PENSION DIVISION AT THE TIME OF DIVORCE: NEW SYSTEMS IN JAPAN

Yuko Koishi, Kyorin University, Japan

I. Introduction

In this presentation, I would like to talk about the division of a pension at the time of divorce. Last year, the Japanese Congress has passed the Welfare Pension Insurance Law, Articles 78-2 to 78-12 and Articles 78-13 to 78-21, which facilitates the division of a pension at the time of divorce. The law includes two systems, as I’ll explain in more detail later. The first system will take effect on and after April, 2007. The second one will take effect on and after April, 2008.

Needless to say, the study of pension systems requires a more global examination, including such issues as the existence of a social security system, the technical enforcement of the system, etc. But this time, I’ll discuss the system mainly as it relates to marital property law.

II. Principles of Japanese Marital Property Law and Pension Division Cases

So, first of all, I need to tell you about the principles of Japanese marital property law. We have a system of separate property. As you know, under a separate property system, each spouse is given the right to own their own property and the right to manage it. Under this principle, the income of wage earner belongs to him (usually the husband) and not to the spouse (usually the wife). Concerning a pension, because it is considered to be deferred income, it is also the separate property of the wage earner. This has caused miserable results in Japan for wives who have no income. Many women who get divorced find themselves in extremely difficult financial straits. But, fortunately, the circumstances have changed gradually. Recognizing the contribution of

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1 Civil Code, Article 762.
wives, the concepts of community property and the equitable distribution of property have crept into the Japanese marital property system.²

Recently, as you will see, there have been some marital division cases involving pensions. Let me introduce one case from the District Court of Sendai dated March 22, 2003. In this case, the defendant (the husband) already had the right to an employee pension, prior to the divorce. The wife also had her own pension, but the amount was very small, due to the short length of her employment service. The marriage broke down because of the husband’s adultery. Then, in the divorce proceedings, in addition to the division of real property and a retirement allowance, the wife sought the division of the husband’s employee pension plan as a periodical payment. The court accepted the wife’s claim on the grounds of her cooperation during the marriage. As to the amount, first the Court calculated an amount based on average life expectancy (in this case, 18 years) and then, from this amount, the Court deducted the amount of wife’s pension. Eventually, the wife got 30 percent of the husband’s employee pension, as a periodic payment.

In this case, the duration of the marriage was not considered at all. And, after the decree, the wife renounced her right to the periodic payments in return for receiving all the real property. But this case is important because it’s the first case showing the division of a pension as a periodical payment.³ And, even though there are still some problems to resolve, I believe most all family law lawyers in Japan approve of this decision.

² Under the influence of the scholarly interpretation of marital property law, the concept of community property appeared in divorce cases almost 30 years ago.
³ There are some cases that have found pension rights to be marital property. But in these cases, the courts considered the existence of a pension as one element in their decision on a lump sum payment, not as a periodic payment. See, the decision of the Tokyo High Court dated June 7, 1988, in Hanrei Jiho, No.1281, p. 96 and the decision of the Tokyo High Court dated November 22, 1989, in Kasaigppou, No. 42-3, p. 80. Concerning the analysis of these cases, see Miyoko Motozawa, “Future Retirement Pension and Property Division in Divorce,” Shihou Hanrei Remarks, Hihonhyouronsya, No. 29, p. 70.
III. The Necessity of Pension Division

Actually, the necessity for pension division has become quite urgent. In Japan, the divorce rate used to be low compared to other industrial countries. But, beginning in the 1980s, the divorce rate in Japan began to gradually rise.\(^4\) In 2004, 289,836 people got divorced.\(^5\) In addition to the rising divorce rate itself, we can see another clear tendency. That is an increase in divorce among couples that have been married for 20 or more years.\(^6\) (Statistics show that the divorce figure for women in this age group is five times the rate of 50 years ago.) In fact, we now have special expressions for this type of divorce, namely *teinen rikon* (retirement divorce) and *jukunen rikon* (mature divorce).\(^7\) Now, in Japan, fortitude is no longer a virtue for women!

On the other hand, the realities of property division in Japan are awful. These days, the average property settlement in which a Family Court is involved is said to be 4 million yen,\(^8\) or 48,000 American dollars. Many women divorce without any settlement at all. This circumstance means that the bulk of divorced women live on Social Security.\(^9\)

Against this backdrop, Congress felt the need to re-examine the pension system as it related to women. So, in 2001, a special committee called “Women and Pensions” was set-up.\(^10\) The purpose of the Committee was to establish a pension system that reflected the current lifestyle of women in Japan. In addition to the subject of pension division at the time of divorce, the Committee discussed other issues, such as a basic pension for housewives (which was established 20 years ago) and pensions for survivors. As these subjects were all related to the fundamental theory of pension

\(^6\) Yasuhiko Yuzawa, op. cite supra, pp. 91-92, p. 49.
\(^7\) Masahiro Yamada, *The Japanese Family in Transition*, Foreign Press Center, 1998
\(^8\) Yasuhiko Yuzawa, op. cite supra, p. 28.
\(^9\) According to statistics of the National Institute of Population, the number of families consisting of a mother and child(ren) that received Social Security in 2002 were 75,097.
\(^10\) Concerning the process of the enactment of the Bill, see Junko Takahata, “Pension Division -- An Aspect Concerning Women and Pension,” *Jurist*, No.1282, p. 74.
systems and the basics of family relations (as I’ll discuss in more depth later), these questions gave rise to much controversy. Eventually, a bill was introduced, under the sponsorship of the Committee, which finally recognized the necessity of pension division. Then, as I said at the beginning of this Presentation, on June 5, 2004, the Bill was passed.

IV. The Fundamentals of the Public Pension System in Japan

Before I explain the contents of the new pension division system, I have to explain a brief overview of the fundamentals of the public pension system in Japan. It’s a two-tier system. All persons between the ages of 20 and 59 years are obligated to participate in the national basic pension scheme. This basic pension is at the lower tier of the two-tier system. In principle, a requirement for receiving a national pension is that all beneficiaries must have made contributions for more than 25 years. But, full-time housewives are treated differently. Their contribution is deemed to be made through the mechanism of their husband’s pension contribution, even though he only makes contributions for himself and not for his wife. So, one contribution (from the husband) plus zero (from the wife) equals the beneficial right of two people of a married couple to each receive a basic pension. Then, you might ask, who pays the contributions for full-time housewives. We do! All of the participants in the national pension system make contributions for these full-time housewives. Consequently, there is opposition\(^\text{11}\) to this system from the viewpoint of fairness and this was considered by the “Women and Pensions” Committee. Fundamentally, this became a question of the constituent unit of the pension -- the individual or the household. But, at this time, just think that full-time housewives have their own pension rights.

At the second tier of the two-tier Japanese pension system is the employee pension. Almost all employees, including private-sector employees, national public-service employees and private school teachers, are participants in this pension tier. In addition to a basic pension, these employees receive a “remuneration portion” determined by the period of time and amount of money they contributed to the system. (The self-employed and people who join only the first tier of the two-tier system

\(^\text{11}\) Concerning the fundamental problem of women’s pensions, particularly the treatment of full-time housewives, see Nobuko Nagase, “Pension and Women, Houritujihou, Nihonhyoronsya, No. 949, p. 59.
receive only a basic pension). The new pension division systems are directed solely at this remuneration portion.

V. **The New Pension Division System**

   Now I will briefly explain the two new pension systems. The first one is applied in the case of a divorce where both members of the couple work. Recently in Japan, the number of working women has grown considerably. And working women greatly outnumber women engaged exclusively in work in the home.\(^\text{12}\) But concerning wages, I have to say a disparity between the wage levels of men and women still exists.\(^\text{13}\) Of course, this disparity influences the amount of the pension. The new system is designed to rectify this imbalance. The object of the proportioning is the contribution record of each spouse. As the pension right itself is not transferred, mortgaged or seized,\(^\text{14}\) the new system actually transfers some portion of the contribution record from one spouse to the other. And the proportion for each must be agreed by the couple. To reach an agreement, the exact details of the record are necessary, so both parties have the right to request this information from the office of Social Insurance.\(^\text{15}\) That is to say that they can freely decide the proportion to each, provided that the maximum for either is 50 percent. Typically, the wife, who usually has the lower contribution record amount, asks the husband to divide the difference between their two records. In case there is no agreement upon the proportioning, the Family Court will determine it, taking into account all the elements of each spouse’s contribution. Then, each member of the couple has a revised contribution record amount, as decided by agreement of the couple or by court order. As a result, the wife can get a higher pension because it will be based on her new contribution record, which includes the additional portion from her

\(^\text{13}\) The disparity between the wage levels of men and women is beginning to diminish. Despite this, in 2004, the average wage of a Japanese woman was still 68.8% of that of a man. In particular, the wage level of middle-aged women is much lower than that of men. Koseisho, “The Actual Circumstances of Working Women, 2005.
\(^\text{14}\) Welfare Pension Insurance Law, Article 41.
\(^\text{15}\) Welfare Pension Insurance Law, Article 78-5.
husband’s record. And under this mechanism, she will not lose the additional portion if she remarries.

The second new pension system is applied in the case of the divorce of a full-time housewife. Article 78-13 makes it clear that the contributions to the pension are the result of the cooperation of both of the spouses. Based on this understanding, if the housewife seeks it, this system allows for a division of contribution record of the husband. In this case, the contribution record is split in half. That is to say that the division is done automatically without the agreement of the divorcing spouses. And the portion to be divided is the contribution record of the husband after the effective date of this system. This means that a 50 percent division will not be a big amount for some time to come. But the important thing is the theory. And, in most cases, as a housewife will have worked for a certain number of years, she can also seek to transfer some portion of the husband’s record under the first system.

Under both of these new systems, the partners in a common law marriage are not allowed to seek a division of the contribution record.

VI. Conclusion

It was in thinking about the needs of divorced women that these new systems were enacted. But, as I explained earlier, in Japan, pension division is not directly linked to the marital property laws themselves. Fortunately, the theory of the equitable distribution was of help in enacting these new systems. And, of course, we have now clearly recognized that pension rights are property rights.

Recently, in Japan, as you know, we have a serious problem with fewer children being born and the aging of our population. Also, the economy is not good. Under these circumstances, the benefits of a pension are becoming less and less. Still this will be a big help for divorced women. In fact, some Japanese weekly magazines reported that many women are postponing divorce until the effective date of these new systems.

Of course, there are some problems with these new systems. Compared to the

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16 It is estimated that the elderly will be 26% of the Japanese population in 2015. The White Paper on the Elder Society, 2004, p. 4.
17 See, for example, Asahi Shinbun Weekly, AERA, 2003, 1.27. 72.
second system, in which the division is automatically half-and-half, the first system requires the agreement of the couple or a court order. With agreements between close people, difference of the power can sometimes influence the outcome. And where the court has determined the division proportions, so far a clear standard has not emerged. Needless to say, concerning the pension system, one of the most important considerations is fairness. In addition to the special treatment of a national basic pension for the housewives, this will be an issue to re-examine in the future. And, isn’t the treatment of common law marriages out of keeping with the times? In the area of the Social Security, we already have some special treatment for common law couples. For example, the partner of employee can qualify for health insurance.\(^{18}\) Even under the pension system, a partner in this kind of relationship is entitled to receive a survivor’s pension\(^{19}\) And there are some cases that have indicated a generous attitude toward common law marriage. Actually, the strict treatment of couples in the division of pensions is against the established purpose the new pension systems -- namely, that it reflect the current lifestyle of Japanese women.

I applaud the significance of the enactment of these new systems, which clearly indicate that the contributions to a pension are the result of the cooperation of both spouses. And I am convinced that the enactment of these new systems is an invaluable first step, particularly in the trend toward no-fault divorce.\(^{20}\)

\(^{18}\) Health Insurance Law, Article 3-7  
\(^{19}\) Welfare Pension Insurance Law, Article 59-1  
\(^{20}\) Since the Supreme Court decision of September 2, 1987, (Minsyu, Vol.41, No.6, p.1423) which allowed a husband to divorce his innocent wife, most scholars believe that Japan accepts the theory of no-fault divorce.