

## A COMPARISON OF HUMAN RIGHTS PROTECTION IN EUROPE AND JAPAN: THE QUEST FOR MARRIAGE EQUALITY

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### Content

- I. Introduction
- II. Legal status of same-sex marriage in Europe
- III. Legal status of same-sex marriage in Japan
- IV. Concluding remarks

### I. Introduction

Japan accepted European law in the Meiji period (1868-1912) after the Edo period (1603-1868) when Sakoku (isolation from other nations) policy was implemented. Japanese civil law was influenced by European law, particularly French and German civil law. The Japanese Meiji Constitution was influenced by Prussia (1850). This article deals with 'Encounter between Japan and Europe and its consequences in the context of human rights'. I chose same-sex marriage as the subject because the Sapporo Regional Court recently gave a landmark decision regarding same-sex marriage, and there have been some efforts to recognise the lesbian, gay, bisexual, and transgender (LGBT) community as an opportunity for the Tokyo Olympics and Paralympics.

Same-sex marriage has not yet been legally acknowledged in Japan. It does not mean that there is no homosexuality in Japan. In fact, since a long time ago, homosexuality has existed.<sup>1</sup> For example, a homosexual culture was found in the Buddhist priesthood. With time, this culture was accepted by military families in the Sengoku period (period of warring states in Japan), from 1467 to 1615, and Kosho, a position in a samurai family similar to a page, served as homosexual partners of paederast lords. Furthermore, homosexual cultures blossomed during the Edo period. In this period, homosexuality culture was called shudo (衆道) and integrated into military families' rules.<sup>2</sup> Homosexuality culture, in this period, was seen among men but

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<sup>1</sup> Cf. Gary P. Leupp, *Male Colors: The Construction of Homosexuality in Tokugawa Japan* (『男色の日本史』), Japanese translation version, 2014, Sakuhinsha (作品社) (original English version, 1995, the University of California Press); R. Hiratsuka, *Research for Homosexuality in Japan* (『日本における男色の研究』) (in Japanese), 1994, Ningen no kagakusha (人間の科学社); Homosexuality between men was called danshoku (男色) in Japanese.

<sup>2</sup> Miho Mitsunari, Tomoko Sasanuma, Naoko Tateishi and Tomoe Yatagawa, *Introduction of Gender Law* (『ジェン

not among women. Homosexuality culture was not only in warrior classes but also in merchant classes in the Edo period. Until the Genroku period (1638-1704), during the Edo period, young kabuki<sup>3</sup> performers had a homosexual relationship with clients because homosexuality was not related to normal and abnormal concept values of modern society.<sup>4</sup> This acceptance of homosexuality was applied only for men, not women because women were not considered as sexual objects, and homosexuality between women was not assumed. It means that the setting of a sexual subject and a sexual object was affected by gender bias.<sup>5</sup>

Religion and thought in Japan have not denied or condemned homosexuality. In fact, in Buddhism, Kannon-sama,<sup>6</sup> a deity of Mercy, does not have a specific gender and can be seen as a man or woman. Influenced by European culture, sex between men was banned in the early Meiji period, which began after the Edo period. Soon after, the ban was abolished. Since then, homosexuality has not been banned in Japan.

Manga (Japanese comics) are famous in Japanese culture. Boys' love (BL) (homosexual love story) is an established category in Japanese manga.<sup>7</sup> BL manga began as a fan publication and was read mainly by women. Currently, BL manga has gained more popularity and is now accepted, and certain BL manga deal with homosexuality-related social issues. Gay people also play an important role in entertainment. 'Kino Nani Tabeta (きのう何食べた?)' (What did you eat yesterday?), a 2019 TV drama series based on a Japanese manga, was a hit and later became a movie in 2021.<sup>8</sup> Every day, you can see openly gay presenters and commentators on TV. You can also find gay clubs at Shinjuku nicho-me (新宿二丁目), Shinjuku ward in Tokyo.<sup>9</sup> On the surface, homosexuality seems to have been accepted in Japanese culture.

In Europe, homosexuality has been considered taboo because of religion, particularly Christianity. In some European countries, sodomy was the subject of a criminal charge. For example, even in 1981, there was *Dudgeon v. the UK* case.<sup>10</sup> In this case, the European Court of Human Rights (ECtHR) held that Northern Ireland's criminal act that criminalised male homosexuality violated Article 7 of the European Convention on Human Rights (ECHR). Therefore, liberation movements were necessary so that members of the LGBT community could be accepted in society. Not all, but many European countries have succeeded in legalising same-sex marriage as an institution based on the non-discrimination principle. We can see huge progress in acknowledging LGBT rights in Europe, thanks to LGBT movements.

On the whole, Japanese culture and thought have been tolerant of homosexuality, and as a result, liberation movements of homosexual people had not happened to the same degree as in Europe until recently. Until now, Japan has still not been able to adopt a law to establish same-

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ダー法学入門』(in Japanese), pp. 58-59, 3<sup>rd</sup> ed., 2019, Horitsubunkasha (法律文化社).

<sup>3</sup> Kabuki, a Japanese traditional drama, is performed only by male actors who play men and women. As for current Kabuki, see <https://www.kabuki.ne.jp/en/>.

<sup>4</sup> Mitsunari, note (2), p. 59.

<sup>5</sup> *Ibid.*, p. 59.

<sup>6</sup> Cf. <https://www.kiyomizudera.or.jp/en/>.

<sup>7</sup> Akiko Mizoguchi, *Evolutionary theory of BL* (『BL進化論』) (in Japanese), 2015, O-ta shuppan (太田出版); Akiko Hori and Naoko Mori (ed.), *BL studies: An Introduction* (『BLの教科書』) (in Japanese), Yuhikaku (有斐閣), 2020; Both books are considered academic. That means that BL manga culture is now a subject of academic research; also Mari Nishimura, *Studies on BL Culture* (『BLカルチャー論』) (in Japanese), 2015, Seikyusha (青弓社).

<sup>8</sup> <https://kinounanitabeta-movie.jp/>.

<sup>9</sup> Cf. <https://2choco.net/>.

<sup>10</sup> ECtHR, *Dudgeon v. the UK*, Judgment of 22 October 1981, Series A No. 45.

sex marriage. Furthermore, Japan is still a conservative society. Recently, the Japanese Supreme Court held that the Japanese family registration law that does not accept separate surnames for married couples is compatible with the Japanese Constitution, particularly Article 24.<sup>11</sup>

Currently, there are some movements and discussions regarding same-sex marriage in Japan as well as in Europe. Even in such conservative Japan, we can see a big change regarding same-sex marriage. In this presentation, I will first briefly present the situation in Europe regarding same-sex marriage. Then, I would like to show you the recent developments regarding same-sex marriage in Japan. Finally, I would like to make some remarks about the encounter between Japan and Europe and its consequences in the context of human rights.

## II. *Legal Status of Same-Sex Marriage in Europe*

### 1. **Multilevel Protection in Europe**

In Europe, fundamental or human rights are guaranteed at multiple levels. According to the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) has guaranteed human rights. The Court of Justice of the European Union also has guaranteed fundamental rights based on the Treaty on the European Union (TEU), the Treaty on Functioning of the European Union (TFEU), and the EU Charter of Fundamental Rights. National courts in Europe have dealt with same-sex marriage issues. The same-sex marriage issues have been discussed at these three levels.

The rights of members of the LGBT community have been recognised in most European countries. European people had to have a long way to achieve this, and they had to have a further way to accomplish it. Facing the LGBT community movement, courts, legislative, and executive organs have accepted these rights accordingly.

### 2. **The ECHR and ECtHR**

The ECtHR examines the compatibility of national measures with human rights under the ECHR. As mentioned above, the ECtHR dealt with the rights of the LGBT community in *Dudgeon v. the UK* case in 1981. In this case, the national law that criminalised homosexual acts was incompatible with Article 8 of the ECHR. In the case of *Christine Goodwin v. the UK*, she was born as a man but transformed into a woman. Her assertion that non-recognition of the right to marry violated Article 12 of the ECHR was accepted by the ECtHR in 2002.<sup>12</sup>

### 3. **EU Law and the CJEU**

Article 10 of the TFEU lays down that 'the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation'.<sup>13</sup>

<sup>11</sup> 令和2年(ク)第102号 市町村長処分不服申立て却下審判に対する 抗告棄却決定に対する特別抗告事件、令和3年6月23日 最高裁大法廷 (The Japanese Supreme Court, Judgment of 23 June 2021, No. 102).

<sup>12</sup> ECtHR, *Christine Goodwin v. the UK*, Judgment of 11 July 2002, Reports 2002-VI.

<sup>13</sup> Underlined by author.

Article 21 of the EU Charter of fundamental rights lays down, '1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation shall be prohibited'.<sup>14</sup> In the EU, the TFEU lays down the principle of non-discrimination, including sexual orientation. The EU can be active and take measures so far as competence is conferred on it according to the principle of conferral (Article 5 TEU). The EU does not have the competence to determine the status of family members, including marriage. Competence in this field belongs to the EU Member States.

They can determine the law regarding marriage and the status of married individuals. Therefore, each State can decide whether to allow same-sex marriage. In some European countries such as the Netherlands, Belgium, Germany, France, Austria, Denmark, Finland, Ireland, Luxembourg, Malta, Portugal, Spain, and Sweden, same-sex marriage has been legalised, while other European countries such as Hungary, Poland, Romania, and Bulgaria have not acknowledged the right to same-sex marriage. There is no unified legislation regarding the right to same-sex marriage at the EU level, and the situation depends on national law.

However, the EU law has demanded substantial changes toward national law that does not recognise the right to same-sex marriage. The issue of same-sex marriage in Romania was dealt with in the Coman case (C-673/16), a landmark case in 2018.<sup>15</sup> In this case, Mr Coman is Romanian and married Mr Hamilton, an American in Brussels, where same-sex marriage has been legalised. They wanted their marriage to be recognised in Romania so that Hamilton could live there. However, the Romanian authority did not acknowledge it. They took action before a Romanian Regional Court and argued that the decision of the authority was discriminatory on the grounds of sexual orientation. Finally, the Romanian Constitutional Court decided to seek a preliminary ruling before the Court of Justice of the EU. The Court of Justice held that even if a matter belongs to a Member State's competence, they have to comply with EU law, particularly, the provisions on the freedom to move and reside in the territory of the Member States (para. 38).

Furthermore, the Court held that the refusal of the authority of a Member State to recognise the status of same-sex marriage violates the right to free movement of EU citizens (paras. 40 and 51). It means that the free movement of same-sex spouses of EU citizens must be guaranteed even in Member States which have not legalised same-sex marriage. Although EU law does not lay down family status law, and the Member States can further decide whether same-sex marriage is allowed or not. This judgment enlarged the scope of legalised same-sex marriage geographically, even in states where same-sex marriage has not yet been legalised. In judging so, the Court relied on the freedom of movement of persons, one of the fundamental freedoms laid down in Article 21 (1) of the TFEU.

The principle of non-discrimination, including based on sexual orientation, is laid down in Article 19 of the TFEU and Article 21 of the EU Charter of Fundamental Rights. Although the EU does not have the competence to rule on the rights of the LGBT community, for example, same-sex marriage as an institution, it obliges Member States to comply with EU law, particularly, the EU values and principles as well as the EU measures reflecting them.

However, it is noteworthy that even in Europe, the rights of members of the LGBT

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<sup>14</sup> Underlined by author.

<sup>15</sup> CJEU, Case C-673/16, Relu Adrian Coman and Others, Judgment of 5 June 2018, ECLI:EU:C:2018:385.

community have not been thoroughly acknowledged. In the VMA case (C-490/20), a pending case before the Court of Justice, the Bulgarian State refused to recognise the same-sex parentage of a child. Advocate General Kokott<sup>16</sup> showed that it could be possible to justify such a refusal based on national identity according to Article 4 (2) of the TEU. She indicated that the Court of Justice had held that the Member States are not required to provide for the institution of marriage between persons of the same-sex in their national law (para. 122) and that the ECtHR had held that a Contracting State is not required to authorise the simple adoption of a child by the homosexual partner of the child's biological mother (para. 125).

#### 4. National Law in Europe

In Europe, where the thought of Christian religion has been prevailing, it has been difficult to recognise same-sex marriage. As a first step, an institution of partnerships of LGBT couples was accepted in some countries. Accordingly, an increasing number of countries have accepted it. Germany enforced the Act on the Termination of the Discrimination of Same-Sex Couples: Civil Partnerships, establishing an institution of partnerships of same-sex couples so they can have rights equivalent to those of legal marriage couples. Some länder took action against this Act before the German Federal Constitutional Court, insisting that this is inconsistent with the German Basic Law (constitution). The Constitutional Court held that the introduction of the legal institution of the registered civil partnership for same-sex couples does not infringe Article 6.1 that guarantees marital freedom and protects the institution of marriage.<sup>17</sup> As a second step, same-sex marriage as an institution has been introduced in some countries.

However, in other European countries, national law has not yet introduced an institution of same-sex marriage nor recognised it. In some countries, acceptance of the LGBT community is returning to the old. For example, recently, in Hungary, the parliament passed a law banning LGBT content in educational materials for those under 18. According to the law, companies and large organisations will be banned from running advertisements featuring gay people in their advertisements targeting minors. Additionally, the law lays down that TV shows and films containing gay characters will be allowed only after the watershed.

Hungary is a Member State of the EU. Therefore, the EU and European leaders can push pressure toward such rollbacks. Facing this new law, the European Commission President Ursula von der Leyen called the law 'a shame'. Furthermore, 17 EU leaders signed a joint letter expressing deep concern and the wish to fight against discrimination toward the LGBT community. The EU Member States, including Hungary, are competent to make national laws to protect young people. However, they have to respect the EU's values and principles, including the principle of non-discrimination. The rights of members of the LGBT community, including the right to same-sex marriage, have not been acknowledged in all EU Member States. However, the principle of non-discrimination related to sexual orientation is one of the EU principles, and as a result, they are obliged to comply with it. The reactions of the European Commission and EU leaders to Hungarian law show that the principle of non-discrimination is firmly embedded in European culture.

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<sup>16</sup> Case C-490/20, *V.M.A. v Stolichna Obsthina*, Opinion of Advocate General Kokott of 15 April 2021, ECLI:EU:C:2021:296.

<sup>17</sup> BVerfG, Judgment of the First Senate of 17 July 2002, 1 BvF 1/01.

### III. *Legal Status of Same-Sex Marriage in Japan*

Now, I will discuss the legal status of same-sex marriages in Japan.

#### 1. **Current Situation Regarding Same-Sex Marriage**

Same-sex marriage in Japan is still not legal. Article 24 (1) of the Japanese Constitution states that marriage shall be based only on the mutual consent of two parties of the opposite sex. It means that marriage between two parties of the opposite sex as an institution is established. Some people have argued that Article 24 (1) of the Constitution should be incompatible with same-sex marriage. Other people argued that, in 1946, when the Constitution was enacted, drafters of the Constitution did not assume same-sex marriage. Rather, they focused on the change of the family system that prioritised the eldest male child and the marriage between families decided by a family head and the introduction of marriage between two persons based on equal rights of men and women.<sup>18</sup> Following this argument, the Constitution does not forbid same-sex marriage because it does not assume it. Some same-sex couples have used an institution of adoption. One of the partners is considered the parent, and the other, the child. As a result, they are considered a family composed of a parent and child, and the child has the right to inherit.<sup>19</sup>

For reference, the lawful age of marriage for men is 18, and for women, it is 16. Needless to say, there are LGBT people in Japan as well. Moreover, we can see movements for the rights of the LGBT community. The rainbow flag, as a symbol for the LGBT community, can also be seen in Japan. As a result of these movements, some municipalities have officially introduced a certification system for partnerships of LGBT couples since 2015.<sup>20</sup> The first and second municipality to introduce this certification is the Shibuya Ward and the Setagaya ward in Tokyo respectively. Shibuya ward introduced the certification system by a Jorei (条例) (ordinance) of the local parliament, and Setagaya ward introduced it through a Yoko (要綱) (outline) for internal rules.<sup>21</sup> The certification system differs from the partnerships of the LGBT community that have similar or equivalent rights to legal marriage couples because the legal effect of the Japanese system is limited.<sup>22</sup> An increasing number of municipalities have introduced this institution. In parallel, increasingly, people have taken action before the courts so that their marriage can be officially recognised.

#### 2. **Judgment of the Sapporo Regional Court**

Following the situation mentioned above, for the first time, on 17 March 2021, the

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<sup>18</sup> Hitoshi Ishida, *Introduction to LGBT* (『はじめて学ぶLGBT』) (in Japanese), 2019, Natsume (ナツメ社), pp. 110-111.

<sup>19</sup> *Ibid.*, pp. 116-117.

<sup>20</sup> As for efforts by municipalities toward the rights of LGBT community, Japan Alliance for LGBT legislation (LGBT法連合会), *What is legal system regarding non-discrimination against 'LGBT'* (『「LGBT」差別禁止の法制度って何だろう?』), 2016, Kamogawa publisher (かもがわ出版); see also, <https://lgbtetc.jp/english/>.

<sup>21</sup> Ishida, note (18), pp. 136-137.

<sup>22</sup> Ishida, note (18), pp. 138-139.

Sapporo Regional Court, located in Hokkaido prefecture, the northernmost prefecture in Japan, held that non-acceptance of same-sex marriage is incompatible with the Japanese Constitution, particularly Article 14, which provides for equality and non-discrimination.<sup>23</sup> In this case, three same-sex couples sued the state, saying that their inability to marry violated Article 14 of the Constitution. Article 14 (1) of the Constitution lays down, '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'.

First, the Court confirmed that Meiji civil law, regulated in 1896 after the Edo period, was drafted by referring to the foreign civil law of eight countries, including France, Italy, and Belgium; at that time, same-sex marriage was not established as an institution in those countries. Second, the Court mentioned the status of same-sex marriage in different countries. For example, the Court explained that in 1989, Denmark introduced same-sex civil partnerships, Germany and Finland followed in 2001, and Luxembourg and Ireland in 2004. Same-sex marriage as an institution began to be introduced in the Netherlands in 2000, Belgium in 2003, and so on. Additionally, the Court stated that in 2017, the Taiwanese Constitutional Court held that national civil law was incompatible with the Constitution. Next, the Court confirmed that the American Chamber of Commerce in Japan pointed out that Japan was the only G-7 country that had not acknowledged same-sex marriage partnership as an institution. The Chamber pointed out that same-sex spouses of foreign nationals in Japan, who had married in another country, could not obtain a spouse visa, and as a result, could not come to work in Japan.

In addition, the Court showed that in 2015, the Shibuya and the Setagaya wards in Tokyo introduced same-sex partnership as an institution, and now around 60 local governments have introduced it. The Court recognised that same-sex marriage had not been allowed under the Meiji civil law or the amended civil law of the year Showa 22 (1947) because homosexuality was thought to be caused by mental illness in Japan and foreign countries. Now, it is no longer like that in Japan.

Furthermore, the Court pointed out that public awareness of discrimination based on sexual orientation is growing and will continue to grow. Although the Court admitted that the legislature has the discretion to take public awareness into account in determining amendments of family law, it held that, in considering whether it is still rational for courts not to provide a legal instrument for homosexual people so that they could enjoy the rights or legal effects derived from legal marriage, it should also consider public awareness when making a judgment. The Court acknowledged current differences in legal effects based on personal statuses, such as inheritance, between the marriage of heterosexual people and that of homosexual people. The Court held that such differences were no longer rational. Finally, the Court decided that the relevant family law is not compatible with Article 14 (1) of the Constitution.

### 3. After the Judgment of the Sapporo Regional Court

Following the judgment of the Sapporo Regional Court on 17 March 2021, there were some movements at the legislative level. The Special Committee on Sexual Orientation and Gender Identity of the Liberal Democratic Party (LDP) considered submitting a bill for LGBT

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<sup>23</sup> 平成31年（ワ）第267号 損害賠償請求事件、令和3年3月17日 札幌 地裁 (Sapporo Regional Court, Judgment of 17 March 2021, No. 267).

rights with Komeito, the LDP's coalition party. The Olympic Games were scheduled to be held in Japan in July and August 2021. It was considered an opportunity to pass the bill because the Olympic Games are considered a festival not only of sports but also of peace and diversity. Some municipalities increased their activity toward the Olympic Games.<sup>24</sup> For example, in October 2018, the Tokyo Metropolitan Government enacted an ordinance, 'Tokyo Metropolitan Government Ordinance Seeking Realization of the Principle of Respect for Human Rights Outlined in the Olympic Charter', forbidding discrimination against the LGBT community and regulating hate speech.<sup>25</sup> Japanese parliamentarians were aware of this public conception of the games across the world. Regrettably, because of Covid-19, the Olympic Games discussions in Japan revolved around whether the games should be conducted or not, rather than promoting diversity. Furthermore, some conservative politicians among the LDP strongly opposed the bill, and it could not be approved in the parliamentary session.

#### IV. *Concluding Remarks*

The issue of same-sex marriage as an institution is not old. In 1989, Denmark was the first country to acknowledge same-sex partnership as an institution, approximately 30 years ago. Since then, the recognition of LGBT rights has progressed rapidly; however, LGBT rights have not yet been completely established, even in Europe. Additionally, the right of same-sex married couples to adopt children has been discussed. In Japan, same-sex marriage as an institution is still not legally established. However, we can see some changes, including the landmark judgment regarding same-sex marriage and efforts by some municipalities.

Now, I would like to comment on the landmark judgment by the Sapporo regional court from the perspective of encounters between Japan and Europe and its consequences in the context of human rights. The judgment was regarding same-sex marriage, stating that Meiji civil law was drafted by referring to European civil law when same-sex marriage was not envisaged at all in European countries. Notably, the judgment knowledgeably mentioned the legal development and current state of same-sex partnership and marriage as an institution and related case law in the world, including Europe and Asia. The judgment was influenced by global developments in this area, particularly in Europe. Such studies of foreign law and judgments led to the landmark judgment by the Sapporo Regional Court. Japanese law was created by referring to European law. It has developed with the development of European law.

Sometimes, it is said that democracy has never quite taken root on Japanese soil. In appearance, there are neither strong demonstration nor strong activities of NGOs and rather indifference of citizens toward politics. Demonstrations, activities of NGOs and indifference of citizens toward politics. Even if that is true, it is important to adopt a law in Japan. If a law regarding same-sex marriage as an institution will be adopted, citizens' consciousness for recognition of diversities will be strengthened. In addition, Japanese people are relatively tolerant towards religions and homosexuality has not been taboo. Therefore, once a law passed, the rights of the members of the LGBT community might be easily accepted in the society.

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<sup>24</sup> Mitsunari, note (2), pp. 54-55.

<sup>25</sup> [https://www.soumu.metro.tokyo.lg.jp/10jinken/hokanko/upload/item/oli-para-jinken2021\\_en.pdf](https://www.soumu.metro.tokyo.lg.jp/10jinken/hokanko/upload/item/oli-para-jinken2021_en.pdf).