Distribution of "Matrimonial" Property of Married, Cohabiting and Same-sex Couples in Japan*

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1. Introduction

The property of a husband and wife in Japan are provided for in Civil Code articles from 755 to 762. The husband and wife may enter into a contract as regarding their property before marriage which needs to be registered prior to the notification of marriage（Articles 755 and 756）. This contract cannot be altered after the marriage has taken place[1]. However, these pre-nuptial arrangements are in practice seldom made in Japan, most married couples' property arrangements are within the scope of the statutory property system whereby a husband and wife share the expenses of married life[2] but have control of their own property at the same time. The property includes all that belong to either party before the marriage and any acquired by either party during the marriage（Art 762 (1)）[3]. This system whereby they control their property separately contrasts with the previous system which was

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* A draft of the paper was originally presented at the 13th World Conference of the International Society of Family Law held in Vienna, September 2009. The author gratefully acknowledges the editorial assistance（proofreading）of Ms. Siri Rasmussen.

1 Art 758 states the restriction on change of property relations of husband and wife. Numbers of provision hereinafter in the paper are of Civil Code if not otherwise specified.

2 A husband and wife are jointly liable for any juristic act with the third person concerning daily household matters including purchase of everyday goods, contracts for medical treatment, and domestic rent（Art 761）.

3 Regarding property whose ownership cannot be determined to either party, it is presumed to be jointly owned by the couple（Art 762 (2)）.

in effect the patriarchal system where the husband had controlled over the wife's property[4].

When it comes to the dissolutions of the marriage by divorce[5], despite the separate property system, either party may make a claim on any of the matrimonial property under Article 768. In the case of death a surviving spouse becomes in every case the inheritor.

Article 768 is the only provision which regulates the distribution of property hence the parties fail to agree, it is left to the discretion of the family courts to make a ruling. This provision has in fact been used by the courts as an instrument to protect non-income spouses, in most cases wives in a one-sided divorce by granting some matrimonial property at separation. In addition, when property is acquired in the name of one spouse (usually a husband), but the other (a wife) contributed to obtaining it, such contribution is to be taken into consideration when determining the distribution of the property they take account of the wives' household works as a factor in acquiring matrimonial property.

The legal interpretation of the matrimonial property distribution has three elements which are; 1) liquidation of property on parting, 2) support for post-divorce life, and 3) compensation for suffering and

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4 Under the Meiji Civil Code (1898), the household leader ***koshu***, who was given a strong power over the members of his household including the wife, bore the whole living expenses and managed their property that a wife was regarded as an incompetent person having no property right and parental authority/right over her own children.

5 Divorce is possible by agreement between the parties (Art 763) in which case no particular ground is required to dissolve their marriage. About 90% of divorces in Japan are this "divorce by mutual consent ***kyo-gi rikon***" type which has no court involvement. The rest 10% of divorces are "divorce by in-court mediation ***cho-tei rikon***" and "divorce by court judgment ***haknetsu saiban rikon***" (less than 1%). An official statistics of matrimonial property distribution cases classified by range of the amount of money agreed are found in the Annual Judicial Statistics ***shiho to-kei nenpo*** Vol.3 Family Matters ***kaji-hen.*** However, the figures shown are mostly of the "divorce by in-court mediation ***cho-tei rikon***" cases that very few matrimonial property distribution arrangements are made every year (6,864 cases in 2007 Statistics) and more than 50% are the cases of less than 4 million yen (3,535 cases/51.5% in 2007 Statistics).

pain. The 3) compensation for suffering and pain applies to cases where a husband/wife is responsible for causing the marriage breakdown or perpetrating ill treatment against his/her partner which can also be claimed separately if the property distribution arrangement is not enough to cover the damage caused[6].

The provision of matrimonial property distribution has also been interpreted to include cohabiting couples who are not legally married. The courts' interpretation was a response to the tradition that in pre-modern Japanese society a cohabiting couple was not unusual and regarded as a ***de facto*** married couple.

Viewing the trends on the other side of the world, while the EU is seeking a harmonised legal solution in disputes concerning matrimonial property[7], the English courts seem to be experiencing difficulty in interpretation and application of the distribution of matrimonial property. This is evident in the emergence of the recent "big money cases" [8] and differences between married couples, civil partners and cohabiting couples.

In Japan, in terms of "matrimonial" property distribution, there has been no acknowledgement of diverse forms and roles of couples. Unlike the world trend, same-sex couples in Japan have far less social and no legal recognition at all. It is apparent that same-sex couples' case of "matrimonial" property distribution would be incongruent with the current system because these couples are not regarded as a union like opposite-sex couples.

This paper therefore reviews property distribution of couples at separation by focusing two "para-legal" ***de facto*** married couples, namely cohabiting opposite-sex couples and same-sex couples in Japan, under the current family law which is mostly targeted at legally married couples.

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6 See the decree of the Supreme Court, 23 July 1971, ***Minshu*** Vol.25 No.5 p.805.

7 The Commission of the European Community, ***Green Paper on Conflict of Laws in Matters concerning Matrimonial Property Regimes,*** 17 July 2006（SEC（2006）952）.

8 The House of Lord judgments of ***Miller v. Miller*** and ***McFarlane v McFarlane***, 24 May 2006（[2006] UKHL 24）.

2. *De facto* "married" couples 1: Cohabiting couples

(1) Social and legal recognition - historical background

Under the Meiji Civil Code era which reflected the 'house *ie*' system of the pre-modern patriarchal Japanese society. So-called common-law marriages[9] were not unusual due to the following two main factors; firstly the 'house *ie*' system itself prevented free marriage[10], and secondly people did not register their marriage for a variety of reasons. The parties did not register their 'marriage', in cases where an heir apparent could not obtain approval for a marriage from the Head of the household or find an acceptable husband/wife, or if a couple were yet to have a child. In addition, notification of marriage was not prevalent in society particularly before the law reform of the Meiji Civil Code in 1989 when registration of marriage became prerequisite in order to validate it by law. There were many couples who had entered into "married" life without registration[11].

A landmark case in ruling in favour of common-law wives was the Supreme Tribunal of 26th January 1915, the case of a common-law wife who was deserted by her "husband" and the court ruled that she could be entitled to compensation for breach of marriage contract[12]. Since then

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9 The use of the term "common-law marriage" in this paper is to describe ***de facto*** marriage between a man and a woman, ***Naien*** in Japanese.

10 Couples who want to marry were required to have approvals from their parents and a permission of a household leader ***koshu***. A man below 30-year-old and a woman below 25-year-old needed these approvals from parents. The permission of the household leader ***koshu*** was necessary at any time.

11 There are few statistics which explains the reasons of not registering their marriage under the Meiji Civil Code era. One of the statistics is a survey result of 1923 conducted in Kyoto city. It shows that 41.9% remained unregistered their marriage due to the fact that they ***could not*** marry ("Because both of the couple are the successor to each house ***ie*** "29.1% plus "Because the couple could not get a permission from parents/house leaders " 12.8%). See S. Ninomiya, ***Jijitsukon*** Ichiryusha, 2002) at 3.

12 Judgment of the Supreme Tribunal of 26th January 1915, ***Minroku*** Vol. 21 at 49). See K. Bai," ***Koininyoyaku yuko hanketsu" no saikento*** A review of the

the courts have come to rule in favour of common-law wives thereby offering some legal protection pursuant to marriage[13]. The courts' attitude towards protecting a common-law wife from being abandoned by a "husband" and his household (*ie*) without any justifiable ground was more firmly established based on the logic of treating common-law marriage as pursuant to legal marriage, thus cohabiting opposite-sex couples were *de facto* married couples.

This *de facto marriage logic* has been accepted commonly both in the courts and by family lawyers. When the relationship breaks down, the financial arrangements of cohabiting couples including "matrimonial" property distribution are dealt in the same way as in the cases of married couples. Furthermore cohabiting couples are viewed under the social security systems as married couples[14]. The new pension distribution system introduced from April 2007 allows non-income insured people, mostly the housewife of an employee, to receive up to a half of the pension payment[15]. However, this is not fully equivalent

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"validating a marriage contract case"), *Horitsu Jiho* Vol.31 No.3 pp.56-61 and No.4 pp.86-95, K. Bai and Y. Sato, *Zoku" Koininyoyaku yuko hanketsu" no saikento* A sequel review of the "validating a marriage contract case"), *Horitsu Jiho* Vol.31 No.10 pp.95-101 and No.11 pp.38-43, for the extensive research and deep analysis from a socio-legal perspective of the case.

13 The courts' decision of giving relief to those women deserted unfairly gradually covered extensively from a pure engagement, a common-law marriage as *de facto* husband and wife, a tentative common-law marriage (marriage on trial) to a continuing extramarital relationship (S. Ninomiya, *Kazokuho 2nd Edition* (Shinseisha, 2005) at 140).

14 The idea of protecting common-law wives reflected in laws relating to social welfare and security was first observed in the Factory Act reform (Art 15) in 1923. Thereafter, the other acts such as the Health Insurance Act 1922(Art 1(2)-1), the Welfare Pension Insurance Act 1954 (Art 3 (2)), the National Pension Act 1954 (Art 5 (6)) and the Worker's Accident Compensation Insurance Act 1947 (Art 16 (2)) also include the provision (specified in brackets) stating that the terms of spouse, husband and wife imply *de facto* marital partners. See Y. Masuda's social security law case study of *the Quarterly of Social Security Research*, Vol.43 No.2, pp.169-175, particularly at 171.

15 It is pointed out that reason why there has been a slight decline of the so-called *jukunen rikon* (divorce of senior couples of middle aged and elderly

to that of legal spouses in that *de facto* spouses' eligibility to receive the pension distribution will be dependent on when the parties were acknowledged as being in a stable relationship and from the time that they were designated as an insured person. This is in contrast to a married couple who can just refer to their date of marriage.

(2) Differing points from married couples

Despite the employment of the above *de facto marriage logic* to treat common-law spouses as equally as legal spouses in terms of matrimonial property distribution, there is a significant difference when it comes to death when common-law spouses have no rights of succession. The courts interpreted the meaning of the word spouse in Article 890 as being confined to a legal spouse and not a cohabiting spouse which thereby excluded them from succession rights.

There are a couple of exceptions; in a case where there is no successor, a cohabitee of the deceased would be able to succeed according to Article 958 (3). This article allows a person who had special connection with the deceased such as someone who lived with him/her and shared the same household to inherit a property. The other exception is Article 36 of the Land Lease and Rent Act that in the event of a tenant's death where there is no legal successor but there was a cohabitee lived with the deceased as de facto married couple or adopted parent and child, the surviving cohabitee is entitled to succeed the deceased person's tenancy rights and duties.

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persons) rate over the last few years was because of these potential senior housewives, who want to divorce, were waiting for the new regime of pension distribution at dissolution of marriage being commenced in 2007. However, the new system can not necessarily be a last resort for these housewives because the system sets a number of conditions with a complicated calculation method for distribution, it is not so simple to halve it but it may require the party some time to reach a settlement. See a conference proceedings under the themes of divorce benefit and pension division for a wide-ranging discussions from different perspectives," *The 23rd Annual Meeting: Divorce Benefit and Pension Division", Socio-Legal Studies on Family Law*, No.23 (July 2007), pp.15-130.

While the majority of courts and scholars are consistent in not allowing these cohabiting couples to enjoy succession rights[16], there are some cases and opinions which provide a different view. The reason being that a certain amount of legacy was due to the contributions made by the common-law wife thus it is viewed as not fair to exclude these wives from succession. There are two grounds to support the view in allowing common-law spouses to succeed; one is to apply a general property law which regards their "matrimonial" property as jointly gained and owned so that they should half it according to Article 250 of the Civil Code（distribution of a shared property in half), even if the property was obtained under the name of just one partner. There are some cases in practice which applied the idea of admitting shared property between cohabiting couples particularly where the couple had jointly run a business[17]. The other ground is to apply the property distribution provision, the Article 768, for example the case where a common-law wife was granted a distribution of succeeded property of the deceased medical doctor because the court took into account her contribution in running his medical clinic despite the property in question being left by the common-law husband it was assessed as a case of liquidation of their "matrimonial" property[18].

However, there is a strong opposition to apply the provision of distribution of matrimonial property for any cases concerning cohabiting couples' liquidation of money relations at either partner's death. This is because the current family law provides that a married couple can

16 The Supreme Court decided that a common-law spouse is not entitled to succession by parity of reasoning the provision of property distribution at separation（judgment of 10th March 2000, ***Minshu*** Vol.54 No.3 at 1040, ***Hanrei Jiho*** Vol.1716 at 60). However, the decision of not applying analogical interpretation of the property distribution is not supported by some family law scholars. For instance, see Ninomiya ibid. at 150, T. Arichi, ***Kazokuho Gairon new edition revised version***（Houritsu Bunkasha, 2005）at 62.

17 Judgment of the Osaka High Court, 30th November 1982, ***Kagetsu*** Vol. 36 No.1 p.139, ***Hanrei Times*** Vol.489, p.65.

18 Judgment of the Osaka Family Court, 23rd March 1983, ***Kagetsu*** Vol.36 No.6, p.51. A similar judgment was given in the Osaka Family Court, 31st July 1989, ***Kagetsu*** Vol.42 No.6, p.45.

dispose of their matrimonial property by the distribution provision at divorce and by the succession provision at one partner's death, it would mix up the two distinct systems if the distribution provision were applied in a case of succession at the death of a common-law spouse. Therefore it is commonly accepted to draw a line between married couples and cohabiting couples in terms of their succession rights.

Moreover, it is generally understood that any matters concerning cohabiting couples which relate to or directly effect the Family Registration Book ***koseki*** cannot be dealt with in the same way as married couples legally. This is due to the fact that a Japanese person's legal identification is referred to the Family Registration Book which registers the person not individually but in the family unit as it records the person's relationship to other family members. Cohabiting couples cannot unite their surnames and a child born within their relationship is not entitled to be legitimate. Considering these respects and the fact of no succession rights, there is a clear distinction between cohabiting couples and married couples.

Under the current family law in Japan, cohabiting couples[19] can be classified into three categories[20], 1) ***bigamous type*** where one of the partners is separated but has a legal spouse, 2) ***intentional type*** where a couple have chosen not to marry legally mainly because they disagree with the institutional marriage, and 3) ***elderly type*** where a senior couple both of whom are widowed do not remarry due to objections from relatives because the remarriage would affect their rights of succession.

The 2) ***intentional type*** has been criticised as there is no need to protect ***de facto*** married couples nowadays in the same way as in the past when

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19 Amongst cohabiting couples, there are some couples who postpone or never plan a marriage but then get married "in a rush" when they learn the female partner is pregnant. They register their marriage before the birth of the child for the child's legitimacy. This kind of behaviour is regarded as to consist one of the reasons why there are far less birthrate of a child born outside of marriage in Japan. The birthrate of a child born out of wedlock in Japan was once 3.9% in 1886, 9.4% in 1906 at the highest and then gradually declined. It has been staying flat at less than 2% after the war to date.

20 See N. Toshitani, ***Kazoku no Ho*** (Yuhikaku, 2005) at 141-142.

cohabiting couples did not marry because they could not marry. It has been argued that cohabiting couples in modern society are those who are in a stable relationship but not going to marry despite having no legal barriers. Therefore if their form of relationship is a result of their lifestyle choice, the question is why they should be granted the same protection as married couples. In addition, there is a recent case where the court ruled against a ***bigamous type*** common-law wife who was deprived of the pension of her deceased common-law husband by his employer[21]. The focal point in judging if the couple were approved as ***de facto*** husband and wife depends on the fact whether they have cohabited and made a living together（financially）although the court asserted that it should be judged carefully whether the relationship between the deceased person and his legal wife has lost substance or not[22].

The "tradition" of ***de facto*** marriage is, as described above, not applicable in light of succession and has also been questioned whether it is necessary to protect cohabiting couples in these days who are to deserve the distinct treatment from married couples if that is what they have

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21 A noteworthy decision was made at the Supreme Court on 8th of March 2007 that the court admitted a common-law wife to receive employee's pension of her deceased "husband" despite the fact that they were uncle and niece（not allowed to marry due to being in inhibited degree of relationship）. The couple was widely accepted as being a wife and a husband both in their family and local community thus they lived together for 42 years with three children including two of their own. The criterion of the court's judgment was that whether there were "particular circumstances" of leading ***de facto*** married life without registration and the similar interpretation was carried over at the Tokyo District Court case of 30th January 2009 where the couple of uncle and niece lived together as a husband and a wife for 38 years.

22 See the judgment of the Tokyo High Court, 11 July 2007, ***Hanrei Jiho*** Vol.1991, p.67, which decided that a ***bigamous type*** common-law wife was not approved to be eligible in receiving survivor's pension of a deceased husband in consequence of "careful" investigation of a marital relationship between the husband and his legal wife. Its original judgment of the Tokyo District Court 12th December 2006, in contrary admitted that the common-law wife was regarded as his "spouse" in light of fulfilling the prerequisite implied both in Art .37（2）of the National Pension Act and Art . 59 of the Welfare Pension Insurance Act.

chosen for.

3. *De facto* "married" couples 2: Same-sex couples

(1) No social and legal recognition – up to date

"Male homosexuality has a long and well-attested tradition in Japan"[23], particularly over the Tokugawa-period (1600-1867) before the Meiji era, where the tradition of male homosexuality was illustrated in various forms of art and literature which "provide extensive representations of the varieties of homosexual love practiced"[24], most remarkably among men of samurai warriors' class, between seniors (masters) and juniors (servants). Thus homosexuality was commonly accepted, despite it being restricted to the male version only, and was not banned like in other countries who were under the influence of Christianity.

However, since the Meiji era (1868-1911), the past positive manner of illustrating homosexuality was concealed but "a new discourse posting homosexuality as a deviant and dangerous passion"[25] was emerged and homosexuality became unlawful for a short period of time between 1872 and 1880 when the act of sodomy was a criminal offence under ***Keikanritsujo-rei*** (the Sodomy Act) of 1872 and ***Kaiteiritsurei*** (the Supplemental Criminal Code) of 1873[26].

Giving homosexuals and homosexuality the status of a deviant and a deviance was established particularly after the Wars despite the fact that

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23 M. McLelland, ***Male Homosexuality in Modern Japan – Cultural Myths and Social Realities*** (Curzon, 2002) at 20. See the whole Chapter 2. Homosexuality in Japanese History, pp.2-42 for further details of the historical background of male homosexuality in Japan.

24 McLelland, ibid. at 20.

25 McLelland, ibid. at 24. This new but negative discourse is illustrated in a well known novelist of the time Mori Ogai's autobiographical work, ***Vita sexualis***, first published in 1909.

26 These acts were replaced with the Old Meiji Criminal Code legislated in 1880 but it had no provision prohibiting homosexuality and criminalising homosexual behaviour.

no statute prohibiting homosexual behaviour or stating anti-homosexual matters were introduced. The official policy "ignored same-sex sexuality as it existed between men"[27], and there is no definition of marriage needing to be constituted between man and woman in the current Civil Code[28] because it was regarded as a matter of course. There has been no space to nominate same-sex relationship to be covered under Japanese law up until now.

This dominance of hetero-normativity is seen not only in legal provisions but also in various forms representing societal phenomena that in contrary homosexuality is considered to be rare or has little social significance, as described that "the invisibility of homosexuality before the law reflects the general lack of discussion of homosexuality as a lifestyle choice in Japanese society"[29].

There is only one case concerning homosexuality issue[30] heard at the Tokyo High Court in September 1997[31] is that of the "Fuchu Youth House" case. This case relates to an incident in February 1990 when members of an organization acting for gay and lesbian called "OCCUR" received ill treatments when they held a study camp at the Youth House (a public accommodation designed to be used for/by young persons) in Fuchu city and were not allowed to stay overnight. The House was

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27 McLelland, ibid. at 27.

28 The only legal ground to confine marriage to a couple of man and woman is Article 24 of the Constitutional Law whereby it stated marriage is based on the fundamental equality of the ***both sexes***.

29 McLelland, ibid. at 39.

30 As an exception, there was a civil case in 1972 where a wife claiming for divorce on the ground of her husband's continuing homosexual extramarital relationship (the decree of Nagoya District Court, 29th February 1972, ***Hanrei Jiho*** Vol.670, p.77).

31 The judgment of the Tokyo High Court, 16 September 1997, ***Hanrei Times*** Vol.986, p.206. It decided that despite of a lack of general consensus in Japan around the time of the incident, an administrative authority such as the Tokyo Metropolitan Board of Education is required to be attentive to include those homosexual people as a minority group and to be supportive for their rights and benefits. The first trial also decided in OCCUR's favour, the judgment of the Tokyo District Court, 30 March 1994, ***Hanrei Jiho*** Vol.1509, p.80.

governed by the Tokyo Metropolitan Board of Education to whom OCCUR presented a petition for compensation. The Court ruled that the refusal and exclusion of homosexual people from the use of the facility constituted a breach of law, and also it remarkably referred to a notion of homosexuality without unprejudiced expression for the first time. The court defined homosexuality as one of sexual orientations of human being where a person is sexually attracted to someone belonging to the same sex as the person him/herself.

Although OCCUR won the case that discrimination on the grounds of one's sexual orientation was banned, the case revealed the fact that a public authority such as the Tokyo Metropolitan Board of Education can be discriminatory against homosexual people. These negative attitudes which excluded same-sex couples as a justifiable object are based on a view that it is an outrage against public decency and a stance to support the traditional idea of marriage which is exclusively a union of man and woman.

Same-sex couples have, therefore, far less social recognition and no legal recognition in Japan in spite of the past history and the presence of homosexual people, except for an "isolated" slogan of no discrimination on the grounds of sexual orientation declared in the Ministry of Justice's human rights campaigns.

(2) Create a legal link by adoption

It has been pointed out that one of the strategies for same-sex couples in order to obtain some legal protection for their relationship in practice is to adopt one partner as a child of the other. There are two types of adoption in Japan, namely the ordinary adoption (*futsu yo-shi*) and the special adoption (*tokubetsu yo-shi*). The statistics and the reality of adoption show the fact that the vast majority of adoptions in Japan have always been the ordinary adoption of adopting adults (presumably "adoption for the adoptive parents/household") and the figures of the special adoption ("adoption for the child") is only a proportion of the total (less than 1%)[32]. The ordinary adoption does not require any

32 The total number of adoption cases was 88,511 in 2005 and only 305 cases

involvement of the courts, i.e. no permission required, if the adoption is operated between adults, the parties can register the adoption at their local registry office "easily".

Once the ordinary adoption arrangement is successfully made between same-sex couples, they are in a parent-child relationship on the surface with the same legal rights enjoyed by any other natural parent-child relationship and adopted parent-child relationship, the mutual rights and duties of support and succession. The court cases concerning this type of adoption between adults who are in fact in a same-sex relationship have been reported in the U.S. but not in Japan[33]. The cases demonstrate the focal issue in that whether this type of adoption can be approved in light of recognising "an intention to form a parent-child relationship" through the adoption[34].

It is therefore argued amongst scholars in Japan that this type of adoption arrangement may not be valid due to the lack of "an intention to form a parent-child relationship" or cannot be approved because it is against public order and morality if there is a sexual relationship between the adopted "parent and child"[35].

There are some same-sex couples who do not support the idea either because they see it as using the adoption system to "camouflage" the true relationship given that they want to be partners but not becoming a parent and a child. Moreover, if the parties completed the adoption arrangement, they will not be eligible to enter either a new same-sex partnership or same-sex marriage if these are approved in the future in Japan. This is because even if the adoptive relationship is dissolved, they would still be prevented from marrying or becoming partners because

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within the figure were the special adoption, according to the Annual Judicial Statistics *Shiho Tokei Nenpo* (issued by the Supreme Court).

33 See S. Suzuki, '*Seinen Yo-shi Engumi to Do-seiai Adoption between adults and Homosexuality*', *Aoyama Gakuin Ronshu* Vol.41 a combined issue of No. 1/2/3, 1999, pp.55-88.

34 Needles to say, a child adoption involving sexual relationship is unacceptable.

35 See S. Hoshino, 'Wagakuni ni okeru Do-seiai-sha o meguru kazokuhojo no shomonndai (Issues and problems of homosexual person in light of family law in Japan)', *Horitsu Ronso* Vol.69 No.3/4/5, 1997, at 254-259.

they have at one stage being in a parent-child relationship[36].
Unlike the case of cohabiting couples, same-sex couples in an adoption relationship have a mutual right of succession although it is not as strong as that of spouses.

(3) Making a contract by notary deed and property distribution

Since the mid 1990s within the gay community it has been suggested that a useful method protecting a same-sex partners' rights, namely financial and cohabitation arrangements is by notary deed at notary public's office[37]. These notary deeds are commonly executed between parties making a contract which includes money transaction such as selling and buying of real estate or payment of debt. The use of a notary deed to register a couple's living arrangement as an official agreement has also being employed by some cohabiting opposite-sex couples[38], particularly the "intentional" type as mentioned in the above three categories.
One of the main purposes for same-sex couples to have a notary deed is to be prepared for any eventual emergency such as a partner's death

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36 Articles 735 and 736 of Civil Code prohibit consanguineous marriage of lineal relatives in law and by adoption even if their legal relationship were dissolved. See M. Ishikawa, 'Shin-Kazokuho jijo 4: Do-seiai-sha no konin sono-2 (New circumstance of Family Law 4: Marriage of homosexual persons part 2)', *Hogaku Seminar* Vol.28 No.9, 1984, pp.56-61 (footnotes 47 and 48 in particular) to learn that the situation has yet to be changed since the time around 1984.

37 Information on the use of a notary deed for the purpose can be easily found from a number of websites including the ones provided by *Gyoseisyoshi* a profession qualified by the Ministry of Internal Affairs and Communication who produce legal documents for various official purposes on clients' behalf), http://rainbow-support.net/kouseishousho.html, for example. See also I. Sugiura et al. (eds), *Patonashippu, seikatsu to seido Partnership, its Life and the Systems* (Ryokufu Shuppan, 2007) at 146-156 for a description of how same-sex couples may employ a notary deed and a column of a same-sex couple's actual experience who are an "international" couple (also, Y. Akasugi et al. (eds) *Do-sei Paton Same-sex Partner* Shakaihihyosha, 2004) at 18-35).

38 Sugira et al. ibid., at 157-158.

or a partner's hospitalisation when the partner's family or relatives are more likely to interfere given that they have legal rights. The property distribution can be included in a notary public deed in the eventuality that the relationship breaks down. In this notary deed, they can also make a will leaving their property to a surviving partner.

However, a case reported in ***Niji*** (means rainbow in Japanese) magazine which promotes a better life for gay people[39] was that of a same-sex couple who attempted to get a notary deed but were rejected by a notary public. When they explained their homosexual relationship to the notary public, he refused to take charge of the work on the ground that he regarded it as being contrary to public order and morality.

Therefore it has been pointed out that the use of a notary deed is no guarantee for all same-sex couples given that a successful arrangement is depended upon a notary public's personal attitude towards homosexuality. Furthermore, not all same-sex couples are able or can afford to undertake the paperwork required. Moreover, it is difficult to estimate how effective these money distribution and succession arrangements are between same-sex couples using a notary deed. This may be because it is all relatively new and any instances would not be made public, given that same-sex parties tend to keep a low profile combined with a lack of recognition by the state.

4. Conclusion

In Japan, there seems to be a legal trend which draws a line between married couples and cohabiting couples of the opposite sex with regard to their financial arrangements. The said "tradition" of ***de facto*** marriage which views cohabiting couples as married may not be justifiably applicable. The argument being that there is no need to treat modern day cohabiting couples as if they were legally married, because they are not in the same position as their counterparts in pre-modern patriarchal society given that they ***intentionally choose*** to remain unmarried.

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39 Sugiura et al. ibid., at 152. ***Niji*** has been discontinued after volume 8 and the back issues mostly unobtainable.

On the other hand, it is clear that same-sex couples are not allowed even to join the above argument because they do not exist in the same sphere of law. The reality of cohabiting couples gradually resulted in a legal remedy. However there remain a number of issues for same-sex couples given that they are predominantly invisible within society.

It is not my intention to elaborate on this interest within the paper or to analyse reasons and factors that have prevented homosexual people from "coming out". Nor address the issue that homosexuality has been ignored within the law. However, it should be noted that if same-sex couples remain in the "closet"[40] or continue to be ignored by society, there will be no potential for them to enjoy any legal rights in Japan.

To date it has not been easy to discuss the diverse forms of couple relationships in the same way as the diverse forms of family which are more prevalent currently. The key to open up the discussion would be how "public order and morality" is defined in order to meet the reality of modern society in Japan, although the reality of "invisibleness" of same-sex couples is an overriding issue which needs to be addressed. When love relationships breakdown, the distribution of "matrimonial" property commences, for same-sex couples this can be more of a challenge as they do not have any legal support.

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40 The voice of homosexual persons can be gradually seen individually at times from 1990s. See ***Coming Out in Japan*** by S. Ito and R. Yanase, a 'leading' same-sex couple who have dedicated in activities disseminating information regarding homosexuality and homosexual person for both homosexual and non-homosexual people. The book, which combined the authors' two separate publications of 1993 and 1994, is translated in English by F. Conlan, and published by Trans Pacific Press, 2001. See also interviews promoting the interested parties' human rights in a legal magazine of Mr. T. Kazama (***Hogaku Seminar*** No.465, 1993 at 1-3) and Ms. Y. Koyama (***Hogaku Seminar*** No. 516, 1997 at 1-3).