

Concerning “Unmarried Couples”

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Introduction

This is a brief overview and history of the current position of de facto relationships in Japan and some of the problems and issues that arise within this subject. A more detailed account on this subject is provided in the reference material published by the First World Congress on Family Law and Children's Rights.

There is variation on the nature and scope of the meaning of de facto relationships. The definition of de facto relationship I accept is “the relationship between a man and woman who do not marry but live together as husband and wife.” This definition obviously fails to in-

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- * 本研究は、1993年度広島経済大学特定個人研究費の援助を受けて行っている「家族法と子供の人権」に関する研究成果の一部である。
- * 「事実婚の比較法的研究」については、1990年度、1991年度の二年間にわたり、文部省の科学研究費補助金の援助を受けた。本研究は、その一部であり、日本の事実婚について問題点を整理したものである。
- * 1993年7月4日～9日の日程で、オーストラリアのシドニーで開催される、「第一回世界会議『家族法と子供の人権』」での報告については、国際交流基金の1993年度国際会議出席助成の援助を受けた。

clude homosexual relationships. Research in this area and the problems within this subject matter in Japan has been limited. For the purpose of the presentation, I will be restricting my discussion to the situation and problems that arise from de facto heterosexual relationships in Japan. However, some of issues discussed also apply to homosexual relationships.

From the middle ages most European countries adopted a Christian ceremony as a public declaration to marriage. However, in modern times a movement towards secular marriage has transferred jurisdiction from the church to the state. With this movement the doctrine of "legal marriage" (which is known in Japan as Horitsu Kon Shugi) was established, and the state introduced laws stimulating formal requirements for validity of marriages.

Some associations of man and woman may lack the legal requirements for marriage although the relationship may to a certain extent be approved or at least tolerated by society. Such associations are commonly regarded as marriages in fact but not in law, or "de facto" marriages.

The existence of family law applicable to legally married couples alters the effect of the general law particularly in regard to such areas as property law and succession law. These varied legal consequences become particularly important when the relationship is dissolved through death or breakdown of the relationship.

De facto relationships upon breakdown have had to rely upon the general law. The circumstances of the relationships were given some limited recognition in some jurisdictions under the law of Equity. However, problems generally arose in regard to property distribution, care and maintenance of children and the carer of the children.

Recently, in Japan, the trend has been away from legally recognizing relationships outside of marriage, while in other economically advanced nations the trend has been towards giving legal recognition to de facto relationships.

The problem of how the law is to treat such relationships while still remaining the doctrine of legal marriage which recognizes that the couples have made a deliberate contract to change their legal status, is presently a world-wide issue.

Historical Development

The doctrine of marriage notification was initially adopted in Japan in 1875 by way of Governmental Order 209 (which we call Daijyokantatsu 209) which stated the effects of marriage and divorce, adoption and dissolution of the family relationship and its effect on parents and adopted children within a family register system. Thereafter, in working on the enactment of the First Civil Code, and influenced by French law, a mixed system containing both a doctrine of legal marriage and of de facto marriage was adopted. This First Civil Code was enacted and promulgated in 1890 and scheduled to go into force in 1893. Because of strong opposition to this Code, enforcement was postponed.

The new Civil Code was named the Meiji Civil Code. The following are the chapters included in the draft:

Book One: General Principles;

Book Two: Property;

Book Three: Contract and Torts;

Book Four: Family Law;

Book Five: Succession.

The first three chapters representing Property Law were enacted in

1896 and the last two chapters representing Family Law were enacted in 1898. The Civil Code in its entirety was enacted into force on July 16, 1899. This Meiji Civil Code is the present Civil Code in Japan. The Property Law section of the Meiji Civil Code, which includes principles of ownership, principles of freedom of contract, and principle of torts, is based upon principles corresponding to modern capitalistic development. However, the Family Law section was based on the feudalistic patriarchal "IE" system which did not recognize the ideals of respect for the individual and equality of men and women.

The Establishment of Legal Theory to Recognize De Facto Relationships

Marriage, primarily, attracted legal consequences that altered the effects of existing property and succession law.

Marriage was only legally recognized by notification of the marriage. This (notification) is a government administered system of marriage registration. A public marriage ceremony attracted no legal consequences without being notified in accordance with Family Registration Law.

Some relationships, that had not been notified, did still attract some of the legal consequences of notification, particularly in regard to property and maintenance issues following dissolution. These common law marriages were called "Naïen."

Other de facto relationships attracted no legal consequences other than those available under the general law.

Japan at this time then had two forms of de facto relationships, one with some legal recognition (which is called "Naïen") and the other having no legal recognition.

The judiciary's distinction between various de facto relationships was based on "intention to marry."

Some couples could not notify their marriage for a variety of cultural, social or legal reasons. For example, a cultural reason was simply that prior to Meiji Restoration couples did not have to register their marriage. After the Restoration, many were not aware of the change or the legal implications of the changes, so that they simply failed to give notification.

Legal impediments to notification of a marriage included that men up to the age of thirty and women up to the age of twenty-five needed approval of their parents, and in addition to this, regardless of age, approval from the head of a family was required. Thus, a marriage could not be notified without permission.

The judiciary decided that in such circumstances the couple were so-called "Naïen." (Further detail on cultural, social and legal impediments to marriage are provided in my paper.)

Economically and/or socially disadvantaged people in de facto relationships had no assistance under the law, if they did not fall under category of "Naïen."

Legislators recognized the possibility of relationships without notification, but enforced this system in their hopes of modernizing marriage.

The Current Position — Post World War II

The Japanese Constitution was enacted in 1946, under American supervision. Article 24 of the Constitution declares that "all laws shall be enacted from the standpoint of individual dignity and essential equality of the sexes."

The Civil Code was amended in 1947 to comply with the Constitu-

tion.

The effect of these amendments were to remove previous legal impediments to notification of a marriage. For example, lack of parental consent does not prevent notification.

Cultural impediments to notification that have also dissipated legal knowledge is more diffused and the notification procedure is much easier.

Today, ideally, relationships out of wedlock are either intentional or accidental.

The judiciary has retained the principle of "Naien" but in practice couples who have not notified a marriage will in regard to property, maintenance or succession disputes, have to rely upon the general law.

No reliable statistics are available on the number of couples living in de facto relationships in Japan so the amount of potential problems in this area is not known. According to available evidence, the percentage of couples living out of wedlock has decreased. In a sense, one could say that the government intention of modernizing marriage has been successful. However, this is not to say all is well. Many marriages continue in law not in fact.

There are still some serious legal impediments to couples notifying a marriage. An obvious legal impediment to marriage would be an existing marriage.

Without going into detail on Japanese divorce law, divorce without mutual consent can be a lengthy procedure. Recent Supreme Court decisions have reduced the minimum necessary separation period. However, it can still take as long as ten years of separation before a disputed divorce may be approved. People may then be forced into a de facto relationship due to their inability to obtain a divorce. Others

may similarly be unable to remarry if the new partner has a particular family relationship to a previous partner. These situations can create an area of hidden de facto relationships.

The primary focus of this presentation is on de facto relationships, but this discussion is intrinsically linked to divorce law in Japan.

Presently, under Japanese family law, the dependent spouse, usually a woman, is unfairly treated in regard to property and maintenance determinations. A dependent spouse will often resist divorce proceedings because of the potential economic disadvantage following divorce.

The judiciary is reluctant to respond to disputed divorce proceedings. This is primarily a result of conservative desires to uphold marriage as a life long commitment, an unrealistic position to take when a couple is in court contesting a divorce.

Some members of the judiciary may also be reluctant to allow divorces because of the economic hardships it will impose on the dependent spouse.

Custody issues are determined under the principle of the best interests of the child. This principle applies to children of a marriage as well as ex-nuptial children.

Principles of maintenance are provided in Article 818 of the Civil Code. Maintenance contribution can be made payable to support ex-nuptial children.

In conclusion, I would like to provide my opinion on the approach needed for reform.

Existing divorce law needs to be reviewed, particularly in regard to adequate equitable property and maintenance provisions, and to difficulties in obtaining a disputed divorce.

Some form of legal recognition of de facto relationships should be considered. The situation, where a dependent spouse is given no access to equitable remedies under the law following the breakdown of a de facto relationship, is undesirable.

However, the need for reform becomes more imperative when the situation involves children. We need to consider the best interests of children and give effect to these considerations whether they be children of a marriage or not. Both parents should be involved in the raising of children in both social and financial aspects.

I would like to thank you all; all of the delegates, and all of the people who have worked for this World Congress. I believe that this Congress will achieve its purpose and will improve mutual understanding on developing the rights for children.