

Same-sex marriage equality developments in Japan

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On 17 March 2021, a Japanese district court ruled, for the first time in Japan, that the national government's failure to recognise same-sex marriage is "unconstitutional". As the Japanese legal system is a civil law system, this case does not set a court precedent that must be legally followed by other courts in Japan. Nevertheless, it does represent a positive development in the legal journey toward recognizing same sex marriages.

Summary of Key Rulings

A summary of the relevant rulings in this landmark decision (Case Number: Sapporo District Court Judgment No. 267 of *Wa* 2019; the "Decision") is as follows:

1. While the provisions of Japan's Civil Code¹ and Family Register Act² concerning marriage (the "**Marriage Provisions**") do not expressly permit marriage between same sex couples, they do not expressly violate Article 24³ (relating to marriage) or Article 13⁴ (relating to individual rights) of Japan's Constitution.
2. However, the effect of the Marriage Provisions is that a homosexual person is not provided with a legal means to enjoy even a part of the legal effects created by marriage, and this effect is beyond the bounds of the legislative body's discretion. To the extent the Marriage Provisions go beyond the bounds of the legislative body's discretion, they violate Article 14, Paragraph 1, of the Constitution (relating to equality among people)⁵.
3. Despite the above, the court held that for the purpose of applying Article 1, Paragraph 1, of the State Redress Act⁶, which was what the case was ultimately concerned with, the national government's failure to amend or abolish the Marriage Provisions is not illegal.

¹ Act No. 89 of 27 April 1896.

² Act No. 224 of 22 December 1947.

³ The Constitution of Japan, Article 24, Paragraph 1: Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.
Paragraph 2: With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

⁴ The Constitution of Japan, Article 13: All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

⁵ The Constitution of Japan, Article 14, Paragraph 1: All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

⁶ The State Redress Act, Article 1, Paragraph 1: When a public officer who exercises the public authority of the State or of a public entity has, in the course of his or her duties, unlawfully inflicted damage on another person intentionally or negligently, the State or public entity shall assume the responsibility to compensate for that damage.

Japan's System of Marriage

Japan's Civil Code and Family Registration Act provide for a system of marriage that as a whole only allows marriage between persons of the opposite sex. For example, a person who intends to marry must give notice of the surname that the husband and wife intend to use; there is no express permission of marriage between persons of the same sex; and the Marriage Provisions only expressly permit marriage between people of the opposite sex.

Background to Legal Views on Same-Sex Marriage in Japan

The Decision provides some useful background to the historical status of same-sex marriages under Japanese law. Under the Meiji Civil Code, which was enacted in 1896 and is the predecessor to the current Civil Code, homosexual⁷ marriage was not permitted on the ground that homosexual love was considered a mental disorder. At the time the Meiji Civil Code was amended to the current Civil Code in 1947, there had been no change in this view of homosexuality, so homosexual marriage continued to be regarded as unacceptable. The Constitution of Japan was promulgated around the same time, in 1946, so Article 24 and Article 13 of the Constitution were drafted based on the same understanding of homosexuality, and Article 24 does not refer to homosexual marriage.

Interpreting "Marriage" in Japan

As a matter of interpretation, the Decision noted that the use of the words "husband and wife" in Paragraph 1 of Article 24 of the Constitution indicate that Article 24 provides for marriage between people of opposite sexes and does not provide for same-sex marriages. Consequently, the term "marriage" as used in Paragraph 1 of Article 24 means a marriage of people of opposite sexes, and the freedom to marry extends only to such marriages. Therefore, the fact that the Marriage Provisions do not recognize same-sex marriages cannot be construed as violating Article 24.

Paragraph 2 of Article 24 of the Constitution entrusts the establishment of a system of marriage and family matters to the reasonable legislative discretion of the Diet, and Paragraph 1 of Article 24 can be construed as a limitation on that discretion. Article 24 cannot be construed, however, as guaranteeing a right to a specific system of marriage or family.

The Decision indicates that while it is therefore obvious that same-sex marriage falls within the scope of matters relating to marriage and family, it is difficult to construe that Article 13 of the Constitution, which is a comprehensive provision on human rights, guarantees a right to seek a specific system of marriage and family, including same-sex marriage.

The Court's Reasoning Underlying the Decision

However, the Sapporo District Court held in the Decision that the Marriage Provisions violate Article 14, Paragraph 1, of the Constitution.⁸ Part of its reasoning that led to this conclusion can be summarised as set out below.

- Article 14, Paragraph 1, of the Constitution provides for equality for all people under the law. This provision should be construed as prohibiting discriminatory treatment of individuals in laws, unless there are reasonable grounds for doing so given the nature of the matter.

⁷ In the Decision, the court defined sexual orientation as meaning a person's attraction to another person in an emotional or sexual sense, the object of which attraction could be a person of the opposite sex (heterosexual) or same sex (homosexual), and it stated that a person whose sexual orientation is homosexual is referred to as a "homosexual".

⁸ See footnote 5 above for the text of Article 14, Paragraph 1, of the Constitution of Japan.

- Currently, homosexuality is not regarded as a psychiatric disorder, and it is possible to conclude that it has come to be established knowledge that homosexuality is not something that is decided by a person, and is difficult to change based on a person's will or any sort of treatment.
- Sexual orientation can be said to be the character of an individual and something that is determined regardless of his or her own will, similar to gender and race, for example.
- Whether or not there are reasonable grounds for a particular instance of discriminatory treatment in a law, where the treatment is based on a matter that cannot be chosen or changed by the will of the affected person, must be carefully examined from the viewpoint of whether or not legislative facts exist to support such a conclusion as well as whether or not the details of any such facts, the purpose of the law, and the details of the legal right or interest being restricted are truly compelling.
- The essence of marriage is that both sexes live a joint life with the sincere intention of being permanently combined mentally and physically.
- As the difference between heterosexuality and homosexuality is only a difference in sexual orientation, it can be construed that a homosexual person can live a joint life with another person in the nature of a marriage between persons of the opposite sex with the same sexual orientation.
- The reason the Marriage Provisions do not provide for same-sex marriage is that at the time the Civil Code was amended in 1947, homosexuality was regarded as a mental disorder. In light of the fact that homosexuals were not considered to be able to establish normal marital relations consistent with socially accepted ideas at that time, the purpose of the Marriage Provisions cannot be construed as being to deny homosexuals living together in marriage-like situations of all legal protections – i.e., legal protections cannot be denied from something which was essentially not considered to be possible to exist.
- It is now established that homosexuality is not a mental disorder in any sense, and nor can it be chosen or modified on the basis of one's own will.
- Homosexuals are only a minority in our country, and heterosexuals account for more than ninety percent of the population. The fact that homosexual couples cannot receive any part of the legal benefits of marriage, which are important legal benefits and benefits which the overwhelming heterosexual majority can receive, means there is obviously a failure in Japan's legal system to protect homosexuals in this sense.
- The legislature does not provide homosexual persons with any legal means to enjoy even a part of the legal effects of marriage, while the Marriage Provisions do provide heterosexual persons with the opportunity to use the marriage system. Therefore, to the extent this discriminatory treatment is beyond the bounds of the legislative discretion, it must be regarded as discriminatory treatment without reasonable grounds.

What Happens Now?

Despite these holdings in the Decision, Chief Cabinet Secretary Katsunobu Kato, a cabinet member of Prime Minister Yoshihide Suga, stated that he does not think the Marriage Provisions are unconstitutional and will carefully monitor other similar pending cases.

The Decision is a lower court decision and is not legally binding on other courts. A careful examination of how other pending cases are decided will be necessary to see how this legal development plays out and, ultimately, how the Japanese government will address the issue of same-sex marriage.

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