



Human Rights Violations on the Basis of Sexual Orientation and Gender Identity in Japan

Joint Civil Society Submission to the Human Rights Committee for State Compliance with the International Covenant on Civil and Political Rights

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Introduction

This report is submitted by human rights organizations Gay Japan News, the International Gay and Lesbian Human Rights Commission (IGLHRC), Kyosei Net and Rainbow Action with input from Takaoka Law University professor Hiroyuki Taniguchi. The report aims to offer an evaluation of Japan's compliance with the International Covenant on Civil and Political Rights ("the Covenant" or "the ICCPR") highlighting important issues facing lesbian, gay, bisexual and transgender (LGBT) people. It is meant to illustrate the need for ongoing advocacy of greater protection and promotion of the right to non-discrimination on the basis of sexual orientation and gender identity in Japan.

Substantive Violations of the Convention

Articles 2(1) and 26: Right to Non-Discrimination

Articles 2(1) and 26 of the Covenant provide for the respect, equality and nondiscrimination of all individuals on the grounds of, inter alia, race, color, sex, and any other status. In 2004 the Committee found that the reference to “sex” in these articles must be taken to include sexual orientation.¹ The notion of non-discrimination in Article 2 is a practical one, meant to ensure to all people equal substantive enjoyment of the rights protected by the Covenant. In other words, laws and policies that do not affirmatively discriminate but have the end result of discriminatory treatment, thereby failing to deliver enjoyment of this right in substance does not meet the Covenant’s standard.² In accordance with General Comment 18 on non-discrimination in the context of the implementation of the ICCPR, in instances where conditions prevent or impair a population their enjoyment of human rights States parties should to “take affirmative action in order to diminish or eliminate conditions” which perpetuate discrimination.³

As described in General Comment 31 on Article 2 of the ICCPR, a State Party can be held accountable for rights violations perpetrated by a non-State actor if it failed to enact measures to protect individuals from these violations.

Housing

In its Concluding Observations on Japan’s fifth periodic report in 2008, this Committee expressed “concern regarding discrimination against lesbian, gay, bisexual and transgender persons” in areas of “employment, housing, social security, health care, education and other fields regulated by law.”⁴ In particular, this Committee expressed concern over Article 23(1) of Japan’s Public Housing Law because it applies only to married and unmarried different-sex couples and, as the Committee observed, this fact “effectively bars unmarried same-sex couples from renting public housing.”⁵ The government responded in its sixth periodic state report, submitted in October 2012, stating that the Article 23(1) of the Public Housing Law was abolished and, therefore, same-sex partners were no longer excluded.⁶ In reality, however, municipalities decide who can rent public houses under the amended Public Housing Law and

¹ Human Rights Committee Communication No. 488/1992, Australia, CCPR/C/50/D/488/1992, (Apr. 4, 1994).

² Concluding Observations, Albania, ICCPR, A/60/40 vol. I (2004) 25 at paras. 82(22).

³ UN Human Rights Committee (HRC), CCPR General Comment No. 18 ¶10, HRI/GEN/1/Rev.9 (Vol. I): Non-discrimination (10 Nov. 1989).

⁴ Concluding Observations of the Human Rights Committee, Japan ¶ 29, CCPR/C/JPN/CO/5 (Dec. 18, 2008).

⁵ Ibid.

⁶ Sixth periodic State Report of Japan to the Human Rights Committee ¶ 255, CCPR/C/JPN/6 (Oct. 9 2012).

few municipal policies allow same-sex couples to qualify.⁷ Thus, in practice same-sex couples remain excluded from public housing.⁸

This situation is further compounded by the fact that Japan does not yet have comprehensive anti-discrimination legislation in place. This failure to enact anti-discrimination legislation to include sexual orientation and gender identity leads to systematic violations of Article 26 (equal protection under the law), in that it essentially removes the possibility for an effective remedy for discrimination on those grounds. In 2002, the Ministry of Justice put forth a Draft Bill of Human Rights Protection that included sexual orientation, but not gender identity, as a category against which discrimination was prohibited. The National Diet, Japan's legislature, failed to pass this bill in 2002, 2003, and 2005, and it has not been introduced since. Further, Japan has yet to establish a national human rights commission that meets the standards of the Paris Principles⁹ in accordance with the recommendations of twelve countries from its Universal Period Review that it adopted in March 2013.¹⁰

Domestic Violence

The Act on the Prevention of Spousal Violence and the Protection of Victims was expanded in January 2014 to cover violence beyond marital relationship and *de facto* marriage to also include violence between partners who are dating and cohabiting. While the law is not explicitly confined to different-sex couples, the judiciary has interpreted the amended law to exclude partner violence in same-sex relationships.¹¹ Some courts limit the scope of this law with the reason that Article 24 of the Japanese Constitution stipulates that “marriage shall be based only on the mutual consent of *both sexes*¹² and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.” While all laws are to be interpreted in a manner that is compatible with the Constitution, this should not prevent courts from applying the anti-violence provisions to non-married same-sex couples.

⁷ Osaka Prefecture made its public housing ordinance inclusive of same-sex couples. Municipalities have individually have stated that they would maintain what was written in the abolished clause in their own public housing ordinances.

⁸ The draft bill on the establishment of human rights commission was approved by the Cabinet in 2012 but as of this time has not been introduced at the Diet.

⁹ The Paris Principles are critically important as they frame and guide the work of National Human Rights Institutions (NHRIs). Compliance with the Paris Principles ensures NHRI's must remain independent from government, have membership that reflects the composition of society, work in close cooperation with civil society and NGOs, and be adequately resourced by the state to carry out their work as NHRIs.

¹⁰ Universal Period Review (UPR) Japan ¶ 147.48 - 147.59 A/HRC/22/14 (Dec. 14, 2012). In September 2012, the Japanese Cabinet adopted a decision to establish an independent Human Rights Commission, compliant with the Paris Principles. Following the UPR, Japan accepted recommendations from twelve countries to accelerate the process of creating the NHRI in accordance with the Paris Principles: Benin, Burkina Faso, France, Indonesia, Jordan, Malaysia, Mexico, Nicaragua, Spain, Tunisia, Ukraine, United Kingdom of Great Britain and Northern Ireland.

¹¹ “Practice of Protection Order Procedures in Tokyo District Court and Osaka District Court based on the Amended DV Law 2013.” Expert opinion by Judge Masayuki Fukushima and Judge Hajime Morikage. Hanrei Times No. 1395 (issued in February 2014.)

¹² Underlined by the provider of this information.

Article 19 and 20(2): Freedom of Expression and Freedom from Incitement of Violence

Under Article 19(2) of the Covenant, “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” The right to freedom of expression, though not absolute, is a fundamental right rooted firmly in international law and only subject to restrictions in limited circumstances.¹³ Article 19(3) permits restrictions that are “provided by law and are necessary (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order (ordre public), or of public health or morals.” Furthermore, Article 20 mandates that States prohibit by law, “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

Read in conjunction with Article 2(1) of the convention, the restrictions in Articles 19(3) and 20 permit States to restrict the right to freedom of expression to prevent advocacy of hatred that constitutes incitement to discrimination, hostility or violence based on sexual orientation and gender identity, so long as the laws and restrictions hold (1) a requirement of intent¹⁴, (2) a legitimate aim and (3) are necessary and proportionate to those means.

In addition, while the right to freedom of expression and opinion applies to everyone, government officials can reasonably be expected to promote and uphold human rights standards through their actions and speech, and certainly have an obligation to prevent violence and discrimination. Yet, statements made by the Japanese government demonstrate a lack of regard for the discrimination of LGBT people, and may even contribute to it. Public statements made by government officials tap into hostility against LGBT people, apparently for political gain. For example, Hyogo Prefectural Assembly member Hiroyuki Inoue called gay men *homo*, derogatory term for gay men, in an assembly committee on May 16, 2014. He also stated that there was no point for the municipal government in intervening with HIV/AIDS cases of gay men because being gay was a “lifestyle choice.” In a 2010 statement to the Tokyo Metropolitan Ordinance Regarding the Healthy Development of Youths, then Tokyo Governor Shintaro Ishihara stated, “Japan has become far too untamed” as evidenced by the fact that “homosexuals are casually appearing even on television lately.”¹⁵

¹³ UN Human Rights Committee, General Comment 34, para. 22.

¹⁴ The Committee has previously criticized laws aimed at “hate speech” which lack an intent requirement. “Written contribution to the thematic discussion on Racist Hate Speech and Freedom of Opinion and Expression organized by the United Nations Committee on Elimination of Racial Discrimination,” Amnesty International (28 Aug. 2012) *citing* Concluding Observations on Rwanda, 2011, para. 14. While this Concluding Observation was in relation to Article 2, the recognition of the risks that arise if intent is not present is important.

¹⁵ Japan: Governor Should Retract Homophobic Comments: Top Tokyo Official Calls Homosexuals ‘Deficient’ (February 2011, <http://www.hrw.org/news/2011/02/01/japan-governor-should-retract-homophobic-comments>).

Article 23: Family Life, Article 2: Non-discrimination and Article 24: Special Protection of Children

Article 23 provides that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” It also prohibits “any discriminatory treatment in regard to the grounds and procedures for separation or divorce, child custody ...visiting rights” ensuring that “interest of the children” is the paramount concern.” Additionally, the Human Rights Committee has affirmed gender identity to be “one of the most basic essentials of self-determination,”ⁱ and has also established that an individual’s gender identity cannot be a ground for discrimination.ⁱⁱ Furthermore, article 24 of the Covenant guarantees “the right [of every child] to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.” Read together, these articles protect rights of all individuals, including transgender individuals, to non-discriminatory rights to family, children and autonomy.

In Japan, article 3 of the Law Concerning Special Cases in Handling Gender for People with Gender Identity Disorder sets five conditions for transgender individuals to be eligible to apply for different sex entry on *koseki*, family registry to a family court.¹⁶ One of these conditions requires that a transgender individual who wishes to change his or her sex be unmarried at the time of application. A transgender person who has undergone sex reassignment surgery may marry a new partner who is of different sex, but cannot remain married to a partner whom the person was married to prior to her/his application.¹⁷ A second condition requires that the applicant have no children below the age of 19 at the time of application. A third condition in a male to female transition requires the applicant to be sterilized; specifically, the applicant must not have testicles or is in permanent loss of testicular function. The second requirement of the policy discriminate against transgender individuals based upon the gender identity, depriving transgender applicants of the ability to have biological children under the age of 19, in clear violation of the non-discrimination clauses of articles 2 and 23 of the Covenant.¹⁸

Furthermore, the third requirement of the policy calling for sterilization contradict transgender individuals rights to self-determination and bodily autonomy. In an interagency statement in released May 2014, seven United Nations agencies including the World Health Organization, acknowledge that transgender and often also intersex persons are required to undergo sterilization surgeries that are often unwanted, as a prerequisite to receiving gender affirmative treatment and gender-marker changes. The statement goes on to explain that these sterilization

¹⁶ Act on Special Cases in Handling Gender for People with Gender Identity Disorder (Japan) Law No. 111 of 2003 (Effective Jul. 16, 2004) [Translation by Chiaki Ota] available at http://blog.hawaii.edu/aplpj/files/2013/01/APLPJ_14.1_Ota_vFINAL.pdf.

¹⁷ Ibid.

¹⁸ These provisions also run counter to Japan’s obligations under the Convention on the Rights of the Child, which note that no child can be discriminated against because of their parents.

requirements “run counter to respect for bodily integrity, self-determination and human dignity, and can cause and perpetuate discrimination against transgender and intersex persons.”¹⁹ Furthermore, in February 2013, the Special Rapporteur on Torture called for States to “repeal any law allowing intrusive and irreversible treatments, including... forced involuntary sterilization” when administered without the free and informed consent of the person concerned. Furthermore, he called for “outlaw[ing] forced or coerced sterilization in all circumstances and provid[ing] special protection to individuals belonging to marginalized groups.”²⁰

Recommendations

- Enact anti-discrimination legislation prohibiting discrimination on the basis of sexual orientation and gender identity, including but not limited to areas of employment, housing, social security, education and health services.
- Establish a National Human Rights Institution independent from the Government in compliance with the Paris Principles as agreed upon in 2013 Universal Periodic Review.
- Modify current legislation to afford unmarried same-sex couples the same rights that are afforded to unmarried different-sex couples.
- Secure an individual and safe shelter room for survivors of violence who are LGBT. This includes providing comprehensive training to their staff about the experiences and specific needs of LGBT victims of violence. In order for the State to discharge its responsibility to protect victims of violence, staff in shelter facilities must be able to offer appropriate and sufficient support to all people.
- Review and amend current legislation regarding people with Gender Identity Disorder (GID) to ensure no person with GID is required to be sterilized. Eliminate the provision that does not permit individuals from remaining married to their same-sex spouses they married as opposite sex spouse. And review and revise the law to ensure that no individual or family members including their children are disadvantaged in the ways described above.
- Provide training for government officials, judges, police as well as schoolteachers and staff at all levels on human rights and non-discrimination on the basis of sexual orientation and gender identity.

Endnotes:

ⁱ European Court on Human Rights, *Van Kück v. Germany*, App. No. 35968/97 (Eur. Ct. H.R. 3d section 12 June 2003), para. 73.

ⁱⁱ **Concluding Observations:** Finland, UN Doc. CCPR/C/FIN/CO/6 (2013), para. 8; Ukraine, UN Doc. CCPR/C/UKR/CO/7 (2013), paras. 8,10; Belize, UN Doc. CCPR/C/BLZ/CO/1 (2013), para. 13; China (Hong Kong), UN Doc. CCPR/C/CHN-HKG/CO/3 (2013), para. 23; Paraguay, UN Doc. CCPR/C/PRY/CO/3 (2013), para. 9; Peru, UN Doc. CCPR/C/PER/CO/5 (2013), para. 8;

¹⁹ “Eliminating forced, coercive and otherwise involuntary sterilization: An Interagency Statement,” OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF, WHO, p.7 (May 2014).

²⁰ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, (Feb. 1, 2013).

Philippines, UN Doc. CCPR/C/PHL/CO/4 (2012), para. 10; Turkey, UN Doc. CCPR/C/TUR/CO/1 (2012), paras. 8 and 10; Armenia, UN Doc. CCPR/C/ARM/CO/2 (2012), para. 10; Kenya, UN Doc. CCPR/C/KEN/CO/3 (2012), para. 8; Lithuania, UN Doc. CCPR/C/LTU/CO/3 (2012), para. 8; Dominican Republic, UN Doc. CCPR/C/DOM/CO/5 (2012), para. 16; Guatemala, UN Doc. CCPR/C/GTM/CO/3 (2012), para. 11; Turkmenistan, UN Doc. CCPR/C/TKM/CO/1 (2012), para. 21; Iran, UN Doc. CCPR/C/IRN/CO/3 (2011), para. 10; UN Doc. CCPR/C/JAM/CO/3 (2011), para. 8; Kuwait, UN Doc. CCPR/C/KWT/CO/2 (2011), para. 30; Mongolia, UN Doc. CCPR/C/MNG/CO/5 (2011), para. 9; Poland, UN Doc. CCPR/C/POL/CO/6 (2010), para. 8.