerous diversion programs provided within the legal system of the U.S., and serve as a reference for the probation and the correction of the offenders.

4. The Framework of Intervention by the Law in Japan

In Section 2 and Section 3, we looked at intervention in family abuse in the theory and in the mirror of foreign cases. In this section I would like to discuss laws related to family violence in Japan.

Violent behaviors can be roughly divided into five categories: (1) physical violence; (2) mental violence; (3) sexual violence; (4) economical violence; (5) neglect and abandonment. There is already a criminal code set to respond to each of the violent behaviors. That means, in Japan there are laws established to respond to physical violence in (1), with articles on violence (Article 208), and injury (Article 204); to mental violence in (2), with articles on threat (Article 222), extortion (Article 223), and insult (Article 231); to sexual violence in (3), with articles on indecent assault (Article 176), rape (Article 177), semi-indecent assault and semi-rape (Article 178), death resulting from such acts as indecent assault (Article 181), and inducement to promiscuous act (Article 182). Moreover, for the economical violence described in (4), in response to embezzlement of assets there is an embezzlement article (Article 252), while the regulation under the Civil Code that includes a system of guardianship is applicable. In regard to (5) neglect and abandonment, there exit articles such as one on abandonment (Article 217) and another on abandonment by guardian (Article 218).

However, there lies a peculiarity within the family violence behaviors which hinders the application of the criminal codes as follows: (1) grasp of violent behaviors is difficult with the family as a thick barrier; (2) even if the facts are confirmed, in cases like child abuse the parental authority becomes a hindrance and makes lifeline support difficult; (3) explanation of the rationality of a constant lifeline support by the emergency protection organization is difficult; (4) the victim may not desire lifeline support. Items (3) and (4) are particularly important. For example, in regard to child abuse, since the child lacks judgment and information, therefore unable to negotiate with the adult or report to an organization that deals with such matter, it is natural that related organizations such as children’s consultation office, school, and child-care facility have a good understanding of the facts regarding the abuse, and finally intervene into the family. However, when the related organizations do intervene, and as the final step the child is separated from the guardian who happens to be the abuser, whether the child would actually desire for such outcome remains a question. Furthermore, the uniformed institutionalization can add mental stress to the child, while also having the possibility of depriving the chance to accumulate human resources such as actually hindering the child’s entrance into a university, thus making it doubtful whether this is desirable for the child’s future. This point is shared also in the case of elder abuse. Kato (2005) points out that there are many parents who do not desire to separate from their child (ren) even though they are being abused by the child (ren) or many parents who fear losing the opportunities of having visits from their child (ren) would tolerate having their pension

4) The contents of the two laws regarding measures for domestic violence are from the South Korean WEB Six Major Laws site.

(http://homepage2.nifty.com/tanimurasakaei/kankoku.htm)

5) Exception regulations are set in Articles 255 and 244 in regard to the usurper being the victim's spouse, a direct blood relative, or a relative living together.
and deposits taken from them. Moreover, considering the close relations as "the connections", it is understandable that, since in such case a victim would receive disadvantages in future prospects such as employment and marriage, they do not desire intervention by the law into the family. With the same kind of problems arising in the cases of the abuse of socially vulnerable children and the elderly, in the case the victim is an adult woman not rendered socially vulnerable, since the parental authority of the child and the distribution of assets are affected, it would be more difficult to explain the rationality of having an intervention by the government. Bearing the above points in mind, I would like to discuss the intervention of the law in Japan in response to abusive behaviors.

(1) Child Abuse

Violence against children by persons with parental right have always been present in the history of human kind and considered a necessary evil as part of the "upbringing" by parents. This has however, become a serious social problem as the severity of the situation is revealed in recent years. In the case of child abuse, while the Child Welfare Law which defines the procedure of how to handle abuse cases does exist, many voice the need to have a new legislation with announcement effects. Based on such opinion, the Child Abuse Prevention Law was enacted through legislation by House members in 2000. However, since unreported child abuse cases come to surface with the enactment of the law, the number of consultation cases related to child abuse at children’s consultation offices increased rapidly with 68% in fiscal year 1999, and with 52% in fiscal year 2000. Consequently, it has been supported by persons concerned that the Child Abuse Prevention Law lacks effectiveness, and a revised bill was drafted in response to this opinion, which was enacted as a revised law of the Child Abuse Prevention Law through legislation by House members in April, 2004.

The major contents in the current Child Abuse Prevention Law concerning intervention in the family are reference with Appendix 1.

While the Child Abuse Prevention Law specifies in regard to child abuse in general, the actual actions taken by public organizations depends on the Child Welfare Law. Articles in the Child Welfare Law related to intervention in the family that are applicable when a child has been abused are such as the measure taken by welfare office chief (Article 25), the measure taken by children’s consultation office chief (Article 25), the measure of entering into a protectory (Article 27 part 2), the measure to separate the child from the guardian (s) (Article 28), and on-the-spot investigation (Article 29); these regulate that the abused child be finally separated by the parent (s) by related organizations and be placed in a facility.

Under the Child Welfare Law and the Child Abuse Prevention Law, when a child is abused, even if restrictive, the organizations concerned are to enter into the family, protect the abused child, and may split up the family. In reality, there are various obstacles in intervening into families, with frequent cases where a children’s consultation office knew the facts to an abuse case but could not help the children. As a result, it has been pointed out that it is necessary to further reinforce the right to intervene. In which case, the intervention into the family would be necessary when the privity of contract between the parent and the child does not function effectively. In addition, the obligation to receive supervision is specified in Article 11 of the Child Abuse Prevention Law, and Article 27 of the Child Welfare Law specifies regulations for when rehabilitation of an offender is possible, all these are notable for not eliminating the possibility to rebuild the family.

In addition, Child Abuse Prevention Law is revised by legislation introduced by a Diet member in 2007. The major contents are; (1) child consultation center has authority to perform an entrance investigation to home though parents refused it; (2) limit of meeting and communication of parents for an institution entrance child; (3) A review of a parental authority system less than 3 years. This revision, particularly a forced entrance, suitable for a direction of a limit of parental authority.

(2) Elder abuse

The abuse of the elderly as a form of domestic violence must not be ignored. While child abuse has been recognized for some time, the situation concerning elder abuse has been obscure up to recently, and the severity of which are usually not noticed until a third party enters the household of the abused after nursing care is introduced.

In many cases, it is the blood relations whose domestic abuse of the elderly who are fairly old and require much nursing care. Generally, the reason is due to exhaustion from nursing, and the abuser is in a sense also the victim of elderly care,
having two sides of the same coin in comparison to the case of child abuse.

According to the “Survey on Domestic Elder abuse”, a first nationwide survey conducted by the Ministry of Health, Labor and Welfare in fiscal year 2002 at national medical institutions and nursing care establishments regarding domestic elder abuse, the average age of the abuse victims is 81.6 years old, three quarters of whom are women, while the majority require level three nursing care. As per the relationship between the abuse offenders with the victim, the abuse offenders are sons at 32.1%, daughter-in-laws at 20.6%, spouses at 20.3%, and daughters covering 16.3%. In addition, for the types of abuse carried out, 60% was psychological abuse, and half are abuse through abandonment of care and physical abuse. As a remarkable characteristic in elder abuse, it has been pointed out that the remarkable characteristics of elder abuse are that the victims are hardly aware they are being abused and that the abuser tend to cover up the truth.

In regard to the government’s handling of elder abuse, the system of measures is stipulated in Article 10, Section 4 of the Welfare Law for the Aged. The conditions of the measure states that, “the victim in question must be above 65 years old, has trouble pursuing daily life due to physical or mental disabilities, and clearly has difficulty using visit nursing set forth by the Nursing Care Insurance Law for reasons beyond their control”, where the reasons beyond control naturally include being abused. However, this measure to be useful, the elderly person in question must be entrusted to nursing caregivers or be institutionalized at nursing homes, or support work for the residence of the elderly must be applied, which all depends on the vacancy of the facilities in question and the agreement of the said elderly person, and with the management right to assets like annuity being held by the abuser, the problem that financial abuse goes untreated, thus making this measure rather ineffective to handle an abuse incident requiring urgent attention.

As elder abuse attracts attention, and with the founding of the “Japan Academy for the Prevention of Elder Abuse” in 2003, there has been a movement aiming for new laws on abuse prevention thanks to the above-mentioned recognition of abuse, resulting in various symposiums held frequently. On November 1, 2005, a Law on the Prevention of Elder Abuse and Support for Caregivers (hereafter as the Elder Abuse Prevention Law) was passed by House members on November 1st, 2005 and implemented in April 2006. The Elder Abuse Prevention Law has an almost identical structure with that of the Child Abuse Prevention Law, having similar characters. The major contents in the current Elder Abuse Prevention Law are reference with Appendix 2.

As seen above elder abuse reflects the fact that there are many incidents within the family due to exhaustion from nursing, and the law concerning this issue is made up from the definition of the issue, early detection, reporting, investigation of the actual situation and protection, counter measures, and support for the abuse victims. As for the life and physical protection of the victims as a priority, with the consultation, guidance and advising of the caregiver set under Article 6 of the Elder Abuse Prevention Law, and the support to alleviate the burdens of the caregiver set under Article 13, the article aims for family rebuilding through alleviating the burdens of the victimizer, even if the victim is temporarily separated from the victimizer.

In the case of the Child Abuse Prevention Law and the Elder Abuse Prevention Law, which were independently enacted as legislations of House members and having no mutual connections, the intervention by the Government into troubles between the victims and their families or people close to them should by all means be only used as a means of emergency evacuation. With the happiness of the person in mind and the administrative costs borne out of an intervention in consideration, there is a shared general concept that through the rebuilding of the family all parties, i.e. the abuser, the abused and the Government, would all become satisfied.

(3) Violence between spouses (DV)

With child abuse and elder abuse, even if assuming the aspect of the victimizer ending up abusing the victim due to exhaustion from nursing care, the factual relationship of abuse is clear. Therefore, as mentioned before, the laws concerning these issues are able to respond sufficiently through a defined course for the regeneration of the family by first defining the issue, and through early detection of abuse, reporting, investigation of the actual situation, protection of the victim, and measures, and finally rebuilding the family. On the other hand, although the Law for the Prevention of Spousal Violence Against Women (DV Law) was established in light of violence toward a spouse, it differs greatly from the two previously
mentioned laws.

First, different from the Child Abuse Prevention Law and the Elder Abuse Prevention Law, when it comes to family violence many of the victimizer and the victim are adults who are able to think and judge and to live independently. In this case, even without the intervention of the government, a divorce may be used as a threat point to negotiate and solve troubles between the couple peaceably. If they have a child or children, actions such as the victimizer’s conviction as criminal or divorce would likely influence the future of the child (ren). Therefore, as Farmer and Tiefenthaler point out, the choice of action opted by the victimizer and the victim in a domestic violence case is a question of cost benefit problem within the marriage contract, and is a no more than a category of rational judgment between the persons in question. Being part of this category of personal rational judgment, the intervention by the government in spousal violence is difficult and this would be one of the reasons why the enactment of a law for dealing with this kind of issues has not been possible in Japan.

Nevertheless, problems related to violence against women have been seen as an important international issue since the “United Nations Decade for Women” international conference in Nirobi held in July, 1985. Following this international trend, the DV Law in Japan was established by legislation on the instance of House members on April 6, 2001.

When the DV Law was enacted, support centers functioning as specialized agencies were set up according to this law, while at the same time the main task was to newly introduce a protection order system. The protection order system functions under the Civil Code more or less as an equivalence to the various orders issued in court, although within the Civil code system the punishment for the violation of the protection orders is only a fine, which posed a great problem concerning whether or not instantaneous effect and effectiveness in the examination process were lacking. As a result, as an exception to the distinctive principle of the Civil and Criminal Codes, imprisonment was introduced under the Criminal Law. In addition, as the human rights of victimizers should also be respected and that evicting them unilaterally from their homes as a basis of their life also renders a violation of their private right, the period of the eviction order is limited to two weeks which is the minimum time required by the victim to move out. In order to maintain the consistency with the general criminal law and the Anti-Stalking Law, the victims by definition are limited to persons abused with violence from their spouses, and the DV Law’s priority was to carry out emergency evacuation of the victims to help them from imminent life and physical dangers posed by the violence of their spouses, violence which is limited to physical violence according to the criminal law.

Despite that, many people working on-the-spot to help the victims have voiced their dissatisfaction that there is insufficiency in the regulations set by the DV Law since the enactment of the law. The following is a list of amendments of the DV Law publicly proposed by mostly women’s groups.

1) Expansion of protection order subjects
   While expanding the scope of subjects under the DV Law, from marital relationship to include the ex-husband after divorce or a current lover, the amendment also seeks to include children in fear that children may be taken away.

2) Simplification of statement procedure of request for protection order
   According to the proposed amendments, since a protection order is a restriction of basic human rights, it is necessary to guarantee objectiveness and fairness, and when making a request for an order a fixed but simplified procedure will be required.

3) Restriction of contact with subjects of a protection order
   As protection orders primarily aim at the prevention of direct violence inflicted upon the victims, while restrictions on loitering around the residence of the victim and contact through telephone, letters, FAX and e-mail have not been included, with the priority set on preventing pressure placed upon the victims, the amendment seeks to place all the forms of contact under regulation.

4) Definition of violence
   While PTSD is added in the law, since an assault crime under the criminal law is concerned with physical violence, mental violence as an assault where the facts hardly remain as evidence was removed from the category of violence. The amendment however, aims to place all kinds of violence, such as mental violence, sexual violence and economical violence as subjects of protection orders.
5) Clarification of support for independence

Seeking for more support for DV victims to rebuild their lives and become independent.

Having received such opinions, the law was revised again and enacted by legislation of House members on May 27, 2004. The main contents of the current DV Law are reference with Appendix 3.

At the time of enactment and excluding the on-the-spot implementation, the DV Law strictly followed the principle of system for emergency evacuation, at least in principle and text of the law. However, in order to promote the independent life of the victims as an activity of spousal violence consultation support centers, the trend has turned from temporary protection of the victims toward promoting their independent life, as seen in the amendment of the DV Law in 2004 stipulating support for the victims’ employment, securing of dwelling, utilization of support systems (Article 3, Section 3), or that welfare offices must take necessary measures to support the independence of victims (Article 8 Part 3).

In addition, just before ordinary session of the Diet closing of June, 2007, the second revised DV Law was submitted, and it was passed on July 5 of the last day. The major contents are (1) the protection order intends for a divorced spouse (Article 10 Section 1); (2) add a telephone and an email to a domestic restraining order (Article 16,17); (3) add the relatives and others of the victim to the object of the domestic restraining order (Article 10 Section 4).

5. Present state and future direction of intervention

(1) Problem of intervention by the government = case studies of the DV Law

So far we have seen that the intervention of the law regarding domestic violence and abuse share the common point of securing of the victims’ safety for a short term, while securing the victims’ safety by separating them from the victimizers using orders of different natures for middle to long term. In child and elder abuse incidents where the victims are incapable of being independent, if rehabilitation of the victimizers fails the only solution would be to finally place the victims at institutions or find foster parents for them. As the parent-child relationship is not an optional choice for the victims, they cannot be held responsible for the abuse. Therefore, it is inevitable that administrative costs are borne out of caretaking of the victims by the government. On the other hand, as a family is formed on the basis of a marriage contract, under the DV Law victims cannot be exempt from their responsibilities for having made the contract. Thus, while it is important to make the maximum effort to execute the contract appropriately and move toward the regeneration of the family, the concept of the rehabilitation of victimizers in the former case is non-existent in the latter case in Japan’s legal system. Therefore, I would like to discuss the problems by making examples of what kind of problems would arise from this and the possibility of problems arising under the DV Law.

1) No considerations on administrative cost

Through the entire Japanese DV Law the texts are concerned with the protection of victims. Japan’s DV-related measures seem to be structured on the premise that (a) a DV offender uses the violence to the extent that the victim senses danger to life; (b) the offender possesses sufficient time, money and knowledge to relentlessly search for the victim; (c) the offender does not have the possibility of reflecting upon their conduct and enter into rehabilitation. Such images of the offenders however, are only given as examples of extreme cases; it is unlikely that an offender would satisfy all the above conditions. Emphasis is very often placed on facts concerning the relentless search by the husband as a DV offender, ignoring the costs necessary for the husband in his search (direct costs, opportunity costs borne out of being unable to work, bad reputation and trouble with the police, to name a few). If great cost is spent in finding the separated spouse, while the chances of finding the said spouse would increase, the husband will not be able live with such high cost. Therefore, such behavior of the victimizer listed as an actual example is irrational.

In the designing of measures for the protection of victims, although administrative costs will differ greatly depending on what kind of victimizers are supposed; if we assume the victimizer to be as described above, then it will require an enormous amount of costs to place security at shelters, to issue a protection order to persons in concern and implement protection, and to support the life of victims who cannot work, in the event that they must live a long-term fugitive life and to provide flexibility in various social systems such as resident registration. While it may be meaningless to spend a large sum of money to respond to a non-substantial image of DV offenders, it is equally meaningless with the reality.
where the lack of awareness of such costs pays no heed to the correction of victimizers and simply gives priority only to supporting the independence of the victims.

2) The ambiguity of reasons for DV victims to bear costs
When the DV Law was changed to the Legislation for the Protection of Victims, a clear explanation was necessary on why the independence of a DV victim within measures for single women should receive special attention. By offering special treatment for only domestic violence victims among single women who are in similar situations, it is inevitable that this would become an unfair treatment for women who are widowed or whose marriage has failed due to reasons other than domestic violence from their husbands. Generally speaking, if a public sector enters a market and gives favors exclusively to a particular group, not only will this cause the effective market distribution of resource to fail, but moral hazard will also occur to the group with special treatment as an incentive for falsifying their situations to a group without the special treatment, thus resulting in the increase of social unfairness. Therefore, if a victim of domestic violence is to be favorably treated under measures devised to that effect, then it will be absolutely necessary to form a national agreement and to carry out strict identification of eligible victims.

3) The ambiguity of contract responsibilities
As in the defining of family violence by Wolfers as a system of private execution to guarantee that rules in a marriage contract are obeyed, while under a private contract it is possible for a spouse to execute a contract based on the mutual ownership, the penal sanction that guarantees such execution inevitably becomes a private matter. That is to say, private punishments (including when violence is involved) are defined from the nature of the contract; and in the event that a public organization must intervene into the family when the situation goes beyond emergency evacuation, then such execution of contract between individuals will be taken over by the public organization, which becomes extremely unorthodox. Apart from emergency evacuations, the execution of contracts by individuals should be handled by the persons bound by the contracts as their self-responsibility.

(2) Conclusion
Like parent-child relationship, while the family fundamentally sets off with a given relationship, within the same generation it is fundamentally built upon the individual action of marriage. Thus, as can be seen in the previously mentioned problems in the DV Law, there are problems with the intervention of the law into domestic problematic behaviors such as 1. the soaring of cost required to implement the measures; 2. the difficulty in explaining the burden of costs; 3. the ambiguity of contract responsibilities; and so on. In addition, as a more essential problem, when the government intervenes in individual contracts, the entirety of such kind of contract may very well be altered by the intervention.

In regard to 1, having the intervention as a way of bodily protection is not at all exempt from administrative costs. Of course, from the social justice stance we cannot deny the idea that there are policies that must be carried out, even if there are problems with the effectiveness, the validity and the cost. However, we must not forget also that such costs for policies are being borne by tax. Also for the aforementioned measures covering victims even outside of emergency in cases concerning problematic behaviors, there is a lack of cost awareness.

In regard to 2 and 3, assuming that some kind of inconvenience should occur within the family, the responsibility falls first on the shoulders of the individuals making up that family, their share of responsibility in the contract must not be ignored at all. As a reflection of such circumstances, there is a stipulation on the support for (education of) abusers in the Child Abuse Prevention Law and the Elder Abuse Prevention Law, with the perspective of reintegrating families under both laws. And while it is not a law related to abuse, the Anti-Stalking Law, which is also a legislation of House members, stipulates the levels of orders and the procedures for hearings leading up the issuance of an order, as well as the implicit goal to help victimizers become aware of and amend their actions. The similar viewpoint is shown directly in Korean domestic violence prevention laws, and in order not to make the responsibility of persons under contract in question ambiguous, priority should be given to the regeneration of the family with the victimizer included, and government intervention should be limited to emergency evacuations only.

Furthermore, if state or government intervention becomes a norm, and if we see it from the game theory, then it will
subtly influence the power relationship within the family that is fundamentally built upon negotiation between independent negotiators. In particular, intervention by a third party under DV-related laws may affect the resources distribution within the family. When one side in a family negotiation has an advantage, and that becomes the control factor in non-DV ‘proper’ negotiations, then resources distribution through free negotiations in the family may be damaged. This would in the end link to the transformation of the nature of the family as a main body.

There are numerous arguments to the intervention of the law in the family as shown above. If we peer into history we can see that while the community was once the main body regulating the family for a long time, it was replaced in modern times by the nation. After that, as the nation eased on the standards of regulations and retreated from making regulations, the family and the community once again became the main bodies under moderate regulations. The reason for the first transition of the main regulating body from the community to the nation was due to the arbitrary of regulations and instability in the standards of intervention and fairness which are unsuitable for a modern nation; and the reason for the transition from the nation to the family or community may be attributed to criticism on the intervention by the nation inside the boundaries of individual life and the spread of small government concepts.

However, such regulations not depending on the nation have arrived at a big turning point with the current progress of declining birthrate and aging society. The family is a basic unit of the society and if we consider that the conditions of the family can greatly affect the social system itself, then we cannot abandon regulations on marriage contracts. That being said however, much is not expected of nuclear families and in aging and weakening regions; and there is no rationality in the policy of disintegrating families operated by the state upfront.

Within the conventional laws in the field concerning family, it is thought that there existed a tacit ranking of the three parties: the family, the individuals and the government, in the order of the individual > the family > the government. This ranking is common also to the Child Abuse Prevention Law and the Elder Abuse Prevention Law, and is restricted to the minimum role necessary in the field of family within administrative regulations. However, the order in Japan’s DV Law (Violence against Women Act) is clearly the individual > the government > the family, demonstrating the view that the nation is more superior to the family. In other words, this means no other than the concept of putting the nation first, with the nation superseding private contracts in bringing the one-sided happiness of persons in question under a contract.

In the relationship between the family and the law, presently there are two standards as described. From the economics and cost perspectives, it may be wise to avoid excessive predominance of the nation. Thus, when an equal negotiation between the victimizer and the victim is possible, excluding emergency evacuation cases, the negotiation between persons concerned should be regarded as the basis and its process should be guaranteed. The government should fulfill its role as aid in setting up a system of protection order, securing shelters to ensure the safety of persons in question, in order that the negotiations may progress without ado.

In the present, it is clear that Japanese family legislation is suitable for a direction of regulation by a nation. However, the best solution to the problems of privity of contract like domestic abuse is for the persons carrying out the deeds to be aware of, reflect and cease doing what they have done so as to adhere to the original contract. Although this may seem like going round about within the legislations, it seeks the global view that priority should be given to urge the individuals’ self-awareness.

References
― (2000), Explaining the Recent Decline in Domestic Violence, Working Paper No.100-09,
Appendix 1.

The major contents in the Japanese Child Abuse Prevention Law

1) Definition of abuse (Article 2)
This Article defines child abuse as the behavior of the guardian against the child under supervision, with four categories given: physical abuse, sexual abuse, mental abuse and abandonment.

2) Specification that no one may abuse a child (Article 3).

3) Duty borne by national and local public authorities (Article 4).
(a) In order that children can live in a sound family environment, this article establishes the system for early detection of child abuse, protection of abused children and support for their independent life, assistance in parent-child reintegration, and other support (Section 1).
(b) Training of persons related to support work (Section 2) and Securing human resources (Section 3).

4) Early detection of child abuse (Article 5)
Stipulation for efforts by organizations concerned in the early detection of child abuse (Section 1) and the cooperation of persons related to support work with the national and local public authorities (Section 2).

5) Reporting child abuse (Article 6)
This Article stipulates the obligation for persons detecting a child suspected to be abused to report the incident.

6) Protection of abused children (Article 8)
This Article stipulates the implementation of safety confirmation and protection of the child in question if a report is received by a welfare office or children’s consultation office.

7) Request the police chief for assistance (Article 10)

8) Guidance for guardians who are child abuse offenders (Article 11)

9) Support for abused children (Article 12).
This Article stipulates the implementation of childcare center placement, education and support for the independent life of the child.

10) Stipulations on parental authorities
The Article stipulates the adequate use of discipline on the child by persons with parental authority (Article 14, Section 1), the denial of exemption from responsibilities for reasons of parental authority concerning crimes such as child abuse (Section 2), and the adequate management of parental authority forfeits system (Article 15).

Appendix 2.

The major contents in the Japanese Elder Abuse Prevention Law

1) Definition of abuse (Article 2)
This article defines elder abuse as abuse of the elderly by persons carrying out nursing care or working at nursing centers. It classifies four categories in abuse by caregivers: physical abuse, abandonment, mental abuse and sexual abuse; and five categories in abuse by persons working at nursing centers, the fifth category being improper profits via asset handling.
2) Duty borne by national and local public authorities (Article 3)
   (a) Establishment of a system for early detection of elder abuse, protection of abused elderly and adequate support (Section 1).
   (b) Training of persons related to support work (Section 2)
3) Early detection of elder abuse (Article 5)
   Stipulation for efforts by organizations concerned in the early detection of elder abuse (Section 1) and the cooperation of persons related to support work with the national and local public authorities (Section 2).
4) Reporting elder abuse (Article 7)
   This article stipulates the obligation for persons detecting an elderly person suspected to be abused to report the incident.
5) Protection of abused elderly persons (Article 9)
   This article stipulates protection for the abused when the above-mentioned report is filed at municipalities.
6) On-the-spot investigation (Article 11)
   This article stipulates for mayors of municipalities to conduct on-the-spot investigation and questioning to investigate the truth of an elder abuse case.
7) Request the police chief for assistance (Article 12)
   This article stipulates the assistance of police officers in the above-mentioned on-the-spot investigations.
8) Guidance and advice for caregivers who are elder abuse offenders (Article 14)

Appendix 3.

The major contents in the Japanese DV Law

1) Definition (Article 1)
   Domestic violence (DV) is defined as “physical or verbal violence behavior of the spouse, which harmfully influences the mind and body”. However, the violence subject to the protection order is limited to direct physical violence (Section 1). In addition, the spouse is defined as the person in a marital relationship (including de facto) or a former spouse (Section 3).
2) Duty borne by national and local public authorities (Article 2)
   The national and local public authorities are responsible for preventing violence from a spouse and protecting the victim.
3) Basic policy and basic plan (Article 2 Part 2 – Part 3)
   For the prevention of domestic violence, on the national level the drafting of a general policy is required, while in the municipalities the drafting of a basic plan is required.
4) Spousal violence consultation support centers (Article 3)
   Municipalities are to help appropriate facilities such as women’s consultation offices function as spousal violence consultation support centers. The purpose of the support centers should be for the consultation, counseling and temporary protection of victims.
5) Reporting (Article 6)
   Anyone who knows a domestic violence victim is encouraged to inform a support center of the police. Persons engaged in medical care may also do so.
6) Prevention of abuse by the police and assistance from persons of authority such as the chief of police (Article 8)
7) Protection order (Chapter 4)
   When fear of severe harm to the life or body of a domestic violence victim through further violence from the spouse becomes great, the court is to prohibit the said spouse from approaching the victim for a period of 6 months (Article 10, Section 1, Clause 1), or retreat from the house for a period of 2 months (Article 10, Section 1, Clause 2) prohibit the said spouse from approaching the child (ren) (Article 10, Section 2), and from loitering near the house (Article 10, Section 1, Clause 2), based on the request of the victim. If the orders are violated, the person in question will be
sentenced to up to 1 year of imprisonment or be fined up to 1 million yen (Article 10, Section 1, Clause 2). In addition, a second request for an eviction order is accepted (Article 18, Section 1, Clause 1).

8) Independence support from welfare offices (Article 8 Part 3)
Welfare offices are to take necessary measures to support the independence of victims, as stipulated by such laws as the Daily Life Security Law, the Child Welfare Law, and the Law for the Welfare of Fatherless Families and Widows.

9) Other
This Article stipulates such matters as the necessary support by private organizations to prevent DV, educate people to deepen their understanding, and for persons involved in support work, it stipulates to respect human rights, such as, not to discriminate against the victim’s nationality or disabilities when on training and carrying out the support work.

Appendix 4.

The outline of two DV Laws in South Korea

1) Purpose (Article 1)
By defining a special case concerning criminal punishment procedures in family violence crime cases and by carrying out probation for environment adjustment and the correction of the offenders, the law aims to restore peace and stability in a home destroyed by domestic violence, thereby nurturing a healthy home.

2) Definition (Article 2)
Family violence is defined as physical, mental, or asset damage between family members (No. 1), where family members is defined as the spouse, lineal ancestors or descendants, stepparents (either one being related in the matter concerned), and relatives living together (No. 2).

3) Obligation to file report (Article 4)
The article ordains the right to report a case of family violence when it becomes known, and the obligation for related parties, such as education, medical and welfare facilities, to file report.

4) Emergency measures against family violence (Article 5)
The judicial police who receive a report is responsible for paying immediate visit to the place where family violence is committed, bringing the violence under control, and escorting the victim(s) to a family violence consultation office, a shelter, or a medical institution.

5) Request for temporary measures (Article 8)
Irrespective of the emergency measures stipulated in Article 5, the public prosecutor can request for temporary measures set in Article 29 when there is fear of recurrence of family violence.

6) Temporary measures (Article 29)
This article allows the judge to order the eviction of the offender from the home, the prohibition for them to approach the home, the referral to medical institutions, and the detention of the offender.

7) Probation (Article 40)
When probation is deemed necessary according to the result of a trial, the judge can restrict the offender regarding approach to and parental authorities over the victim(s), order the offenders to do social service and attend correction program, put them under probation, send them to a rehabilitation facility, request treatment at a medical institution and have consultation sessions at a consultation office (more than one of these may be implemented).

8) Cancellation of probation (Article 46)
When probation is not carried out or not duly executed, the court must cancel the said probation and turn the case to a public prosecutor of the Public Prosecutor's Office who will handle the case.

9) Termination of probation (Article 47)
When the court deems that the offender’s character has been corrected and normal home life can be maintained, it can then terminate all or part of the probation.

10) Cost liability (Article 48)
The cost arising from the probation is to be borne by the offender.
In addition, having the same purpose as that of Special Act for the Punishment of Domestic Violence, Special Act for the Punishment of Domestic Violence specifies the shelter for the protection of victims and consultation offices for domestic violence crimes.