Article

Status of Same-Sex Marriage Legislation in Japan

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ABSTRACT

This article provides an overview of the status of same-sex marriage legislation in Japan. While there are lawmakers in Japan who advocate for recognition of same-sex marriage through legislation, conservatives committed to the traditional family view predominate in the Diet. Article 24 of the Constitution is a provision on marriage, but because it states that "marriage shall be established solely on the basis of the consent of both sexes," there are a few scholars who argue that the Constitution guarantees same-sex marriage, while there are few who argue that it prohibits it. The majority holds that the law can recognize same-sex marriage. There have been lawsuits filed seeking recognition of same-sex marriages, but it is unlikely that the Supreme Court, with its extreme judicial reluctance, would find them unconstitutional. On the other hand, public opinion's understanding of same-sex marriage has gradually improved in recent years, and while the road is not easy, it will be interesting to see what happens in the future.

Keywords: *Same-sex Marriage, the Constitution of Japan, the Equality Principle*

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I. INTRODUCTION

The Japanese Constitution does not mention same-sex marriage, and the Civil Code denies same-sex marriage. The Supreme Court is very conservative and is unlikely to judge such civil code provisions as unconstitutional. Constitutional theory favors the approval of same-sex marriage, but constitutional scholars are divided on the details. In public opinion, while the understanding of sexual minorities is gradually spreading, conservatives still strongly oppose same-sex marriage. In the Diet, conservatives are the majority, so it is unlikely that homosexual marriage will be approved by legislation. However, unlike other countries, the influence of religion is smaller for Japanese conservatives than traditionalism.

II. CHARACTERISTICS OF HOMOPHOBIA IN JAPAN

Before discussing the issue of same-sex marriage legislation, I'd like to describe briefly the situation in which homosexual people are placed. Legally speaking, there are few laws through Japanese history that prohibit homosexual activity. Even before modern times, homosexuality was tolerated, and literature works often described homosexuality positively. Exceptionally, early in the modernization period (1870s), laws punishing homosexuality were enacted, but were quickly repealed.

Today, there are no laws prohibiting homosexual activity or explicitly discriminating against homosexuals (although there is indirect discrimination that excludes non-law-married couples from social security). However, discrimination in society is severe. According to Keith Vincent, even if homosexuality is rarely the subject of explicit hatred and eradication in Japan, hidden discrimination does exist, and is harsher because it is hidden.[1] This is what is called "Japanese-type homophobia".

Because of the severe discrimination against homosexuals, it is extremely difficult for these people to come out, and they must live by hiding their sexual orientation. As a result, their existence has become invisible. Advocacy groups, especially large ones, are few in number. Also, homosexual rights have not been strongly claimed. For example, until recently, there was only one prominent lawsuit over homosexual rights (and this was only a lower court decision, not a Supreme Court case).

In this case, which happened in 1990, a homosexual group was denied access to an accommodation facility for young people managed by a local

1. KEITH VINCENT, TAKASHI KAZAMA (風間孝) & KAWAGUCHI KAZUYA (河口和也), GEI SUTADĪZU [ゲイ・スタディーズ] [GAY STUDIES] 109-11 (1997).

government. The ruling of the Tokyo High Court on September 16, 1997 stated that "there were improper restrictions on the right to use of homosexuals and consequently, substantially discriminatory treatment," and that said denial to access was illegal.[2] Plaintiffs had alleged violations of the Constitution, but the Court didn't mention the Constitution.

This invisibility has continued since then, but in recent years we can observe a gradual change. Some public figures have dared to come out. In 2013, the first member of the Diet (Ms. Kanako OTSUJI) to announce that she was lesbian appeared. In 2015, the Japan Alliance for LGBT Legislation (J-ALL) was established and started activities toward legal acknowledgement of their rights.

A lawsuit has also been filed. I put aside a same-sex marriage lawsuit filed in 2019 that will be described later, and here I introduce a Hitotsubashi University outing case. In this case, a student at Hitotsubashi University Law School, one of the prominent law schools, committed suicide after his classmate exposed to other classmates that he was gay. Parents of the student have filed lawsuits blaming exposed students and the law school. Thereafter, a settlement was reached with the classmate, and the law school's liability was denied by a ruling.[3]

These movements are gradually changing the situation of invisibility.

III. Current Status of Legislation and Court Cases

A. *Article 24 of the Constitution and Family Law Part (Parts 4 and 5) of Civil Code*

The Constitution of Japan, established in 1946, stipulates in Article 24 as follows:

> 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. 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.

At this point, it can be said that the Constitution of Japan introduced the provisions to protect marriage and family earlier than constitutions of other

2. Tōkyō Kōtō Saibansho [Tokyo High Ct.] Sep. 16, 1997, Hei 6 (ne) no. 1580, 986 HANREI TAIMUZU [HANTA] 206 (Japan).

3. Tōkyō Chihō Saibansho [Tokyo District Ct.] Feb. 27, 2019, Hei 28 (wa) no. 18926.

countries. The reason for that was criticism that women or wives were forced to have extremely subordinate status under the feudal family system before World War II. As was common at that time, there was no interest in protecting the rights of or even acknowledging the existence of sexual minorities.

One argument of the constitutional interpretation of same-sex marriage that has recently taken place is the interpretation of Article 24, in particular a paragraph that says "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." Because it said "the sexes" and "husband and wife", the Constitution guarantees only marriage between men and women, and can be interpreted as not guaranteeing same-sex marriage. This will be discussed later.

Since the Constitution was enacted in 1946, the Family Law Part of the Civil Code has undergone extensive amendment to conform to Article 24 of the New Constitution. However, the revised Civil Code has gradually been criticized for the fact that conservative provisions still remain. For example, the Supreme Court said in 1995 it was constitutional with respect to the provision that discriminated against illegitimate children (Minpō (Civ.C.), art. 900, para 1, no. 4) as to their legal inheritance, which was set at half of that of legitimate children.[4] However the same Court determined in 2013 that it violated the principle of equality (Article 14 of the Constitution).[5] In addition, the Supreme Court determined in 2015 that it was partially unconstitutional regarding the provision of a six-month remarriage prohibition period after divorce (Minpō (Civ.C.), art. 733), fixed only for women.[6] On the other hand, Minpō (Civ.C.), art. 750, which requires married couples to have the same surname, is constitutional.[7] The Civil Code only requires that the couple's family name be unified, and does not stipulate that the wife must change her family name to her husband's family name. In fact, however, it is almost always the wives that are obliged to change their surname. It was claimed that this was indirect discrimination against women, but the Supreme Court maintained that formal equality was maintained, and that the judgment of the Diet should be respected as to what extent substantial equality should be considered. For this reason, this provision is not against the Constitution.

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4. Saikō Saibansho [Sup. Ct.] July 5, 1995, Hei 4 (o) no. 255, 49 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1789 (Japan).

5. Saikō Saibansho [Sup. Ct.] Sep. 4, 2013, Hei 24 (ku) no. 984, 985, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1320 (Japan).

6. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Hei 25 (o) no. 1079, 69 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2427 (Japan).

7. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Hei 26 (o) no. 1023, 69 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2586 (Japan).

Speaking of same-sex marriage, the Civil Code and other acts do not permit same-sex marriage or a civil partnership system. There is also no law to prohibit discrimination against sexual minorities.

Thus, the legislation regarding sexual minorities in Japan remains very conservative in comparison with today's international standards. The reason for this is not clear, but it is undeniable that Japan is a highly homogenous society and tends to exclude minorities in some ways. Not only sexual minorities but also foreigners and persons with disabilities are not well protected.

In addition, the Liberal Democratic Party, which has almost always been a ruling party since the 1950's, is basically conservative, and many of its members embrace traditional family views. This is the reason why the amendment of the provision on the married couple's surname is not realized. The same is true for legislation that allows same-sex marriage. However, unlike other countries, Japanese conservatives are not so influenced by specific religions; rather they are the opposite, holding a traditionalist point of view.

The traditional family-oriented position is rarely expressed in academic papers, but it is shared by a certain range of the public (about 20% according to one survey[8]), including politicians and intellectuals. According to this, "Marriage has been between a man and a woman since ancient times. The union of a man and a woman is the union of kindred, the union of a clan, through which they leave their children to posterity as a community. This system of marriage is the greatest paradoxical wisdom ever produced by mankind, which turns the dark desires of sex, which are stalked by violence and concealment, into the brightest blessed light of society, and makes it the basis of stability and happiness through order."[9]

This Party published a pamphlet on this topic, in which it agreed with the Government position that the Constitution does not give marriage status to same-sex couples.[10]

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8. Jin Ishida (石田仁), *Dōsei kon ni Taishite 'Dentō-teki Kazoku no Sōshitsu' Narabini `hi Seishoku-yue Konomashikunai' to Kangaeru Hitobito no Iishiki o Kitei Suru Yōin wa nani ka:-Sei Nenrei-sō-betsu Bunseki* (*同性婚に対して「伝統的家族の喪失」ならびに「非生殖ゆえ好ましくない」と考える人々の意識を規定する要因は何か：性・年齢層別分析*) [*Factors Behind the Belief That Same-Sex Marriages Represent the "Collapse of the Traditional Family" or Are "Undesirable Because They Are Non-Reproductive": A Gender-and Age-Based Analysis*], 49 MEIJIGAKUINDAIGAKU SHAKAIGAKUBU FUZOKU KENKYŪJO KENKYŪJO NENPŌ (明治学院大学社会学部付属研究所研究所年報) [MEIJI GAKUIN UNIVERSITY FACULTY OF SOCIOLOGY RESEARCH INSTITUTE ANNUAL REPORT] 63, 64 (2019).

9. Eitaro Ogawa (小川榮太郎), *Seiji wa "Iki Dzura-sa" to iu Shukan o Sukuenai* (*政治は「生きづらさ」という主観を救えない*) [*Politics can't save the subjectivity of "hard to live with"*], 37 SHINCHO 45 (新潮45) [NEW TIDE 45] 84, 88 (2018).

10. JIYŪMINSHUTŌ (自由民主黨) [LIBERAL DEMOCRATIC PARTY], SEITEKI SHIKŌ SEIDŌITSU-SEI (-SEI JININ) NI KANSURU Q&A (REIWA GAN'NEN-BAN) (性的指向・性同一性 (性自認) に関する

On January 30, 2020, Prime Minister Shinzo Abe stated in the House of Councilors as follows: "Article 24 of the Constitution stipulates that marriage shall be based solely on the consent of both sexes, and under the current Constitution, it is not envisaged that same-sex couples will be allowed to enter into marriage. Whether or not the Constitution should be amended to recognize same-sex marriages may be something that should be discussed, but we believe that this is an issue that is fundamental to the nature of the family in Japan and requires extremely careful consideration."

Incidentally, according to a survey made for candidates at the House of Councilors election in July 2019, 36% of the candidates of the Liberal Democratic Party were opposed to same-sex marriage, and the approval was only 9%, while 55% of respondents said they were neutral.[11] This result shows their conservative mentality. However, seeing the high rate of the answer "neutral", we could have some expectation for change in the future.

On the other hand, there are, of course, liberal political parties, and, in 2019, bills amending the Civil Code have been submitted to the Diet in order to allow married couples to maintain their surname and to recognize same-sex marriage. The bill to recognize same-sex marriage was proposed by lawmakers from the Constitutional Democratic Party, the Communist Party and the Social Democratic Party. In the Civil Code, the words "husband and wife" and "parents" would be amended to "parties to the marriage" and "parents," and same-sex couples would be allowed to have a "special adoption" (Minpō (Civ.C.), art. 817-2. An adoption which extinguishes the legal relationship between a child and his/her natural relatives).

However, liberals are minorities in the Diet, so it is very unlikely that such bills will be approved.

This is despite the fact that a slim majority of Japanese now approve of same-sex marriage, according to a public opinion survey by the public broadcaster NHK in 2017, in which 51% agreed with same-sex marriage and 41% disagreed.

Q&A (令和元年版)) [Q&A ON SEXUAL ORIENTATION AND IDENTITY (EDITION OF FIRST YEAR OF REIWA)] 37 (June 2019),
https://jimin.jp-east-2.storage.api.nifcloud.com/pdf/news/policy/132489_1.pdf.

11. *Opponents of same-sex marriage, LDP 36%, down from 3 years ago Candidates for the Upper House*, ASAHI SHIMBUN (July 14, 2019),
https://www.asahi.com/articles/DA3S14096433.html?iref=pc_ss_date.

B. *Partnership Certification System by Local Government*

Observing the stagnation at the national level, local governments are increasingly adopting policies to care about sexual minorities within their powers.

The first example is Shibuya Ward, Tokyo. In 2015, Shibuya Ward established the "Partnership Certification System" by enacting an ordinance for that. Through this, the Ward authority certifies same-sex couple relationships and issues a certificate, thereby giving such couples easier access to public and private daily life services. In other words, it can be said that this certification system is mainly introduced in order to allow same-sex couples to receive the same treatment as heterosexual couples in daily life.

The number of local governments introducing these systems has increased little by little, and now there are about 30, but these are still only a tiny fraction of all local bodies (about 1700). This is because the situation of same-sex couples isn't properly understood by local governments, and the actual value of this system is not so significant.

In fact, the family system is governed by national laws and is not under the authority of local governments, and so the fundamental problem cannot be solved by the partnership certification system. However, the existence of the local certification system is meaningful in that the situation of sexual minorities is widely known to the majority of people and may contribute to the advancement of social understanding.

C. *De Facto Marriage*

In Japan, civil law theory and administrative practices to protect *de facto* marriage have been developed for heterosexual couples. In other words, even if a heterosexual couple is not formally registered as married, if a couple in a *de facto* relationship are living in conditions similar to those of a couple in a legal marriage, they can receive the same social security benefits and are treated in almost the same way as a married couple. Also, according to the case law, if there is an unfaithful act of a partner of a *de facto* couple, the other can claim damages in the same way as a married partner.

There is also a question as to whether homosexual couples can be protected in a fashion similar to such *de facto* marriage. Recently, an interesting district court ruling appeared. On March 4, 2020, Tokyo High Court granted a claim for damages from the other party for a catastrophe in their partnership caused by an unfaithful act by one party of a same-sex couple.[12] As mentioned above, if a similar lawsuit is filed regarding a

12. Tōkyō Kōtō Saibansho [Tokyo High Ct.] Mar. 4, 2020, Rei 1 (ne) no. 4433 (Japan).

heterosexual couple, the claim for damages is acceptable. The ruling has become known as a first court judgement for allowing damages for same-sex couples.

This judgment points out that while the factual marriage relationship has been in no doubt considered to be between men and women, the values and lifestyles have recently diversified and there is no necessity to limit marriage to men and women. And, the court said, even a same-sex couple should be protected under tort law if they are recognized as having a relationship similar to a heterosexual couple.

Thus, under tort law, it was determined that same-sex couples could receive protection similar to the factual marriage of heterosexual couples. However, this decision is only a district court decision, and it remains to be seen whether this idea will be widely accepted by the courts. However, I think it will be possible because tort law is a law branch that shows dynamism in responding to changes in the society.

D. *Sex Change and Same-sex Marriage*

On the other hand, different court decisions have been made in cases related to the family register system, in which the formality is more important. The Gender Identity Disorder Act defines the conditions and procedures required for transgender persons to change their legal sex registration. And as one of these conditions, it requires them to be "not actually married". Therefore, if a married person wishes to change their gender, they will be forced to divorce. In a case where the constitutionality of this requirement was at stake, the Kyoto Family Court stated that this requirement was constitutional because it was necessary to avoid the occurrence of a same-sex marriage problem.[13] According to the court, it is basically the Diet that determines how to deal with gender according to gender identity and how to legally evaluate new types of family such as one composed of sexual minorities, not envisioned by the framers of the Constitution. The court said that it was entrusted with the judgment and decided that "not actually married" as a requirement for a gender change would not violate the constitution. The same judgment was made by the Osaka High Court for the same case.[14]

13. Kyōto Katei Saibansho [Kyoto Family Ct.], Mar. 27, 2019, Hei 31 (ka) no. 219 (Japan).
14. Ōsaka Kōtō Saibansho [Osaka High Ct.], Jun. 20, 2019, Hei 31 (ra) no. 525 (Japan).

IV. CONSTITUTIONAL INTERPRETATION

A. *Overview*

Articles 24, 13, and 14 of the Constitution are here relevant. The text will be introduced later.

Opinions of constitutional scholars are divided. First, the Constitution prohibits same-sex marriage. Second, the Constitution requires allowing same-sex marriage. According to this position, the Diet is obligated to recognize same-sex marriage by law, and the current state is in violation of the Constitution. Third, the Constitution does not require allowing same-sex marriage, but does not prohibit it either. According to this, the Diet is not obliged to enact a law that allows same-sex marriage, but if enacted, it is not unconstitutional.

These understandings are the outcome of interpretation of the above three articles. It is not clear which is the majority opinion, but at least, it can be said that there are only a few supporting the idea that the Constitution prohibits same-sex marriage.

B. *Interpretation of Article 24*

First, Article 24 is presented again. 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. 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.

Article 24(1) is considered to guarantee freedom of marriage. Here freedom of marriage means that whether to marry or not, when and with whom should be left to equal decision-making between the parties. There are three points to note about this freedom of marriage. One is that in Article 24(1), the words “husband and wife” are used. Also, in paragraph 2, you see the word “the sexes”, so Article 24 may be premised on heterosexual marriage. For this reason, it can be said that Article 24 is not the basis for constitutional guarantee of same-sex marriage. Therefore, in order to argue that same-sex marriage is guaranteed by the Constitution, there is a strong tendency to think that constitutional provisions other than Article 24 must be used.

However, there is a view that the wording of Article 24 should not be overemphasized. According to these observations, the reason for the existence of Article 24 is to deny the feudal family system before the WWII,

and the words "husband and wife" or "the sexes" are not so important.[15] However, these observations do not necessarily state that Article 24 guarantees same-sex marriage, but it can and should be accepted by law.

Second, marriage freedom is not a pure right of freedom but a right to access the marriage system. Article 24 obligates the Diet to establish a marriage system by law, and the various conditions stipulated in Article 24, paragraphs 1 and 2 are the conditions imposed on the Diet in establishing the marriage system. It is understood that, as I mentioned earlier, if Article 24 provides for freedom of marriage, this freedom of marriage has the nature of free access to the marriage system; in other words, this freedom of marriage should be distinguished from pure freedom rights such as religious freedom or freedom of speech, which are freedom from government intervention.

I have the impression that this distinction is considered more seriously in Japan than in other countries. Under the influence of German constitutional theory, a clear distinction between "constraints" and "content formation" of basic rights is influential, and the Supreme Court also seems to take this approach. Then, the freedom of close relationships between same-sex couples is clearly distinguished from the right to marriage, and Article 24 is considered to be related to the latter. The former is said guaranteed under Article 13. This also affects the interpretation of Article 13 discussed below.

Third, from what has been said above, for some people, article 24 does not require that same-sex marriage be allowed by law. Moreover, they wonder about whether it is violating Article 24 if same-sex marriage is allowed by law.[16] However, many scholars are negative in this regard, and even if same-sex marriage is permitted by law, it does not violate Article 24 and other constitutional articles. Therefore, it is thought that there is no need to amend the Constitution to allow same-sex marriage. We can do it just by passing an act.

According to another minority view, Article 24(2) does not require approval for same-sex marriage, but at least calls for a partnership.[17] This view is based on Article 24, paragraph 2, which states that "on other matters relating to marriage and family, the law must be enacted on the basis of

15. Tomoya Ohno (大野友也), *Nihonkokukenpō to Dōsei Kon* (*日本国憲法と同性婚*) [*Constitution of Japan and Same-sex Marriage*], 452 GEPPO-ZENSEISHI (月報全青司) [MONTHLY REPORT ALL AOJI] 6, 13 (2017); Satoshi Kotake (小竹聡), *Kenpō to Dōsei Kon-Jendā Hōgaku no Susume* (*憲法と同性婚－ジェンダー法学のすすめ*) [*Constitution and Same-sex Marriage: Recommendation of Gender Law*], 737 HŌGAKU SEMINAR (法学セミナー) [LAW SEMINAR] 10, 11 (2016).

16. Hidetsugu Yagi, *Legal judgment based on Japanese family view should be made*, SANKEI NEWS (Mar. 2, 2015), https://www.sankei.com/column/news/150302/clm1503020001-n2.html.

17. MASAHIRO HABUCHI (羽渕雅裕), SHINMITSUNA NINGEN KANKEI TO KENPŌ (親密な人間関係と憲法) [INTIMATE HUMAN RELATIONSHIP AND THE CONSTITUTIONAL LAW] 106 (2012).

personal dignity and the essential equality of both sexes.”.

C. *Interpretation of Article 13*

Article 13 of the Japanese Constitution is as follows. “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.”

This provision is important because the right to pursue happiness here is said to be the basis for deriving basic rights without a clear provision in the Constitution. This Article 13 is an equivalent for Article 2(1) of the German Basic Law, which contains the “right to develop personality freely”, or for Article 22 of the Taiwanese Constitution.

Some constitutional scholars argue that the right to same-sex marriage is guaranteed by Article 13 as one of the basic rights not expressively formulated in the Charter of basic rights in the Constitution. Certainly, the freedom to establish intimate relationships with others is commonly said to be guaranteed by Article 13 as a right to self-determination. So, it can be considered that freedom to have intimate relationships within same-sex couples is guaranteed by Article 13.

Therefore, if there were a law that punished homosexuals, such as exists in some countries, it would violate Article 13. However, laws punishing homosexuals in Japan were very rare in the past and do not exist today. As I mentioned above about *de facto* marriage, the freedom of same-sex couples to live together is not restricted by law. What is important here is the distinction between the pure right to freedom mentioned above and the right of access to the system. Basic rights based on Article 13 are limited to freedom rights, and it is considered that the right of access to the system cannot be granted on the basis of Article 13. Therefore, the majority of scholars believe that freedom of marriage as a right to use the marriage system cannot be recognized on the basis of Article 13.

Under the influence of the German constitution theory, a clear distinction between “constraints” and “content formation” of basic rights is influential, and the Supreme Court also seems to take this approach. Then, the freedom of close relationships between same-sex couples is clearly distinguished from the right to marriage, and Article 24 is considered to be related to the latter. The former is guaranteed under Article 13.

Such an interpretation is different from Taiwan’s Judicial Yuan’s Interpretation No. 748 and the U.S. Supreme Court’s ruling in *Obergefell*.

D. *Interpretation of Article 14*

Article 14 of the Japanese Constitution provides for equality under the law. Paragraph 1 provides, "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." (The second and third paragraphs are omitted.)

As we have seen so far, there is a strong opinion that Articles 24 and 13 don't constitute grounds for admitting same-sex marriage. Then, here is a tendency for scholars to view absence of same-sex marriage in the Civil code as a violation of Article 14.

From my viewpoint, there seem to be two approaches to Japanese theories when they consider possible violation of the principle of equality. One is to emphasize dignity infringement and the other is to be more analytical. The former was influenced by the Obergefell decision. The decision assumes that marriage has four significances. The first is to support individual autonomy, the second is to support intimate connections, the third is to provide a stable place for child rearing, and the fourth is to be linked to various benefits and so to be a cornerstone of social order. And denying and eliminating homosexual access to such an important institution as marriage stigmatizes homosexuals and violates their equal dignity and the principle of equality.

In Japan, some argue that such denial violates Article 14 as equal dignity infringement based on the logic of the Obergefell decision. In addition to violating the principle of equality, the Obergefell ruling actively acknowledged the right to marry, but emphasis on the right to marry would lead to praise of the marriage system and stigmatize non-marriage. That would not be suitable for the theory of liberalism. In Japan, there are some approaches to claiming unconstitutionality by focusing on violations of the principle of equality, while being aware of danger of acknowledging this marriage right.[18] However, unlike the US Constitution, the Constitution of Japan requires in Article 24 the establishment of a marriage system, and so giving the privilege to marriage is a constitutional requirement.

However, the concepts of stigma and dignity are very vague, and there is no tradition of using these concepts in equality cases in Japan. Therefore, there is a position to discuss the violation of the equality principle more analytically. Professor Sota KIMURA says that there are three main legal effects of marriage: (1) the effect as a cohabitation contract that establishes

18. Misaki Maki (巻美矢紀), *Obergefell Hanketsu to Byōdōna Songen (Obergefell判決と平等な尊厳)* [*Obergefell v. Hodges, and Equal Dignity*], 4 KENPŌ KENKYŪ (憲法研究) [REVIEW OF CONSTITUTIONAL LAW] 103, 107 (2019).

the rights and obligations for communal living, (2) certificate of the cohabitation contract, and (3) the granting of qualifications to form a joint parent-child relationship.[19] He continues that in the legal *status quo*, (2) and (3) are not allowed for same-sex couples, while (1) is guaranteed for same-sex couples. And for (2) and (3), he examines whether there is a reasonable reason for allowing these for heterosexual couples but not for same-sex couples, and whether it is unreasonable to not accept same-sex marriage. He concludes this constitutes a form of discrimination prohibited by Article 14.

Despite these difference in approach, in order to support unconstitutionality of denial of same-sex marriage, the argument based on violation of Article 14 is the most promising.

When it comes to detailed interpretation of the text, the question is whether it constitutes a violation of the principle of equality for the Civil code to permit only heterosexual marriage and deny same-sex marriage. What is important here is whether this distinction corresponds to the list shown in the latter part of Article 14(1). It is thought that discrimination based on the five reasons on this list (race, creed, sex, social status or family origin) should be strictly examined as a "suspicious category." First, some scholars say that denial of same-sex marriage is discrimination by "sex".[20] However, both homosexual men and women can be legally married to a person of the opposite sex. So, it might not be a problem of discrimination by sex. Rather, refusal of same-sex marriage could be said to be discrimination based on sexual orientation, which is considered to be a "social status."[21] Then, the constitutionality of not allowing gay marriage will be strictly examined, or at least with the intermediate scrutiny standard.

However, while the above interpretations of the latter part of Article 14(1) are commonly supported by scholars, the Supreme Court does not agree with them. The Court's interpretation of Article 14 will be discussed later.

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19. Sota Kimura (木村草太), *Kenpō to Dōsei Kon* (憲法と同性婚) [*Constitution and Same-sex Marriage*], *in* GURŌBARU-KA NO NAKA NO SEIJI (グローバル化のなかの政治) [POLITICS IN THE AGE OF GLOBALIZATION] 84 (Masachi Osawa (杉田敦) et al. ed., 2016).

20. Tomoya , *supra* note 15, at 12.

21. Toru Enoki (榎透), *Nihonkokukenpō ni Okeru Dōsei Kon no Ichi* (*日本国憲法における同性婚の位置*) [*Status of Same-sex Marriage in the Constitution of Japan*], 135 SENSHŪ HŌGAKU RONSHŪ (専修法学論集) [THE JOURNAL OF LAW AND POLITICAL SCIENCE] 15, 32 (2019).

V. CONSTITUTIONAL LITIGATION FOR SAME-SEX MARRIAGE

A. *Collective Lawsuits*

In February 2019, 13 same-sex couples filed lawsuits in four district courts seeking damages, alleging that it was a violation of the Constitution that same-sex marriage was not allowed. This is the first lawsuit whose main issue is constitutionality of denial of same-sex marriage.

The plaintiff's constitutional arguments are based on infringement of the right to self-determination (Article 13), and freedom of marriage (Article 24) and the equality principle (Article 14). These arguments overlap largely with the discussion introduced so far, but the idea that freedom of marriage is guaranteed in Article 24 and guaranteed even for same-sex couples is less supported by scholars. Alleged violation of Article 14 here is not a dignity-based claim like the Obergefell decision. Rather, marriage status is very important in the sense that various legal interests are linked to that status, and, because it is discrimination regarding such an important position, scrutiny of constitutionality must be strict.

B. *Whereabouts of Same-sex Marriage Lawsuits*

What kind of decision will the court make in this case? This is difficult to predict, but two scenarios are possible.

For one thing, Japan's Supreme Court is known for its extreme judicial reluctance with regard to unconstitutional review. In fact, in a little over 70 years, only 10 decisions have ruled laws unconstitutional. In particular, there has been a tendency to allow the Diet wide legislative discretion in matters relating to the family. And the Diet, almost consistently controlled by the Liberal Democratic Party, has been reluctant to legislate in favor of family diversity, with the Supreme Court playing a role in endorsing this type of legislation as a result. Whether or not to allow marriage is a matter of legislative discretion, and it wouldn't be unconstitutional to deny same-sex marriage under the current law.

If we look for this scenario in the Supreme Court's previous cases, the surname after marriage[22] case is important. It said that the details of the marriage and family system should be stipulated in the related law, and the design of the system is primarily left to the legislative discretion of the Diet. In this regard, rules related to marriage and family are determined by comprehensive decision-making of the Diet, taking into account the overall

22. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Hei 26 (o) no. 1023, 69 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2586 (Japan).

rules about couples and parent-child relationships in each era, and various factors in the social situation, including national traditions and people's sentiments. The decision also states that the family is the natural and basic group unit of society.

In view of this case law, it is unlikely that the Court dare say that not permitting same-sex marriage is unconstitutional.

On the other hand, we cannot exclude the possibility of another scenario. As the plaintiffs say, it is possible to focus on the fact that access to the marriage system is an important benefit because of the many rights and interests linked with marriage.

From this point of view, nationality law case should be mentioned.[23] This case is related to the acquisition of Japanese nationality of an illegitimate child who was born between a Japanese father and a mother with foreign nationality who were not married. In such a case, if the parents get married after the child is born and the child gains the status of a legitimate child by this marriage, Japanese nationality can be acquired with a simple declaration, whereas that is not the case if the parents do not get married and the child remains illegitimate. In this case, the question was whether these provisions of the Nationality Act would violate the principle of equality by discriminatingagainst illegitimate children.

In this case, the Supreme Court decided that the provisions of the Nationality Act were unconstitutional because they violated the principle of equality. Although legislative discretion is, generally speaking, very wide, the scrutiny standards are made strict in this case because nationality is an important position linked to various rights and interests. And children have no responsibility for their illegitimate status. From this approach, the fact that access to the marriage system is important and that one can't choose one's sexual orientation could lead to tightening the constitutional scrutiny.

However, after all, I have to say that the first scenario is more likely.

VI. CONCLUSION

I have briefly reviewed the status of the law relevant to same-sex marriage in Japan. Unlike other countries where the guarantee of the rights of sexual minorities has been developed, including the approval of same-sex marriage, through democratic processes or constitutional litigation, the changes in Japan have been very gradual.

However, in the last few years, groups advocating LGBT rights have become more assertive. In particular, 2019 was a significant year, as

23. Saikō Saibansho [Sup. Ct.] June 4, 2008, Hei 18 (gyotsu) no. 135, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1367 (Japan).

opposition legislators drafted bill allowing same-sex marriage in the House of Representatives, and some people filed a lawsuit questioning the constitutionality of the legal status quo. Whether it is a legislative or a court decision, the path to the establishment of same-sex marriage is not easy, but we have to keep our attention on it.

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同性婚姻在日本

曾我部真裕

摘　要

本文提供日本同性婚姻立法狀況之概覽。儘管部分日本立法者提倡透過立法承認同性婚姻，支持傳統家庭觀的保守派依然占據日本國會的多數。日本國憲法第24條雖為婚姻相關之規範，其明文規定「婚姻僅能在兩性別的同意為基礎下成立」，部分學者主張憲法保障同性婚姻，另一部分的學者主張憲法禁止同性婚姻。多數學者之見解認為法律有承認同性婚姻之空間。現今有人透過訴訟以尋求法律對同性婚姻之承認，但因日本最高法院會儘量避免宣告法律違憲，其認定日本法律違憲的機率可以說是微乎其微。同時，大眾對於同性婚姻的理解在近年來已漸漸提升，雖然爭取同性婚姻的道路不容易，但這依然是個可以在未來持續追蹤的有趣議題。

關鍵詞： 同性婚姻、日本憲法、平等原則