

Can human rights of a sexual minority in Japan be Guaranteed? A Comparison with Taiwan's efforts for Gender Equality

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Preface

On May 24, 2017, the top court in Taiwan ruled that current laws preventing same sex couples from marrying violated their right to equality and were unconstitutional. It then gave a period of two years for laws to be amended.¹ Thus, "Taiwan is closer to becoming the first place in Asia to allow same-sex marriage."²

Until this constitutional judgment was made, there has been accumulation of social and legal arguments. One special result of that was the Gender Equality Education Act enacted in 2004. This act, which required schools to teach gender equality and diversity, was epoch-making.³ Many young people came to recognize gender equality as natural (Tamura 2017).

It is said that the historical development of human rights protection of European sexual minorities has three stages in common. They are: 1) Stage I-the establishment of a foundation of human rights by eliminating criminal laws, such as the sodomy law which punishes sexual contact between same-sex couples; 2) Stage II-legal protection of sexual diversity by prohibiting discrimination on the grounds of sexual orientation and gender identity and 3) Stage III- approval of sexual diversity, review of the legal system concerning marriage and family, and reconstruction the legal system (Taniguchi 2016). According to these development stages, Japan is similar to Taiwan in that there is no law that imposes criminal penalties on homosexual acts in Stage I.

In the last 30 years, Taiwan has experienced dynamic development from Step II to Step III in response to the international trend of gender equality including gender diversity. On the other hand, in Japan, conservatives have emphasized the "masculinity-femininity" duality and the traditional value of families since the latter half of the 1990s. Japan still has not reached Stage II. And the current legal situation is that there are neither laws nor judicial precedents giving any legal guarantee to a homosexual partnership.

Even in Japan, the transgender was given the legal status of "gender identity disorder." It then became possible to change the legal gender status under certain conditions. However, the various sexual minorities who are not under protection of the law are still isolated while experiencing difficulty. This legal shift aimed not to confuse the existing heterosexual love order.

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Despite such difficulties facing various sexual minorities, in recent years movement aimed at eliminating discrimination and protecting rights became visible at the local government level which is closest to the lives of the citizens. Particularly, Tokyo's Shibuya Ward began issuing partnership certificates to same-sex couples in 2015, which was brought to public attention by the media. This in turn accelerated actions by other municipalities. In Taiwan, same-sex marriage was legalized for the first time in Asia. Alternatively in Japan, elimination of discrimination against sexual minorities and the protection of their rights remain at the stage of voluntary efforts by local governments. What are the factors that caused this difference? In response to this question, this paper examines factors that impede the legal status of diversified sexual minorities located in Japan compared to the situation in Taiwan.

1. Homosexual identity and legal status as a "minority"

In Japan and Taiwan, there is no law to criminalize homosexuality unlike the sodomy law in Western Europe, and both countries are told that homosexuals as homosexuals are not at the stage of establishing a human rights foundation. However, in Taiwan, the Kuomintang regime, which lost the Civil War in 1949 and relocated to Taiwan, was subjected to an extremely strong authoritarian rule until the mid-1970s. During that regime, Confucian ethics and the distinction between public domain and private domain were regarded as national policy, and sexual minorities were under the severe control of the police as "sexually immoral persons". Therefore, reformists aiming for democratization urged for the respect of a wide range of minorities including gays and lesbians' human rights. The reformists supported the citizenship movement of sexual minorities after the 90's (Tamura 2017).

(1) The establishment of modern gender bias and homophobia

On the other hand, in postwar Japan, under the Constitution of Japan which emphasizes freedom of expression, democratization advanced with an economic priority. At the same time, there was no crackdown on discourse and publication on homosexuality. And in the 1950s, gay magazines were launched one after another. The topic of gay boys who work in the entertainment world was taken up in the media. And around the mid-1960's, gay bars etc. lined up in Tokyo's Shinjuku 2-chome district-a red light area since a long time ago. It became prosperous enough to be called Asia's largest gay town.

However, homosexuality is limited to a subcultural space. And its representation is also metaphorically "a flowerless plant" (Ishida 2014).⁴ Homosexuality is positioned as "sexual perversion" that violates "a healthy society." This is because the marriage system is bound by

the law (established after World War II) which stipulates that only "Sexual love of married men and women / reproduction" is protected as legitimate. Article 24 of the Constitution of Japan provided "individual dignity and essential equality of the sexes" as a principle of the law based on the family and gender equality. This progressive article denies both fathers' and husband's rights. Based on this principle, the Civil Code was also revised greatly. However, families popularized after the war were composed of a couple defined as "men with long working hours + women with housekeeping and part-time work." And the relationship between married couple incorporated in employment system premised on gender-based division of labor was not based on equal sexuality in which individuals are respected.

The divorce request from the accused spouse who committed infidelity was not recognized for a long time. And the provision of discrimination against legitimate inheritance of illegitimate child was justified as protection of the married family. In 1987, the Supreme Court ruled that the divorce request from the accused spouse was accepted under certain conditions. And in 2013, the Supreme Court ruled that the discrimination against the legitimate inheritance of an illegitimate child was unconstitutional. An accusation was leveled against a civil code provision that married couples must have the same surname. The reason was that the code violates the Treaty on the Elimination of All Forms of Discrimination against Women. However, on December 16, 2015, the Supreme Court said the law did not violate the constitution (Omi 2017).

On the other hand, for a divorce request from the wife on the grounds that her husband is homosexual, there is the precedent of a court recognizing divorce and the payment of a large amount of consolation money to the wife. The serious reason for this is that homosexuality makes it hard to continue the marriage with a "sexually abnormal character" (February 29, 1972 Nagoya District Court judgment). Also in guidance given at schools, homosexuality was considered as a "sexual anomaly/perversion delinquency" which threatens healthy heterosexual love. In the "Elementary Materials on Student's Problem Behavior - Junior High School / High School Edition -" (January 1979) issued by the Ministry of Education (then), the Ministry of Education warned about the international propagation of the gay movement as follows,

"There are also movements to "acquire gay citizenship" in the United States and elsewhere, which in general state, that homosexuality may inhibit the development of healthy heterosexual love, contrary to sound social morality. It may be an act to disturb the sexual order and is not endorsed even in modern society."

In 1993, this description concerning homosexuality was recognized as "inappropriate" by the Ministry of Education. And discriminatory treatment of homosexuality by national and administrative officials concerning AIDS control was finally discussed as a human rights issue.

(2) Visualization of homophobia and the occurrence of gay activism

Japan's AIDS panic is said to have been created by the Ministry of Health and Welfare by using of society's prejudice which links homosexuals to abnormal sex⁵. The first AIDS patient confirmed in Japan was reported as a Japanese homosexual male living in the United States (March 22, 1985). In fact, two years ago, it was confirmed by "A Research Group on the Actual Situation of AIDS" that a hemophiliac had a HIV infection by polluted non-heated pharmaceuticals. However, this was not made public until the homosexual's infection was confirmed and hemophilia patients infected with AIDS were left untreated. The so-called AIDS prevention law (Act on Prevention of Acquired Immune Deficiency Syndrome) under which male homosexuals and sex workers were placed with "the group that poses danger to society," was enforced in February of 1989.

However, visualization of blatant discrimination against homosexuality and homophobia also caused homosexuals to confirm their identities as homosexuals and encouraged gay activism in Japan. As a self-help group of homosexuals, "The Japan Association for the Lesbian & Gay Movement (so-called OCCUR)"⁶ was established in March 1986. It aims for peer support, prevention enlightenment support and systematic care for HIV infected persons and AIDS patients.

When overseas shocking human rights violations caused by the AIDS panic was reported in the Japanese media, they started to pay more attention to discrimination and the prejudice against the domestically HIV infected person. And the AIDS panic began to cool down. In 1999, the AIDS Prevention Law was abolished and the "Infectious Disease Prevention Law (Act on the Prevention of Infectious Diseases and Medical Treatment for Patients with Infectious Diseases)" was enforced. And the point of view that a male homosexual and a sexual industrial practitioner are exposed to risk and require support (individual policy layer) was emphasized.

(3) Homosexual as the minority that should be considered

From 1991-1997, OCCUR, as a base for AIDS activism, went to trial about the discriminatory treatment of homosexuals by a public authority as a human rights issue. The trial involved OCCUR members who were harassed by other guests with discriminatory words such as "homo" or "okama" when OCCUR carried out a training camp at the Tokyo Fuchu Youth facilities. So, when OCCUR asked for discussions with a group of other guests at that time, the facility manager's response was to refuse OCCUR the use of the facility from the next time. The significance of this trial is that social prejudice and feelings of discrimination about homosexuals which are unconsciously internalized by administrative officials are felt in public

places. However, the legal positioning of homosexuals as minorities should consider their human rights.

Both the court of the first instance and the second instance ruled that facility managers refusing the use of facilities to homosexuals is illegal. The courts also emphasized the kind of attitude that administrative officials should have. What was confirmed in the ruling is that (1) Homosexuality is one of the sexual orientations that human beings have. And homosexuality is no longer considered to be pathological in psychology/psychiatry internationally. (2) The gender separate room rule is a social custom premised on heterosexual love. There is a serious disadvantage when it is applied mechanically to homosexuals. (3) Elementary school students have the ability to understand homosexuality. (4) Homosexuals have accommodation rights. (5) Discriminatory behavior of elementary school students is caused by curiosity about and contempt for homosexuals. And (6) The social recognition situation about homosexuality is changing now. Then the court concluded, (7) "As administrative authorities including the Municipal Board of Education, when conducting their duties, must pay careful attention to homosexuals who are small in number and adequately defend the rights and interests of homosexuals. And as persons exercising public power, to be indifferent or not to acknowledge the situation is not permitted."

As the Tokyo Metropolitan Government did not appeal to a higher court about this judgment, the Tokyo High Court judgment stood. Therefore, it became an important judgment for accusing the unjustness of administrative correspondence.

2. Gender equality law and human rights protection of a sexual minority

The above judgment that homosexuals are minorities whose human rights should be considered became a memorable precedent for twenty years. Even now, however, in Japan, there is no legal basis for sexual minorities to fight the discrimination against their own rights⁷ which is a big difference compared to Taiwan's situation. This absence of legal basis is one of the factors that caused the stagnation of the development of sexual minorities' human rights protection in Japan.

(1) Women's political participation and positive action

Taiwan's creation of a legal system to prohibit sexual minority discrimination⁸ is developing based on the gender equality law. The "Gender Equity Education Act", which stipulated the elimination of discrimination based on sexual orientation and gender identity for the first time in East Asia, started with a draft of women's movement which aimed for human rights protection

of women in the education field. Later it transformed into a gender equality law that subsumed the issue of sexual minorities in the drafting process⁹.

Because Taiwan is not an official member of the United Nations, it does not appear in the index or ranking of the United Nations. However, if we look at Taiwan's statistics based on the United Nations Development Program Gender Inequality Index (GII)(2012), Taiwan has the lowest gender inequality index in Asia. Every year, one major factor is the high proportion of female legislators (Fukuda 2014). In 1998, the proportion of female legislators in Taiwan was 19.1%, but in 2016, it is 36.6%.¹⁰ In the National Assembly of the Parliament (IPU)'s annual report, Taiwan is ranked 24th in the world.

With the percentage of female legislators at 9.3%. Japan ranks at 163. Women's political participation has not advanced at all, which is a major factor impeding the realization of gender equality

A dramatic increase in female legislators is often brought about by a quota system obliging the recruitment of a certain proportion of female candidates or reserved seats through the constitution and election law. In Japan, there is resistance to legal affirmative action for women. Discussion to introduce it does not generate much excitement. But in Taiwan, it seems that there is little resistance to a women's reserved seats system. The Constitution of the Republic of China, which was brought into Taiwan after World War II in 1946, stipulates that it is necessary to establish a women's reserved seats system in each parliament to ensure gender equality. Moreover, the Taiwanese Constitution is effectively frozen. One seat for a woman was reserved per ten winners in local level bodies. This rule later became law and was applied in central level elections. And in the local institutional law (promulgated in 1999), the number recommended by the law was raised from 10% to 25%. And in 2005 when the proportional representative co-ordination system of small electoral districts was introduced into election system reform, the proportion for women of each political party winners in the proportional representative election was set at 50% or more. The number of female representatives rose even in the small district elections. Therefore, it follows that this 50% guarantee system pushes up the percentage of female representatives in the Legislative Yuan to 30% (Fukuda 2014 · Counterattack 2010).

(2) Participatory democracy and propagation of international trends of gender mainstreaming

What led to a higher level of female representation in Taiwan? One factor is that the direct external pressure of the United Nations did not work. Another is that a discriminatory domestic legal system for women was maintained until the 1990s. In Taiwan, there was also a Relatives Civil Code which prioritized fatherhood and husband rights until the 1990s. And even

in the 1980s, there was no law to ensure the employment of women despite women's considerably higher education¹¹.

Due to the maintenance of a discriminatory legal system for women, however, the main battlefield of women's movement has become legislation and law reform. And because it is not expected that the government will voluntarily promote policies by external pressure, the women's movement actively entered the policy decision process. This included the criticizing of the conservative Kuomintang government on women's policy, while working with the Democratic Progressive Party (DPP) that criticizes the system (Ko 2010) . In the Taipei mayoral election, the woman's movement supported Chen Shui-bian, a candidate for the Democratic Progressive Party. After Chen, won, the "Women's rights promotion committee (Women's rights promotion committee in 2005)" was established in Taipei in 1996. The committee functions as a participatory democratic platform for women's movement groups. It was also a model for other municipalities and central government. (women's rights association model).

Women organizations as well as women lawyers, researchers and activists who studied at universities and graduate schools in Europe and the United States returned home after the martial law was canceled. They became important political participation actors. The second wave of Western feminism and gender/sexuality tendencies in the West were brought in by the U-turn of the study abroad boomers; the theoretically backed up women's movement and the rights advocacy movement of sexual minorities. Many women who were appointed as bureaucrats from women's movement organizations¹² as well as a policy participation network consisting of three parties-femocrats or legislators, academic experts and non-government women's groups helped to promote gender mainstreaming.¹³ It is also important that the KMT has been forced to change along with the ascension of a DPP government. Even after the DPP became the ruling party in 2008, the bill with a gender perspective was regarded as part of the strategy to return to the international community. In addition, it was part of the DPP strategy of national integration, which also encouraged the legalization of same-sex marriage. In 2011, a law to implement the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was enacted in Taiwan. And a system was established in which the government voluntarily implemented and monitored the Convention's philosophy by the government¹⁴.

(3) Domestic political situations to impede the international trend of gender mainstreaming

The legal institutionalization of gender equality in Japan has been influenced by an international trend connected to the United Nations. In 1975, the National Women's Year set up

a National Machinery at the Office of Prime Minister to comprehensively promote the status of women. And in 1985 in Japan, in order to ratify the Convention on the Elimination of All Forms of Discrimination against Women, amendment to the paternal priority nationality law was implemented, co-education of home economics at high school was carried out, and the "Equal Employment Opportunity Law" was legislated. However, even now, wage disparities between men and women do not shrink. Rather, women's labor participation has been enclosed into irregular employment with poor conditions such as part-time work (Miura 2011). Meanwhile, while responding to the trend of international gender equality, contradictory policies, such as a pension and tax system that give preferential treatment to housewife households, were implemented. These policies reinforced the postwar system of families and impeded the economic independence of married women.

These contradictory policies occurred under the postwar political system managed by the conservative Liberal Democratic Party (LDP). When the sole ruling party system of the LDP collapsed in the 1990s and a series of coalition governments was established, the search for a political order reflecting more democratic and diverse public attitudes began. Through the 4th World Conference on Women, a network of bipartisan women and NGO women was formed in Japan. This in turn became the driving force for promoting gender mainstreaming policy and the legislation of gender equality aimed at "building a social system" in Japan.¹⁵ In the preamble of the Basic Law for Gender Equality Society enacted in 1999, the "gender equality society" is described as a society that can fully demonstrate individuality and ability "regardless of male or female." Based on the Basic Law, the municipalities throughout the country are proceeding with the establishment of ordinances towards promotion of "gender collaborative (equality) participation policy." Some local governments insert the phrase "sexual orientation" into ordinances, assuming the presence of homosexual citizens. However, within the LDP, as the movement aiming for the revision of the patriarchal family system and the constitutional amendment that contains provisions restricting basic human rights became active, critical discourse (backlash) pushed back the flow of gender mainstreaming as extreme feminism spread rapidly on a nationwide scale, mainly in local councils (Hikita 2006). A specific example was the deletion of the phrase "regardless of sex" included in ordinances and the permitting of the words "accepting the difference between men and women" to be inserted into ordinances. Although it is a policy task of the municipality to promote non-politicized gender equality, local governments were forced to retreat due to the delayed response to the backlash faction of politicians (Funabashi 2007).

3. "Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder" establishment and evaluation

In Japan, gender equality was delayed. "Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder" was enacted in 2003 to solve the problems of transgenders. In the 1990s, female legislators who could become critical actors to promote women's policies were elected by the House of Councilors' restricted roster proportional representation system (Miura 2016). From the late 1990s to the beginning of the 21st century, important laws such as the DV Prevention Law, the Stalker Control Law, and the sexual harassment provision of the Equal Employment Law were enacted in cooperation with bipartisan legislators and NGOs (Kaino 2005). Act on Special Cases GID is also one of its "citizen legislation." Councilor Noono Chieko (LDP) is one of the above female legislators who played a central role in the agreement's formation in the LDP.

(1) Legal status of transgender as "gender identity disorder"

The first legal argument in the field of sex change in Japan is a case where the physical sex change by gender change surgery was contested (Blue Boy case). In this case, if the court ruled that the sex change operation was judged to be in violation of the Eugenic Protection Law (at the time) (Tokyo District Court 1969, Tokyo High Court 1970), there would have been a guilty verdict. Rather, the judgment did not make the sex change operation itself illegal. It allowed that if the process is given informed consent, it may be accepted as a medical practice. In 1998, sex change operation as a treatment for sexual identity disorder was legally performed in Japan for the first time. The Saitama Medical University Ethics Committee reported on this in "Report on Recommendations on Gender Identity Disorder and Recommendations" (1996). And the support/self-help group for sex-identity disabled "Trans-Net Japan (TS and TG "The Association of People Who Support")" was launched. The Japanese Psycho-neurological Society announced "Guidelines for Diagnosis and Treatment of Gender Identity Disorder" (1997). After the Ministry of Health, Labor and Welfare confirmed that the sex change operation did not violate the Maternal Protection Act, the surgery was carried out. When the surgery was openly carried out in Japan, GID study group (organization centered on doctors), TS method study group (mainly lawyers) and the Trans-Net Japan Movement began to move concretely towards the enactment of laws for gender identity disabled people to legally change gender.

In Japan, many official documents on a daily basis have a gender description column which must be presented in various situations. Every time someone is made conscious of a sex different from oneself's sex identity or treated as that other gender, this causes uncomfortable and intolerable pain. Whether rape charges are applied or not, whether housed in a prison

accommodation facility for men or women¹⁶, the exercise of public authority is usually based on the sex listed in the family register. Even before the implementation of sex-compatible surgery, allegations to change the gender of the family register to the court have been made, but neither was allowed¹⁷. The court's criterion is that "the sex of a human being should be decided according to the sex chromosome" (determined by the Nagoya High Court on November 8, 1979). However, a legal sex change was practically difficult due to the legal technical problems which affects the family register of other family members. Because changing one's gender means changing the notation of the relationships including the order of age (eldest son, second son, eldest daughter, second daughter etc.).

(2) Legal protection of transgenders by Act on Special Cases GID

While the number of cases of sex-compatible surgery in Japan was increasing, the courts also urged legislative resolution in the decision (determined by the Tokyo High Court February 9, 2000). In the long running television drama "Kinpachi sensei," gender identity disorder is the subject. A person with a gender identity disorder ran for local councils and was elected. And academic and practical organizations such as the Japan Society of Sexual Society and the Japan Federation of Bar Associations repeatedly issued statements requiring legislation. Given this backdrop, some LDP members who tried to address this issue appeared. However, since the revision of the Family Register Law is hopeless, they aimed to establish a special law. Councilor Noono Chieko took the lead, creating a bill aimed at the establishment of a special act. Thus, the "Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder¹⁸" was unanimously established at the record speed of just 10 days after the submission of the bill to the Diet.

Even at the time of enacting the law, however, there were conflicting opinions among the parties' groups who cooperated with the enactment of the law. The established Act on Special Cases GID approved the change of the gender status in family registration only for the person who is a Person with Gender Identity Disorder (Article 2) and falls under all of the five following items: (1) is not less than 20 years of age; (2) is not currently married; (3) currently has no child (Article 3 of the same paragraph was revised in 2008 to "currently has no child who is a minor"; (4) has no reproductive glands or whose reproductive glands have permanently lost function. And (5) has a body which appears to have parts that resembles the genital organs of those of the Opposite Gender. A particularly highly controversial requirement by the parties was item (3) "currently has no child." There were no legislative examples of foreign countries which were referred to in this legislation. In order to prevent the influence and confusion of the child's welfare and family order, it was explained that a person with a gender identity

disorder can not change his/her gender status, as long as he/she has children. And it is assumed that children and families can not accept gender change. Opponents of this requirement argued the law infringed Article 13, 14 and 25 of the Japanese Constitution. However, the Supreme Court upheld the law by granting the legislature extensive discretion because the reason for its establishment was not rational, although "Gender is a serious matter related to the person's personality". (Watanabe 2017, Decision of the Supreme Court First Petty **Bench** on October 22, 2007)¹⁹. Moreover, the requirement of (2) non-marriage which is described as avoiding the situation of same-sex marriage by legal change of gender status does not accept same sex marriage as an exception. Rather it confirms heterosexual centralism²⁰ and forces divorce contrary to the intentions of the parties. In addition, requirement for (4) no-reproductive function and (5) genital appearance of the Opposite Gender²¹ is included to avoid pregnancy due to the remaining reproductive function, and because "there is a risk of confusion in social life (at public bathing places etc)." Both requirements, however, force surgery with health risks and economic burden.

(3) Evaluation of Act on Special Cases GID and the significance of the legislative movement

Although the Act on Special Cases GID is the only domestic law that responds to legal issues concerning sexual diversity, it is (1) systematically designed on the basis of society's non-recognition of gender identity disorder, (2) a society which strictly maintains gender binary based on physical characteristics and a marriage order premised on heterosexual love. Consequently, diverse transgender people, who can not receive legal protection, have become isolated in society with difficulties.

But I would like to point out the merits of the law's enactment. Firstly, with this legislation as the starting point, movement, such as litigation, appeals to the government and lobbying for the revision of the law started with the human rights violations of the five requirements. At the center of the movement was the "gid.jp; people who live with gender identity disorder in Japan" (formerly "the association aiming for a society where people with gender identity disorder can live ordinarily."²²) They established this organization at the same time as the enactment of the law. The organization has branches nationwide to continually promote understanding and information on gender identity disorder, support for improvement of the lives of the parties, and make policy recommendations to the government, Diet, local governments and various organizations, etc.

Second, as the term "gender identity disorder" was stipulated in the law, gender identity disorder was widely recognized by society. And the government started to make some response to the difficulties faced by sexual minority children. In 2010, the Ministry of Education,

Culture, Sports, Science and Technology (MEXT) issued a notice to local governments and educational committees nationwide on "Making thorough Educational Counseling on Problems of Children Students," targeting children with gender identity disorder. And in 2014, MEXT carried out a nationwide survey on child students with gender identity disorder (gender disagreement). And in May of 2015, MEXT released a notice on "About the implementation of detailed response to students with gender identity disorder." And in 2016, MEXT prepared a guidance manual for faculty and staff for the "implementation of fine-tuned responses to students on gender identity disorder and sexual orientation/gender identity (SOGI), such as detailed measures to deal with child students." Consideration for sexual minorities in general were required.

4 Country's response to the UN SOGI resolution and efforts by local governments

What became clear from the experience of legislating Act on Special Cases GID is that the legislation produces divisions among various sexual minorities by establishing the scope of legal protection. Moreover, the legal system and social institutions built on the basis of majority (cis gender and heterosexuality) are the biggest obstacles to the expansion of the guarantee of sexual minorities' rights. From this point of view, it is said that in the field of international human rights law, the concept of SOGI (Sexual Orientation and Gender Identity)²³ is focusing on individual attributes used. The Japanese government is actively involved in UN efforts on SOGI. Despite this, contradictory attitudes that do not advance domestic reform were indicated. It can be said that Japanese bureaucrats do not care much about international evaluation in the human rights field (Miura 2014). In Japan, it is also a factor that does not advance domestic reforms according to international norms.

(1) Japan's response to SOGI resolution and international evaluation of the human rights field

Two examples of Japanese attitudes towards human rights issues of sexual minorities commonly mentioned are related to responses to a series of resolutions on efforts of human rights protection regarding sexual orientation and gender identity (SOGI resolution in 2011, 2014). Japan voted in favor of the resolutions as a member of the UN Human Rights Council. It also played a central role in these measures as a member of the UN LGBT Core Group. However, the Japanese government has not actively undertaken aggressive domestic legal system reform in accordance to the recommendations based on adopted measures.

The next point is that the Japanese government did not abstain but voted against the resolution ²⁴ to condemn execution of homosexual acts adopted at the United Nations Human

Rights Council on September 29, 2017. This resolution, which was proposed by European countries including Belgium and Switzerland, condemns the imposition of a death penalty as a sanction against apathy, disbelief, adultery, consenting homosexual acts etc. 27 of 47 member countries agreed, 13 countries opposed and seven countries abstained. Japan voted in opposition as did the United States, Saudi Arabia, etc. About Japan's voting behavior in the UN, the Ministry of Foreign Affairs (MOFA) explained on its website,²⁵ "The reason is that the purpose of this resolution as a whole was a biased towards the abolition of the death penalty and the seeking of a temporary suspension of execution (moratorium)." And the "Ministry of Foreign Affairs expressed on the floor that Japan expressly opposes all discrimination. It clearly expressed the opinion that discrimination in the case of capital punishment was not permitted." In 2015, as Japan voted against an U.N. resolution related to the death penalty issue, its vote against the resolution in 2017 was consistent with its previous voting. However, for MOFA, as a member of the LGBT Core Group, the priority was not avoiding the risk of Japan being regarded as accepting discrimination. Rather it wanted to emphasize that stopping the death penalty was not a national obligation.

(2) Initiatives of the same-sex partnership certification by local governments

Despite the contradictory attitude of the Japanese government against the UN SOGI resolution, the international trend pushing for sexual minorities' human rights has certainly propagated to Japan. Attention is also focused on the movement of local governments on the so called "LGBT boom". In 2013, Yodogawa Ward of Osaka, as an administrative institution, issued for the first time the "Declaration of Support for LGBT" as well as started telephone consultation and staff training etc. Following in 2015, Shibuya Ward enacted regulations stipulating the procedure for issuing the same partnership certificate.²⁶ In response to this action by Shibuya Ward, efforts and activities of other municipalities, such as enlightenment activities, the training of staff and opening of consultation counters on sexual orientation and sexual recognition accelerated sharply. According to the "Survey of measures concerning gender identity and sexual orientation in national municipalities (hereinafter referred to as municipal government survey in 2016)," ²⁷ conducted in 2016, municipalities referring to sexual orientation and gender identity in the official documents as the basis for implementing measures such as local governments' plans were 188 (23.2%) among 811 municipalities. And since the partnership certification service began in Shibuya and Setagaya Wards, the number has increased dramatically from 2015 to 2016. ²⁸

Following Shibuya Ward, municipalities that start partnership certification services appear one after another. They are now implemented in five other municipalities as well such as

Setagaya Ward (November 2015); Iga in Mie Prefecture (commenced in April 2016); Takarazuka in Hyogo Prefecture (June 2016); Naha City in Okinawa Prefecture (July 2016) and Sapporo in Hokkaido (June 2017). Only Shibuya Ward enacted regulations aimed to be as legally effective as possible by making it mandatory to prepare a notarized document when issuing certificates. Residents, business operators, public institutions, etc. in Shibuya Ward must carry out the maximum responses and take appropriate measures as possible for effective legal impact. The five municipalities after Setagaya Ward are based on the "outline" established by the decision of the heads of municipalities. And the main focus is placed on prompt response to the diverse needs of sexual minorities.

The procedures of Shibuya and Setagaya are modeled respectively as the "Shibuya method" and the "Setagaya method." And concerning the requirements for the parties to whom this system is applied (such as applicant's address, presence or absence of marital disability reason, same gender on family register etc.); documents necessary for application; the handling of applicants, and so on, Various issues have been clarified, and various ideas have been devised. However, this system has the function of making the same-sex couples socially recognizable. Although at the same time as it announces sexual orientation, there is also a risk of social prejudice against homosexuals. Therefore, in the case of the "same-sex partnership oath" in Setagaya, they are considering privacy. For example, the oath ceremony is carried out in the meeting room on the office's closed day. Attention is also paid to the place for photographs so that it is not identified. In addition, as there is no confirmation made with the family register, there are no public order and morality violations incurred. In this way, it is understood from this interview that administrative officials are making various efforts to gain trust from residents. Since the system started a year and a half ago, a total of 53 pairs have administered the oath. This confirms that there is a need for public approval, even if it is not legally binding.

(3) Policy of municipality for supporting independence of a sexual minority

Categorizing concrete policies that municipalities are working on can be classified into the following five: (1) training for municipal officials, (2) enlightenment activities through lectures and symposiums for citizens, (3) support for independence of sexual minority parties, such as dedicated telephone counseling, in person assistance, and assistance with a place to live, (4) documentation of adding sexual minority words in documents such as basic plans and guidelines and the (5) establishment of regulation.

According to the "Municipal government survey in 2016," many municipalities are linked to (1) training, (2) enlightenment, and (4) documentation, triggered by demands and consultations from citizens and citizen groups. One area where many municipalities have taken action is the

column on forms asking about gender. Since the establishment of the Act on Special Cases GID in 2003, the movement for getting rid of this column is spreading.

However, we can not deal with the response to the gender binary system besides the sex mention column sex section unless it is implemented as a policy task of minority human rights protection. Concerning the support of independence of sexual minorities, the municipality plays the role of supporting sexual minorities side by side to support problem solving. Focusing on the minorities with difficulties, efforts as a modern administrative task to support self-reliance are necessary, and regulation and institutionalization are necessary.²⁹

Until now municipalities have focused on elderly people, people with disabilities, foreigners, and child victims of crime. However, for a concrete measures related to sexual minorities, there are policies such as establishment of dedicated telephone counseling, empowerment of parties by assisting with a place to live and providing living support, such as the introduction of medical institutions and real estate. Measures for the parties to become self-reliant entities through municipalities' support have already been tackled in the field of gender equality. Local governments, based on victims' counseling at female centers as well as through women's counseling and police assistance etc., have supported solutions to the matters mentioned above. Regarding the human rights protection of sexual minorities, many local governments are engaged in gender equality policies at woman's centers and other organizations concerning such parties' independence support activities. In addition to the activities of the municipalities, there is helpline called "Yorisoi Hotline" for sexual minorities as a special consultation services. The "Yorisoi Hotline" is a dedicated 24-hour 365-day free line operated by the "Social Inclusion Support Center." The Center is a corporation which received subsidy from the Ministry of Health, Labor and Welfare. The NPO "Sexual minority support nationwide network to create a symbiotic society (Symbiotic Net)," a corporation, is in charge of telephone consultations on the line and supports local government measure.

(4) Start of "Parliamentary Association": "Eliminate discrimination " or " Promote understanding"?

In 2015 when Shibuya Ward issued a "same-sex partnership certificate", the discussion on sexual minorities started at the level of national administration. It seems that the establishment of Shibuya Ward's regulation became big news. While news of The Tokyo Olympic Games and the Paralympic Games scheduled to be held in 2020 continues, the word "LGBT boom" has penetrated through the media. This is a promising sign. By the call of Representative Hase Hiroshi (Liberal Democratic Party), who was concerned with the establishment of Act on Special Cases GID, in March of 2015, the "Parliamentary League for Considering Issues on

LGBT" (hereinafter referred to as the Federation) consisting of bipartisan Diet members started. In response, the LGBT Federation Association (a nationwide association for the development of laws against parties with difficulties due to sexual orientation and sexual identity etc.) was formed in April of 2015. And with the approval of about 70 parties' groups and others, movements towards the establishment of the "LGBT discrimination prohibition law" began.

Due to the internal affairs of the Liberal Democratic Party, however, adjustment at the federation did not proceed smoothly. This internal situation involves the forming of political factions by conservative lawmakers who do not understand completely the problems faced by sexual minorities. Member of the House of Representatives Goshi Hosono wants to promote legislation. Member of the House of Representatives Hiroshi Hase wants to advance legislation through the coordination of ruling and opposition parties in the Federation. And LDP president political chairman Tomomi Inada who later changed her position to favor legislation. Among these three actors, movement aimed at establishing the law was confused. Ultimately, the LDP was unable to obtain consensus within the party due to the opposition of conservatives' to the draft "Understanding Promotion Bill." Consequently, only the "Basic way of thinking" was announced. And in May before the Upper House election 4 opposition parties submitted the draft "Bill to resolve LGBT discrimination" (Bill for resolving discrimination, etc. due to sexual orientation or sexual recognition) to the Diet, but the bill has not yet been deliberated (Nikaido 2017).

Although the draft of LDP "Understanding Promotion Bill" has not been announced, it basically emphasized the need for human rights awareness and human rights education. There is a great distinction philosophically between the above LDP proposed bill and the opposition party's draft bill - "Resolving LGBT discrimination Bill," which provides prevention and prohibition of direct discrimination and indirect discrimination against LGBT and obligation of reasonable consideration. Based on the experience of the legislation of the Act on Special Cases GID, it could be possible in the future to create a "LGBT Basic Law," which prioritizes the terms and definitions of "sexual recognition" and "sexual orientation" in the law as the next step. In addition, for the protection of sexual minorities' human rights, support of their autonomy is indispensable. If the law only stops at preventing discrimination of these minorities, this leads to isolation. Discussion about the establishment of basic laws that require all municipalities to implement support for these minorities should be held.

Conclusion

Taiwan is where same-sex marriage was legalized for the first time in Asia. And Japan is where there is no basic law on sexual minorities nor laws or precedents that give any kind of

legal protection to homosexual partnerships. What is the cause of the differences in this legal situation?

First, in Taiwan where democratization advanced since the late 1980s, the proportion of female legislators remarkably increased, the gender gap was eliminated, and triangles of women's movement, scholar experts, and female bureaucrats that promoted gender mainstreaming have also played an important role in expanding the citizenship of sexual minorities.

On the other hand, in Japan, employment systems are based on the premise of gender role based division of labor. This in turn has supported Japan's economic growth since the 1970s. And in the 1980s, it also supported a lifestyle maintained by legal marriage of men and women couples, modeled on men working long hours and women housekeeping. While isolating homosexuals in a subcultural private space, legitimization of legal marriage and homosexual homophobia. This trend based on the premise that "heterosexual = legitimate/homosexual = sexual abnormal" unconsciously spread throughout society. In addition, the civil rights movement that was triggered by the AIDS panic in the late 1980s was visualized mainly by male homosexuals.

Secondly, in Taiwan, the "Gender Equality Education Law" was enacted as a law to respond to the legal issues of sexual diversity and the increasing number of young people who accept homosexuality as normal. This has led to legalization of same-sex marriage.

On the other hand, in Japan, response to sexual identity disorder preceded to legislation, and the enactment of the Act on Special Cases GID. This act permits the change of gender status only for persons with gender identity disorder who meet strict legal requirements and include them in family. Therefore, the legal system of the family order presupposing heterosexuality and the sexual binary system based on physical characteristics was maintained and strengthened. Through this legislative movement, it became clear that there was a review of the legal and social system (family registration, a family-based family registration system) structured according to the majority (cis-gender heterosexual).

Thirdly, in the case of Taiwan, which is internationally isolated, democratization is important for appealing its existence to the world. And policies to realize human rights protection of international standards promoted the legalization of same-sex marriage. The Taiwanese judicial system has made aggressive constitutional decisions to adapt to this. On the other hand, in Japan, which has formed an alliance with the United States and won status as a developed country, domestic factors impact on matters of sexual diversity and issues of gender equality. One such factor is a political situation which makes it difficult to change the editing principle of the family registry and the marriage laws based on it. Thus, Japan has few incentives to acquire the international networks' estimation through human rights issues. In

addition, the courts, which have right of judicial review, recognize the legislature's broad discretionary power and are unlikely to interpret the Constitution to conform to international human rights law.

Further elaborating on differences with Taiwan, I would like to call attention to the fact that Japanese local governments have carried out a variety of advanced efforts which have also impacted on affairs at the national level. Particularly in Shibuya, the start of the same-sex partnership certificate service has accelerated citizen reviews and various initiatives of other local governments through the media. Moreover, conservative politicians have started to realize that 'social consciousness is beginning to change'. Concerning this trend, parties' organizations with experience in peer support and outreach activities of sexual minorities are also important actors who collaborate with academics, lawyers, etc., create lists of difficulties that sexual minorities face everyday, work with local governments and make policy recommendations to the government.

In Japan, various local government initiatives like the "Shibuya model" and the "Setagaya model" respectively could be an important resource for legal institutionalization at the national level. At the same time, in Taiwan, the advanced efforts of Taipei City became a model ("Women Rights Committee" model) and a gender mainstreaming platform was realized even at the national level (Kaneto 2005). If we can learn from the feminism movement in Taiwan, Japan should tackle both the protection of sexual minorities and the gender gap at the same time.

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NOTES

¹ In addition, the constitutional court declared that "even if legal measures are not taken, rights and obligations as spouse will occur by marriage register."

² "Taiwan Is Closer to Being 1st Asian Place to Allow Same-Sex Marriage", Gender News in Taiwan, CEDAW in Action <http://www.cedaw.org.tw/en/en-global/news/detail/147>

³ See, Tamura (2017, Taiwan to Singapore ni-miru Seitoki Mainoritii no Jinken to Simin-syakai(Sexual minority human rights and civil society seen in Taiwan and Singapore). Ajia Josei Kenkyu (Journal of Asian Women's Studies (JAWS), No.26),19-35

⁴ The metaphor of "a flowerless plant" in magazines was continuously used until the late 1980s. Continuously, gays were depicted as dark, spooky and as a multiplying phenomenon. The word "homo" has been used frequently in male magazines as a new word since the 1970s.

It was said that unknowingly this image was violating the readers' world.

⁵ For the AIDS panic including the extraordinary news at the time. See, Ikeda, Osamu (1993), *Tukurareta Eizu Panikku (AIDS Panic Made)*. Tokyo: Kiri Shobo, Ikeda, Eriko (1993), *Eizu to Ikiru Jidai (Age of living with AIDS)*. Tokyo: Iwanami Shoten, Kazama, Takashi and Kawaguchi, Kazuya (2010), *Dosei-ai to Isei-ai (Homosexuality and heterosexuality)*. Tokyo: Iwanami Shoten.

⁶ See, <http://www.occur.or.jp/about.html>

⁷ However, the Ministry of Health, Labor and Welfare shows "sexual harassment guidelines" that discriminatory behavior against sexual minorities in the workplace is included in sexual harassment of the Equal Employment Opportunity Law (May 2015). Similarly, the National Personnel Authority revision of the sexual harassment provision (December 2016) was also seen as an improvement. In addition, the rape charges of the criminal law regulating only women as victims were revised to "extortion for sexual intercourse" regardless of gender (June 2017). Even in the amendment of the Child Welfare Law and the Child Abuse Prevention Act (June 2017), appropriate responses to residents who are sexual minorities were specified clearly.

⁸ Focusing on actors, not all women's movements that became active after martial law decree lifted the LGBT rights advocacy campaign. Some female legislators have also put on "hold" LGBT rights protection and same sex marriage. For these circumstances, see TAMURA (2017) and HO (2013).

⁹ Also in the field of employment labor law, the "Gender Equal Employment Bill," aiming to secure women's labor rights, was drafted by a women's movement organization. After the bill became law in 2002, it was amended in 2008 to include a provision prohibiting discriminatory treatment on the grounds of sexual orientation and gender identity in the workplace.

¹⁰ 行政院主計總處「國際性別平權綜合指數」性別不平等指數(The Directorate General of Budget, Accounting and Statistics (DGBAS), Executive Yuan, "International Gender Equality Composite Index" (Gender Inequality Index, GII) , Update :2017-04-21.
<https://www.gender.ey.gov.tw/>

¹¹ There was no law to guarantee the employment of women until the "amphoteric equal work method" was enacted in 2001. In the 1990s, the practice of women still having to voluntarily retire if they got married or pregnant still continued.

¹² In Japan, female bureaucrats who worked at the department in charge of female policy are basically made into femocrats but in Taiwan's case, there is interactivity "from feminists to bureaucrats" and "from bureaucrats to feminists" (Hong 2010)

¹³ "Gender Equality Education Bill," since the drafting team of the draft actively adopted external opinions by inviting private activists, researchers, school teachers, etc., has been sent to the Legislative Yuan and has been deliberated on in just two months.

¹⁴ Legislature passes CEDAW act, TAIPEI TIMES <http://www.taipeitimes.com>

¹⁵ As a result, there are amendments to the Equal Employment Opportunity Act (1997, 2006), enactment of the Child Care and Family Care Leave Law (2001), and the Domestic and Violence Act (DV Law: 2001, 2004 revision) .

¹⁶ Regarding treatments at the penal institution of a transgender who is a man in family register and biology, but is a woman in terms of gender identity and appearance, the Tokyo District Court's decision on March 29, 2006 said that "unless there are special circumstances, a female official, doctor or a young woman should inspect the detainee, while respecting the latter's self-recognition of their sexual identity.

¹⁷ Regarding the correction of the gender description of intersex, there is a decision to allow correction as if there was "mistake" (family register law 113) in the description of the family register. However, changes in gender description due to sexual identity disorder were not based on mistake as described in Article 113 of the Family Registration Law and correction of

family register was not allowed.

¹⁸ It was promulgated on July 16, 2003, and came into effect on July 16, 2004.

¹⁹ Supreme Court Decision on October 19, 2007 (Family 60, Vol. 3 No. 36); and in the same year, the October 21, 2007 Decision (Family 60, Vol. 3, p. 37).

²⁰ Besides that, the requirement for (4) no-reproductive function is contrary to the basic idea of reproductive health/rights, and the requirement for (5) genital appearance of the Opposite Gender is criticized because of expensive medical expenses applied outside the National Health Insurance and difficult access due to limited special medical facilities.

²¹ Concerning the two requirements for a sex change operation, the cost, limited medical institutions that can handle this and the possible infringement of reproductive health rights are pointed out as problems.

²² See. <https://gid.jp/> According to HP of gid.jp, the number of changes related to the handling of gender changes in 2016 is 885. The cumulative number of changes since the enforcement of the law is 6,906.

²³ To be exact, although the term SOGIESC which includes Sexual Orientation (SO), Gender Identity (GI), Gender Expression (GE), Sex Characteristics (SC) (Taniguchi 2017) is in use, this paper calls attention to the SOGI resolution of 2011 which alternatively uses the term SOGI.

²⁴ http://ilga.org/downloads/HRC36_resolution_question_death_penalty.pdf

²⁵ See. Foreign Ministry's HP "36th UN Human Rights Council" Death Penalty "resolution adopted (October 18, Heisei 20)" http://www.mofa.go.jp/mofaj/fp/hr_ha/page25_001054.html

²⁶ First Shibuya Ward is the local government which made the regulations by the strong political intention of its chief to "empty a vent into the society tabooing a discussion of the same-sex marriage." Based on the Shibuya Ward Chief's resolution, five other local governments established a network.

²⁷ "Survey on Policies on Gender Identity and Sexual Orientation in National Municipalities (conducted April - July 2016) Report" (August 2017), edited by Grants-in-Aid for Scientific Research "Construction of Queer Studies in Japan" Research Group.

²⁸ In 2015, the number of newly mentioned official documents was 31, compared to 103 in 2016.

²⁹ According to municipal survey in 2016, there are 27 municipalities (3.3%) that have words directly related to "gender identity" and "sexual orientation" in their ordinances. At the same time, 786 municipalities (96.7%) are not mentioned. As regulations are adopted by majority votes in the local legislatures, the ability to respond to criticism from conservatives is important. Municipalities such as Bunkyo Ward and Tama City, which fully reflected the opinions of the council members and female citizens, were rarely confused. For example, the ordinance of Bunkyo Ward was unanimously approved by the local legislature.

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ANNOTATION

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