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National Report: Japan

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NATIONAL REPORT: JAPAN

TEIKO TAMAKI*

1. Legal framework of Japan¹

(1) Sources of Law

A fundamental feature of Japanese law is that it is based on statutory law. Customary laws, which are not contrary to public order and morality, may supplement the statutory laws provided there is no relevant regulation.² With regard to the application of case law as a source of law, the courts are not constrained by precedents, and the lower courts are not constrained by the upper court's decisions in principle, provided it is virtually within the bounds of possibility.

Since the codified laws remain general to a certain extent, gaps between the clause and the reality have to be bridged by court judgment. "The court has also been instrumental in mitigating the effect of provisions of a law,"³ and judges may interpret the meaning of a clause for cases which may cause unfairness if they were literally and strictly read.

(2) Legal History

The legal history of Japan can be outlined in that Japanese law is based on three receptions of different jurisdiction in successive periods; Chinese law in ancient times, Continental laws in the Meiji era (after the Tokugawa Shogunate), and American law after the World War II. Regarding the latter two major influences of foreign laws, the Japanese legal system "became a composite of mainly French and German elements, but soon after codification began, the influence of German legal dogmatics became dominant."⁴ The trend thereafter was altered by the further introduction of

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1. Each number of sections in this paper corresponds to the questionnaire provided by Professor M. Saez (the General Reporter).

2. Article 3 of *Horei* (Act on the Application of Laws in General).

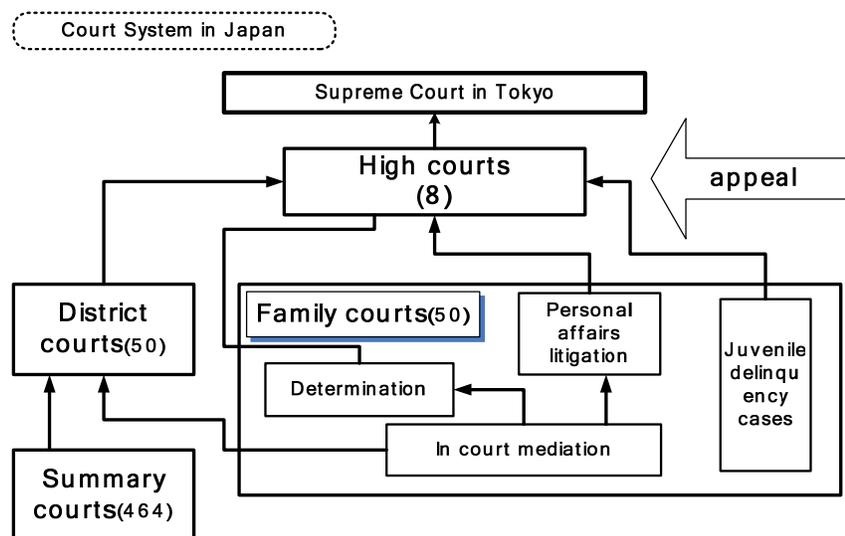
3. Oda, H. (1999), *Japanese Law 2nd edition*, Oxford University Press at 51.

4. S. Kakiuchi, "Access to Justice in Japan," *Japanese Reports for the XVIIth International Congress of Comparative Law ICCLP Publications No.10*, International Center for Comparative Law and Politics, University of Tokyo, 2007, at 114. See

some American legal elements after the war, and the judicial system was simplified so as to have one ordinary jurisdiction of the following court system.

(3) The Court Structure

Japan has a three-tiered court system whereby one can appeal twice against the original judgment heard at the District Courts, once to the High Courts and finally to the Supreme Court. The unique feature within the system would be a separate deployment of the Family Courts which deal with cases concerning family affairs and juvenile delinquency cases. Any disputes relating to husband and wife matters, including marriage and divorce, have to be referred to the in-court mediation held at the Family Courts. For cases where both parties could not come to an agreement as a result of in-court mediation sessions, the parties shall be allowed to bring it to a court trial as the second stage (the principle of pre-posing the in-court mediation).



*The figures in brackets show the number of each court and its branches spread throughout Japan.

(4) Legal Professions and a New Lay Judge System

“Judges, public prosecutors, and attorneys form a distinct group which is called the *hoso*,”⁵ meaning the legal professions. All of these professions are raised from legal trainees of those who passed a uniform bar examination, *shiho-shiken*. Although the three professions share the same

Kakiuchi, *ibid.* at 113-115 for further basic information on the Japanese legal system.

5. Oda, *ibid.*, at 86.

exam (at the entrance), they remain separate professions which the trainees have chosen at completion of legal training.

Since 21 May 2009, the newly introduced lay judge system has come into force, the *saibanin-seido*, where three judges and six lay persons decide together both guilt and sentences for the most serious criminal cases.

2. Constitutional regulations applicable to same-sex partnerships

Japanese laws defining marriage are included in the Constitution (1947) and in Book IV (regulations on family and relatives) of the Civil Code (originally legislated in 1889 and amended in 1947). Marriage is confined to that of a man and a woman; Article 24 of the Constitution regulating rights to marry, whereby it states marriage is based on the fundamental equality of “both sexes” and that “a husband and a wife” are required to maintain married life by mutual cooperation. The two key-phrases in quotation marks clearly indicate the fact that marriage is exclusive to opposite-sex couples.⁶

Article 24 [Rights to marry]

Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through co-operation with the equal rights of husband and wife as a basis.

With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

Despite Article 12 stating that “[t]he freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people,” the freedom and rights to marry same-sex partners have not been achieved because they were not recognised in the same way as opposite-sex partners despite the following provision which assures the rights to pursue one’s happiness.⁷ Article 13 reads, “[a]ll of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and the other governmental affairs.” Given that freedoms and rights are guaranteed under the Constitution, there is no legal construction or legal consciousness to regard homosexuality as a human right needing legal protection.

There is no definition of marriage needing to be between a man and a woman in the current Civil Code because it was regarded as a matter of

6. Although there is a minority opinion of interpreting “both sexes” to include *two* same-sex persons, the Courts and the majority of family lawyers are consistent on this point of not stretching “both sexes” to mean other than a man and a woman.

7. T. Maruta, “Seitekikoudou to kojinn no sekinin (1) – douseiai wo megutte (Sexual act and individual responsibility part 1 – issues relating to homosexuality),” *Hogaku Seminar* Vol. 553, 2001, at 74.

course. Chapter II of the Civil Code Book IV regulates matters concerning marriage. Section 1 (Articles 731-749) Formation of Marriage includes requisites, nullity and annulment of marriage; Section 2 (Articles 750-754) Effect of Marriage, Section 3 (Articles 755-762) Matrimonial Property System; and Section 4 (Articles 763-771) Divorce.

Bars to marriage are referred to within the provision laid down in Section 1 which does not contain any clause which would prohibit same-sex marriage. However, the Court's interpretation of same-sex marriage was that it is null and void due to a lack of "intention to marry" as stipulated in Article 742,⁸ and this view has also been supported by a majority of family lawyers.⁹

Homosexuality once 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. These acts were replaced with the Old Meiji Criminal Code legislated in 1880 which had no provision prohibiting homosexuality or criminalising homosexual behaviour.

3. Legal statutes: A specific law allowing same-sex marriage

There has been no law which allows same-sex marriage until today. The general view of the Courts on same-sex relationships has not necessarily been favourable to interested parties¹⁰ or they remained less interested until the "Fuchu Youth House" case in 1990s, given that same-sex couples are predominantly invisible within this society.

It is clear that same-sex couples still do not exist in the same sphere of law as other forms of relationships, namely married couples and opposite-sex cohabiting couples, or as a family. The overall answers to the questionnaire can be limited accordingly.

4. Any formal difference in the treatment between different sex and same-sex marriages

Not applicable due to an absence of same-sex marriage regulation.

5. Some sort of civil union regulation

There is no law for both same-sex and opposite-sex couples to form a civil union/partnership.

8. The adjudication of the Saga Family Court, 7 January 1999, a case approved to amend the record in the Family Registration Book of the claimant asking for nullity of his marriage to a Philippine "wife" who later was found to be male. *Kateisaibansho geppo* (A monthly report of Family Court), Vol. 51 No. 6, 1999, at 71-74.

9. However, as described later at Q. 9, it is unclear and difficult to grasp whether this interpretation still remains mainstream in light of societal changes nowadays.

10. See Maruta *ibid.* at 74 and also Y. Watanabe, "Douseitouroku pa-tona-shippu shian (Draft proposal on same-sex partnership registration)," *Doshisha Hogaku* Vol. 53 No. 9, 2002, at 143.

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6. A civil union regulation opened to heterosexual couples or only to same-sex couples

Not applicable due to an absence of a civil union regulation.

7. Any formal differential treatment between heterosexual and same-sex couples within the civil union statute

Not applicable due to an absence of such civil union/partnership law.

8. Other legal statutes that specifically recognize same sex partners for specific purposes

There are no legal statutes that recognize same-sex partners for any purpose.

9. Domestic discussions for future regulation on same-sex marriage

Discussions regarding the introduction of a same-sex marriage law have never arisen, either at a constitutional, legislative, or administrative level in Japanese society. Several legal scholars, particularly those involved with family law, have referred to the possibility of introducing marriage or another form of official registration for same-sex couples.¹¹ Their views on the legal recognition of same-sex partners including the pros and cons of same-sex marriage providing equal treatment for couples of the opposite-sex and the same-sex couples can be classified as follows¹²:

1. Traditional (used to be the mainstream) interpretation: Not to approve same-sex partners as a legal “coupledom” under existing laws on the grounds that the institution of marriage is confined to heterosexual couples which is a socially accepted ideal. The other reason for disapproving of same-sex marriage is that there is a general absence of “intention to marry” which is a requisite to constitute marriage.¹³

2. Recent interpretation (1): Opposing the traditional interpretation that it is no longer applicable because the purpose of marriage has shifted to focus on its functions other than that of procreation and nurturing children which used to be predominant. It is therefore presumed that there are no

11. Literature concerning the legal recognition of same-sex partners is still limited.

12. The classification is referred to both M. Tanamura, “Douseiaishakan no konin wa houteki ni kanouka (Is a marriage between homosexual persons legally enforceable)?” *Hogaku Seminar* Vol. 476, 1994, at 21 and Y. Numata, “Douseiai wo meguru kasajitsumujo no shomondai ni kansuru ichiko-satsu (A study on problems of Family Court practice concerning homosexuality),” in *Atarashii kateisaibansho wo mezashite (Aiming for a new family court)* edited by Member of Editorial Board of Collected Papers Commemorating Judge Tsuneo Suzuki’s Retirement, Look, 2000, at 53-55.

13. See A. Omura, “Seitenkan, douseiai to minpo (ge) (Sex-change, homosexuality and civil law – part 2),” *Jurist* No. 1081, 1995, at 61-69 as his reluctant attitude in offering same-sex couples a legal recognition represents the group of people who remain conservative and prudent on the issue.

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reasonable grounds to refuse same-sex partners from having the same legal benefits as married couples. They should be given quasi-legal protection, given that unmarried heterosexual couples already enjoy those benefits.

This interpretation can be further subdivided depending on whether it supports;

- a) Not specifying whether different-sex or same-sex marriage but a sort of civil union,¹⁴
- b) Not same-sex marriage but a sort of civil union,¹⁵
- c) Not full protection pursuant to marriage but providing another form of protection.¹⁶

3. *Recent interpretation (2):* Valuing legal marriage, common-law marriage, and same-sex partnership in the same way as cohabitation, as a lifestyle choice. Each individual is to be given the choice which he or she may find most applicable to him or herself.¹⁷

10. Domestic discussions for future regulation on same-sex unions different to marriage

As described in the above Q. 9.

11. Non-legislative regulations: Specific benefits/rights to same-sex couples via administrative acts

To date same-sex couples are neither regarded legally nor socially as established partners therefore no benefits/rights or obligations are given to them via administrative acts or by civil law. Therefore some same-sex couples in Japan have sought out practicable solutions in order to obtain some legal protection, for example, they make a contract of their relationship by way of notary deed, or they create a legal link with their partner by adoption (See the additional comment paragraphs at the below Q. 13).

12. Judicial construction of the law: Any relevant decisions that had or may have future impact in the legal construction of same-sex marriage or in the legal recognition of same-sex unions/partnerships

14. S. Ninomiya, *Jijitsukon no gendaitekikadai (Contemporary issues on de facto marriage)*, Nihonhyoronsha, 1990, at 344–345.

15. Watanabe, *ibid.* at 152, 172–173.

16. Numata, *ibid.* at 66.

17. Y. Tsunoda, *Sei no horitsugaku (Jurisprudence of Sex)*, Yuhikaku, 1991, 210–212.

A landmark—and the only—case concerning the issue of homosexuality¹⁸ was the “Fuchu Youth House” case, with the judgment of the Tokyo High Court, on 16 September 1997.¹⁹ This case related to an incident in February 1990 when members of an organisation acting on behalf of gays and lesbians called “OCCUR” received ill treatment when they held a study camp at a Youth House (a public accommodation designed to be used for and by young people) in Fuchu city. They were not allowed to stay overnight because the “House,” without evidence, suspected that the members might engage in sexual activity which would have a negative impact on other young people present. The House was governed by the Tokyo Metropolitan Board of Education to whom OCCUR presented a petition for compensation based on the premise that the House’s attitude was discriminatory and therefore prejudiced against homosexual people.

The Court ruled that the refusal and exclusion of homosexual people from use of the facility constituted a breach of law, and remarkably it also referred to the notion of homosexuality without unprejudiced expression for the first time. The court defined homosexuality as one of sexual orientations of a human being in that a person is sexually attracted to someone belonging to the same sex as him or herself. It decided that despite the 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 homosexual people as a minority group and to be supportive of their rights and benefits. The case was also remarkable in that homosexual people unprecedentedly took a leading role in the judicial process.

Although OCCUR won the case that discrimination on the grounds of one’s sexual orientation was illegal, the case revealed the fact that a public authority such as the Tokyo Metropolitan Board of Education did discriminate against homosexual people.

13. Additional comments: The specific situation concerning same-sex relationship in Japan

18. Provided, 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, 29 February 1972, *Hanrei Jiho* Vol.670, at 77). The Court decided in favour of the wife, however, it did not regard the husband’s homosexual behaviour as adultery but it applied the Civil Code Article 770 (1)-5 on the ground of their judicial divorce whereby his extramarital homosexual relationship constituted a “grave reason” for the wife to discontinue the marriage.

19. *Hanrei Times* Vol. 986, at 206. The OCCUR members also won the first trial (the judgment of the Tokyo District Court, 30 March 1994, *Hanrei Jiho* Vol. 1509, at 80) finding that the House could not refuse the OCCUR members to stay overnight unless there were “definite possibilities” for them to have sex in the House and that it was not likely to happen. The High Court’s decision was more in-depth in pursuit of the House’s injustice action in that it went forward and made reference to the House’s regulation that rooms cannot be shared by people of the opposite sex.

Unlike the world trend, same-sex couples in Japan have far less social and no legal recognition at all. These couples are still not regarded as a union in the same way that opposite-sex couples are; prejudice, discrimination, and negative attitudes which excluded same-sex couples are justified based on a view that it is an outrage against public decency, a stance which supports the traditional idea of marriage, namely that it is exclusively a union of man and woman.

Having little to answer the above questions on same-sex marriage/union, it would be appropriate to add some historical background as well as practices and strategies of the parties concerned in order to obtain the least legal protections which are currently unfurnished to them.²⁰

(1) No social and legal recognition to date

“Male homosexuality has a long and well-attested tradition in Japan,”²¹ 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,”²² 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 as in other countries who were influenced by Christianity.²³

However, since the Meiji era (1868-1911), the past positive manner of illustrating homosexuality was concealed but “a new discourse positing homosexuality as a deviant and dangerous passion”²⁴ emerged. Giving homosexuals and homosexuality the status of a deviant and a deviance was

20. A large part of the paragraphs was originally published in T. Tamaki, “Distribution of ‘Matrimonial’ Property of Married, Cohabiting and Same-sex couples in Japan”, *Hosei Riron: The Journal of Law and Politics* Vol. 42 No. 1, 2009, at 21–36.

21. 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” at 2–42 for further historical background details of male homosexuality in Japan.

22. McLelland, *ibid.* at 20.

23. It is often said that homosexual persons and homosexuality in Japan are not so much segregated in a similar way as those in the Christian societies because it is a country of non-Christian culture and background. However, Yuri Horie, who has been the first lesbian Christian minister to “come out” with her sexual orientation, questions the “tolerance” of homosexuality as a part of culture in Japanese society. She points out that the “culture tolerant of homosexuality” is confined in particular to male homosexuality expressed in arts and literature. See Y. Horie, “*Rezubian*” *toiu ikikata – kirisutokyo no iseiaishugi wo tou* (Way of life as “Lesbian” – Querying heterosexualism in Christianity), Shinkyō Shuppan, 2006, at 102-104. Horie also refers to a serious murder case of October 2000 as a homophobic hate crime which cannot be accepted in a “tolerant” society.

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

established particularly after the Wars despite the fact that no statute prohibiting homosexual behaviour or stating anti-homosexual matters was introduced. The official policy “ignored same-sex sexuality as it existed between men”²⁵ and that male homosexuality had always been predominant, however, voices from their counterpart, namely lesbians, gradually emerged.²⁶

The dominance of *hetero-normativity* is seen not only in legal provisions but also in various forms representing the societal phenomena that 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.”²⁷

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.²⁸

(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”) are only a proportion of the total (less than 1%).²⁹ Ordinary adoption does not require any involvement of the courts, i.e., no permission is required if the adoption is operated between adults, and 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

25. McLelland, *ibid.* at 27.

26. See Horie cited above at footnote 22 and Y. Iino, *Rezubian dearu “watashitachi” no sutori (“Our” story as Lesbian)*, Seikatsu Shoin, 2008, for most recent publications.

27. McLelland, *ibid.* at 39.

28. “Human Rights Protection, Activities of the Human Rights,” May 2005, at <http://www.moj.jp/ENGLISH/HB/hb01.html>, last accessed on 28th September 2009.

29. The total number of adoption cases was 88,511 in 2005 and only 305 cases within the figure were the special adoption, according to the Annual Judicial Statistics *Shiho Tokei Nenpo* (issued by the Supreme Court).

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.³⁰ 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.³¹

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.”³²

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 do not wish to become 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 they have, at one stage, been in a parent-child relationship.³³

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.³⁴ These notary deeds are commonly executed between

30. 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, at 55–88.

31. Needless to say, child adoption involving a sexual relationship is unacceptable.

32. 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.

33. Articles 735 and 736 of the 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 around the time 1984.

34. 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://digitalcommons.wcl.american.edu/jgspl/vol19/iss1/12>](http://rainbow-</p>
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parties making a contract which includes money transaction such as selling and buying of real estate or payment of debt.³⁵

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 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 event 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 people³⁶ 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 dependent 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) *No way to start a family*

With regard to ways and means to have a child, it is probable that both Assisted Reproductive Technology (ART) and adoption are not possible or at least not realistic ways of forming a family for same-sex couples.

Despite the lack of regulation on the use and effect of ART in Japan (as there is only a guideline for operation of ART proposed by the Japan Society for Reproductive Medicine and it has been no more than a consultation of the Special Committee on Medical Technology for Reproductive Treatment at the Ministry of Health, Labour and Welfare

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 patona (Same-sex partner)*, Shakaihihyosha, 2004 at 18–35).

35. The use of a notary deed to register a couple's living arrangement as an official agreement is also being employed by some cohabiting opposite-sex couples, particularly those who remain legally unmarried as their lifestyle choice.

36. Sugiura et al. *ibid.*, at 152.

which has never developed into proposing a bill), it is likely that same-sex couples will not be allowed to go for ART due to the following reasons: firstly because each hospital and clinic approved for ART will refuse same-sex couples to have its medical treatment as it is not compatible with the guideline. The guideline's basic position is that it is intended for a married couple to have ART and that in case of unmarried couples, hospitals would have screening sessions with an internal bioethics committee to decide whether to grant the ART treatment or not. Secondly, it would be difficult or impossible to register a child born with the aid of ART in Japan, even for the couples who have successfully undertaken the whole process abroad. It is now fixed to interpret legal motherhood as a person who gave birth to the child in Japan³⁷ and the child will be registered in the mother's Family Registration Book (see the following paragraph (5)), there might be a chance to register a child born by ART outside Japan in the case that either partner of a female same sex couple underwent ART treatment and delivered the child, with the name of the father being left in blank describing that the child was born out of wedlock. However, it is not realistic for a male homosexual couple to think that they could do the same.

The other method to have a child, namely through child adoption, is also not realistic to think it as possible for same-sex couples, even through the ordinary adoption system,³⁸ 1) although it is possible for a single person to adopt a child it requires the Family Court's permission if the child is underage (under 20 years old),³⁹ and 2) the Court's permission is mandatory even when adopting the partner's own child.⁴⁰ A conceivable practical way for same-sex couples to have a bigger "family", more than just a couple, may be something like the following model: a partner **A** (senior) adopts a partner **B** (junior) through the ordinary adoption. While **B** has a child of his or her own, **C** exercises parental powers and duties (*shinken*) and custody over **B** (not **C**'s other parent). **A**, **B** and **C** can therefore live and lead a life together with some legal links created amongst them.

In any case, it does not go much beyond the reality of leading a life "as a family" that same-sex couple is not entitled to enjoy the rights to have a family of their own under the current law.

(5) *A crucial lack of viewpoint of perceiving same-sex partners as "family"*

37. Decree of the Supreme Court on 27 April 1962.

38. Needless to say the special adoption is possible. See the above paragraph (2) at p. 8.

39. A child over 15 years old can decide and act on one's will to have an adoption contract, without consent from parents or a guardian, however the Court's permission is still required.

40. This is contrary to a case of a step-parent adopting a child of his or her (new) spouse's own that the Court's permission is not necessary even if the child is underage.

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 currently more prevalent. However, same-sex couples are not even included in the category of “family.” They are precluded in the existing statutes relating to family matters as a justifiable object.

One of the reasons to prevent a wide perception of same-sex partners as “family” is that people’s views of what family is are bound by the institution of *Koseki* (the Family Registration Book, hereinafter the FRB). The FRB is a fundamental legal identification record for each Japanese national which is unique in the respect that the record is not independent but compiled in the form of a family unit.⁴¹ It is stated in the Civil Code Article 739 that “[a] marriage becomes effective by notification thereof in accordance with the provisions of the Family Registration Act (*Koseki-ho*, Act No.224 of 1947),” whereby it means that the institution of marriage associates with the Family Registration system. It is presumed that the majority of people never questioned, but just accepted, the fact that same-sex couples cannot marry under the Japanese law, which therefore means that they cannot constitute a common FRB and thereby form a family accordingly.

It has also been pointed out, as a reason to preclude same-sex couples from the legal sphere, that the absence of provisions of family protection in the Constitution that Article 24 can be read as a provision reflecting individualism but with no implication of family being included.⁴²

The exclusion of same-sex couples from law is not only found in earlier legislation but also in new legislation established within the last two decades. For example, the Welfare of Workers Act 1991 (amended in 2004)⁴³ defines its subject family members, including so-called common law spouses, at Article 2 (4) which does not cover same-sex partners. They are not entitled to enjoy such social welfare schemes as other workers and the “heterosexual family.”

The relatively new Prevention of Domestic Violence Act 2001 (amended in 2007)⁴⁴ has also left out same-sex partners as its intended target given

41. To be precise, each member of the family has a sheet of their own in the same FRB which contains an individual’s name, date of birth, and relationship to other family members. The child’s status is described in reference to the Head of the FRB, which is, in the majority of cases, his or her father, e.g. “the first daughter” for a case of the Head of the FRB’s first female child.

42. E. Saito, “Doseiaisha to kazoku (Homosexual persons and family)”, *Tokai Hogaku* Vol. 27, 2002, at 222.

43. The official name in English is the *Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave*. The Article 2 (5) reads that the range of “family members” can be broadened to include “other relatives specified by ordinance of the Ministry of Health, Labour and Welfare.”

44. The official name in English is the *Act on the Prevention of Spousal Violence and the Protection of Victims*.

that the definition of “spouse” is as follows: “Article 1 (3) The term “spouse” as used in this Act shall include persons who are in a de facto state of marriage, even if it has not been legally registered”

The interested parties in same-sex relationships might regard themselves as in “a de facto state of marriage” and “has not been legally registered.” Because there is no way or means to have any legal registration, it can be interpreted that they are also eligible for the use of the Act. However, there was no implication for including same-sex couples at the legislation process, and moreover there has been hardly any action or lawsuit to speak of about the issue.

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. If same-sex couples remain in the “closet”⁴⁵ or continue to be ignored by society, there will be no potential for them to enjoy any legal rights in Japan. More significantly, Kazama, who participates actively as a homosexual person, has made a point that their “coming out from the closet” cannot function without a reaction from the side who receives their message, whereby the “coming out” is a *concerted action* by both homosexual and non-homosexual people.⁴⁶

45. Narratives of homosexual persons have gradually been disclosed individually at times from 1990s. See *Coming Out in Japan* by S. Ito and R. Yanase, a “leading” same-sex couple who have been dedicated in their activities of disseminating information regarding homosexuality and homosexual people to 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 T. Kazama (*Hogaku Seminar* No. 465, 1993 at 1–3) and Y. Koyama (*Hogaku Seminar* No. 516, 1997 at 1–3).

46. Citation from Horie, *ibid.* at 42. The original literature “Kyodokoui toshite no kaminguauto (Coming out as a concerted action)” by T. Kazama was said to be published in a newsletter of the Kyoto Parish of United Church of Christ in Japan issued on 2 September 2001, but I have failed to obtain a copy to date. See Horie, *ibid.* at 256 for reference.