

## Private International Law Aspects of Same-Sex Couples in Japan (Summary)

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The legal recognition of same-sex relations around the world, especially in Europe, has undergone significant changes. More than half of the Member States of the EU have introduced legislation on the formalization of same-sex relationships to date. Most of them provide for registered partnerships and some allow same-sex couples to enter into marriage. Unlike this world trend, there has been no law for same-sex couples to establish a registered partnership in Japan. Same-sex marriage is considered not to be allowed, either. But we need to confront the issues on same-sex relations in Japan if same-sex couples cross a border and their relations become internationalized.

The purpose of this paper is to examine the issues how these new institutions for legally recognizing same-sex relationships should be treated under Japanese Private International Law. First, this paper offers a general review of the substantive law rules and of the private international law rules concerning same-sex relationships, focusing on the situation in several European countries. Next, the treatment of same-sex relations in Japanese Private International Law is investigated and the author's conclusion is described.

Most of the countries surveyed in this paper distinguish between same-sex marriage and registered partnership from the viewpoint of private international law as well. The concept of private international law should be wider than that of substantive law. For example, polygamy is considered as marriage in Japanese private international law, even if the substantive law permits only monogamy. Compared with the characterization of marriage, that of registered partnership seems to be controversial. The particular conditions for registered partnership under national substantive laws are likely to have a great influence upon the characterization of their private international laws. However, in my view some commonalities are made out, that is, a registered partnership is a partnership entered into between two persons, taking effect through the registration by a public authority and having similar legal effects to those of marriage.

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As far as the law applicable to same-sex marriage is concerned, we must distinguish between the countries where same-sex marriage is allowed and those where marriage is opened only to different-sex couples. The former considers same-sex marriage as marriage and applies the private international rules for marriage to same-sex marriage. On the other hand, some countries of the latter also categorize same-sex marriage as marriage, the public policy exception, however, would be frequently used to deny the recognition of same-sex relations, some which have already introduced the institution of registered partnership regard same-sex marriage as registered partnership and therefore apply their private international rules concerning registered partnership.

The private international law treatment of registered partnership could be divided broadly into two approaches. The one is the application of the domestic law. In some countries reference is made to the rules on marriage. Most of these countries apply the domestic law to marriage entered into in its own country, while a foreign marriage is recognized under specific conditions without confirming by the applicable law. Further, a category of registered partnership is subdivided into several categories (formation, legal effects and dissolution) in the same way as marriage in some countries. The other approach is the application of the law of the country where couples seek to have their union registered, *i.e.* the *lex loci registrationis*. The countries which adopt the distributive application of the national law of the parties concerning the formation of marriage had to introduce a new rule concerning registered partnership; otherwise their attempt to open a new institute for same-sex couples would have led to naught. The *lex loci registrationis* is applied to all the issues on registered partnership, from its formation to its dissolution, in order to ensure the expectation of the parties. This point seems to be so important that it deserves special emphasis, because the shape, the content and the consequences of national registered partnerships may vary in various laws.

Turning now to the situation in Japan, we have no specific rule regarding same-sex relations, either in the Constitution or the Civil Law. But it should not be interpreted that Japan denies entirely the legal recognition of same-sex relations. Japan has had no statute prohibiting homosexual behavior or stating anti-homosexual matters. It has been also indicated that one partner of same-sex couples adopts the other as a child in order to obtain some legal effects like inheritance. Japanese society, officials and courts have not just faced up to

their existences. There is already an opinion, even if it is in the minority, that a same-sex marriage could be entered into in Japan under Japanese Constitution and Civil Law.

In United Nations General Assembly the declaration for the universal decriminalization of homosexuality and the consideration of human rights violations based on sexual orientation and gender identity was read out on 18 December 2008, and was the first declaration concerning gay rights read there. 85 of the United Nations' member countries sponsored a new version of the declaration issued at the March 2011 session of the UN Human Rights Council, including Japan. Although we have had no legal framework for same-sex relations yet, same-sex couples should be respected and be assured the rights to pursue their happiness in Japan as well. The relationship of same-sex couples crossing a border should be recognized as far as possible. It is unlikely in Japan to refuse the recognition of same-sex relations for the reason of public policy.

In my opinion foreign registered partnerships should be governed by the *lex loci registrationis* in accordance with the principle of justice for purposes of ensuring the rights of same-sex couples. Presently, outside of Japan, legislative acts providing for registered partnership have been enacted in just limited jurisdictions in comparison to marriage. Furthermore, the contents of each legislation are varied from jurisdiction to jurisdiction. In order to meet the parties' expectations, the same law should govern all matters including formation, dissolution and effects.

Same-sex marriage should be characterized by its nature as marriage. The concept of marriage in Japanese private international law is not necessarily in accord with that of the substantive law. However, the rule for the formation of marriage under Japanese private international law (Act on General Rules for Application of Law) adopts the distributive application of the national law of the parties. This approach could eventually lead to unfairness between the same-sex couples entering into marriage and those establishing registered partnership. This unfair treatment does not seem to be justified because Japanese law has not made so clear its attitude on same-sex relations. Therefore, another alternative adopting the *lex loci registrationis* principle for same-sex marriage as well as registered partnership seems appropriate. It would be the time that the legislation concerning same-sex relations both in the substantial law and in the private international law should be set about.