

# Against Intra-Household Exploitation

—Philosophy and Policy for Equity within the Family in Japanese Context—

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## Abstract

Many workers quit job and have an interrupted career in order to take family responsibilities, while others do not so. This paper makes an attempt to theorize why that situation is unjust, and to find a solution in family law debates.

The first half of this paper introduces a human/social capital approach to this issue. It explains that the injustice is a result of the difference in risks that derive from the family members' investments in their human/social capital. Such difference is typically derived from specialization between wife and husband. It also points out that some assumptions in the family law disable marital economies from filling the gap in the risk. That is, since the family law requires a couple to enjoy the same level of living, share of profits upon the investment in a marital economy shall be equal, no matter how high risk one undertakes.

The latter half examines debates about a reform of Japanese family law to remove the injustice. The material for our analysis is Suzuki Shinji's (1992) writing on a new standard for financial provision on divorce. Which addresses fifty-fifty division of earning capacity gained during marital life and liability to pay training cost necessary to recover the earning capacity lost during marital life. We formalize and assess Suzuki's standard from the viewpoint of equity (and equality) between divorcing spouses, and also suggest some developments in the standard.

**Keywords:** financial provision on divorce, marital property, human capital, breadwinner, housekeeper

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## 1 Introduction

Under the breadwinner/housekeeper regime, there is a great difference in economic status between those who take family responsibilities and those who do not. Breadwinners (often men) have an advantage in the labor market because they flee from family responsibilities. Housekeepers (often women) have interrupted career to fulfill the family responsibilities. Differences in career bring about inequity between them.

Japan's current "gender equality" (男女共同参画) policy [13] [14] [27] [36] takes two kinds of measures for this purpose: (1) in-kind care services (e.g., public daycare), and (2) a system of partial participation in workforce due to family care (e.g., care leave). Such policies have its root before 1960s [Yokoyama: 29], but it was the late 1990s when the Government of Japan converted from the breadwinner/housekeeper model to a new model of lifestyle by which women and men both continue their occupational career, regardless of their family responsibility.

In spite of these policies, breadwinner/housekeeper regime has not been changed. Since 1990s, there have been a number of quantitative studies conducted on employment trend of women in childrearing period [10] [18] [21] [22] [28] [30] [39] [40]. The studies agreed that (1) at approximately 20% of women choose to continue regular employment in the stages of childrearing, and (2) there has been no significant change in these ratios in this half century. These findings arouse questions about the effect of the policies.

We should seek an alternative to the current policy — an alternative to achieve equity between breadwinner and housekeeper, instead of terminating the breadwinner/housekeeper regime itself. If the current policies are

ineffective, the regime itself will survive. We should accordingly prepare to realize equity under the breadwinner/housekeeper regime.

In this paper, we choose Suzuki Shinji’s works on financial provision on divorce. “Financial provision on divorce” (離婚給付) is defined as any payment made on divorce [Mizuno: 2: 1624]. This issue has been subjected to long debate since the late 19th century [Motozawa: 20]. After the decision in 1987 by the Supreme Court that allowed unilateral divorce sought by a spouse at fault (i.e., “guilty” for having broken down the marriage), many law scholars has debated on this issue. Suzuki’s works were published during this period. His works were very radical in these days, and were also advanced even for today’s standard.

## 2 Theory of Intra-Household Exploitation

### 2.1 Transfer and dependency

To locate the problem, we start by quoting Sørensen and McLanahan’s writing.

……the condition for this equality between husbands and wives is the economic dependency of married women. That is, husbands and wives are economic equals only if there is a transfer from the husband to the wife large enough to provide her with equivalent economic resources. This transfer is the source of her dependence. The larger the transfer relative to her own contribution, the greater her dependency.

[Sørensen + McLanahan: 3: 660]

They argue about the cause of wife’s “dependency”. And they contend that monetary transfer from husband to wife is the cause of dependency.

Their work is suggestive and offers a good start point. To make further progress, we consider two questions.

First, they focus on monetary transfer from breadwinner to housekeeper. However, there is also transfer in the opposite direction: non-monetary transfer of household production from housekeeper to other members. Why is this kind of transfer not a source of dependency? In other words, how we can theorize the asymmetry between monetary and non-monetary transfer.

Second, how can we evaluate the dependency from ethical perspective? When we take this issue in politics, we should have ethical basis to evaluate situation in the viewpoint of justice.

In this paper, we will try to answer these questions by human/social capital approach.

### 2.2 Human/social capital approach

Economists often theorize household as a sort of enterprise: a production unit that mobilizes means of production and labor. Such studies often mention specialization between wife and husband: One of them commit to work as an employed, while the other gives up employment to commit to housework. In such an economic framework, this way of specialization is for efficient production within household [Becker: 6].

Specialization within household causes differentiations in human/social capital<sup>1)</sup>. Those who do not take family responsibility continue to work outside of household so that they accumulate knowledge and skills required in the work, maintaining their privileged status. On the other hand, those who take family responsibility accumulate knowledge and skills required in housework, with sacrifice of labor-market-oriented investment. As a result, the former will develop labor-market-oriented capital, while the other will develop housework-oriented capital.

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1) Economists often focus on “human capital” that is usually accumulated in the forms of individual’s competency, knowledge, and skills. With regard to specialization within household, it is equally important to examine whether one can continue the employment relationship with a company on a long-term basis, and maintain one’s position in the labor market. Relationship like this, built between multiple actors, can be a sort of “capital”, because it brings about returns in the future, in exchange of “investment” for creation and maintenance. This is equal to so-called “social capital”. The paper use the term “human/social capital” to refer to the whole of individual’s competency, knowledge, skills, and relationship with other actors.

### 2.3 Economic risk of specialization

The point here is that there is a higher risk attached to the investment into housework, than that into labor market.<sup>2)</sup> Labor-market-oriented human/social capital is so “liquid” that it is portable outside of household. In addition, given its convertibility to money, it can readily satisfy basic day-to-day requirements. In contrast, there is a limit in utilizing housework-oriented human/social capital, because it is effective only in a particular human relationship (e.g., emotional tie with the spouse), or at a specific lifestage (e.g., childrearing period). Additionally, regardless of how well one can perform at housework, such skill can hardly satisfy basic day-to-day requirements without production equipment and raw materials. Ultimately, one must be capable to earn money to purchase those equipments and materials to satisfy basic day-to-day requirements. Due to this difference, specialization will create a significant gap in terms of living conditions after dissolution of marriage.

This gap of investment risk cannot be, in most cases, filled up in marital relationships. That is one of the characteristics of marriage economies distinct from general economic transactions. In a general economic transaction, high-risk investment is rewarded by high returns from the profits upon the investment. However, in marital economies, share of profits shall be “equal”, no matter how high risk one undertakes.

That is due to the social norm providing couples’ unlimited special responsibility of mutual support. The theory of couples’ responsibility of mutual support was established by family law debates under the Meiji Civil Code (Law No. 9 of 1898). A quotation from Nakagawa Zen’nosuke’s writing captures the essence of the theory: husband and wife shall share the very last piece of meat or the very last grain of rice, and shall maintain each other’s quality of life as “his or hers” [1]. Nakagawa thus theorized the heavy duty of couples as the core of marital relationship. He also argued when the duty was not performed, the relationship, in practical, was already ruined [1]. Since the extensive amendment in 1947 (Law No. 222), the Civil Code has stipulated husband’s and wife’s duty to live together, cooperate, and provide mutual support (Article 752), as well as the duty to share living expenses (Article 760). Today’s accepted legal theory interprets these articles, in line with Nakagawa’s theory, as providing that husband and wife shall enjoy the same level of living [Toshitani: 38: 56]. Such a duty thereby prohibits one of a married couple taking a larger share and enjoying better life than the other.<sup>3)</sup>

However, in practice the duty is only a normative one without enforcement with punishment. There may be occasions when a couple deviates from the norm and neglects the duty. On such occasions, a husband and a wife will no longer be concerned about maintaining the quality of each other’s life. Instead, they will conduct an “intra-household bargaining”, solely to maximize his or her own utility. Will this achieve a result that rewards high-risk investment with high return? —Unfortunately, the conclusion is completely opposite.

The result of an intra-household bargaining depends on the players’ bargaining power. One with stronger bargaining power can conclude the negotiation with conditions favorable to him or her. One of the factors that define the bargaining power is “threat point”, an expectation on the quality of future life the player can maintain if negotiation breakdowns.<sup>4)</sup> Let us imagine how well divorced will live their lives (e.g., remaining single, getting remarried, or returning home to live with their parents). If they can expect that they will live a good life after divorce, their bargaining power will be strong. Contrarily, if they can expect their life going miserable after getting divorced, their bargaining power will be weak.

In an intra-household bargaining, labor-market-oriented investment raises threat point and increases bargaining power. On the other hand, housework-oriented investment drags down threat point and impairs bargaining power. If all the other conditions are the same with the two parties, the one who takes family responsibility will thus be largely disadvantaged in an intra-household bargaining.

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2) Following explanation is based on England and Kilbourne [4: 173–179] and Tanaka [32: 9].

3) That is also conceptualized in different ways in other field of social sciences. Economics has a concept equivalent to that: an assumption of “unitary utility function” of household [Jacobsen: 17: 75]. Sociology conceptualizes that as one of the basic characteristics of the modern family [Yamada: 11: 44–45].

4) This is a derivation from the theory of “cooperative game” between two players. According to this theory, players will come to agreement at John Nash’s bargaining solution [Ott 1992]. See also Carter and Katz [15] for intra-household bargaining models.

## 2.4 Intra-household exploitation

Under current Japan’s family system, those who make investment into housework cannot get returns on the basis of their investment risk. These people are exploited within household.

We refer to this kind of exploitation as “intra-household exploitation”. This circumstance is problematic because it is against the principle of equity, which claims outcome should be proportional to input [Inoue: 23: 15].

## 3 Transfer to Remove Intra-Household Exploitation: Four Principles

To reduce inequity within household, we consider establishing the system of making monetary transfer to exploited people. Such transfer should follow the four principles.

- (1) Equity among households
- (2) Not to be consumed in the household
- (3) Appropriate evaluation of the risk of specialization
- (4) To reduce inequity and inequality

## 4 Debates on Financial Provision on Divorce

We consider financial provision on divorce as a transfer to recover equity within household. It does not create inequity among households, because it is closed transfer between (ex-)spouses. It is not consumed in the household, because it is made after the marriage substantially ends. It is therefore automatically according to the first and second principles above.

Whether it follows the third and fourth principles is dependent on how the provision on divorce is determined. In the following subsections we will look at the issues in financial provision on divorce in Japanese context.

### 4.1 Problems in consensual divorce

In Japan, “consensual divorce” (協議離婚) accounts for 90% of the total number of divorce cases [Minamikata: 34]. In consensual divorce, law rarely intervenes between the two parties, as far as they reach at an agreement without such intervention. To realize equitable provision on divorce, a reform needs to be done so that legal intervention is institutionalized for such consensual divorces [Ueno: 9].

The next question is, if legal intervention should be institutionalized to cover a majority of divorce cases, what standard we should establish. To overcome intra-household exploitation, it is necessary to revise the framework of division of marital property at dissolution of marriage from the viewpoint of equity. This issue has been on debate about court cases of divorce.

### 4.2 Standard developed through court cases

Since the amended Civil Code in 1947 (Law No. 222) stipulated “division of marital property” (財産分与) under Article 768 and 771, there has been a steady improvement in case laws. Courts have considered property obtained during the marriage as community property of the couple. Such property shall accordingly be divided into half and distributed to both parties at divorce, unless under special circumstance.<sup>5)</sup> This is the established principle in case law today, with regard to the division of material marital property.

Furthermore, there have been court decisions that ordered a division of foreseeable earnings: that is, retirement benefits and pension to be received after divorce [Ninomiya: 19] [Kazimura: 33]. Also, by the reform of the pension

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5) For trends in judicial precedents, see a case study by Ootu [5], and a comprehensive data collection by Yoshida et al [16]. The proposal for a revision of the Civil Code [12] —which was prepared for the Diet session in 1996 but was not legislated— stated that when the level of contribution to property accumulation is not clear, fifty-fifty division was deemed appropriate. Oda [26: 37] reported results from a survey asking judges judgments on a variety of fictitious cases that it was dominant among the judges to sentence fifty-fifty division of property even for full-time housewives.

scheme in 2004 (effective in 2007), it has been possible to split up a record of employee’s pension paid during marriage at the point of divorce [Takahata: 35: 77].

### 4.3 Suzuki’s standard

The biggest problem yet to be solved is that the “property” does not include human/social capital accumulated during marriage. Suzuki [8: 256, 281] makes a criticism on this point. He contends that at average worker’s family, even if material property is fairly settled, it can never be “equal”. It ignores the gap of “earning capacity” (稼得能力) between husband and wife: that is, difference in vocational status, seniority, working experiences, skills, employability, and so on. These will produce differentials in their incomes after divorce.

Suzuki advocates the establishment of a new standard for financial provision on divorce that takes into account the outcome of specialization during their marriage. Here let us take an example of a couple of X and Y. Suppose that X’s earning capacity has increased during the marriage, while Y’s has decreased. We thereby write Suzuki’s standard in two components:

- (1) The increase in X’s earning capacity during the marriage shall be divided equally, as well as material property obtained during marriage.
- (2) Spouse X is liable to pay Y training cost and living expenses necessary to recover the earning capacity. However, if Y cannot start the training during the period of the custody of a child, X shall make additional payment for living expenses for the period. If Y is deemed unable to recover the earning capacity because of old age, X will be liable to pay Y living expenses until Y’s death.

Figure 1 indicates how the financial provision should be under the Suzuki’s standard. The gained earning capacity of X should be divided into half (Figure 1(a)). The lost earning capacity of Y should be recovered by off-the-job training (off-JT), cost for which should be paid by X (Figure 1(b)).

Suzuki’s proposal aimed to establish an equitable structure in which one can liquidate the outcome of economic activities during marriage. In addition to equally dividing material property and earning capacity gained during the marriage, it also tries to restore reduced earning capacity of one of the spouses. This is an attractive proposal, because it proposes development in the framework of family system to remove intra-household exploitation and to realize equity within household.

## 5 Development of Suzuki’s Standard

Here we explore whether Suzuki’s standard follows the principles in Section 3. As we saw, the first two principles apply to any financial provision on divorce. On the other hand, it is an issue to be confirmed whether Suzuki’s standard follows the last two principles.

### 5.1 To set a ceiling for equality

Suzuki’s standard contravenes the fourth principle in Section 3. Since it contains no rule to secure equality, it can require transfer from the party of lower income to the party of higher income.

To refrain from promoting inequality, we impose a condition for requiring transfer. Let  $Q$  denote the amount of money that Suzuki will require the spouse X to pay. Let  $t$  denote any timing after divorce. Let  $x(t)$  and  $y(t)$  respectively denote earning capacity of X and Y at timing  $t$ . Then transfer from X to Y should be

$$\begin{cases} \min\left(\frac{x(t)-y(t)}{2}, Q\right) & \text{if } x(t) > y(t) \text{ and } Q > 0 \\ \max\left(\frac{x(t)-y(t)}{2}, Q\right) & \text{if } x(t) < y(t) \text{ and } Q < 0 \\ 0 & \text{otherwise} \end{cases} \quad (1)$$

## 5.2 In case that off-JT ineffective

How about the third principle? Can we appropriately evaluate the risk of specialization with Suzuki's standard?

The standard has a problem in compensating the lost earning of housekeepers. It suggests the loss in earning capacity to be compensated only by claiming for training costs. If the spouse's capacity is not restorable by training, the other spouse is responsible merely for the payment of two million yen of living expense annually [Suzuki: 8: 318, 320].

This is inequitably unfavorable to the spouse Y. If the spouse's earning capacity has been impaired due to marital life, the loss should be equitably compensated. So the other spouse X should pay sufficient money to Y. Of course, Y can use the money for training on Y's own choosing.

We should accordingly revise the amount of money paid by the spouse X. Let  $x(0)$  and  $y(0)$  denote X's and Y's earning capacity when they got married. Let  $x(1)$  and  $y(1)$  denote X's and Y's earning capacity when they divorced. Then  $Q$  should be determined by

$$Q = \frac{x(1) - x(0)}{\alpha} + \frac{y(0) - y(1)}{\beta} \quad (2)$$

where  $\alpha$  and  $\beta$  denote the effect of the couple's cooperation. If their values are unknown—as will apply to most divorce cases—we can put  $\alpha=\beta=2$ .

## 5.3 The ideal standard

The next problem is that Suzuki attempted to measure increase and decrease in earning capacity with the difference between earnings at the points of marriage ( $t=0$  in Figure 1) and at the point of divorce ( $t=1$  in Figure 1). It does not fully cover the potential outcomes from the creation, maintenance, accumulation, and consumption of human/social capital that both husband and wife commit in their marital relationship.

We consider that financial provision on divorce aims at equitable settlement of any result of irreversible process in marital life [Motozawa: 20: 272–273]. The provision should therefore reflect the change of earning capacity *due to* the marital life. Which is different from the change *during* marriage. All changes during marriage are not necessarily compensated by the financial provision on divorce. Moreover, changes after divorce should be also compensated, if the changes are results of the marital life.

We should settle financial provision on divorce by estimating each spouse's earning capacity that she (or he) would obtain if she (or he) was not married. Amount of the money to be paid should be determined with the difference between the estimated capacity and the real capacity.

$$Q^* = \frac{x(t) - x^*(t)}{\alpha^*(t)} + \frac{y^*(t) - y(t)}{\beta^*(t)} \quad (3)$$

In this equation,  $\alpha^*(t)$  and  $\beta^*(t)$  denote the balance of responsibility by each spouse to make the difference. If the values  $\alpha^*(t)$  and  $\beta^*(t)$  are unknown, we assume  $\alpha^*(t) = \beta^*(t) = 2$  for all range of  $(t)$ . This  $Q^*$ , instead of  $Q$ , should be used in the ideal standard to tell completely equitable provision on divorce.

## 5.4 Differences from the ideal standard

The difference between  $Q$  and  $Q^*$  indicates the bias in Suzuki's standard. If we put  $\alpha = \beta = \alpha^*(t) = \beta^*(t) = 2$ , then the difference between equations (2) and (3) is

$$Q - Q^* = \left( \frac{x^*(t) - x(0)}{2} - \frac{y^*(t) - y(0)}{2} \right) + \left( \frac{y(t) - y(1)}{2} - \frac{x(t) - x(1)}{2} \right) \quad (4)$$

This equation tells two factors of deviation from the ideal standard.

The first factor is change in earning capacity under the assumption that the spouse has been unmarried ( $x^*(t) - x(0)$  and  $y^*(t) - y(0)$ ). Suzuki's standard is thus unfavorable to the spouse who had started a fast-track career.

The second factor is change in earning capacity after divorce ( $y(t) - y(1)$  and  $x(t) - x(1)$ ). Suzuki's standard is thus unfavorable to the spouse who will continue a dead-end career after divorce.

In Japanese society today, men have a fast-track career at higher probability than women, because of discrimination or self-selection [Brinton: 10]. In this respect, Suzuki's standard is unfavorable to husbands. On the other hand, when a worker tries to re-enter the labor market after being a full-time housekeeper (as a majority of Japanese women do), it is highly probable for her to get a dead-end job without prospect for promotion or pay raise. In this respect, Suzuki's standard is unfavorable to wife. Of course, this consideration is on average couple. Each couple is in different circumstance. Moreover, the balance depends on the duration of marital life ( $0 \leq t \leq 1$ ) and of post-divorce life ( $1 < t$ ). In case of divorce in the early time of life, housewife would be disadvantageous, on average.

## 6 Assessment

### 6.1 Biased evaluation

As we have seen the previous section, Suzuki's standard has some biases. It will require too large transfer to some spouses, while it will require too small transfer to other spouses. This bias depends on the career the spouses started before marriage, as well as on the length of marital life. However, in most cases it will be difficult to correct this bias, because the careers are not observed.

### 6.2 Light burden of estimation

On the other hand, Suzuki's standard has a merit that it is composed from elements that could be easily estimated. Although it will be difficult to estimate the effects of cooperation (denoted by  $\alpha$  and  $\beta$ ) in most cases, we regard them as fifty-fifty ( $\alpha=\beta=2$ ). This lightens the burden of estimation.

It is a great merit, with regard to the difficulty to estimate the unobserved capacities ( $x^*(t)$  and  $y^*(t)$ ). This kind of difficulty has been one of the obstacle against introducing evaluation of "earning capacity" in divorce settlement [Schneider + Brinig: 24: 328]. We should carefully weigh these merits and demerits.

### 6.3 Human/social capital as community property

Suzuki's proposal also has an impact on philosophical debate on distributive justice. His proposal includes the concept that we should regard human/social capital as community property, if it has been accumulated owing to cooperation among members of a community. This concept denies the conventional notion of self-ownership of human/social capital.

This concept can be applied not only to marital life, but also to any form of family, local community, nation state, and public (or publicly subsidized) education. So it has a wide scope that covers many aspects of inequality growing through human/social capital investment. It is thus an issue of great interest for social scientists how the concept will be implemented in law.

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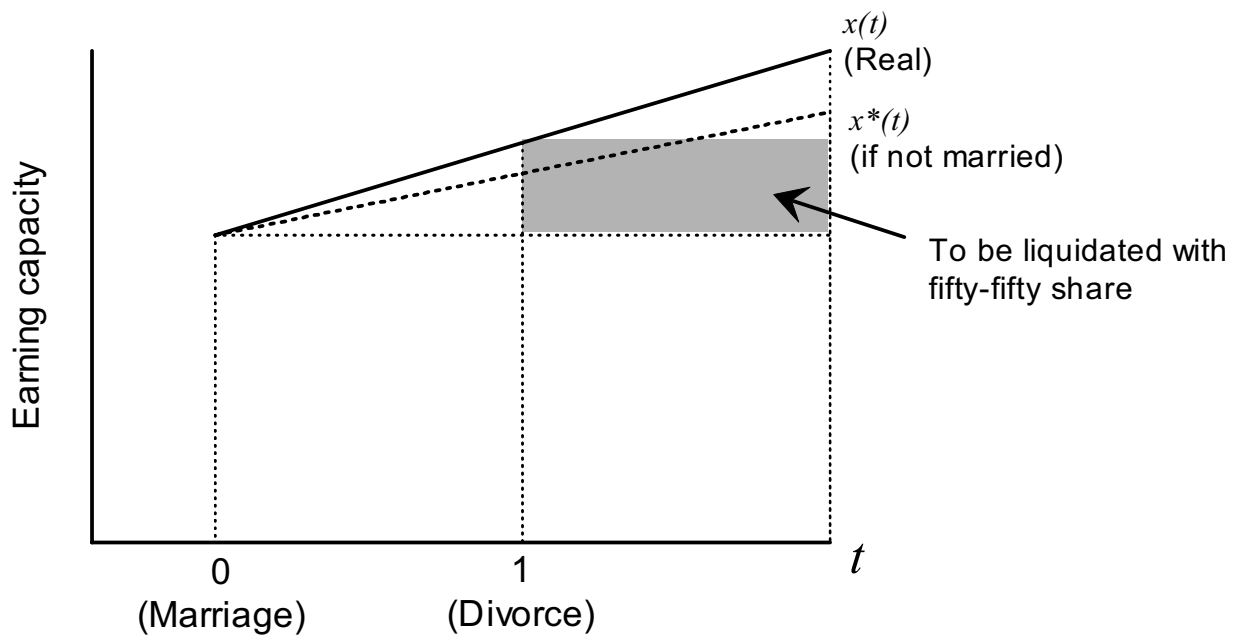
In triangle brackets <> are ISBN, ISSN, URL, or NCID (used in NACSIS-CAT/ILL system: see <http://webcat.nii.ac.jp>). [J] is for Japanese literature. Japanese name/title is transliterated from kana-syllabary text in accordance with the International Standard for Romanization of Japanese (ISO 3602), unless there is authorized or well-known romanization. Reference list includes kanji names/titles that would otherwise difficult to identify.

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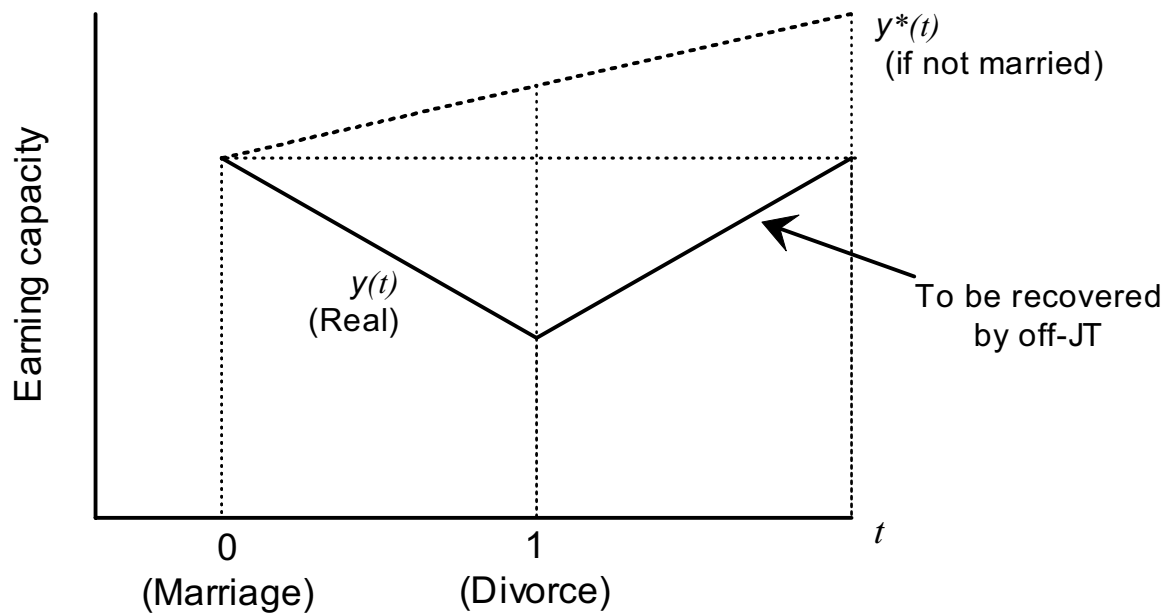
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(a) For spouse specialized in market work



(b) For spouse specialized in housework

**Figure 1** Suzuki's standard for distribution of earning capacity