

# Shifting Arrangements on Love, Sex and Reproduction in Japan and Switzerland: Legal and Social Contexts

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## 1 Introduction

Family laws in Japan and Switzerland are concerned with all the legal issues involving family relationships, such as marriage, premarital agreements, divorce, child custody and adoption. However today there are more late marriages, cohabiting unions, fragmented families, unmarried mothers and divorced parents and therefore also many more single people in general, who love, have sex or reproduce and do not fit to the existing legal regulations and need different kinds of arrangements (Ninomiya 2007: 34–36).

Love, sex and reproduction are generally less connected to marriage arrangements than they were 50 years ago. Modern dating arrangements – from social meeting platforms to mobile application purchases such as *Tinder* – are equally popular in Japan and Switzerland, and may offer more than sex. Moreover, so-called “sex arrangements” are not necessarily concerned only with sex, but also, and even more so, with entertainment, as is and has always been the case with the traditional Geisha business. They might also take the character of a short-time partnership in which company and attention are sought, meaning two people agreed on paid companionship.<sup>1</sup> When a businessperson does not want to attend an official ceremony without a partner, s/he is likely to find one with an escort service, be it in Japan or Switzerland. Then again, there are very committed relationships without any expectation of love, sex and reproduction, which are legally not well regulated. Moreover, reproduction arrangements today can be disconnected to sex.<sup>2</sup> There are several possibilities for someone looking to have a child without love and sex (adoption, IVF with heterologous insemination or surrogacy).

In short, one current question within family law studies in both countries is whether there is any need for reforms (e.g. the call for partnership law to legalize marriage for homosexual partners) or whether we could follow a contractual approach, allowing adult people to mutually agree on their personal relationships by contract. In fact, any case of love, sex and/or reproduction is based on arrangements and legal agreements,

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1 On the Japanese market there are, for example, “chuddle” services available and in general “hostess clubs” (where customers are treated with food, drinks and talks) are very widely spread.

2 Artificial insemination (AI) was the first technology of reproduction which bypassed sexual intercourse, resulting in a non-coital assisted conception. Surrogacy became possible with the advent of artificial insemination and *in vitro* fertilization.

in other words on contracts: A marriage arrangement, for example, is based on a consensual marriage contract even if a special institutional character is foreseen (and we might not call it a “marriage contract”). In Switzerland, for example, a civil ceremony between the couple at the registry office to change the own status is mandatory.<sup>3</sup> Nevertheless many couples will consider their Christian religious ceremony in church as the solely relevant commitment.<sup>4</sup> The Japanese civil law marriage is not very different from this: The marriage arrangement is legally effective once the couple has successfully submitted the required documents to the registry office to change their status in the family register (*Koseki*, cf. 2.3.1), but there is no need for a civil ceremony at the registry office. Wedding ceremonies in Japan again vary from a Shinto ceremony at a shrine to a Christian wedding at a chapel, though today a hotel hall wedding ceremony is the most common. Then again, marriages in Switzerland and Japan often end with a divorce settlement, which is again nothing other than a legal agreement between the two parties. Finally, on the other hand the existing divorce settlements or a premarital agreement are often about financial issues only, although they are closely related to love, sex and reproduction. So we also need to tackle the question: What is so special about these contracts?

In this article, I will discuss some shifting arrangements on love, sex and reproduction in their legal and social contexts. To start I will outline the legal framework, namely the family law regulations (cf. 2). I will explain how the legal histories of the Japanese and Swiss Civil Code are connected and then I will continue to outline some recent trends in the family laws of Japan and Switzerland. Then, I will go on to present some real cases of arrangements on love, sex and reproduction which I heard during interviews<sup>5</sup> from a comparative legal perspective, and outline the broader social context (cf. 3). Then I would like to make the theoretical argument (cf. 4), that the law generally should take a non-partial attitude towards love, sex and reproduction – and certain individual and family lifestyles – and that contractual agreements suit these very personal arrangements well: Who else than the involved parties themselves should and could decide better on these very personal matters of love, reproduction and/or sex? The hypothesis is, that a contractual approach would constitute and strengthen the rights to self-determination of individuals in these very personal arrangements concerning the individual or family lifestyles. If partners could and would contract more often, this would lead to additional legal protection. However, minors and other vulnerable people would still need further protection by family law regulations, independently of the agreements taken by partners.

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3 Art. 90–102 Swiss Civil Code.

4 However, Art. 97 para. 3 Swiss Civil Code states explicitly that a civil law marriage is always required before a religious marriage ceremony can take place. The Roman-Catholic church considers matrimony as a sacrament, which cannot be dissolved normally. However, Catholic matrimonial law is also based on a free mutual agreement.

5 For more stories, see Holloway (2010).

## 2. Legal Context

In Switzerland and Japan any agreement between two private parties, which would set out rights and obligations, is regulated by contract law, whereas the marriage contract is regulated by family law provisions. Additionally, relationships of love, sex and reproduction are based on gender role constructions and therefore also some international and national laws in this regard, e.g. the CEDAW (UN Convention on the Elimination of All Forms of Discrimination against Women, 18.12.1979), have an impact as well. Moreover, family law and reproduction rights cannot be separated. Therefore, this article will not only “travel” between Japanese and Swiss legal systems, and between present and future possible laws, but also between the boundaries of legal fields, e.g. contract law and family law. Nevertheless, contract and family law are parts of the civil law systems, so the first question is: Why do we find similar civil law systems in Japan and in Switzerland? This is a question about the specific legal contexts, including for instance the legal histories of the two countries and their common civil law models, the plural legal structure of Japanese civil law. On the other hand, similar social phenomena and international legal incentives (e.g. treaties such as CEDAW) have brought recent trends in the Japanese and Swiss family laws.

### 2.1 Legal History

During the Meiji period (1868–1912) not only did great technical and medical innovations take place, but also the Japanese court system was developed with high speed and the law-making process – especially in the field of private law – progressed on a large scale. Before that, there was no need for private law, because in a feudal system, social structures and stratification tell people what to do. During the nineteenth century many different European and other laws had been consulted by the Meiji government in Japan, in order to expeditiously set up a civil law book that suited Western powers. Only with a western-style civil law would Japan find international acceptance (Jansen 1988: 432, 448, 474). The result was a reception of provisions and the overall pandectic structure<sup>6</sup> of the German Civil Code, the BGB (or to be precise: the structure of the first draft of the BGB from 1887) (Hotz 2006: 6, 10). The actual Japanese Civil Code, hereinafter *Minpō* dates from 27.04.1896/No. 89 and from 21.06.1898/No. 9, whereas since the linguistic revision of 2004 it is only registered as law No. 89 of 1896: Book III of the *Minpō* covers the laws of obligations, and Book IV the family law.<sup>7</sup>

Towards the end of the nineteenth century Eugen Huber in Switzerland got the order from the Federal Council to codify a national Swiss Civil Code (*Zivilgesetzbuch*, abbr. ZGB), which was adopted on 10 December 1907 and came into force in 1 January 1912 together with the fifth “Book on the Laws of Obligations” (The Code of Obligations,

6 This basically means, that the Code has a five book-structure, which derives from the Roman *Corpus Juris Civilis* Book I: General Part, Book II: Laws of Obligation, Book III: Property Rights, Book IV: Family Law, Book V: Inheritance law, see Hotz (2006: 25).

7 All Japanese Laws referred to hereafter can – unless mentioned otherwise – be found in the Japanese/English translation data system of the Ministry of Justice (2016). <http://www.japanese-lawtranslation.go.jp> (last visited 15.07.2016).

*Obligationenrecht*, abbr. OR, which has been since then a separate Code in Switzerland as of 30 March 1911. This was approximately ten years later than the Japanese and German Civil law codifications came into force. Nevertheless the Roman legal foundations of the Swiss Civil Code and the BGB were the same, and some of the same preexisting laws (e.g. *Dresdner Entwurf* of 1866, *Privatrechtliches Gesetzbuch für den Kanton Zürich*, 1853–1855) and the drafts of the BGB were consulted when drafting the Swiss Civil Code (Hotz 2006: 24). This explains why the Japanese and Swiss Civil law Code are similar in their structure and content, though we can also find significant differences (see for a concrete example 3.1.1).

After World War II, the Japanese Constitution, hereafter *Kenpō* of 3 January 1946, in force since 1947, namely Art. 13 (personal rights), Art. 14 (right to equality) and Art. 24 (right to marriage)<sup>8</sup> *Kenpō* and the Book IV of the *Minpō* on family law were fundamentally changed to a system protecting equality of the individuals (Wagatsuma 1950: 405; Wagatsuma 1969; Ōmura 2010: 23–24). Family law made the transition to a law of “relationships of relatives” and gave up the old *ie*-system (*ie seido*), which was in short a very hierarchical and patriarchal household system with one “pater familias”. Marriage has since then been regulated as a consensual act between adults and does not require the consent of a guardian. Husbands and wives came to be treated as equals with regard to the right to own and manage property, the right of inheritance, and the right of custody. Divorce cannot be finalized without going through a registered procedure. Additionally, family courts (*Katei Saibansho*) were established to decide on all family issues (including juvenile criminal cases).

In conclusion, the Japanese Civil Law of today is a fusion of European legal thinking dating back to the end of the nineteenth century, American legal thinking prevailing since the time after WWII (e.g. political equality, reform of family law) and traditional Japanese thinking and conventions.<sup>9</sup> And one can add to this, as mentioned already, a certain global legal incentive of today in Japanese law (e.g. women’s equal rights, cf.

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8 Article 13: All 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 in other governmental affairs. Art. 14: 1) All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin. 2) Peers and peerage shall not be recognized. 3) No privilege shall accompany any award of honor, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it. Article 24: 1) Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. 2) 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.

9 One could add to this the reception and circulation of “Chinese law” in the seventh century; however, this did not touch private laws.

c).<sup>10</sup> Today this “hybrid character” between the traditional Japanese and a civil law and common law tradition is not contested anymore.

### 2.2 *Premarital Agreements – an Example of the Multi-layered Legal Culture*

To give a concrete example for the Japanese multi-layered civil law culture, I will outline here some comparative legal aspects on the provisions for pre/marital agreements. Although there is no specific regulation on the marriage contract itself in the *Minpō*, there are some provisions on a premarital agreement on the property scheme of the couple which is going to marry. This is equally true for Swiss or German family law. Whereas the German wording for a marriage contract, “Ehevertrag”, counts for a contract to enter into a marriage arrangement and at the same time for the premarital or marital agreement on property schemes, there is a specific term for the latter in English: premarital agreements on property or prenuptial agreements (pre-nups).

In short (cf. more in detail Hotz 2011: 94–215), the eight provisions on the topic of matrimonial property in Art. 755–762 *Minpō* are part of the family law and follow a similar system as the Swiss provisions in the Civil Code. As the US-American (common law) legal system does not provide “one” comprehensive federal civil code or family law such as the Japanese *Minpō* or the Swiss Civil Code, but is instead based on case laws, state statutes and some uniform law Acts,<sup>11</sup> this is not surprising.

Analyzing the content of the Japanese provisions that foresee a separation of property during marriage between the spouses, this notion is closer to the predominant US-American legal solutions (few US states presume community of property). This also partly explains the Swiss and Japanese differences in the amount of provisions, since according to Swiss law three property schemes are foreseen, from which the parties can choose (Art. 181–251 ZGB, see table below).

Then again, a unique Japanese provision is, for example, the moment for making such an arrangement, that is, it can only be made before marriage.

Although Art. 755 and 756 *Minpō* foresees the freedom of contracting in this legal field and a premarital agreement on different property schemes between the two spouses – as the Swiss law and the American do, they practically do not exist in Japan in reality and remained law in the books only. Such arrangements are basically not considered necessary because there is a certain expectation to trust each other.<sup>12</sup>

10 The Japanese Civil law system is far from the only one on the Asian continent, which was (and still is) influenced by the civil law system, derived from the pandectic system of civil legislation in the nineteenth century. Also in the Republic of Korea and in the Republic of China there are examples of civil law systems with considerable significance. Reflecting on the historical context underpinning contemporary private laws and recent trends, it becomes apparent that legal traditions from different centuries have persisted in each of the countries, while Chinese and Western law models have been circulating all along, see Hotz (2015: 286–288).

11 The “Uniform Premarital Agreement Act” (hereinafter UPAA) as of 1985 and its eight articles are relevant for the arrangements on premarital property issues. With the *American Law Institute’s Principles on Dissolution of Marriage* as of May 2002 (hereinafter ALI) there was also a move towards an alternative private ordering of the issue, see Bix (2001: 231).

12 This is at least one of the answers I got from my Japanese colleagues.

	<b>Japanese Civil Law, <i>Minpō</i></b> 27.04.1896/No. 89 21.06.1898/No. 9	<b>Swiss Civil Code, <i>Zivilgesetzbuch (ZGB)</i></b> 10.12.1907/30.03.1911	<b>US State Statutes &amp; Case Laws &amp; Uniform Premarital Agreement Act (UPAA)</b> as of 1985; ALI Principles on Dissolution of Marriage (ALI) as of May 2002
<b>Matrimonial Property Schemes/System</b>	Art. 755–762 <i>Minpō</i> 7 articles separation of property	Art. 181–251 CC 68 articles Three property schemes can be chosen, whereas No. 1 is legally foreseen, if there is no contract 1) a joint ownership of acquired property 2) community of property 3) separation of property	US statutes, case laws and UPAA 8 articles separation of property community of property e.g. state laws of California, New Mexico, Louisiana. §3 UPAA no schemes, lists possible contents: community or marital property, spousal support, will/trust, benefits of insurance policy and then a general norm “any other” within the law
<b>“Marital Agreement on Property”</b>	Art. 755–756 <i>Minpō</i> spouses special register	Art. 181–184 CC legal capacity written form, notary public	States statutes, case law and §§ 1 UPAA, § 7.04–1 ALI prospective spouses written (see Benson 2003 for exception) signed by both
<b>Point of Time</b>	only before marriage	before or during marriage	before or during marriage, even during divorce
<b>Freedom of Contract Restrictions</b>	Article 755 <i>Minpō</i> states it implicitly no special restrictions	Art. 181 CC  Only the three statutory property schemes can be chosen, not more: Art. 182 para 2 ZGB	not expressed in the UPAA/ALI § 3 UPAA: lit. a cif. 8: within limits of public policy and criminal law, lit. b excluded is child support § 8 UPAA: restrictions to enforceability
<b>Case Law</b>	There are no cases of the <i>Saikōsai</i> on “pre-marital contracts”	There are hardly any cases on public policy and “pre-marital agreements”, but then again in Switzerland the courts check upon every divorce settlement	e.g., see: Button v. Button (1992) substantively fair at the time of the enforcement, procedurally fair at the time of enactment no duress at the time of enactment, cf. Biliouris v. Biliouris (2006)

	Japanese Civil Law, <i>Minpō</i> 27.04.1896/No. 89 21.06.1898/No. 9	Swiss Civil Code, <i>Zivilgesetzbuch (ZGB)</i> 10.12.1907/30.03.1911	US State Statutes & Case Laws & Uniform Premarital Agreement Act (UPAA) as of 1985; ALI Principles on Dissolution of Marriage (ALI) as of May 2002
<b>Dissolution</b> Whereas only in US law there are differences between a dissolution by divorce / by death, during intact marriage	Art. 768 <i>Minpō</i> : (1) Parties may demand the distribution of property (2) If the parties do not or cannot settle, the family court decides, whether or not to distribute; (3) if to distribute taking into account the amount of property obtained through the cooperation of both parties and all other circumstances: lump-sum payment incl. pension division	Different provisions depending on the choice of the three statutory property schemes plus periodic sums incl. pension division	Dominant rule: equitable distribution practiced by courts lump-sum or periodic sum payment
<b>Facts</b>	It is not common to sign a premarital agreement	Not many couple sign a premarital agreement (approx. 10%) Mostly for “best solutions” – practices among spouses, sometimes a “separation of property among” marriage with foreigners or in cases remarriage	Appellate opinions suggest: that there are more premarital agreements within second marriages, older and more affluent couples

This plural legal culture and the hybrid character of Japanese civil law have been upheld in Japan until today. Any Japanese legislation work is based on profound comparative legal studies taking into account the existing continental European civil law systems and the common law legal solutions (known from the UK, US, Canada or Australia) as well as studying carefully the legal solutions of their neighbor countries (e.g. Republic of Korea, Republic of China, Vietnam).<sup>13</sup> With the awareness of Japanese culture and knowledge on the body of case law Japanese lawmakers search for their own Japanese legal solutions, whereas an original legal system and structure is applied. An actual example is the ongoing revision of the law of obligations in the Civil Code (*Minpō*) including contract law. The “Reform Group” of the Japanese Civil Code (law of obliga-

<sup>13</sup> Before thinking about amendments in family law in 2010, profound comparative studies were necessary: “*Hikaku-hō kenkyū [...] mo jubun ni kōryo suru hitsuyō ga arō*” (Kyo 2010: 4).

tions) took on their work in 2006, because there was and is a need to follow the changes in the social economy and in the great body of case law (established since the codification more than 100 years ago).<sup>14</sup> In any case, this shows that civil laws are circulating to this day (and will circulate in the future as well). Today, after an interim draft as of 2013, which was proposed under the lead of the Ministry of Justice, and a subsequent consolidated draft as of September 2014, which was presented to the parliament on 31 March 2015, procedures had a slowdown and an enactment is not expected in the near future.<sup>15</sup>

### 2.3 Recent Trends in Family Law

In the course of this fundamental reform process of the law of obligations, also a revision of the Japanese Family Law, book IV, has been suggested. Some key issues for reform were:<sup>16</sup> equal inheritance law for people born out of wedlock and those born to a married couple, discriminatory provisions relating to minimum age of marriage, discriminatory provisions relating to 300 days of waiting before remarrying only for women, discriminatory provisions relating to the choice of surname and to regulate artificial reproduction.

#### 2.3.1 Strengthen Children's Rights

The Japanese Supreme Court, *Saikōsai*, precipitated an important ruling in September 2013 on the equal treatment of non-marital children in inheritance matters.<sup>17</sup> In short, the *Saikōsai* argued that times have changed over the years and that the number of children born out of wedlock had risen, holding unanimously that their inequality towards marital children is unconstitutional with regard to Art. 14 *Kenpō*. The parliament revised Art. 900 para. 4 *Minpō* a couple of months later.<sup>18</sup> However, some discriminatory provisions including the provision in the Japanese Family Register Act, hereinafter the *Koseki-hō*<sup>19</sup>, concerning the discriminatory description during birth notification have been retained. According to Article 6 and Art. 49 para 2–1 of the *Koseki-hō* a non-marital child is to be explicitly registered as such and follows her/his mother's "new family register sheet", which means everybody can see from the separate register sheets, that they do not belong to the "family" and the "household" (*ie*)<sup>20</sup>:

14 It proposed in 2009 an interesting mixture of an "American restatement approach" and a classic amendment of a part of a code.

15 Cf. 15 January 2016, 190th session of the Japanese diet, cf. for further details and the revision process Hotz (2015: 299, 304–307).

16 There was an attempt to revise these family law provisions already in 2 February 1996 with the *Minpō no ichibu o kaisei suru hōritsu-an yōkō* [Draft for a partial revision of the *Minpō*].

17 *Saikōsai*, 4 September 2013, in: 67 *Minsū* (official compilation of the leading Civil law cases) 1320; Kimura & Koziol (2015; 2012: 117).

18 Act No. 94 of 11 December 2013.

19 Act No. 224 of 22 December 1947 / amendment 2007.

20 Cf. history on the *ie*-system: Wagatsuma (1948: 50); Ueno (1994: 68).

Art. 6 *Koseki-hō*: “A family register is created for each unit: consisting of a husband and wife, and any children thereof with the same surname, who have their registered domicile within the area of a municipality; provided, however, that when a new family register is created for a person who has entered into marriage with a person who is not a Japanese national (hereinafter referred to as a “foreign national”), or for a person who does not have a spouse, it shall be created for each unit consisting of such person and any children thereof with the same surname.”

Art. 49 para 2–1 *Koseki-hō*: “(1) A notification of birth shall be submitted within 14 days thereof (if the birth took place abroad, within three months). (2) The following matters shall be entered in the written notification: (i) the gender of the child, and whether the child is born in or out of wedlock [...]”

According to Art. 62 *Koseki-hō*<sup>21</sup>, for example, a notification of the birth of a non-marital child to the Family register shall also count as a notification of parentage. Even if this regulation secures the rights of a non-marital child, the wording remains discriminatory, because its premises are otherwise.

Meanwhile also some regulations on children rights have been revised: For example, in Art. 766 *Minpō* a sort of “visitation right” to non-custodial parents is stipulated in the *Minpō* in 2011 (Ōmura 2010: 174–176, 183–185; Uchida 2004: 134)<sup>22</sup> and the *best interest of the child* as the foremost important principle of the Japanese family law was codified in the *Minpō*, too (Art. 818ff., 820 *Minpō*, in force since 1 April 2014).

However, there is, as yet, no joint child custody after divorce in Japanese family law. Reiko and Masami (cf. 3.1) could have filled out the very same standard divorce forms and both could have declared that it would be either the father or the mother who had custody of the children after divorce, but they couldn’t have chosen it jointly (this is simply not an available option in the standard form).<sup>23</sup> If the parents can’t agree on custody, the family court has to decide, whereas according to Japanese law court mediation is mandatory; only if mediation is not successful, one has to sue his/her spouse for divorce (Art. 770 *Minpō*). If the child is 15 years old or older, the court must hear the child’s opinion.

In favour of the child’s best interests and care is also the “Act for Partial Revision of the Act for Measures to Support the Development of the Next-Generation Children” (Act No. 28 of 2014), which wants to expand and reinforce, for example, the support for single-mother households, through the prefectures’ active and planned implementation of support and/or the preparation of regulations. And the very recently revised Japanese Child Welfare Act of December 1947 (Act No. 164 of 1947)<sup>24</sup> will help to facilitate and

21 Article 62 *Koseki-hō*: “When parents submit a notification for the birth of a child in wedlock with regard to a child who is to acquire the status of a child in wedlock pursuant to the provisions of Article 789, paragraph (2) of the Civil Code, such notification shall have the effect of a notification acknowledging parentage.”

22 However, the problems are not been solved yet, cf. Wakabayashi (2012).

23 Ōmura (2010: 177); Uchida (2004: 136).

24 The amendment passed the diet on 27 May 2016 and shall come into force on 1 April 2017.

promote foster and adoptive care for children, reflecting the fact that today in Japan many children are living in care institutions.

### 2.3.2 *Improvement of Family Procedural Laws*

In addition to reforming substantial law, a revision of the family procedural laws was proposed as well, e.g. the *Kaji-shinpan-hō*<sup>25</sup> was replaced with an uniform procedural law for all family law affairs on 25 May 2011: *Kaji jiken tetsuzuki-hō*<sup>26</sup>. This comprehensive law containing nearly three hundred articles came into force in 2013. It was adopted to facilitate access to justice, promote mediation and also strengthen children's rights to participation and self-determination<sup>27</sup> during the process. However, there is no provision for the legal representatives of children. At the same time, the powers of the Family Court have been extended.

Furthermore, Japan has ratified the Hague Convention on the Civil Aspects of International Child Abduction, which came into force in April 2014.

### 2.3.3 *Family Name – a Remaining Gender Inequality*

The provision of Art. 750 *Minpō*, for example, remains widely criticized in Japan. This states that a couple who wants to get married shall choose one surname as the family name, which leads to the fact that 96% of all families choose the man's name as the common surname.<sup>28</sup> This means a couple cannot register their marriage in their *Koseki* (family register), unless one of them gives up his or her surname, which is a burden for many Japanese working women. And this means subsequently that any child whose genetic/biological parents are unregistered will be considered to have been born out of wedlock. The choice of one surname for a married couple was also a controversy for two decades in Switzerland until the recent civil law revision on the right of name, in force since 2013, allowing the married couple to choose between the man's or the woman's name for their family name (Art. 160 Swiss Civil Code).<sup>29</sup> The other quite famous remaining legal gender inequality is the provision of Art. 733 *Minpō*, which states a unilateral 6-months waiting period for women before they can remarry. Such a waiting-period to protect legal parentage was also known to the Swiss family law until its abolishment

25 Act No. 152 of 1947, amendment No. 152 of 2004.

26 Act No. 52, of 25 May 2011.

27 Japan ratified the UN Convention on the Rights of the Child already in 1994.

28 The *Saikōsai* admitted this percentage literally in its ruling of 17 December 2015; cf. Ōmura (2010: 46, 244, 375), see for the discrimination of foreign partners: Nishitani (2014: 85).

29 Before the revision there were at least two cases against the State of Switzerland in re in front of the European Court of Human Rights: *Burghartz c. Suisse*, 16213/90, 22 February 1994; *Losonci Rose et Rose c. Suisse*, 664/06, 9 November 2010, which had decided in both cases, that the past Swiss regulation violated Art. 8 and Art. 14 ECHR.

with the revision of the divorce law in 2000.<sup>30</sup> The *Saikōsai* (Grand Bench), decided in two judgments of 16 December 2015. It states as follows:<sup>31</sup>

1. The six months waiting period for remarriage is basically unconstitutional. The court has ordered that the period should be reduced to 100 days and that this shall be implemented by the authorities immediately. However, the Supreme Court had dismissed the concrete damage claim of the couple, who claimed that it had been unable to marry and their genetic son was therefore born before the 6-month period, and the former husband became the child's legal parent.
2. On the right of the family surname (Art. 750 *Minpō*), the *Saikōsai* was more restraining. It could not see any indirect discrimination and unconstitutionality of Art. 750 *Minpō* and referred explicitly to profound Japanese traditions, that are linked to having a common family name. A couple who wishes to marry must therefore use the official document to choose their common family name in order to be able to continue with their marriage procedures.

#### 2.4 Any Calls for Partnership Laws?

A couple that does not marry but lives together like a married couple is described as living in a *naien* relationship. *Naien* literally translates “to live inside together” and is also called an “unregistered marriage” (because it cannot be registered in the *Koseki*) or a “de facto marriage”. Ōmura calls it “*naien* couple relation” (*naien kappuru kankei*<sup>32</sup>), which marks the estrangement from a marriage arrangement:

It was originally meant for couples who could not marry (by status, *Koseki* system and civil law). Today people live together in partnerships because they do not wish to get married. The existing provisions of marriage laws have been applied pragmatically *in analogiam* for a long time, if the couple really lived like a married couple.<sup>33</sup> As a result, except for the provisions on the family register system, as already mentioned with all their consequences and except for the rights of succession, the legitimacy of non-marital children and the right to a family name (Art. 750 *Minpō*), non-married couples are treated like married couples.

30 A waiting period for women to remarry (old Art. 103 ZGB) of 300 days after any dissolution of marriage and a special punitive waiting period after a divorce (old 104/150 ZGB) were abolished: 2000 (Botschaft Scheidungsrecht, Bundesblatt 1995: 11, 66). In Germany the discriminatory waiting period was abolished in 1998. However, Swiss Art. 257 ZGB presumes legal parenthood to the husband of the mother during the “same” 300-day period.

31 *Saikōsai*, 16 December 2015, judgement 2013 (o) No. 1079. [http://www.courts.go.jp/app/files/hanrei\\_jp/547/085547\\_hanrei.pdf](http://www.courts.go.jp/app/files/hanrei_jp/547/085547_hanrei.pdf) (last visited 15.07.2016). And judgement 2014 (o) No. 1023. [http://www.courts.go.jp/app/files/hanrei\\_jp/546/085546\\_hanrei.pdf](http://www.courts.go.jp/app/files/hanrei_jp/546/085546_hanrei.pdf) (last visited 15.07.2016).

32 Ōmura (2010: 229–248); Uchida (2004: 141–162).

33 *Saikōsai*, 11 April 1958, in: *Minshū* 12–5–789; *Saikōsai*, 18 November 2004, in: *Hanrei Jihō* (1881 [2005]): 83; To live like a married couple means generally to live in the same household, cohabit for a certain duration, share housework, have contact with common friends and family members.

But then again, the family name law, for example, is often one of the actual reasons not to marry. Swiss law, for example, follows the line that who does not wish to marry should not fall under any marriage laws (not even *per analogiam*).<sup>34</sup> However there are some special Japanese provisions regarding social security, insurance, labour and rent to equal legal treatment, for (surviving) *naien* partners.

Another question is whether there are any partnership regulations, which would include same-sex partners. According to the Japanese Constitution, Art. 24 *Kenpō* (cf. footnote 7), marriage is considered to be limited between both sexes (literally: *ryōsei no goi*). Moreover, there is relatively little discussion to open up marriage to same-sex partners in Japan (Arai 2014: 124, 130). But then again the regulation of the same-sex partnership in a different act would be constitutional according to Art. 24 *Kenpō*. It remains a fact that there exists no equivalent to a Swiss Registered Partnership Law, which has been in force since 2007 (*Partnerschaftsgesetz*, SR 211.231). This leaves same-sex couples in Japan, for example, without legal protection in the case of surrogate medical consents (unless there is a registered contractual agreement) (Arai 2014: 137). However, there seems to be a certain call for such a law nowadays: There is, for example, a political initiative and network to promote a *Patonashippu-hō* (Partnership Law) that lobbies for a registered partnership.<sup>35</sup>

But as people in same-sex relationships were not as overtly discriminated against as they were in European-Christian societies, and there exists a long tradition of and possibilities for single adoption, and even to adopt a partner to secure him/her, for example his or her inheritance rights, there is no current comparable political and legal call for equality in this respect in Japan (Kimura & Koziol 2011 121). Yet, while, for example, *de facto* and former spouses are explicitly subject to the “Act on the Prevention of Spousal Violence and the Protection of Victims” (Art. 1 para 3) since the last amendment<sup>36</sup>, the law excludes people in same-sex partnerships.

### 2.5 International Incentives Towards More Equality

One important reason for this incentive towards family law reforms have been “external influences”. For example, Japan has ratified the UN Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 (CEDAW) in June 1985, and so is reviewed regularly by the CEDAW-Committee.<sup>37</sup> The international reporting system, which goes along with the ratification of a UN Convention, namely the *Concluding observations of the Committee on the Elimination of Discrimination against*

34 BGE 108 III 206 (*Bundesgerichtsentscheid*, compilation of Swiss Supreme Court decisions).

35 Institute for a Partnership law, since 2011, cf. <http://partnershiplawjapan.org/japan> (last visited 18.12.2016).

36 Act No. 31 of 2001, as amended by Act No. 72 of 2014; cf. expert opinion by Judge Masayuki Fukushima and Judge Hajime Morikage. Hanrei Timuzu No. 1395 (issued in February 2014).

37 United Nations, Treaty Series, Vol. 1249 p.13 (1981); cf. UN Treaty Collection, status as at: 10.07.2016.

*Women as of August 7th, 2009* had been listing some of the above-mentioned discriminatory provisions of the current *Minpō* very explicitly.<sup>38</sup>

In their recent *Concluding observations of the Committee on the Elimination of Discrimination against Women of March 27th, 2016*, (regarding the “seventh and eighth periodic report” of Japan on the CEDAW, due on 16 September 2014 with following hearings), the committee criticizes the two mentioned judgments of the *Saikōsai* from December 2015, on the same surname of married couples and the unequal waiting period of 100 days before getting remarried, and reiterates its previous recommendations concerning the revision of the Civil Code.<sup>39</sup> Moreover, the committee mainly remains concerned about the widening of the gender pay gap, the concentration of women in low paid sectors and in part-time work due to family responsibilities and the reports of maternity-related harassment.<sup>40</sup> The latter e.g. means to force pregnant employees out of their workplace or discourage them from taking maternity leave in accordance with the law<sup>41</sup>. The committee also stresses general and special measures to accelerate *de facto* equality between women and men.<sup>42</sup>

Although the provisions of the CEDAW and the reporting system were bearing some fruit only 30 years later, in 2009, and there remain some doubts in Japan on the self-executing quality of the CEDAW<sup>43</sup>, there have been considerable positive effects of the CEDAW on Japan’s legislation. Noteworthy are the following acts:

1. The *Danjo kyōdō sankaku shakai kihon-hō* (from 28 June 1997<sup>44</sup>), literally “Act to create a society in which women and men are equally participating”, is understood as the national implementation of the CEDAW and is therefore directly connected to the global human rights and anti-discrimination incentives of the United Nations. Article 1, for example, refers directly to the CEDAW. On the other hand, in contrast to the CEDAW, it provides support and protection for women *and* men equally. Being a framework law (*kihon-hō*), this act also asks for more detailed legislation on a prefectural and/or communal level. However, this is not an enforceable obligation. The law is named after an Ordinance of 1994, which was established by the Office

38 As of 7 August 2009, CEDAW/C/JPN/CO/6, para. 17–18 on discriminatory legislation of the unilateral waiting period for women to remarry and the setting of the minimum age of marriage for both sexes at 19 years; in consideration of the 6th periodic report of States Parties Japan, 8 September 2008, (cit. CEDAW/C/JPN/6). Two meetings and the responses of the Japanese state, available at: <http://www.refworld.org/docid/491aaf462.html> (last visited 10.07.2016).

39 As of 27 March 2016, CEDAW/C/JPN/CO/7–8, para 12 a–c.

40 CEDAW/C/JPN/CO/7–8, para 34 a–c.

41 Today there is a special Japanese expression for this: *matahara*, a compound deriving from “maternity harassment”.

42 CEDAW/C/JPN/CO/7–8, para 16–18.

43 High Court of Tōkyō, ruled on 28 March 2014.

44 Act No. 78 of 1999.

- of the Prime Minister,<sup>45</sup> where a special commission to foster the equal participation of women and men in Japanese society had been already established a long time.<sup>46</sup>
2. The recent *Josei no shokugyō seikatsu ni okeru katsuyaku no suishin ni kansuru hōritsu* from 4 September 2015, translates as “Act on the Promotion of Women’s Participation and Advancement in the Workplace” and seeks to empower women in employment.
  3. Revision of the Japanese “Part-time Labour Act” of 2014, which improves the treatment of part-time workers, who are mostly women.<sup>47</sup>
  4. The Japanese “Equal Employment Opportunity Act”, which came into effect already in April 1986,<sup>48</sup> was the first legal act after the ratification of the CEDAW to implement gender equality. It states, for example, that women and men in Japan have the same legal opportunities to ask for childcare leave.<sup>49</sup> It was revised substantially in 1997.

To sum up, there is a relatively longstanding and strong emphasis in Japanese legislation towards gender equality in the workplace, and the *Danjō kyōdō kihon-hō* of 1997 follows a strategy which can be called gender mainstreaming. Especially in the twenty-first century, Prime Minister Abe’s strategy to “womenomics” has led to new discussions, laws and amendments. However, all these laws have not yet been fully implemented, and it will be interesting to see what will happen to Japanese society during the next two decades in terms of gender equality in the workplace and in families. The question is why with all this legal and political awareness of gender inequality in Japan there haven’t been more changes before now.

In the meantime, both countries have also ratified the UN Convention on the Rights of Persons with Disabilities from 13 December 2006, in 2014, which foresees a similar promising reporting system to promote more equality towards disabled people.<sup>50</sup>

### 2.6 No Comprehensive Laws on Artificial Reproduction

Whereas the fertility rates are dropping (cf. 3.2), artificial reproduction is growing. This is equally true for Japan and Switzerland, but there are no reliable data on artificial reproduction, because of the legal insecurities in this field: In Japan, to this day, artificial

45 Prime Minister Office Organization Ordinance Amendment Ordinance of 1994.

46 *Danjo kyōdō sankaku suishin shingikai* (The Establishment Law of the Prime Minister’s Office), Act No. 127 of 1949.

47 *Tanjikan rōdō-sha no koyō kanri no kaizen nado ni kansuru hōritsu* (lit: Act of Improvement etc. of Employment Management of Part-time Worker), No. 76/1993 came into force on 18 June 1993, amended Law No. 72/2007.

48 *Koyō ni okeru danko no kikai kintō ni kansuru hōritsu*, Act No. 113 of 1972, cf. Hotz (2010: 221).

49 According to the *Summary of the Employment Status Survey of the Ministry of Internal Affairs and Communications 2012* ([www.stat.go.jp/english/data/shugyou/pdf/sum2012.pdf](http://www.stat.go.jp/english/data/shugyou/pdf/sum2012.pdf), last visited 10.07.2016), the numbers of employees who used childcare leave or other support systems amounted to 1,430,000 persons. Whereas the number of used childcare leave amounted only to 843,000, the others had short hours leave or sick day childcare leaves; whereas regular staff amounted to approx. 23.7 % and women amounted to approx. 76%.

50 Japan: 20 January 2014, whereas the first state report was submitted in February 2016. Switzerland: 14 April 2014 and the first state report is in preparation.

reproduction is not regulated in a comprehensive manner, and in Switzerland it is regulated restrictively.<sup>51</sup> For these reasons, many people go abroad for these services.

The first guidelines were written by the Japanese Society of Obstetrics and Gynecology (JSOG), and permitted IVF in marital relationships only, and without third person gametes or embryos. The first legal case on heterologous insemination took place in Osaka in 1998.<sup>52</sup> After the first surrogacy had taken place between two sisters in Japan in 2003, the guidelines from the Japanese Institution for Standardizing Assisted Reproductive Technology (JISART) from 2003 were enacted and, in effect, prohibit surrogacy.<sup>53</sup> Some people went overseas, some people continued to employ surrogate mothers in Japan. In 2006, for example, it was disclosed that a Japanese surrogate had given birth to her own grandchild. Since then, there have been also some famous surrogacy court cases, namely the *Kondo* Case in 2005<sup>54</sup> and the *Tanaka-Mukai* Case in 2007.<sup>55</sup>

In 2008, the *Guidelines of the Japanese Scientific Counsel on Reproductive Medicine* from 8 April 2008 were enacted, which more or less prohibit any form of surrogacy agreement for ethical reasons.<sup>56</sup> However, they also state that the use of donated eggs shall be allowed under the terms of their guidelines. This means that a contract between somebody who wishes to become a parent and a surrogate mother who agrees to conceive and give birth to a child and then give up any parent's rights when it is born, would not be illegal but it would be most probably void in Japan according to Art. 90 *Minpō*, because it is against public policy. Whether any contract on an egg donation in Japan is valid, remains a gray area, because these guidelines are not laws. However, in 2013 Oocyte Donation Network (OD\_NET), the first Japanese non-commercial egg bank started,<sup>57</sup> and to the head's own surprise, many volunteers offered their eggs:<sup>58</sup> Donors must be under 35 years old, must have a child of their own, and must agree to disclose their identity to the genetically related child (once it turned 15 years old). Receivers must be under 40 years old, married and infertile.

51 1) The Swiss Federal Act on Medically Assisted Reproduction (*Fortpflanzungsmedizinengesetz*, FMedG, SR 810.11) of 1998, prohibits assisted reproduction outside marriage, unless it is a homologous IVF procedure (Art. 3 para. 3) and the couple must not be too old (Art. 3 para 2 lit. b) and have to be infertile (Art. 5). Egg donation and surrogacy are prohibited (Art. 4) and semen donation has to be non-commercial (Art. 5). There has been a recent amendment of the law to permit preimplantation genetic diagnosis in a restricted manner. 2) The Swiss Federal Act on Genetic Testing of Humans (*Bundesgesetz über die genetischen Untersuchungen am Menschen*, GUMG, SR 810.12) of 2007 regulates the genetic prenatal testing, which is allowed in Switzerland, unless the diagnosis informs on the sex of an embryo/fetus without medical indication. However, this is a current hot topic and the law is under revision.

52 *Chisai* (*Chisai Saibansho*, The District Court) *Osaka*, 18 December 1998.

53 <https://jisart.jp/> (last visited 10.07.2016); however, there were earlier initiatives, cf. Alcantara (2010: 424–425).

54 *Kōsai* (*Kōto Saibansho*) *Ōsaka*, 20 May 20 2005 In: *Hanrei Jihō* (2005 [1919]: 107).

55 *Saikōsai*, 23 March 2007, In: *Minshū* 61–619.

56 Assisted Reproductive Technologies Review Committee Science Council of Japan (2008: 39).

57 *Saikōsai*, 23 March 2007, in: *Minshū*: 61–619.

58 Interview with Sachiko Kishimoto, Head of OD\_NET in: *The Japan Times*, 3 May 2013.

In surrogacy cases to this day, the Japanese and the Swiss civil law tradition would follow likewise the *mater semper certa est* and the *pater est, quem nuptiae demonstrant* rules, meaning the (legal) mother is always certain and the (legal) father is the person, who is married to the mother. Accordingly, the biological mother, namely the surrogate mother, will be the legal parent of the child and her husband is presumed to be the legal parent as well.<sup>59</sup> The Japanese Family register system only allows them to be registered.

More recently though, there are discussions to regulate surrogacy by a comprehensive act<sup>60</sup> and allow it in a non-commercial way along with egg donation and heterologous insemination. This stands in contrast to Switzerland, where surrogacy is considered an issue for same-sex couples or heterosexual couples who have passed the age limits for full adoption. A further specific Japanese problem is a possible pressure situation among relatives for the woman to conceive and give birth to a child to family members who are not able to have a biological child.<sup>61</sup>

### 3 Shifting and Remaining Arrangements on Love, Sex and Reproduction in the Social Context

To highlight the legal and the social context of these shifting and remaining arrangements on love, sex and reproduction I would like to present a few cases and discuss them from a comparative legal perspective. As “love” itself remains ubiquitous and hardly a goal or performance to define (in an agreement), it could not be part of a legally binding contract. The agreement that might come closest to it today is the marriage contract and the “love marriage”. However, whether love is necessarily a motive for a marriage contract depends on the individual and cultural meaning of love and the concepts of marriage, which changes over time.

#### 3.1 Shifting Arrangements on Marriage and Divorce

Reiko and Masami met at the same University and fell in “love”. After graduation, both took jobs, Reiko as an interpreter and Masami in one of the big Japanese companies. After two years in these jobs, they got married. Both of their families agreed to their marriage (though his family a bit less because she was two years his senior). But Reiko was immediately faced with the prospect of quitting her job, since her husband and his parents did not wish her to keep on working, and discouraged her with reasons concerning her age and future role as mother. Moreover, her elderly mother was going to live with them. Reiko and Masami soon had two children. Reiko raised them and managed the household. Masami continued to work for the same company, followed successfully his career as a middle-class manager and was practically absent from home, even on weekends. They continued to have sex, and on his side there was seldom extra-marital sex. Only much later did Reiko begin to work again as a part-time sales person. By the time of their children leaving home, the couple had been married for more than 23 years.

59 Art. 772 *Minpō*, Art. 252ff. ZGB.

60 Draft as of 2 April 2014.

61 *Saikōsai*, 23 March 2007 in: *Minshū* 61–619.

At that point Masami left their house without any explanation and went to live with his old mother and didn't come back. The couple did not fight, or speak to each other, at least not about the reasons for their break-up and how they both felt. It was a hardship for both of them: He was often sick and she felt ashamed at having been left by her husband. They met three times within five years to settle some financial agreements and once, to talk about the marriage of their daughter. When Reiko wanted a fresh start two years ago, she asked Masami for a mutual divorce (*kyōgi rikon*). They set up – literally translated – a “divorce performance agreement” (*riikon kyūfu keiyaku*) with which they stated their will for mutual divorce: Firstly, they divided their property (house) and secondly fixed a lump-sum settlement money (*kaiketsukin*) of 20'000'000 Yen (which is approx. 175'000 Euro) to pay to Reiko. Additionally, she was promised 50% of his employees' pension money (*nenkin bunkatsu*) by the time he turned 65 years old (her own pension was split as well, although it was much smaller). This agreement was officially registered (*kōsei shōsho*). In the end, Reiko went to the city hall alone to hand in the documents and to file for the mutual divorce. Since she was still in possession of the family seal, she could stamp the form for Masami and herself.<sup>62</sup>

### 3.1.1 “Love” Marriage

The call for the abolishment of the feudal household system and for more equality between men and women during the Meiji period brought also for the first time the ideal of a nuclear family and of monogamy. Nevertheless, the traditional family model of Imperial Japan remained predominant for a long time.

After World War II, with the revision of the constitution and family law to a more equally balanced understanding of human and family rights, also “romantic love” was promoted and was seen to be the antidote to the traditionally arranged marriage.

Along with this, there was a certain wave of moralization, which strengthened the idea of an ideal “love” and an exclusive “love marriage”. It is no coincidence that in that time different terms for love arose: a distinction between a perfect and intimate relationship (*ai* and *rabu*, from English “love”) and purely sexual desire (*iro, iro koi*) came up. Accordingly, *ren'ai kekkon* translates as “love marriage”.<sup>63</sup> And “I love” translates with *ai shiteru* and is only used in Japanese when you are actually feeling such for another person and/or you are proposing. It is not the same as *suki* (to like) in Japanese, whereas in English, we love “our dearest” and we love “ice-cream” likewise.

“Love marriage” and dating (*dēto* from English “date”) became increasingly popular from the late 1950s onward.<sup>64</sup> As a romantic ideal, love became the notion of “pure love”.<sup>65</sup> However, arranged marriages lasted longer. Until the 1960s, an estimated 50% of marriages were arranged. Today this figure has dropped to 10–20%. Nevertheless most

62 The parties do not have to go to the city hall together to present the document; it can even be submitted by a third party: *Saikōsai* (Japanese Supreme Court, abbr. for *Saikō Saibansho*) 31 January 1949, in: 553 *Hanrei Jihō* 47.

63 Morikawa (2015: 167, 204); Ueno (1995: 53); Ryang (2006: 70).

64 Gordon (2014: 255).

65 Acc. to Ryang “pre-sexual love became something the nation looked up” to by the 1960s (Ryang 2006: 66).

Japanese couples still get to know their future spouse at a common workplace and/or educational institution or through friends and family members, which means that similar criteria as in arranged marriages remain important in matchmaking: social class, education, income and age. This seems equally true for Switzerland and other countries.<sup>66</sup>

In Japan this additionally goes hand in hand with the fact that the proportions of marriages with one foreign partner are very low compared, for example, to Switzerland (approx. a ratio of 3% to 50%),<sup>67</sup> whereas they have increased nationally.<sup>68</sup> This means that to this day marriage arrangements in Japan are taken in relatively homogenous socio-cultural matchmaking settings.<sup>69</sup>

Love marriage seems widely “romanticized”, at least this can be thought by the continually expanding Japanese wedding market, which sells “Western style” wedding parties. The contemporary “love marriage” is in reality hardly the fulfillment of a romantic dream; marriage is rather – as in Switzerland – an arrangement of many promises and contents: Correspondingly, when there is no mutual wish to divorce, “ceased love” is not a legally accepted reason to divorce. This is true equally for Switzerland and Japan.<sup>70</sup> Moreover, as we will see later, marriage arrangements are still chosen predominantly when Japanese women are pregnant.

A certain impact can be seen in the numbers of suicides caused by “love”, which is definitely higher in Japan than in Switzerland. However, the average suicide rate is higher in Japan, and there is, besides the individual hardship, still a strong social stigma in being left by a partner. In fact, that was Reiko’s strongest concern, when Masami left their house. Japanese people used to believe that ending a marriage in divorce, for whatever reasons, involved a loss of face and honour. On Masami’s side, there was less fear of a negative stigma in his employment world, because firstly, he had already been a senior employee and sufficiently promoted by his company, secondly, his children were financially independent, and thirdly, his wife was able to continue to live in their house.

66 See Franzen & Hartmann (2001: 183); Peukert (2015: 37).

67 Out of approx. 41’000 marriages in Switzerland in 2015, only 19’000 were between two Swiss citizens (approx. 15’000 swiss/foreigner; approx. 6’000 foreigner/foreigner), cf. Swiss Federal Office of Statistics 2015 (*Statistik der natürlichen Bevölkerungsbewegung (BEVNAT), Section Démographie et migration, “Mariages selon l’état civil, la nationalité et la religion”, 2016*).

68 In 1980 Japan, approx. 7’700 out of 700’000 marriages were binational with one foreign partner, whereas in 1990 the total amount increased to 25’000 out of 720’000 and in 2006 to approx. 44’000 out of 740’000 marriages. Then the number declined, and since 2013, there are to approx. 21’000 binational marriages out of a total of 660’000 marriages and in 2014, also 21’000 but the total declined to 640’000 marriages (Vital Statistics 2014, Statistics of the Ministry of Health, Labour and Welfare).

69 There seem to be some more difficulties in the establishment of the love-dating-market in Japan. Cf. Retherford et. al. (2001: 77).

70 Cf. Japanese Judgements: *Kōsai Tōkyō*, 1 July 1998, in: 999 *Hanrei Taimuzu* 102; *Kōsai Tōkyō*, 30 November 2000, in: 1107 *Hanrei Taimuzu* 232, cf. Frühstück (2003: 22).

According to Swiss divorce law “ceased love” was not a reason to divorce: Supreme Court ruling, 22 January 2001 (5C.272/2001) E. 3b.: “alors qu’elle lui témoignait auparavant de l’affection et de la tendresse, notamment dans des ‘lettres d’amour enflammées’, elle a décidé assez rapidement de faire chambre et ‘cuisine’ séparées [...]”

## 3.1.2 More Divorce Settlements

The divorce rate in Japan is, accordingly, still lower than in Switzerland, but it has grown considerably. Divorces and divorce arrangements have become more common. Late-life divorces especially have become more common.

	Population	Marriages	Divorces	Marriage/Divorce Ratio
<b>1965</b>				
Japan	99 Mio	954'000	77'000	less than 1:10
Switzerland	5,9 Mio	42'000 (1960/1970)	4'665	approx. 1:10
<b>1985</b>				
Japan	121 Mio	753'000	166'000	
Switzerland	6,6 Mio	41'000 (1980/1990)	11'416	
<b>2005</b>				
Japan	128 Mio	714'000	261'000	
Switzerland	7,3 Mio	40'139	21'332	
<b>2014</b>				
Japan	127 Mio	643'000	222'000	1:3
Switzerland	8,27 Mio	41'891	16'737	1:4

Source: official statistic of the two countries: <http://www.e-stat.go.jp> and <https://www.pxweb.bfs.admin.ch> (last visited 10.07.2016).

90% of divorces in Japan are performed by an informal mutual settlement, which is how Reiko and Masami have ended their marriage. This informal mutual divorce without the involvement of a court, and without compulsory attendance of both parties, is very common. It requires basically the filing of both parties in the right form, which is the divorce notification paper, the seals of the parties and two witnesses (officials) acc. Art. 763, Art. 739 para. 2 *Minpō*. The local municipal or the city hall official must then accept the form and record the divorce in the family register (*koseki-bo*). Once the divorce is recorded, it is legally effective (739 *Minpō* and the Art. 76 of the *Koseki-hō*<sup>71</sup>).

As of 1 April 2007, women have the chance to receive 50% of their ex-husband's pension money,<sup>72</sup> which makes a significant difference for women like Reiko with a husband in a good long-term position. She can live off that money after the divorce for the rest of her life. Before that, women normally faced serious financial consequences, since to

71 Law No. 224/1947.

72 As of 1 April 2007, spouses are entitled to up to half of the benefits from their ex-husband or wife's Employees' Pension (*kōsei nenkin*), a scheme to which most workers belong and which operates in tandem with the mandatory National Pension (*kokumin nenkin*) since 1961. This is comparable to the Swiss pension system, which adopted a mandatory mutual split upon divorce as of 1995 (Art. 122 para. 1 Civil Code; *Freizügigkeitsgesetz* of 17.12.1993, SR 831.43).

this day they do not have their own regular full income and a corresponding pension. Moreover, there is no joint custody by law as already mentioned in the case of Reiko and Masami, and child custody goes to the mother in most of the cases.

### 3.2 Remaining Arrangements on Reproduction?

Closely connected to marriage arrangements is the fact that there are significantly few non-marital children in Japan. In comparison to Switzerland and other European countries or the U.S., the amount of non-marital children is 5–10 times smaller. In other words, to be a single non-married person in the age of the formation of a family in Japan will regularly also mean that this person will be / remain childless.

The birth rates in Japan are still dropping and are among the lowest in the world.

	Population	Marriages	Birthrate / per 1000 People	Non-marital Births
<b>1960</b>				
Japan	92,5 Mio	–	17,3	
Switzerland	5,3 Mio	41'000	17,8	
<b>1965</b>				
Japan	99 Mio	954'000	18,7	
Switzerland	5,9 Mio	approx. 42'000	approx. 19,2	
<b>1985</b>				
Japan	121 Mio	753'000	11,7	
Switzerland	6,6 Mio	41'000	11,3	
<b>2005</b>				
Japan	128 Mio	714'000	–	
Switzerland	7,3 Mio	40'139	9,9	
<b>2014</b>				
Japan	127 Mio	643'000	8,2	1 out of 100
Switzerland	8,3 Mio	41'891	10,3	1 out of 5

Source: official statistic of the two countries: <http://www.e-stat.go.jp> and <https://www.pxweb.bfs.admin.ch> (last visited 10.07.2016).

According to the sociologist Hertog's empiric studies in 2004/2005 (68 interviews), having a non-marital child in Japan is still a hardship for mother and child. Practically all the interviewed unwed women across all spectrums of personal experiences,<sup>73</sup> profession

<sup>73</sup> For example, having an unfavorable attitude towards marriage because of the "bad" marriage of their parents.

and education see marriage as a “necessity” when they are pregnant: An unwed mother would hardly find a job to make her living and both would encounter legal discrimination.<sup>74</sup> But in Hertog and Iwasawa’s conclusions in 2011, the reason to marry was also felt to be a “crucial prerequisite for childbearing and happy children”.<sup>75</sup> Because Japanese women are living up to this “normativity”, according to the two authors’ opinion it will be difficult for any legal amendment and any practical changes in the working place situations to be successful in the near future.

So we could eventually turn the question the other way round: Might a marriage arrangement in Japan after all remain an arrangement on reproduction? The answer is both no and yes. No, because there are still many abortions in Japan<sup>76</sup>, which means, that there is obviously no significant social and moral pressure not to abort.<sup>77</sup> This is related to a less romantic perception of sexuality, as we will see later (cf. 3.4). Therefore, there is a choice not to reproduce and the marriage arrangement can therefore not primarily be an arrangement on reproduction. This would go along with some findings in the aforementioned study that most abortions are decided upon to avoid a possible future economic hardship and to be responsible.<sup>78</sup> And, because a marriage arrangement in Japan was traditionally not overly romanticized, but arranged. It is rather an unquestioned “normality” to marry. That is how the *Koseki* system sets (and has always set) the legal frame (cf. 2.3.1). In view of economic, social and legal hardships, the most pragmatic solution for unwed pregnant women is to marry. An additional more practical explanation for the low prevalence of cohabiting unions (with children) are the high costs of establishing a temporary residence.<sup>79</sup>

### 3.3 *O-hitorisama*: People, Who Are Alone

Despite the romanticization of love marriages and the prevailing normativity of marriage arrangements (especially among unwed pregnant woman) “people who are alone”, literally *o-hitorisama*, have become more popular in Japan. *O-hitorisama* are characterized as being independent, economically stable or even wealthy, authoritative and caring for others, and more interested in professions than in becoming housewives and/or mothers.<sup>80</sup> From a legal perspective, *o-hitorisama* (at least in the age of family formation) do not wish for marriage arrangements. They are mostly single and childless. But that does not mean that they do not have any personal relationships. So the question is what

74 Hertog (2009: 35).

75 Hertog & Iwasawa (2011: 14).

76 Hertog & Iwasawa (2011: 18).

77 LaFleur (1994). The numbers of abortions dropped drastically in Japan from 15 per 1000 in 1990 to 7 per 1000 in 2013 according to the data of the Ministry of Health and Welfare Statistics in 2014, whereas the abortion ratio was quite constantly 6,3 per 1000 women in Switzerland from 2004–2015 (Federal Office of Statistics. Statistics on Abortion, 2016). Of course, we have to consider here the fact that contraceptive pill was permitted in Japan very late.

78 Hertog & Iwasawa (2011: 20–22).

79 Raymo, Iwasawa & Bumpass (2009: 785).

80 Iwashita (2001); Akaishi (2011).

kind of arrangements will they need on love, sex and reproduction? Will they need a short-term sex and/or partnerships agreement or are they more likely to live together in cohabitation? And how is a legal arrangement formed and called, if three single persons live together on a long term basis without any intentions to “love”, sex or reproduction, but with mutual respect and a sense of responsibility?

### 3.3.1 *Different Motives and Change of Arrangements*

However, there are different motives to being a single person, and singlehood does not necessarily mean that a person wishes to live alone:

Mia, for example, is in her late 30s and lives in Tōkyō, together with her younger sister Chieko and their elderly mother in their parent’s house. Both sisters are single and work full time, one in an advertising company, the other as a teacher at a local university. Mia is a gifted teacher and enjoys her teaching subject “American-English literature”, which also gives her the opportunity to travel and to introduce Japanese students to a foreign culture. She handles not only her pupils very well, but she also takes care of her younger sister and her elderly mother. For example, she helps them with all of their financial and personal decisions. Her mother runs the daily household for the three of them.

Mia does not mind being single. She loves children, but she also wants to be able to continue her teaching and traveling work, and she would hate to give up her job, her surname and her mother’s wonderful house, care and food. Chieko likes to be single, too. She goes out with her friends to restaurants and boutiques, and she feels comfortable living in changing relationships.

### 3.3.2 *Increase of Single-person Households*

*O-hitorisama* are mostly characterized as being independent, economically stable or even wealthy, authoritative and caring for others, and more interested in professions than in becoming housewives and/or mothers, as is Mia.<sup>81</sup> Mia’s sister Chieko, who is more into consumption, materialism and romance than Mia, is also quite comfortably and willingly living as single. While for the latter, the negative term *parasaito shinguru* (from the English: parasite single) was coined, *o-hitorisama* are also regarded positively: For example there is a popular TV series *Ohitorisama* (2009)<sup>82</sup>, the main character of which is a person like Mia. And the characters of Sachi and Yoshino in Hirokazu Koreeda’s recent movie *Our Little Sister* (jp. *Umimachi Diary*, 2015) resemble Mia and Chieko as well.

Different factors have been relevant for the increase of singlehood: After the burst of the bubble economy, the traditional family model embodied in the middle-class nuclear family model of Reiko and Masami fragmented and shifted in the 1990s and 2000s:<sup>83</sup>

81 Iwashita (2001); Akaishi (2011).

82 For a discussion on the representation of *o-hitorisama* in this TV series, see Dales (2015: 21–24).

83 Ueno (1994: 23); Dasgupta (2015: 9–10, 19).

1. The normativity of the marital relationship has changed, though more among women than men.<sup>84</sup> Mia and Chieko don't want to follow Reiko's path and they don't have to, because they are well educated and they live with their mother.<sup>85</sup>
2. Divorces are more common (cf. 3.1.2).
3. Workplace situations have become more insecure. Economic pressures and high competition have restricted the well-known social practice or custom of lifetime employment (*shūshin koyō*) and purely age-related pay. Nevertheless, the practice is still widespread in Japan compared to Switzerland. But it has always been a privilege to white-collar employees as Masami is and not to "freeters" and part-time workers such as Reiko.<sup>86</sup> However, the ongoing deregulation of the Japanese labour market urges also more men into irregular employment. This again disqualifies male labour and might rend a large proportion of men "unattractive" as futures spouses.<sup>87</sup> The latter is a tendency which is known from European countries such as Switzerland too: Well-educated women are not (yet) emancipated enough to choose partners with lower education and income, who are, for example, ready to participate in or to take over childbearing and household duties.<sup>88</sup> Japanese scholars have suggested that there are limited opportunities for meeting even a suitable partner, who would be willing to cohabit before marriage.<sup>89</sup>
4. Usages and conditions reflected in the labour market participation of women and men and in founding a family are fundamental reasons as well: There remains a discrepancy between progressive legal emancipation of women and the persistence of the traditional family system.<sup>90</sup> Despite the *womenomics* policy, women in Japan remain regarded as "second class workers", because their lifestyles simply do not fit in with the traditional Japanese working routine of overtime and drinking evenings among colleagues.<sup>91</sup> Working women and mothers have to go home to take care of the house and/or children, they are not as privileged as Mia or Chieko (or they simply might not like long drinking nights).
5. Moreover, the ageing of society generally has led to more elderly single people. The first to depict the term *o-hitorisama* was the feminist scholar Ueno Chizuko, who

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84 Ueno (2007: 43–45).

85 Retherford et al. (2001: 77).

86 Sugimoto (2009) pointed out that lifetime employment in Japan is a frequent cultural misunderstanding because it always applied only to white-collar professionals. The "freeter" problem is – from the perspective of young people – also a critique and new kind of resistance against joining the full-time workforce. In the meantime, there has already emerged a new word, *snep*, characterizing 20–59 year old solitary non-employed people, suggesting massive economic problems, although the unemployment rate remains low.

87 Raymo & Iwasawa (2005: 802), Raymo, Iwasawa & Bumpass (2009: 785–803).

88 Peukert (2015).

89 Raymo, Iwasawa & Bumpass (2009: 785); Raymo & Iwasawa (2005: 803).

90 Atoh, Kandiah & Ivanov (2004).

91 Schad-Seiffert (2015).

has carried out empirical research on Japanese widows' and divorcees' lives as single persons, at a later period of life.<sup>92</sup>

Single-person households are now a very common form of household in Japan, with a large number of elderly people living alone: The population census of 2015 shows that 57.3% of households were nuclear-family households (parents and children) and 32.6% were one-person households. The expectation is that the number of single-person households will rise to 37% by 2030.<sup>93</sup> In 2015, the percentage of the population who were 65 and older in Japan was 26.7%, exceeding the equivalent population in Switzerland (17.9%)<sup>94</sup> and indicating that the ageing society in Japan is progressing rapidly as compared to Switzerland, and indeed other European countries.

In Switzerland during recent years (2013–2015) also one third of all households were single-person households. More than three quarters of women and men in Switzerland between the ages of 35 and 65 live in a partnership, whereas singlehood remains an exception.<sup>95</sup> Most of the couples also live together in the same household (90%). Whereas among the younger generation (18–35 year olds) two third do not live together with their partners.<sup>96</sup>

As a result, the many more people living alone in Japan reflects a shift towards more diversity in the lifestyles of individual people and the way a Japanese family functions. In both countries, living alone is no longer a phenomenon peculiar to young people. There are, for instance, many single-person households especially among elderly women. The potential risks of growing old alone without any family support in Japan must be addressed, because there is a lack of communal and institutional support.

### 3.4 *Shifting Arrangements on Sex*

Whereas prostitution has a very long tradition in Asia and Europe and more recent phenomena such as Tinder are equally well known in Japan and Switzerland, the traditional service of a Geisha or the fairly young “chuddle service” seem to be more specific Japanese arrangements regarding sex, or better, entertainment.

92 Ueno (2007: 120).

93 *Statistical Handbook of Japan 2016*, Statistics Bureau Homepage, see <http://www.stat.go.jp/english/data/handbook/c0117.htm> (last visited 20.12.2016). And, for the population census conducted in 2013, as of 26 February 2015, see <http://www.e-stat.go.jp/SG1/estat/ListE.do?bid=000001051892&-cycode=0>; (last visited 20.12.2016). See for data figures on 2030 by Household Projection for Japan (January 2013), released by the National Institute of Population and Social Security Research, and compiled by the Mizuho Information and Research Institute Inc.

94 Federal Office of Statistics (Bundesamt für Statistik, abbr. BFS) on National Population (*Die Bevölkerung der Schweiz*, 2015), 22 November 2016.

95 BFS, 24 November 2016, see <https://www.bfs.admin.ch/bfs/de/home/statistiken/bevoelkerung/familien.assetdetail.1362677.html> (last visited 20.12.2016).

96 BFS, 31 March 2016, see <https://www.bfs.admin.ch/bfs/de/home/statistiken/bevoelkerung/familien/paare.html> (last visited 20.12.2016). However, the data are as of 2013.

### 3.4.1 *Past Agreements on Performing Arts*

Emiko is over 70 years old. She runs a little restaurant with her husband in Tōkyō. We meet in an international and luxurious hotel lobby in Tōkyō (Akasaka). She is wearing a Japanese style Kimono and her back is turned towards the grand hall. She is stunningly elegant and she has a very warm smile and agreeable voice. We are introduced by a friend whose sister's husband is in the restaurant business outside Japan. First, we exchange presents. Then she starts to talk. She was twelve years old when she left her parent's house to join a "Geisha house" in the northern part of Tōkyō. Her parents were poor farmers and had four children. They were happy to receive this opportunity, making sure that their daughter would be nourished and educated. Emiko was rather unhappy at that time.

At the Geisha house she was educated and trained with three other girls and learnt classical dance, music, poetry, literature, tea ceremony and politics. Emiko liked her apprenticeship more and more. When the customers came to visit them, she and her colleagues had to perform whatever they wished (e.g. a specific instrument, poem, song). She was hardly ever alone with any of the customers, instead she stood under the guidance of her senior colleagues and the customers came in groups of 3–10 people. As the years went by she gained very regular customers, who came for the performances, but also mainly to talk and drink.

She denies that she was ever expected to be sexually active with any of them. She explained that she was rather in the position of being able to refuse any of the customers. My questions regarding her earnings she very politely refused to answer.

### 3.4.2 *Long Tradition of Prostitution*

There are very long traditions of prostitution in Europe and in Asia. Whether it is also – as is often cited – one of the oldest professions in the world, can however be questioned, and is nowadays considered a significant trivialization of the issue, because at a time when women had no rights at all, prostitution was often coupled with slavery. The first site for this purpose was registered by the ancient Greek Solon in the sixteenth century BC. Evidence of the extent of the sex trade in Roman times (first century AD) is provided by the brothel at Pompeii (*Lupanar*). In addition, there is some proof of the old tradition of so-called "temple prostitution" in old Mesopotamia. Furthermore, there are numerous passages in both the *Epic of Gilgamesh* and the *Old Testament*, which show that prostitution had a prominent place in these cultures.<sup>97</sup>

The long tradition of the Japanese sex and entertainment industry (*mizu shōbai*) is quite well documented and can be traced back to the end of the Heian period in the twelfth century: Already the first Shogun of the Kamakura period, *Minamoto no Yoritomo* (1147–1199), regulated prostitution in installing so-called "control stations" to protect travelers and samurais. Several centuries later, from 1600–1868, all three major cities of the Edo period Kyōto, Ōsaka and Edo (later Tōkyō) possessed authorized prostitution quarters, which were thriving and well-organized: Yoshiwara in Edo has

97 Ringdal (2006: 16–131, 250–263); Ditmore (2006: 157).

long been one of Japan's most famous pleasure quarters. There were over 3,000 women registered, who had a license and worked in districts along with many other unregistered prostitutes. Shimabara, the corresponding district of Kyōto, for example, included also a sub-quarter for same-sex sexual activity. These *aka ten* (literally: "red light districts") flourished for more than 300 years. The prevalence of prostitution in Japan also meant that extramarital relations and the frequenting of prostitutes were, so to speak, part of the everyday life of a man. The custom was not socially disreputable until the twentieth century, though for women adultery was forbidden.<sup>98</sup>

During the Meiji period (1868–1912), which was also known for its expansionism and wars, the demand for prostitutes and the number of brothels increased. Prostitution was then controlled by the state officially via the governments of the prefectures and their police officers. It was also the most effective manner of health control (e.g. regarding syphilis and gonorrhea). According to historian Yuki Fujime, the procedure was also meant to show off (to the "Western states") how well organized and civilized Japan was.<sup>99</sup>

As in the Meiji period the idea of monogamy gained significance,<sup>100</sup> and keeping concubines became at least formally prohibited (1883), though the emperor was exempted from this rule. This was accompanied by a call to strengthen marriage and to counteract the relatively high divorce rates. At the same time, one result of the increasing "Western-European influence", which was equated with progressive thinking in Japan, was the ban on trafficking. The first ordinance in Japan that explicitly banned trafficking of women had been adopted in the Meiji period, in 1872: *Shōgi kaihō rei* (literally: Ordinance Liberating Prostitutes). The scope of this ordinance was the liberation of women from trafficking, because at that time many ships with trafficked women arrived in Japan. Only later, under the influence of postwar America, did the still existing *Baishun bōshi-hō*, Act No. 118 of 1956 become adopted (in force 1958).<sup>101</sup> It literally translates as the Prostitution Prevention Law and not, as one can often read as Prostitution Prohibition Law. The scope of the law (Art. 1) is to protect human dignity, and sexual morality, and to prevent prostitution in society. Art. 2, *Baishun bōshi-hō*, describes prostitution as "intercourse with any person, whether paid or against any other promise". Any sexual practices other than coitus is beyond the scope of this law; and any sexual intercourse with a "specific person", a person one meets on purpose, is beyond the scope of this law as well. This might already suggest that this regulation is not about the abolishment of adult prostitution.<sup>102</sup> Furthermore, a law to regulate the entertainment business was enacted: *Fūzoku eigyō nado no kisei oyobi gyōmu no tekiseika nado ni kan-*

98 Cf. Vaporis (2012a, 2012b); Koyano (2007: 22–41); Neuss (1979).

99 Fujime (2009: 45–47).

100 Monogamy was thought to be something progressive: Fukuzawa Yukichi (1835–1901) worked e.g. as translator of the Shoguns. Cf. Fukuzawa (2007: 305–306).

101 Act No. 25 of 1 April 2005 amended.

102 However, there is a Japanese law against child prostitution and pornography, Act No. 52 of 26 May 1999: *Jidō baishun, jidō poruno ni kakaru kōi nado no shobatsu oyobi jidō no hogo nado ni kansuru hōritsu* Nr. 52/1999, which defines as child acc. to Art. 2 lit. (i) any person under 18 years and as sex any kind of sexual act.

*suru hō*, Act No. 22 of 1948. The title of the law is translated by the Japanese Ministry of Justice pragmatically as Law Regulating Adult Entertainment Business, or simply as the Entertainment Law. It provides a framework for the entertainment and sex work business and contributes to a certain protection of minors (Art. 1). The main purpose of the law is the requirement of a licensing system (Art. 3–9), which is linked to criminal sanctions in case of non-compliance. For example, a license shall not be granted if the business violates the *Baishun bōshi-hō* or the law on the prevention of child prostitution (Art. 4–2). In addition, the law sets out the key conditions such as buffer requirements to schools, living areas, opening times or advertising.

Because of their activity mainly as performers, Geishas (*geisha* literally means a person that performs arts) were never considered to be subjects to both of these laws. Geishas are legally recognized professionals. But there always was and still is a registration system (*kemban-sho*, registration and inspection office).<sup>103</sup> However today the figures of Geishas are decreasing rapidly, so Emiko's case story might be history soon enough, but it highlights the tradition of contractual agreements on entertainment and/or sex with customers.

### 3.4.3 Sex versus Love & Reproduction?

Marriage in Japan is also an institutional matter (cf. 1), although it is hardly a sacred one and many things are kept quite informal compared to Swiss law, especially the mutual divorce procedure (cf. 3). The dichotomy of prostitution as a “sin”, because it is “sex only” and marriage as “morality”, because it relates sex to something “good” (reproduction and love) is less rooted in the Japanese tradition than in Christian culture in Switzerland. This is evident from the dimension and diversity of the sex and entertainment business in Japan, from lax regulations on prostitution and the entertainment industry in general, and from the non-consistent enforcement we can see still today. Sexuality itself is neither in Buddhism nor Shintoism considered to be something to hide, as bad or immoral. Instead, it is something rather ordinary and earthly. While in Buddhism the need principle (of sex) might itself not necessarily be positive, it is nevertheless assumed that sexuality is and should be lived in everyday life.<sup>104</sup> To Shintoism the concepts of good and bad are less known, and therefore sexuality or sexual practices are widely freed from being pressed into these dichotomies.

Sexuality is ubiquitous in Japan: widespread sex and entertainment industries, pornography, advertising and (popularly read on trains) sex *mangas* are widely regarded as unproblematic. Unsurprisingly, also abortions and the release of children for adoption, for example, are less stigmatized in Japan. Moralizing sexuality seems to go back to the Portuguese traders (sixteenth century), who brought Christianity with them. In this context the first law that would prohibit the trafficking of women was enacted. However,

<sup>103</sup> Today the word *geisha* only refers to female entertainers, see Aoki (2008: 350).

<sup>104</sup> Morikawa (2015: 175); Lopez (2012: 274); further references in e.g. Pali monastic law books. While there are several schools of Buddhism, only Tibetan Buddhism would discourage specifically sex between two men.

prostitution is commonly thought of as a “necessity” in consequence of the traditional normative male promiscuity in the face of (monogamous) marriage.<sup>105</sup>

### 3.4.4 Arrangements on Attention, Company or Entertainment

The variety in the sex work business has increased a lot. In Japan, the “sex industry” is huge, diverse and powerful (the turnover is approximately 24 billion Yen/per annum). Nowadays the sex industry is not just about a sex arrangement which is to be fulfilled, but each customer is to be given the opportunity to satisfy his or her specific needs individually. Many different artistic aspects (e.g. dressing up, preforming, dancing) and wellness (e.g. massage, body treatments) are more and more associated with the sex trade. Thus, also the purpose of the contractual agreement for sexual services is likely to have changed and differentiated. Instead (or alongside) of physical satisfaction, the individual special experience lies in the foreground: customers wish for attention, company and entertainment – in a very broad sense. One interesting example are the Japanese love-hotels (*rabuhō*),<sup>106</sup> because they are visited equally by young and old lovers, married couples and prostitutes with clients. If to frequent a love-hotel is considered to be common, it cannot be “immoral”, meaning from a legal perspective, that the service contract between the hotel and the customer is valid.

## 4 Concluding Remarks

Although probably nobody would deny that we have “traveled” through different cultural settings, comparing shifting arrangements of love, sex and reproduction in the legal and social cultural contexts, we could see similar phenomena: the changing of marriage arrangements, the increase of singlehood, the declining birth rates, and the aging of society are features Japan and Switzerland share. Accordingly we could see similar recent trends in family law. Why are these similarities not so surprising?

Firstly, the historical legal context is significant. About hundred years ago, Japan considered also European civil law models (e.g. German Civil Code, which is again related to the Swiss Civil Code) for their national civil legislations, going along with a lot of individual intellectual exchanges. These then newly circulating civil models were integrated (in an already existing tradition of reception, see footnote 9). Then, the time after World War II and the American occupation brought the legal thoughts of political equality and reform of family law to Japan. – Today there is again a need to reform and consolidate the Japanese and the Swiss civil legal systems to comply with current practices, social norms and/or with the large body of adjudication that has been developed.

As globalization and the opening of the markets have encouraged the idea that national laws can be more of a barrier to markets, business and contracts, a general wish

105 Journalist and feminist Matsui Yayori (1934–2002), who was very committed to fighting against the trafficking of women in Japan, came to the conclusion that the woman will degrade into an “object” not only in prostitution but equally in marriage. Cf. Buckle (1997).

106 Abbreviation of *rabu hoteru*; Kimu (2005); West (2005: 145, 151).

for more consistency between different legal systems was formulated and numerous international conventions were enacted.

Moreover there are similar recent trends in family law and the existing international or global laws towards more equality (human rights), whether we live in Japan or in Switzerland. There might be some time lags between the current evolution of national family laws. The Japanese law and the shortly revised Swiss law of the choice of family surname seems a good example of how two legal systems in Europe and Asia have similar laws because of their legal history, a general comparative law tradition and globally circulating civil law models (e.g. ECHR jurisdiction, which is known to Japanese law experts). A call for change by the plaintiffs and the international reporting systems, that have already criticized the *Saikōsai* for its ruling of 2015, has been made. This process cannot be stopped; it is more a question of time until this discriminatory provision will be abolished. And I would assume that it is similar in the case with the legal equality of non-marital children, which is not yet fulfilled in Japan.<sup>107</sup>

Of course we have also seen legal differences in details (e.g. premarital agreements; not to forget the issues of child custody such as the lack of joint custody, which I have only touched on here), but the roads we are going down are generally the same i.e. towards the implementation of more personal, children's and women's rights and towards more legal equality. The present calls for legal changes toward more equality and/or diversity in family relationships are due to common social phenomena: better education and working opportunities for women, more late marriages, unmarried mothers, divorced parents, fragmented families and many more elderly single people and more human rights for children are common phenomena contemporary family laws have to deal with. From the Swiss legal experience in family law (recent revisions on joint custody (*gemeinsames Sorgerecht*), maintenance and pension compensation laws), we can predict that more changes in Japanese rulings and family law will most probably take place in the near future.

These similar social phenomena are not, then, that surprising, since structural backgrounds such as gender inequality, conservative family politics and firm labour market structures, which in the end go hand in hand, are common to both societies. And both possess workplace structures which do not permit women, especially women with children, to enter a well-paid full-time job easily, and which do not permit men to work less or in less-paid positions without being in some way stigmatized, both of which have effects on the equally low birth rates in both countries. However, we can also note two striking differences:

Firstly, in Japan marital childbearing is still very much the norm. In comparison, in Switzerland currently a fifth of all children are born outside a marriage arrangement (compare to Germany, where it is a third of all children). To this day in Japan, single mothers, for example, have not been well supported by the state. Whether the new law of 2015 will help remains to be seen. And although the *Saikōsai* made an important ruling on the equality of non-marital and marital children in regard to inheritance law

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107 Kimura & Koziol (2012: 117).

in 2013, the remaining legal discriminations, e.g. of the *Koseki* system, weigh heavily on non-marital children and unwed mothers. In the current legal and socio-legal context it is pragmatically “better” to enter in a marriage arrangement before having a child. Existing laws still foster the normativity of the marriage arrangement, so logic calls for further legal changes and incentives on different legal levels. The power of law is certainly also limited; we need other disciplines (e.g. politics, economy) working on practical changes in the organization of workplaces to render them more favorable to women. It would for example be helpful to abolish open-ended time commitment from management track employees on the assumption that someone else will take care of the home and children, while treating everyone else as temporary/low-paid help, and we need ideas for future living forms with more *o-hitorisama* and especially more elderly people. For example, isn't it a myth that *o-hitorisama* prefer to be alone, or that educated women reject less educated partners, when they would share childbearing? We certainly need further scientific studies on these topics.<sup>108</sup> And how about promoting ideas such as that of childcare among Japanese grandfathers?

And then again a change of workplace organization itself might not suffice: In contrast to most continental-European societies such as Switzerland there is a higher asymmetric gender division with respect to household labour remaining. And the increase of the individualistic attitudes of women (and men) is still very limited.

Secondly, one obvious difference is the lack of diversity in ethnicity in Japanese society (with only 3% bi-national couples). Multi-ethnicity might speed up social changes in many ways (and should not only be discussed in the context of the over-ageing of Japanese society).

In conclusion we can see that some legal arrangements on love, sex and/or reproduction like the marriage and the prostitution contract, are very traditional and long-known arrangements. However, their contents, their motives and their contexts have changed over time. Women like Mia and Chieko do not wish for a marriage contract and generally will negotiate any contract differently from Reiko. And then again, I am sure that the 18-year-old Emiko would have negotiated differently than 40 year old Emiko has done in the past. Other arrangements on love, sex and/or reproduction than marriage and prostitution contracts are rather new and remain unregulated – at least in Japan, as for example the arrangements on artificial reproduction. And the many *o-hitorisama*, whether they live in changing relationships as Chieko (maybe a *naien*?), or live their lives for many years with mother and sister as Mia does (certainly not a *naien*, because they don't form a “couple”), seem to have insecure legal foundations in their relationships.<sup>109</sup>

In view of these shifting (and persisting) agreements on love, sex and reproduction and the insecure legal foundations, the parties will and shall find new contractual relationships with respect to paid company, for example. I would like to propose that the law generally takes a non-partial attitude towards these various wishes and manifestations of love, sex and reproduction – meaning individual and familial lifestyles. Because it

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108 Peukert (2015: 32).

109 Mizuno (1998: 72–77).

would basically constitute a violation of each person's right to self-determination if laws prohibit or courts intervene in any other arrangement on love, sex and reproduction than the marriage arrangements. Contract law generally offers a powerful tool to secure this specific right to self-determination: Who else than the involved parties themselves should and could decide better on these very personal matters of love, reproduction and/or sex? Any adult, any parent should be able to organize their lives in different ways, with or without a marriage arrangement (and their child to obtain full legal recognition), unless severe public policy issues are at stake (e.g. health, security, human rights issues). Can it really make a legal difference, if Masami or Chieko visit a love-hotel to have paid sex or to receive paid services such as emotional attention or just a cuddle (from the contract party)? All customers have to pay, for what they agreed on, with another adult person with legal capacity. And does not the Japanese informal divorce settlement (and procedure) of Reiko and Masami show us that things can function quite pragmatically and well after love, sex and reproduction have ceased?

Moreover, when personal relations have become fairly complex (e.g. artificial reproduction, patchwork families) carefully drawn up contracts might generally be helpful and in the end also in the best interests of the child, because the legal parentage will be clearly regulated and/or certain visiting rights are, for example, written down and the contract parties might have thought in advance on possible future conflicts and maybe even certain conflict-solving methods. Whereas the surrogacy contract, for example, is currently illegal in Switzerland, there remain certain contractual possibilities in Japan. But one can also think of such a contract, when there is, for example, a third person sperm donor involved, who would like to have visiting rights towards the child from the very beginning.<sup>110</sup>

With respect to contractual thinking, there might be a future contract on multi-parenting.<sup>111</sup> However, for the time being, Swiss and Japanese laws accept only the paternity of two parents. To sum up, it can be seen as a positive aspect of a contract approach that both parties have to think about contracting (including contents and future breach) in these very personal relationships and their current or future complex family situations, which might help to protect the parties and the children in the future.

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110 BGH (Bundesgerichtshof, Highest German Civil Court, Az. XI ZR 99/14) has, for example, even decided on 23 September 2015, that there is a contract between the mother and her partner in favour of the future child including financial obligations, when he consents to an insemination by a third sperm donor.

111 The Dutch Ministry of Security and Justice, more precisely, the Government Committee on the Reassessment of Parenthood, has just recently published a report "The Child and Parents in the 21st Century" and proposed an amendment on parentage and custody including a multi-parenting contract, which would have to be presented to the Court for recognition. The contract would state the legal parentage and include agreements e.g. on care, up-bringing and financial obligation, main place of residence and the name of the child. The report foresees an additional guardian to secure the child's interest (as of December 2016). <https://www.government.nl/documents/reports/2016/12/07/child-and-parent-in-the-21ste-century> (last visited 20.12.2016).

Finally, contracts and contract law are intrinsically about balancing between parties and justice.<sup>112</sup>

On the other hand, we all know that people are the most vulnerable when it comes to their very personal lives and legal affairs. 18-year-old Emiko was certainly not in the same negotiating position as 40-year-old Emiko. Women such as Reiko, for example, might be better off without any special marriage contract, which might mislead them even to waive their legal rights upon divorce. She was actually very lucky, because the Japanese pension laws had changed before her divorce. And neither a surrogate mother who is greatly in need of money, nor a childless person, nor a couple after several attempts to conceive a child by IFV or via a surrogate mother, will be in the best negotiating positions.

We are also aware of the fact that the classical contract law provisions to protect a party e.g. breach of contract caused by pressure/duress, fraud or mistake and some obligations to reciprocal information, are not always sufficient. They demonstrate that the distributive aspects of contract law are not fair and need correction by courts or lawmakers (that is why e.g. consumer contract law developed).

In conclusion, a certain legal framework for a contractual approach to these shifting arrangements of love, sex and reproduction is necessary. A certain additional protection of vulnerable parties is needed e.g. by family courts, who control/check the contracts (as we proceed, for example with premarital contracts in Switzerland) or compulsory provisions on the form of these contracts, or special provisions on disclosure – or even maybe by rethinking the concept of self-determination. Providing a contractual option and protection also to unmarried couples or people like Mia, Chieko and their mother living together for a longer duration in the same household is firstly, a condition to their right to self-determination in contract and secondly, necessary to protect them. In these two crucial points I can see no substantial difference between a short term contract on sex, entertainment or attention between two adults and a surrogacy contract, although the latter is more complex (because more actors are involved and the time period is longer).

Family law on the other hand shall protect all people who are not able to make a living on their own and require protection, such as vulnerable people (minors, sick, elderly persons) in their everyday life, independent of the agreement of the contract parties. In other words, the children's rights and best interests shall remain additionally protected by family law (e.g. guardian, procedural control).

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112 Cf. Annen (1994: 129–145); Nozaki (2003: 160).

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