

I. Introduction: importance of the topic

Rainbow is a phenomenon that a multi-colored arch is formed in the sky, caused by refraction and reflection of sunlight occurring in water droplets in the atmosphere. Mythologically, rainbow symbolised an arch to god, god's bow, and a divinity in the ancient world. Now, in 21st century, rainbow has symbolized a new concept—LGBT. LGBT often stands for lesbian, gay, bisexual, and transgender people, yet in accordance with the United Nations (UN) and previous Universal Periodic Reviews (UPR), LGBT as “lesbian, gay, bisexual, transgender and intersex persons” will be used throughout this human right essay.

Globally, LGBT rights have been gradually acknowledged. While in some countries, such as Iran, Iraq, and Zambia,¹ same-sex relationship is still criminalized, and in some countries, such as India, LGBT rights are not prioritized,² same-sex marriage has been legalized in approximately twenty countries in the world, such as Canada, France, Sweden, and South Africa.³ The movement of decriminalization of same-sex relationship has been promoted since 2008.⁴

In spite of international tendency of acknowledgement of LGBT rights, there is a serious violation of human rights of LGBT people in Japan. Even though same-sex partnership was first introduced in Shibuya, Tokyo, in 2015 and implemented in six cities currently,⁵ same-sex marriage is not willing to be legalized in Japan. Due to this, LGBT people, especially, same-sex couples, are not given full legal rights that non-LGBT people are able to possess, and discrimination against LGBT has still remained in every phase of the society. In order to solve this unfairness and inequality, specific measures are to be taken as soon as possible to promote and protect LGBT rights. This essay, focusing on the current situation of LGBT rights in Japan, suggests a legalization of same-sex marriage as a possible solution to improve their rights and eliminate discrimination in using international human rights protection mechanism.

II. Current situation of LGBT rights in Japan

Government of Japan (GOJ) has been showing its positive attitude to participate in the international community to promote LGBT rights. However in the country, GOJ does not seem to show its willingness to legalize same-sex marriage, which tends to let LGBT people face insufficient legal rights and discrimination.

II-1. Attitude of GOJ to LGBT rights in the international society

For last decades, GOJ has been showing its affirmative position on LGBT rights in the international society. In June of 2011, GOJ adhered to *Human Rights, Sexual Orientation and Gender Identity* adopted at General Assembly. This resolution, ensuring that “everyone is entitled to all the rights and freedoms,” was concerned discriminatory laws and violence against individuals based on their sexual orientation and gender identity.⁶ In 2008, when 66 states presented the statement condemning the violation of human rights of LGBT people to General Assembly, Japan was one of the states drafting the statement.⁷

Although GOJ has taken a positive attitude to this human rights issue in the international society, the violation of LGBT rights are happening in the country, such as their lack of legal rights and discrimination.

II-2. A lack of legal rights of same-sex couples

Currently, same-sex couples commonly face legal challenges because the civil partnership does not guarantee couples' legal rights.⁸ Specifically, they are not able to exercise parental authority, inheritance, and spouse tax breaks.

Parental authority, with respect to same-sex couples, is provided to only either one partner, while both partners of married heterosexual couples are allowed to gain this right.

Article of 818-3 of the Civil Code prescribes parental authority as follows: “Parental authority shall be exercised jointly by married parents; provided that if either parent is incapable of exercising parental authority, the other parent shall do so.”⁹ Parental authority is basically exercised when parents are being married. Yet, since same-sex partnership is not recognized as a legal marriage in Japan, parental authority cannot be given to both sides of same-sex couples. This lack of rights would not enable one of the partners who does not have parental authority to consent for child’s surgery or medical treatment, for example.¹⁰

Inheritance is generally given to a surviving spouse who is considered to be a legal heir in a case of his or her partner’s death. However, since same-sex couples are not legally married in Japan, a surviving partner is not able to receive the deceased partner’s inheritance unless it is specified in the written will. In a case of a sudden death, for example, it may be difficult for a surviving same-sex partner to get inheritance. In some cases, inheritance may be provided to the deceased partner’s family in a certain amount even if the will is written beforehand. In order to determine a recipient of inheritance, same-sex couples require to name his or her partner as a life insurance beneficiary or to conduct adoption proceedings to form a legal bond between two partners.¹¹

Spouse tax breaks is not applied for same-sex couples since their relationship is not considered to be married, legally speaking.¹² Clearly, because of their inherent sexual orientation, LGBT people often confront unfair situations.

II-3. Reasons not to legalize

Why does not GOJ legalize same-sex marriage in Japan? Focusing on previous UPR sessions and 183rd of Plenary session of the House of Councillor of Japan, there may be two main reasons. The first reason is the modality of family in Japan. In the third UPR session conducted in November 14th, 2017, GOJ responded to Canada’s recommendation urging Japan to formally recognize same-sex partnership¹³ as follows: “Allowing same-sex marriage at the national level would have great impact on the national modality of family in Japan so it should be given careful consideration.¹⁴” Traditionally, a family consisting of a mother, father, and children (or a child) has been standardized,¹⁵ which image may be strongly remained.

The second reason is Article 24 of Constitution of Japan. Pursuant to the Article 24, which states, “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,¹⁶” marriage can be recognized if only two partners are different sexes. In fact, in 183rd of Plenary session of the House of Councillor of Japan, Prime Minister Shinzo Abe mentioned the current Constitution was not willing to recognize same-sex marriage.¹⁷ Additionally, he showed his concern for the necessity of rewriting Article 24 of the Constitution by reason of “the national modality of family in Japan.”¹⁸

II-4. Discrimination

Discriminatory behaviours and speech against LGBT is often seen in the society. In fact, approximately 60 to 70% of LGBT people reported their experiences of having been bullied or harassed.¹⁹ As stereotypical, negative images of LGBT tend to be formed through mass media, and as the understanding of LGBT might be limited in the society, they often face discrimination mainly in employments, schools, health services, detention facilities, and emergencies.²⁰

At workplace, being LGBT becomes a reason of demotion, dismissal, harassment, and both verbal and physical abuse. Sometimes, transgender persons are denied their employment in a case sexualities indicated in their identification documents differ from their genders. Furthermore, regarding some facilities, such as washrooms, and uniforms, most of the companies do not consider about transgender employees. The grounds of low awareness level of

LGBT at workplace, LGBT employees are possibly feel disturbed when they are asked about their plans for marriage or told to act more like a man or a woman.²¹

At schools, facing discriminatory behaviors, three to six times more students than non-LGBT students have committed suicidal actions.²² A lack of understanding of LGBT allows both students and teachers to say homophobic rhetoric against one's gender identity and sexual orientation without noticing, and therefore, a number of LGBT students hesitate to disclose their genders, concerns, and experiences of being bullied or abused. As well as the case at workplace, school facilities and uniforms are challenges for transgender students. As a result, feeling isolated, some of them tend not to attend schools or sometimes attempt to kill themselves.²³

In detention facilities, individuals are usually sent to the detentions based on their sexuality of birth. There is a high possibility that transgender persons impose to harsh discrimination, such as physical and verbal violence and sexual harassment. Besides, hormone treatment is mostly not approved at detention facilities.²⁴

In emergencies, such as natural disasters, LGBT people possibly face difficulties in terms of supplies and shelters mainly. Transgender persons have to use gender-specific facilities and supplies, such as washrooms and sanitary supplies. Concerning same-sex couples, it may be difficult for them to find temporary shelters for family use and to gain information on partners' safety since their legal status does not imply they are family.²⁵

III. Specific needs and measures to improve LGBT rights in Japan

In order to solve human rights issue of LGBT in Japan, the legalization of same-sex marriage would be inevitable. Simultaneously, considering both advantages and disadvantages of this human rights protection mechanism, same-sex marriage might be introduced in Japan if more precise, implementable recommendations were presented by member states in UPR cycles.

III-1. The legalization of same-sex marriage

(1) A lack of legal rights

If same-sex marriage were legalized, same-sex partners would be able to enjoy their legal rights. In spite of legal, cultural obstacles preventing the legalization, same-sex marriage should be legalized at nation level; the obstacles are possibly debunked. Firstly, with respect to the national modality of family, considering today's diverse types of family, it might not be uneasy that same-sex marriage is accepted in the society. In fact, the proportions of "standard family," single family, single-parent family, and childfree family in the entire population have been changed in the recent fifteen years. Between 1995 and 2010, the proportion of "standard family" dropped by 18%. On the other hand, in the same period of time, single household, single-parent family, and childfree family increased by 26%, 14%, and 24% respectively.²⁶ Those various existing and accepted family forms indicate that same-sex marriage may be recognized in the society as a part of diversity, and no longer "standard family" may be standardized.

Secondly, even though the prime minister pointed out the Constitution, there would be no need to rewrite Article 24 to legalize same-sex marriage. Technically speaking, the Article 24 seems to specify marriage should be made by a man and woman since the context states "both sexes." However, this "both sexes" does not necessarily mean physical sexuality of the two partners, but one's gender identity. Some scholars advocates that "both sexes" can be interpreted to mean "sexes of both of two partners" and it does not prescribe that marriage should be made by a man and woman.²⁷ Lawyers for LGBT & Allies Network, which is a network of lawyers who adhere to promotion of LGBT rights in Japan, describes the Constitution originally does not intend to ban same-sex marriage, yet abolish patriarchal family institution.²⁸ Additionally, as Articles 13 and 14 of the Constitution guarantee all people' liberty,

pursuit of happiness, and equality, not legalizing same-sex marriage could be violation of Constitution.²⁹ To sum up, it can be said that Constitution of Japan is not a hurdle of the legalization. If same-sex marriage were approved, they are automatically able to exercise some legal rights they currently do not possess. Therefore, inequality between heterosexual couples and same-sex couples can possibly be lessened and even eliminated.

(2) Discrimination

If same-sex marriage were legalized, discrimination against gender identity and sexual orientation would be deterred because the understanding of LGBT can be raised in the society. Statistically, in the United Kingdom, after same-sex marriage was legalized in 2014, the proportion of people who approved same-sex marriage increased significantly.³⁰ This demonstrates that the legalization would be able to make public views on LGBT more positive and promote the understanding in the society simultaneously. Since the better understanding, the less discrimination, the legalization of same-sex marriage should be prioritized so as to combat discrimination based on gender identity and sexual orientation.

III-2. UPR mechanism and the legalization of same-sex marriage

(1) Advantages of UPR

UPR can be said to be an effective mechanism to promote the protection of human rights of a state under review (SuR) due to power balance and shared positive norm within UPR. Firstly, in UPR, all states have equal rights to make recommendations or ask questions to SuR. Unlike Security Council, in which particular five states are solely and permanently able to exercise veto power, UPR tends not to allow particular states to obtain more power to make remarks, but all states can be reviewed equally and transparently. Equal distributed rights among states may prevent deadlock between economically stronger states and weaker states and encourage the mechanism to work smoothly and properly. Secondly, by creating the system that states themselves monitor and review one another, common norms of aiming the improvement of human rights could be constructed among states. The normative pressure may tie states to make efforts cooperatively and hinder states from worsening their situations. Additionally, UPR may be able to provide a wider point of view on states' current human rights situations since SuR can be reviewed from multiple perspectives: SuR itself, stakeholders, Working Group, and member states.

(2) Disadvantages of UPR

On the other hand of those three benefits, there are several possible downsides of UPR mechanism: hardly disputable responses, numerous soft recommendations, and no legal force for implementation. Firstly, member states are basically unable to censure the responses of SuR. During the interactive dialogue, member states are allowed to make some remarks on human rights in SuR, however, there is no chance for member states to argue over the way that SuR responds to the recommendation. It means SuR has choices to carefully consider or ignore recommendations. SuR is technically allowed to say, "those recommendations are not correct" as the state does not want to be pointed out its particular human right issue. If this happened, the review mechanism would not effectively work and the violation of human rights may be belittled. Secondly, precise, practical recommendations tend to be decreased. Actually, as for phrase of recommendations, in the second cycle, compared to the first UPR cycle, relatively moderate recommendations (such as the ones asking information to share, continuity of efforts, and consideration to change to SuR) rose from 26% to 29%.³¹ Soft recommendations tend not to encourage SuR to take actions or suggests practical solutions for improvement. It may hardly contribute to immediate actions to eliminate the current violation of human rights. Thirdly, unlike Security Council or General Assembly, there is no legal force, such as sanctions, applied to UPR. As the implementation of recommendations may not be legally obligated, the progress of improving human rights issues discussed in UPR tends to depend on each state's attitude toward making efforts.

III-3. An improvement in UPR enabling GOJ to legalize same-sex marriage

The advantages suggest the potentiality of UPR in terms of the legalization of same-sex marriage in Japan. International tendency of recognition of same-sex marriage and normative pressure of making efforts to remove discrimination based on gender identity and sexual orientation, being force for GOJ, could make the government to change its attitude toward the legalization. UPR also enables GOJ to gain views on its situation of LGBT rights from several groups: groups of experts who have been working on various human rights issues, NGOs who actually work with victims of violation of human rights, and member states, some of who may advance in LGBT rights protection. Objective opinions would be able to give GOJ realization of the significance and necessity of the legalization.

Of the human rights mechanism, the disadvantages imply that the need of more specific, action-oriented recommendations. Ambiguity might not lead states to practical actions. Instead of such statements, state-specified recommendations might be effective. In the third UPR cycle, GOJ, by reason of national modality of family, did not accept the recommendation urging the recognition of same-sex partnership at the national level. If a recommendation had pointed out the image of family becoming diverse in the society, for example, it might be possible that GOJ would refer its possibility of the legalization of same-sex marriage. Furthermore, if a recommendation quoted a specific law or phrase of law to prove that not legalizing same-sex marriage can be considered to be the violation of law (for example, as Article 14 of Constitution guarantees equality of all individuals under law, the current LGBT rights in Japan might not be considered to be full implementation of their human rights), the legalization of same-sex marriage could possibly be taken into consideration. Not only making practical recommendations, but also continuous recommendations are required. Hence, the international human rights protection mechanism is likely to support the legalization of same-sex marriage and protection of LGBT rights in Japan, provided that more constructive, clearly identified recommendations were made.

IV. Conclusion

In today's Japanese society, the violation of human rights of lesbian, gay, bisexual, transgender, and intersex persons is happening nationwide. Same-sex couples are not allowed to obtain legal rights because their marital status is not legally approved, and LGBT people are victimized by discrimination on the basis of gender identity and sexual orientation because the understanding of LGBT is still low. With the aim of removing the legal obstacles that same-sex couples commonly face and raising awareness level in the public, the legalization of same-sex marriage could be a possible solution. To realize this solution, Universal Periodic Review might play a significant role only if more action-oriented recommendations were presented in the cycle. As the population of LGBT increases, as the Constitution promises all individuals' equality and rights, and as the international tendency of recognition of their rights and promotion of the understanding, the legalization of same-sex marriage might be unavoidable in the near future.

¹ See Martel Frédéric, & Harume Hayashi. *Genchi Repōto Sekai LGBT jijō: Kawaritsutsuaru Jinken to Bunka No Chiseigaku*. Iwanamishoten, (2016).

² See Misra, Geetanjali, & Radhika Chandiramani. *Sexuality, Gender and Rights: Exploring Theory and Practice in South and Southeast Asia*. Sage, 82-97 (2009).

³ See Frédéric, & Hayashi, *supra* note 1.

⁴ See Frédéric, & Hayashi, *supra* note 1, at 214-18

⁵ See Osaka Bengoshi Kai. *Erujībītēsu No Hōritsu Mondai kyū Ando ē*. Bengoshikaikanbukkusentāshuppanburabo, 37, (2016).

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- ⁶ See 17/19 Human rights, sexual orientation and gender identity, 1, July 14th, 2011, www.bing.com/cr?IG=ED FE98409581446EB, last visited June 26th, 2018.
- ⁷ See “UN: General Assembly Statement Affirms Rights for All.” *Human Rights Watch*, 17 Apr. 2015, www.hrw.org/news/2008/12/18/un-general-assembly-statement-affirms-rights-all.
- ⁸ See Osaka Bengoshi Kai, *supra* note 5.
- ⁹ “Civil Code (Act No. 89 of 1896).” www.cas.go.jp/jp/seisaku/hourei/data/CC4_2.pdf, 31.
- ¹⁰ See Osaka Bengoshi Kai, *supra* note 5, at 48-49.
- ¹¹ See Osaka Bengoshi Kai, *supra* note 5, at 22-32.
- ¹² See Endo, Michi. *Ryosei No Byodo o Meguru Kazokuho Zei Shakai Hosho: Sengo Nanajunen No Kiseki o Fumaete*. Nihonhyoronsha, 40.
- ¹³ See Report of the Working Group on the Universal Periodic Review* Japan, 16, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/002/35/PDF/G1800235.pdf?OpenElement>, last visited June 26th, 2018.
- ¹⁴ Report of the Working Group on the Universal Periodic Review* Japan Addendum, 4, <https://www.ohchr.org/en/hrbodies/upr/pages/jpindex.aspx>, last visited June 26th, 2018.
- ¹⁵ See Aoki, Yukihiro. “Kojinkasuru Kazoku Tayoukasuru Setai: Shouhitanni No Henka Wo Do Toraeruka.” *Japan Marketing Journal*, vol. 29, no. 1, ser. 113, 30 June 2009, pp. 2-3. 113, www.j-mac.or.jp.
- ¹⁶ *THE CONSTITUTION OF JAPAN*, japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html, last visited May 27th, 2018.
- ¹⁷ See “Sangiinkai Giroku Dai-Nana-Go Kokumudaijin No Enzetsu Ni Kansuru Ken.” *Kanho*, House of Councillors, The National Diet of Japan, 18 Feb. 2017, kokkai.ndl.go.jp/SENTAKU/sangiin/189/0001/18902180001007.pdf, 25.
- ¹⁸ See House of Councillors, The National Diet of Japan, *supra* note 16, at 27.
- ¹⁹ See “LGBT” *Sabetsu Kinshi No Hōseidotte Nandarō?: Chihō Jichitai Kara Hajimaru Senshinteki Torikumi*. Kamogawa Shuppan, (2016), 47.
- ²⁰ See *Human Rights Law and Discrimination against LGBT People in Japan*. Amnesty International 2017, [www.amnesty.org/download/Documents/ ASA2259552017ENGLISH.PDF](http://www.amnesty.org/download/Documents/ASA2259552017ENGLISH.PDF), 9
- ²¹ See Amnesty International, *supra* note 20, at 10-12.
- ²² See “LGBT,” *supra* note 19.
- ²³ See “LGBT,” *supra* note 19, at 122.
- ²⁴ See Amnesty International, *supra* note 20, at 19-20.
- ²⁵ See Amnesty International, *supra* note 20, at 21-22.
- ²⁶ See *Heisei 22-Nen Kokusei Chosa: Jinko to Kihon Shukei Kekka*. Ministry of Internal Affairs and Communications, 2013, 30.
- ²⁷ See Amnesty International, *supra* note 20, at 16.
- ²⁸ See [Ronten] Nihonkokkenpo Ha Doseikon Wo Kinshi Shiteirunoka? | Lawyers for LGBT & Allies Network.” *LLAN - Lawyers for LGBT & Allies Network*, 17 Mar. 2018, llanjapan.org/lgbtinfo/649.
- ²⁹ See *THE CONSTITUTION OF JAPAN*, *supra* note 16.
- ³⁰ See D'Urso, Rachel Schraer & Joey. “Gay Rights 50 Years on: 10 Ways in Which the UK Has Changed.” *BBC News*, BBC, 29 July 2017, www.bbc.com/news/uk-40743946.
- ³¹ See *A Guide for Recommending States at the UPR*. UPR Info, 25-27.
