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Author(s)	Chi, Naomi
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What is at the End of the Rainbow?: Prospects and Challenges for Sexual Minorities in Japan

CHI Naomi *

I. Introduction

2015 marked a cornerstone for sexual minorities in Japan, as Setagaya and Shibuya wards of the city of Tokyo introduced a certificate system to recognize same sex partnership as equivalent to marriage since November 2015. It is considered as a cornerstone because these two wards became the first and second local governments in Japan to implement such a system. As of December 2015, 16 same-sex couples of registered and received their certificates from the above wards¹⁾. The city of Iga in Mie Prefecture and the city of Takarazuka in Hyogo Prefecture have declared to introduce this certificate system recognizing same-sex partnerships in April and June of 2016, respectively.

While such endeavours have increased awareness and recognition of sexual minorities in Japan as well as paved the road for unprecedented discussion on equality, the certificate issued by these local governments are not legally binding and the process itself is very tedious and expensive. Thus, the certificate does not pose as an effective solution to the challenges faced by sexual minorities in Japan. While the certificate allows same-sex partners to visit each other in the hospitals, rent an apartment, as well as few other benefits including becoming a beneficiary of life insurance, however, it does not address the more prolonging and serious issues such as equality in the job place, equal rights, and human rights issue.

This article will examine and explore the legal status of sexual minorities in Japan, the framework of the new same-sex partnership certificate system, and the positions of the main political parties in Japan toward the rights of sexual minorities.

* Assistant Professor of Graduate School of Public Policy, Hokkaido University
(n_chi@hops.hokudai.ac.jp)

1) "City of Iga to recognize same-sex partnerships from April," *The Japan Times*, December 26, 2015. http://www.japantimes.co.jp/news/2015/12/26/national/social-issues/mie-prefecture-city-iga-recognize-sex-partnerships-april/#.Vq63q_9f3th (last accessed on January 31, 2016).

II. Legal Status of Sexual Minorities in Japan

1. Backdrop

It is said that approximately 5% of Japanese people identify themselves as a sexual minority²⁾. In Japan, sexual minorities are referred to in various terms, however, the most accepted terminology is LGBT, referring to the respective orientations: L (Lesbian), G (Gay), B (Bisexual), T (Transgender)³⁾. The term LGBT and sexual minority (*seiteki soushusha*) are used interchangeably. Though there are some discrepancies in the statistics regarding sexual minorities in Japan, as mentioned above, it is said that 5% of the population identify themselves as a sexual minority, which would account for approximately one to two students in a class of thirty (which is the average class size in secondary schools in Japan). In Japan, however, most people do not even recognize the distinction between homosexuals and gender identity disorders, and much work still needs to be done in terms of the legal framework for equal rights for sexual minorities. Having said that, very few countries recognize the rights to sexual orientation and ensure it as a basic right in their constitution.

The international legal frameworks regarding sexual minorities include the “Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity” which was developed at the International Commission of Jurists, the International Service for Human Rights and human rights experts in 2006, however, the United Nations has not accepted these principles. Instead, the United Nations Human Rights Council adopted two resolutions, Resolutions 17/19 and 27/32 on the Human Rights, Sexual Orientation and Gender Identity, in 2011 and 2014 respectively⁴⁾. This was the first time in which a United Nations body approved a resolution affirming the rights of LGBT people⁵⁾. Japan was one of the countries that voted in favour of both resolutions, however,

2) Kaku Sechiyama, “Gay and Lesbian: Freedom of Sexual Orientation is the ‘Human Rights of the 21st Century,’” in *Nippon.com*, April 30, 2015. <http://www.nippon.com/ja/currents/d00174/> (last accessed on January 31, 2016).

3) In recent years, the term LGBTQ or LGBTQIA have emerged to represent wider gender neutrality and progressive outlook: “Q” stands for queer (or questioning), “I” stands for intersex, and “A” stands for asexual (or ally). However, in Japan, the term LGBT is the mainstream, therefore, this article will utilize this terminology. For more information on LGBTQIA, please refer to: Michael Schulman, “Generation LGBTQIA,” *New York Times*, January 9, 2013. http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html?_r=0 (last accessed on January 31, 2016).

4) United Nations Human Rights Council, “Resolutions 17/19 and 27/32 on Human Rights, Sexual Orientation and Gender Identity,” <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/148/76/PDF/G1114876.pdf?OpenElement> and <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/177/32/PDF/G1417732.pdf?OpenElement> (last accessed on January 31, 2016)

5) David Cray, “UN group backs gay rights for the 1st time ever,” *The Gazette*, June 17, 2011. <http://gazette.com/un-group-backs-gay-rights-for-the-1st-time-ever/article/120021> (last accessed on

sexual minorities still face discrimination and unequal treatment in various aspects of social life. The next section will examine the history and current legal status of sexual minorities in Japan.

2. Legal Status of Sexual Minorities in Japan

Many western countries have experienced similar historical background concerning the legal status of sexual minorities which include the stages of: (1) decriminalization, (2) anti-discrimination and (3) partnership legislation. One of the most important aspects of decriminalization is to decriminalize sexual conducts of the same sex, as many countries prohibited sodomy. The next stage is that of non-discrimination based on sex, sexual orientation and sexuality at the work place. The last stage is the legal recognition of same-sex partnership in which same sex couples are “legally” recognized as heterosexual couples.

Compared to the West, there is one significant difference in Japan and that is the absence of sodomy laws⁶⁾, therefore, same-sex sexual activity is not illegal in Japan. However, though the law does not prohibit same-sex sexuality, Japanese law does not recognize other aspects of LGBT rights such as marriage, social security or inheritance, and there are no legal protections available to same-sex partners. Moreover, there are no specific legislation on discrimination against or human rights for LGBT. Thus, although same-sex sexuality itself is not regarded as a criminal act, there has been virtually no effort made in anti-discrimination or partnership legislation.

3. Cases concerning LGBT

There were cases concerning LGBT issues in Japan prior to the 1990s, however, most of them did not have any significant impact on society. The first “small” but important victory in a court case took place in 1997 which was concerning the use of a youth hostel by a famous lesbian and gay movement group (also known as OCCUR⁷⁾) in the city of Fuchu. The Tokyo Metropolitan Board of Education that manages the youth hostel denied the use of the facility by OCCUR as it was “against their policy to allow LGBT groups to use the facility” because it did not provide a “wholesome environment for young people”.⁸⁾ The Board of Education

January 31, 2016).

6) Makoto Furukawa, “Sekushuariti no Henyo: Kindai Nihon no Doseiai wo Meguru Mittsu no Kodo,” (Transformation of Sexuality: Three Codes Concerning Homosexuality in Modern Japan) *Nichi-bei Josei Janaru* (Vol. 17, 1994) pp. 29-55.

7) Japan Association for the Lesbian and Gay Movement (OCCUR) <http://www.occur.or.jp/sip.html>

8) Tokyo High Court, Case number H6-NE-1580 (September 16, 1997). See also Masaomi Kimizuka,

argued that “it was appropriate for sexual minorities to stay in the same room since they were sexually attracted to each other, thus having a negative influence on other young people staying at the facility⁹⁾.”

The Tokyo District Court ruled that denying the use of the facility was “illegal and discriminatory” and ordered the Metropolitan Government to compensate for the damages, because the denial was based on the “abstract possibility of sexual relationships” making it impossible for sexual minorities to use the hostel. The Tokyo Metropolitan Government appealed to the Tokyo High Court but was rejected based on the following: “When government bodies accomplish their duties, they must pay attention to the situation of sexual minorities and guarantee that their rights and interests are upheld.” The High Court rejected the appeal but reduced the amount of compensation.

LGBT activists regard this case as the first victory for sexual minorities in Japan, however, as aforementioned it was a “small victory” in the sense that it attracted public attention and increase people’s awareness to human rights for sexual minorities, but there was no improvement in the recognition and implementation of LGBT rights.

In the case of transgender, there is a famous case called the “Blue Boy Case¹⁰⁾” in 1970. The case was concerning the legality of sex-change surgery and involved a doctor who had conducted the surgery on three individuals. The Tokyo District Court and the High Court both ruled that the procedure was illegal because it violated the Law for the Protection of Maternal Body or *Botai Hogo Hou* (previously known as the Eugenic Protection Act or *Yusei Hogo Hou*), which prohibits the elimination of otherwise healthy reproductive organs which inhibits one’s ability to procreate. The doctor was sentenced to 2 years in prison and a fine of 200,000 Japanese yen¹¹⁾.

Another obstacle for transgender individuals in Japan is the change of the individuals’s sex and name on the official Family Registry or *Koseki*. In many cases, transgender individuals opt to undergo sex-change surgery in a third country such as Singapore, Thailand or the United States, but most have been unsuccessful in changing their sex on the family registry when they come back to Japan.

The situation for transgender improved significantly when the Japanese Society of Psychiatry and Neurology (*Nihon Seishin Shinkei Gakkai*) recognized sex-reassignment

“Dosei Aisha ni Taisuru Koukyou Shisetsu no Shukuhaku Kyohi,” (Case concerning the exclusion of the use of Tokyo Youth Hostel) in *Bessatsu Jurisuto* (Vol. 154, 2000) pp. 70-71.

9) Ibid.

10) Tokyo District Court, Case number S40-GOWA/TOKUWA-307/779/927 (February 15, 1969); Tokyo High Court, Case number S44-U-1043 (November 1970).

11) Sachiko Goto, “Buru Boi Jiken Saikou,” (Reconsidering the Blue Boy Case) *Nihon Bunkaron Nenpo* (Vol. 7, 2004).

surgery in 1996¹²⁾. However, the surgery is available only to those who are diagnosed and are suffering from Gender Identity Disorder (GID) thus not available to all persons who wish to undergo the surgery. Moreover, individuals who have had the surgery still could not legally change their sex on Family Registry.

With the increase in awareness of GID, the Japanese government drafted the “Act on Special Cases in Handling Gender for People with Gender Identity Disorder” (*Sei Douitsu Shougaisha no Seibetsu no Toriatsukai no Tokurei ni kansuru Houritsu*, hereinafter referred to as the Special Act on GID). The Act stipulates several legal conditions that must be fulfilled in order to have your sex legally changed which include: 1) the individual must be over 20 years of age; 2) must be single at the time of request; 3) the individual does not have a child (or children) under 19 years of age at the time of request; 4) be deprived of their gonad (reproductive gland) or reproductive function; 5) possess an external genital organ resembling those of the sex to which the individual wishes to be reassigned to¹³⁾. When the individual who has applied for the request to change his/her legal sex has fulfilled the above conditions, the applicant can take it to the Family Court to file for the change and have his/her sex altered. Once this is finalized, the individual is considered to be his/her new legal sex and laws and ordinances including the Civil Code will be applied to the individual thereon. The Act was implemented in July 2004 and the Division of Family Affairs of the Japanese Supreme Court reported that the 208 out of 218 requests were accepted during the first year of the enforcement of the Act (from July 16, 2004-July 15, 2005)¹⁴⁾. With the help of the growing social awareness of GID issues, the Act itself was passed in the Japanese Diet without much resistance, however, it triggered various debates for and against the Act, particularly the strict requirements for the individuals wishing to change their sex.

4. Legal Debates

Though some progress has been made for transgender individuals to legally change their sex in Japan as mentioned above, however, there is much work left to be done in terms of the recognition of same-sex partnership in Japan. There has been a longstanding legal debates concerning the recognition of same-sex partnership since the 1990s, however, there are several

12) The Japanese Society for Psychiatry and Neurology (*Nihon Seishin Shinkei Gakkai*), <https://www.jspn.or.jp/>. The latest version (or the 4th version) of the “*Sei Douitsu Shogai ni kansuru Shindan to Shiryo no Gaidorain*” (The Guideline to the Assessment and Treatment of Gender Identity Disorder) can be found at: https://www.jspn.or.jp/uploads/uploads/files/activity/journal_114_11_gid_guideline_no4.pdf (last accessed on January 31, 2016).

13) GID Professional Guide (*GID Senmonka Gaido*), <http://www.gidjapan.com/knowledge/law/>.

14) Division of Family Affairs of the Japanese Supreme Court (*Saiko Saibansho Jimu Sokyoku Katei Kyoku*), http://www.courts.go.jp/vcms_lf/20515001.pdf. (last accessed on January 31, 2016).

legal barriers that inhibit any significant progress.

While Article 14 of the Japanese Constitution stipulates that, “All people are equal under law and there shall be no discrimination in political, economic or social relations due to race, creed, sex, social status or family origin,¹⁵⁾” however, sexual orientation or gender identity have not been included in the article. Furthermore, Article 24 of the Japanese Constitution stipulates that, “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 (emphasis added).¹⁶⁾” At present, the term “both sexes” is interpreted to be a man and woman, though this has been debated amongst scholars and activists that it could be interpreted as “two people”. Moreover, the terms “husband and wife or *fufu* (夫婦)” have gendered meanings in its daily usage in the Japanese vernacular, therefore, marriage is interpreted to be consisting of a husband who is a man and a wife who is a woman, rather than the social roles that are attached to the terms “husband” and “wife”.

A similar debate exists with the Civil Code and other family related acts in Japan. For example, Chapter 2, Part IV of the Japanese Civil Code concerning “marriage or *konin*” uses the terms husband or *otto* (夫) and wife or *tsuma* (妻) which is interpreted as marriage between two people of two different sexes (emphasis added)¹⁷⁾. Thus, marriage in Japan as stipulated in the Japanese legal system refers only to marriage between two people of different sexes, therefore excludes same-sex marriages.

An alternate way in which same-sex partners can receive some legal protection is through the adoption system or *yoshien gumi*. The Japanese Civil Code stipulates that an older person can adopt a younger person who is of age 20 or over (so long as there is even one day of age difference between the adopted and adoptee)¹⁸⁾. The problem with this option is that it does not constitute legal recognition of same sex partnership, rather, it goes against the true intent of the system of those who wish to adopt an individual to continue the family name or to pass on their inheritance. Moreover, the relatives of individuals concerned can file to nullify the adoption based on the lack of the true intent to adopt and individual.

However, since the late 1990s and early 2000s when domestic partnership or common law partnership started to be implemented in European countries as well as in parts of the United States and Canada, the debate on the legal recognition of same-sex partnerships also started to take place in Japan amongst academics. After the case involving the Youth Hostel in Fuchu in

15) The Japanese Constitution (*Nihon Koku Kenpo*), <http://law.e-gov.go.jp/htmldata/S21/S21KE000.html> (last accessed on January 31, 2016).

16) Ibid.

17) The Japanese Civil Code (*Minpou*), <http://law.e-gov.go.jp/htmldata/M29/M29HO089.html> (last accessed on January 31, 2016).

18) Article 792 and 793 of the Civil Code.

1997, not only academics but also activists got involved in the debate, and in recent years the issue has attracted a more widespread attention which led to the registration of same-sex partnership in Shibuya and Setagaya wards in Tokyo, Japan. This will be examined further in the next section.

III. Recognition of Same-Sex Partnership in Japan

In April 2015, Shibuya ward (Tokyo) announced its plan to recognize same-sex partnerships, while in July 2015 Setagaya ward announced it would be joining Shibuya in recognizing same-sex partnerships. This procedure would allow couples to get a "proof of partnership" paper, which is not based in Japanese law, but can help in, for instance, getting access to a partner who is ill and in hospital, renting apartments together, receiving an inheritance, becoming a beneficiary of a life insurance, or getting a "family discount" for various services.

There are several differences in terms of the recognition and procedure of same-sex partnership between the two wards. First and foremost, Shibuya implemented the "Same-sex Partnership Ordinance (*Jorei*)" whereas Setagaya implemented a "Same-sex Partnership Guideline (*Youko*)". The major difference between an ordinance and a guideline is that an ordinance must be decided upon and passed by the majority vote at the ward assembly whereas a guideline is decided and implemented by the authority of the Head of the Ward. Secondly, in order to register for the same-sex partnership certificate at Shibuya, the couple must bring with them a notarized document stating that the two people are in fact a couple, whereas in Setagaya once the couple makes a declaration at the ward office that they are a couple, the office will issue a written declaration and a certificate stating that the ward office has recognized the declaration. Moreover, it costs approximately 80000 Japanese yen to apply and receive the Partnership Certificate from Shibuya whereas in Setagaya it is free of charge. The third difference is that although both are not legally binding and the acceptance of the partnership is on the discretion of the hospital, real estate agency (or landlord), insurance company or any other companies, the Shibuya ordinance states that it will disclose those who refuse to accept the certificate, whereas such a clause is not included in the Setagaya guideline¹⁹⁾.

In short, although both the documents issued by the respective ward office are not legally binding, the implementation of the ordinance and the guideline has had some influence in

19) Setagaya Ward Office, "Guideline on how to Handle the Declaration of Partnership in Setagaya Ward" http://www.city.setagaya.lg.jp/kurashi/101/167/1871/d00142701_d/fil/regulations1.pdf ; Shibuya Ward Office, "Same-sex Partnership Ordinance" <https://www.city.shibuya.tokyo.jp/est/oowada/partnership.html> (last accessed on January 31, 2016).

bringing more awareness to sexual minorities in Japan and allowing same-sex couples to potentially enjoy some of the same privileges as heterosexual couples.



Figure 1: Sample of the same-sex partnership certificate from Shibuya *

* Huffington Post, October 23, 2015 http://www.huffingtonpost.jp/2015/10/22/shibuyaku-certificate_n_8365162.html (last accessed on January 31, 2016).

IV. Positions on Sexual Minorities of Main Political Parties in Japan

LGBT or sexual minorities rights are rarely discussed or debated publicly, and most political parties do not make any formal position, in favor of or in opposition, to LGBT rights in their party's platform or manifesto. The Special Act on GID was drafted and passed during the Liberal Democratic Party (LDP)'s Koizumi administration in mid 2000s, however, the LDP in the past has not made any specific references to rights for sexual minorities or same-sex marriage in its manifesto²⁰). In its 2013 manifesto, the Democratic Party (JDP) declared to

20) The Sankei Shimbun, January 14, 2016. <http://www.sankei.com/politics/news/160114/pl1601140026-n1.html> (last accessed on February 2, 2016).

“create a society where sexual minorities will not be discriminated upon,” and created a committee for sexual minorities within the party. Also, Ms. Kanako Otsuji²¹⁾, who served as Osaka Prefectural Assembly member and also as a member of the upper house (House of Councilors) is affiliated with JDP²²⁾. The Komeito Party has declared to build a society where sexual minorities can live a comfortable and safe life and to reinforce support for those who suffer from GID²³⁾. The Communist Party has promised to improve the social status of and protect the human rights of sexual minorities²⁴⁾. Moreover, the party will include sexual realignment surgery to be covered by the national health insurance, and remove obstacles that hinder same-sex partners to live together. Lastly, the Social Democratic Party has declared to resolve the discrimination and prejudice toward sexual minorities, prohibit discrimination in terms of employment and use of public housing and other public facilities. It has also mentioned the legalization of partnership²⁵⁾. Mr. Taiga Ishikawa²⁶⁾, is a member of the Social Democratic Party and is a representative for the local assembly for Toshima Ward.

These parties have also responded to enquiries concerning rights for same-sex marriage policy. The Liberal Democratic Party has indicated opposition to legalizing it, and the Japan Restoration Party and the Social Democratic Party have indicated support for legalization, while the Communist Party has indicated support for legalizing same-sex civil unions²⁷⁾.

Other than the two politicians mentioned above, there are two more famous politicians who have come out about their sexuality. Ms. Aya Kamikawa is currently a Tokyo municipal assembly member who is the first transgender politician to be elected into public office. Mr. Wataru Ishizaka is currently a Nakano ward assembly member who has openly come as gay. Although they comprise a small number, all of them are very active in their respective community and constituency to promote awareness and understanding and to pave ways for legislation to prohibit discrimination toward and instill equal rights to sexual minorities in Japan.

21) First homosexual politician to formally come out.

22) The Asahi Shimbun, December 21, 2015. <http://www.asahi.com/articles/DA3S12127357.html> (last accessed on February 4, 2016).

23) The Mainichi Shimbun, February 4, 2016. <http://mainichi.jp/articles/20160204/ddm/005/010/076000c> (last accessed on February 6, 2016).

24) Japan Communist Party, Akahata Shimbun, March 6, 2015. http://www.jcp.or.jp/akahata/aik14/2015-03-06/2015030603_01_1.html (last accessed on February 4, 2016).

25) The Social Democratic Party, “Manifesto”, June 20, 2013. <http://www5.sdp.or.jp/policy/policy/election/2013/commitment/08.htm> (last accessed on February 4, 2016).

26) First openly gay candidate elected to office in Japan.

27) Raianbow Ehime, “Questionnaire concerning Sexual Minorities before the 2014 Lower House Election,” December 4, 2014. http://blogs.yahoo.co.jp/project_gl05/65086604.html (last accessed on February 6, 2016).

V. Conclusion

The first ordinance and guideline in Japan recognizing same-sex partnerships which came into effect in Tokyo's Shibuya and Setagaya wards, respectively, are the first step in providing basic rights for sexual minorities in Japan. Due to the legal constraints that exist in Japanese laws, immediate legalization of same-sex marriage seems unlikely, however, that is not to take away the urgency of discussing the question of whether to allow sexual minorities what is equivalent to a civil partnership practiced in various European countries and parts of United States and Canada. Such a partnership would make an impact in allowing sexual minorities to be part of their partners lives in basic life situations such as giving consent to operations or making hospital visits, renting an apartment together, receiving an inheritance or insurance payouts should something happen to their partner.

There are still issues pertaining to discrimination, sexism, hetosexism, and gender binary system that must be dealt with because these are issues that affect not only sexual minorities but also people who live "alternative" lives that diverge from the norm. The issues faced by LGBT people in Japan should not be a matter that concerns only sexual minorities but Japanese society as a whole.

In an interview conducted in 2011, actress Kate Winslet stated that her 7 year old son said to her, "One day I will have a girlfriend. Or I might have a boyfriend. If I'm gay. Which would you prefer?" She replied to her son, "My love, that would be entirely up to you, and it doesn't make any difference to me." It is this kind of encouragement and support that we should be giving to our peers and loved ones especially when it concerns the sensitive matter of sexuality. There is still much to be done, however, the same-sex partnership ordinance is a step in a positive direction. It is still unclear what is at the end of the rainbow for sexual minorities in Japan, but the hope is that there will be equality, love and care for all people regardless of their sexual orientation and gender identity, among others.

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Abstract

2015 marked a cornerstone for sexual minorities in Japan, as Setagaya and Shibuya wards of the city of Tokyo introduced a certificate system to recognize same sex partnership as equivalent to marriage since November 2015. While such endeavours have increased awareness and recognition of sexual minorities in Japan as well as paved the road for unprecedented discussion on equality, it does not address the more prolonging and serious issues such as equality in the job place, equal rights, and human rights issue.

This article will examine and explore the legal status of sexual minorities in Japan, more specifically the court cases and legal debates concerning sexual minorities, the framework of the new same-sex partnership certificate system, and the positions of the main political parties in Japan toward the rights of sexual minorities.

Keywords

LGBT, Sexual Minorities, Same sex partnership