

# Legal Protection of Nontraditional Families in Japan: Lessons from Europe

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## Abstract

In Japan, the family law system designed to protect traditional two-parent families—that is, a mother and father raising their biological children—has remained nearly unchanged since the end of World War II. However, the recent increase in families considered to be outside the traditional family framework has led courts to respond to the new reality. This article<sup>1</sup> addresses those challenges and, from a European perspective, examines some possible solutions that Japanese courts could adopt to effectively protect children's rights and the status of family members in nontraditional families in Japan.

## 1. Introduction

In Japan, the traditional legal framework designed to protect the nuclear family structure of married different-sex couples and their biological children has remained largely unchanged<sup>2</sup> since the revision<sup>3</sup> of the Civil Code (*Minpō*) in 1947. However, with the emergence of more families considered to live outside traditional family structures—among others, stepfamilies, families formed by same-sex and/or transgender parents, and families formed through assisted reproductive technology (ART)—the country's traditional legal framework has been unable to provide appropriate protections in responses.

In Asia, Taiwan legalized same-sex marriage in 2019 and granted same-sex couples the right of joint adoption in 2023<sup>4</sup>. Meanwhile, Japan remains the only Group of Seven (G7) country that has not yet recognized same-sex marriage or civil unions. In 2022, the UN Human Rights Committee stated<sup>5</sup> that it “remains concerned about the lack of comprehensive anti-discrimination legislation in accordance with the provisions of the Covenant” and “concerned at the absence of legislation that explicitly prohibits discrimination based on sexual orientation and gender identity.” In turn, the Committee recommended<sup>6</sup> that Japan adopt “comprehensive anti-discrimination legislation, to ensure that its legal framework provides adequate and effective substantive and procedural protection against all forms of direct, indirect and multiple discrimination,” including sexual orientation and gender discrimination.

Following the G7 summit in Hiroshima in May 2023, when Japan faced international pressure<sup>7</sup> to show greater support for equality, the Japanese Parliament (*Kokkai*) enacted a programmatic law<sup>8</sup> to promote the understanding of the LGBTQ community. Despite being the first law in the

country to address issues related to sexual orientation and gender identity, it has been criticized by some LGBTQ rights groups<sup>9</sup> for neither prohibiting discrimination based on sexual orientation and gender identity nor imposing civil or criminal sanctions for such discrimination.

In recent years, numerous municipalities in Japan have issued certificates recognizing same-sex partnerships, beginning with Tokyo's Shibuya<sup>10</sup> in 2015. According to a survey conducted by the non-profit organization Nijiuro Diversity and Shibuya Ward<sup>11</sup>, by June 2023, 328 municipalities across Japan had already adopted some kind of partnership system. Although those systems issue certificates that afford same-sex couples in Japan to access some local services, including the ability to rent public apartments together and hospital visitation rights as family members<sup>12</sup>, they are not legally binding. As a consequence, same-sex partnerships have no inheritance rights or tax benefits, among other privileges, comparable to those enjoyed by married different-sex couples.

Same-sex marriage bans have also been challenged in the courts, based on the argument that it violates the Japanese Constitution (*Nihonkokukempo*)<sup>13</sup>. In 2019, the organization Marriage for All Japan, which campaigns for marriage equality, filed lawsuits in five district courts (*chihō saibansho*)<sup>14</sup> around the country that challenged the constitutionality of the Japanese Civil Code and the Family Register Act (*Kosekibō*), which constitute the laws regulating marriage in Japan. Between March 2021 and June 2023, four of those five district courts ruled<sup>15</sup> that the current lack of marriage equality indeed violates the Japanese Constitution. The court battle is expected to continue and will likely reach the Japanese Supreme Court in the next few years.

All of those developments suggest that small but significant changes are now taking place in Japan, as local governments and courts push for marriage equality despite the Parliament's resistance to any change. However, those local legislative and judicial responses remain insufficient and leave members of nontraditional families vulnerable to some legal gray areas.

## 2. Domestic Courts' Responses to Legal Issues Raised by Nontraditional Families

Current legislation in Japan does not fully protect nontraditional families or the best interests of their children and thus leaves them without many of the legal protections granted to children who have two different-sex biological or adoptive parents. In the absence of protective legislation, courts have been called upon to protect the rights of nontraditional families in innumerable cases. This section of the article provides an overview of the most common legal issues raised by nontraditional families in Japan and how courts have responded to those challenges.

### 2.1 Same-Sex Families

The lack of clear legislation concerning same-sex marriage in Japan does not constitute an obstacle to same-sex *de facto* cohabitation and its legal implications. As mentioned, Japan's local governments have begun to implement same-sex partnership systems. Moreover, in some of those local governments, same-sex partners are considered to be spouses (*haigūsha*) for the purposes of the foster care system<sup>16</sup>, even though same-sex couples are not legally permitted to adopt children.

Beyond that, as frequently reported by media<sup>17</sup>, many same-sex couples in Japan use donated sperm obtained online in order to conceive, for they are generally prohibited from accessing fertility treatments in health care institutions. That restriction stems from the guidelines<sup>18</sup> of the Japan Society of Obstetrics and Gynecology, which bar the use of donated sperm among same-sex couples. In a 2021 survey<sup>19</sup> conducted by the organization Kodomappu, of the 141 respondents who were pregnant or raising children with a same-sex partner, 55% (n=77) had used donated sperm and/or ova to conceive their children<sup>20</sup>. Most of those 77 respondents found sperm donors on social media (29.9%, n=23), whereas others relied on friends or acquaintances (19.5%, n=15), overseas sperm or egg banks (14.3%, n=11), and friendship marriage websites (6.5%, n=5)<sup>21</sup>. Nevertheless, seeking donated sperm online poses certain health and safety risks. In fact, a study<sup>22</sup> conducted in 2020 examining 140 Japanese-language websites offering donor's sperm showed that 96.4% (n=135) of them were unsafe and that only five provided adequate, reliable information.

Those new realities pose significant challenges for the courts, which have been asked to interpret existing laws and decide to what extent such relationships are to be protected. For example, in a case concerning compensation for immediate family members of homicide victims, the Aichi Prefectural Public Safety Commission (*Aichiken Kōan Inkai*) refused to pay the family benefit typically granted to homicide victims' families to a man living in a stable same-sex relationship with his partner, who was murdered in 2014. The Commission argued that the surviving male partner had no right to receive the benefit as a spouse because they were not legally married. In response, the surviving partner sued the Aichi Prefecture in a bid to have the Commission's decision revoked on the grounds of discrimination based on sexual orientation and thus in violation of individual dignity and social welfare rights. However, both the Nagoya District Court<sup>23</sup> and the Nagoya High Court<sup>24</sup> denied his request; they maintained that the definition of "spouse" under the concerned law<sup>25</sup> includes only different-sex *de facto* partners, for social consensus exists in Japan that same-sex *de facto* relationships should not be treated the same as marriage. For that reason, the courts concluded, the Commission's decision did not violate the Japanese Constitution. As Aki Tashiro notes<sup>26</sup>, although the formal interpretation of existing laws given by courts may make sense in that case, courts are nevertheless expected to act as a bulwark for the rights of sexual minorities, whose rights are generally not safeguarded under the democratic process.

By contrast, in a case involving the dissolution of a lesbian couple in a committed relationship, Japanese courts<sup>27</sup> awarded one partner 1.1 million yen in damages on the grounds that the other partner had had an adulterous relationship with their sperm donor. The couple, after having legally married in the U.S state of New York in 2014 and having held their wedding ceremony in Japan in 2015, had been living together for several years. Upon deciding to have children together, the defendant was inseminated with a donor's sperm using a syringe. Once the plaintiff discovered that the defendant had been having an affair with the sperm donor, their relationship collapsed, and the plaintiff sought damages from her former partner<sup>28</sup>. Both the Utsunomiya District Court and the Tokyo High Court held<sup>29</sup> that although the couple was not allowed to legally marry in Japan, their relationship should be regarded as the equivalent of a *de facto* (*naïen*) relationship and have

the same legal protection as *de facto* different-sex relationships. In accordance with the Japanese Civil Code, the plaintiff was thus awarded compensatory damages for emotional distress, including attorney’s costs, as a result of the defendant’s unlawful act (*fūbō kōi*)<sup>30</sup>.

Those two recent cases illustrate different ways in which same-sex couple families have been denied or granted legal protection by Japanese courts in both the public and private spheres.

## 2.2 Transgender Families

Transgender couples in *de facto* cohabitation and their families are also a reality in Japan, despite the legal barriers facing them and the lack of legal protections against unequal treatment in family matters. For example, in a case disputed in Japanese courts in 2022 involving a transgender woman (MtF) and her female partner, the existing laws prevented them from enjoying equal parental rights. The transgender woman, who had been assigned the male sex at birth but had undergone a gender reassignment surgery in 2018, thereby legally becoming a female under the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (GID Act)<sup>31</sup>, had frozen her sperm before legally transitioning. She and her female cisgender partner were living in a *de facto* relationship, for the marriage of two women remains prohibited in Japan. They decided to use the frozen sperm to have children, with the first child being born before and the second after the transgender woman had legally changed her sex from male to female. The local government responsible for birth registration recognized the female partner as the children’s legal mother due to her having given birth to them, but refused to recognize the transgender woman’s legal paternity of either child, because Article 4 of the GID Act<sup>32</sup>, which states that a person’s gender becomes their acquired gender for all purposes. As a result, she filed a lawsuit asking the court to decide on her paternity.

In that case, although both children were confirmed to be biological children of the transgender woman, who had provided her sperm, the Tokyo Family Court denied<sup>33</sup> the application in February 2022 arguing that somebody who is legally a female cannot be acknowledged as being the father of a child<sup>34</sup>. However, in August 2022, the Tokyo High Court overturned<sup>35</sup> the Family Court’s decision in part and recognized the transgender woman as the legal father of the first child, for she was legally a male at the time of that child’s birth. However, the Tokyo High Court decided<sup>36</sup> that the legal relationship with the second child could not be recognized, for the parent’s legal sex was female at the time of that child’s birth and a woman cannot be acknowledged as the father of any child.

That case illustrates that existing laws concerning the acknowledgement of paternity in Japan—laws created for families in the traditional legal framework—continue to be restrictively interpreted by the courts in order to fit the model of a traditional family in which a “father” is a male, even when the child is genetically related to her. As a consequence of that restrictive interpretation, siblings born to the same parents under the same conditions and living with both as a family are being denied equal treatment by courts, which is unlikely to be in their best interests.

Another example is the Japanese GID Act of 2003 itself, which was enacted to ensure that the

legal sex of transgender people matches their gender identity. The GID Act is based on the premise that changing one’s legal sex negatively impacts children and does not serve their best interests. The Japanese Supreme Court has already recognized<sup>37</sup> that a parent’s sex change may cause confusion in the family order and problems from the perspective of a child’s welfare. Therefore, under the current legislation<sup>38</sup>, transgender people who have children under 18 years of age cannot apply to change their legal sex in their Japanese Family Register.

The GID Act also requires<sup>39</sup> that transgender people undergo gender reassignment surgery in order to have their legal sex changed on official documents. The constitutionality of that surgical requirement has been challenged in courts, and, in 2019, the Japanese Supreme Court held<sup>40</sup> that the requirement is constitutional. According to the Court, the purpose of the law “may be construed to be based on considerations for preventing any social confusion due to issues concerning the parent and child relationship arising as a result of a child born using the reproductive function of the original gender status.”<sup>41</sup> That case is another example of how laws are interpreted to fit the model of a traditional family in which a parent’s sex change is believed to affect children’s welfare.

However, in October 2023, the Supreme Court changed its position and declared<sup>42</sup> the surgical requirement unconstitutional. The Court noted that issues related to the parent-child relationship arising from a child born using the reproductive function of the original gender status are rare<sup>43</sup>. Moreover, the Court acknowledged that surgical treatment is not medically necessary for all transgender individuals, as demonstrated by the absence of this requirement in many countries<sup>44</sup>. For these reasons, the Court concluded that the surgical requirement imposes excessive restrictions on the right to bodily integrity, thereby violating Article 13 of the Japanese Constitution<sup>45</sup>.

### 2.3 Stepfamilies

Not only do LGBT families but also stepfamilies offer unique challenges for family members in Japan’s family legal system. However, in many cases, those families remain expected to fit the model of a traditional married, two-parent family with the parent’s biological children. For example, in a case of stepparent adoption—that is, the legal adoption of a child by the spouse of the child’s birth parent—a Japanese court<sup>46</sup> restricted the visitation rights of the non-custodial parent (i.e., the mother) by not allowing the children to stay overnight with her. After divorce, the custodial parent (i.e., the father) remarried, and his new wife adopted the children. In Japan, after divorce, only one parent retains legal parental responsibility (*shinken*) for each child. Consequently, if the parent with sole custody and responsibility for the child remarries, then their new spouse can adopt (*futsū yōshi engumi*) the child without the consent of the non-custodial parent and acquire joint custody and responsibility for the child. Furthermore, because stepparent adoption does not terminate the legal relationship with the non-custodial parent, a child may have more than two legal parents (i.e., multi-parentage). In the specific case mentioned here, the children thus had three legal parents: the biological father, the biological mother, and the stepmother.

Even though stepparent adoption does not terminate the legal relationship with the non-custodial parent, courts in Japan tend to restrict contact between non-custodial parents and

children even when they wish to continue it, by arguing that it is in a child's best interest to avoid conflicts or confusion in parental roles. In the mentioned case, before the custodial parent remarried, the Kyoto Family Court<sup>47</sup> allowed the non-custodial parent to stay overnight with her children. However, after the remarriage of the custodial parent, the Osaka High Court<sup>48</sup> overturned the lower court's decision on the grounds that the children were in the process of building a new family relationship with their stepparent and that situations that can adversely impact the children's emotional stability, including differences in lifestyle and discipline, should be avoided<sup>49</sup>. For that reason, the mother was barred from staying overnight with her children.

As Shinji Nozawa notes<sup>50</sup>, there is a strong tendency in Japan for non-custodial parents to lose contact with their children and for stepfamilies to be treated as reconstituted nuclear family households given a focus on replacing parental figures. Courts subsequently tend to protect the remarried nuclear family, which consists of only one mother and one father, while restricting the rights of the non-custodial parent.

#### 2.4 Families Formed Using ART

Last, families created by means of ART have also been denied legal recognition and protections due to not fitting the traditional family model, in which a woman who gives birth is considered to be the legal mother and her husband to be the legal father. The most representative examples of that trend are cases involving surrogacy arrangements. Japanese courts have consistently refused to recognize the legal parent-child relationship between intended mothers and children born through surrogacy, even when the intended mothers are genetically connected to the children and the surrogate mothers have no desire to raise the children<sup>51</sup>.

For example, in 2007, the Japanese Supreme Court ruled<sup>52</sup> that a foreign court decision declaring a Japanese intended mother to be the legal mother of twins born abroad through surrogacy was contrary to public policy and therefore should not be recognized in Japan. The Supreme Court held that "the absence of a provision specifying the legal relationship in such case is due to the fact that such situation was not anticipated at the time of the enactment of the Civil Code."<sup>53</sup> However, considering the public interest as well as the welfare of children, the Court further concluded that "there is no choice but to construe the existing Civil Code to require that a woman who has conceived and delivered a child shall be the mother of the child, and that a mother-child relationship cannot be deemed to be established between the child and the woman who has not conceived or delivered the child, even where the child is born using the egg donated by that woman."<sup>54</sup> The Supreme Court's interpretation of the Civil Code was later converted into legislation; a new law<sup>55</sup> enacted in 2020 clearly stipulates that any woman who gives birth to a child by means of ART using another woman's ovum or embryo is the child's legal mother.

Although surrogacy is a highly controversial issue around the world, Japanese courts have not shown enough flexibility in adjusting the interpretation of existing laws to ensure equal treatment for all families, even in cases involving children born outside Japan in surrogacy-friendly jurisdictions.

### 3. Legal Remedies: Lessons from the European Court of Human Rights

Having provided a brief overview of the current situation of nontraditional families in Japan and the legal challenges that they face, this article shifts to exploring the paths taken by the European Court of Human Rights (ECtHR) in formulating solutions in similar cases. Taking that perspective may offer some inspiration for Japan and serve as a source of ideas for Japanese courts.

In recent years, the ECtHR has developed extensive jurisprudence for protecting the rights of nontraditional families in Europe. As J.M. Scherpe notes<sup>56</sup>, the ECtHR's decisions have a direct impact on national family laws because they are binding for member states of the Council of Europe, which make those decisions the "gametes of a European family law." Meanwhile, the right to respect for private and family life under Article 8 of the European Convention on Human Rights<sup>57</sup> has been interpreted by the ECtHR to include positive obligations to be met by member states. For example, concerning same-sex couples, the ECtHR has recognized the positive obligation of member states to implement a legal framework regulating same-sex relationships.

#### 3.1 Same-Sex Families

In *Oliari and Others v. Italy* (2015)<sup>58</sup>, the ECtHR stated that "While the essential object of Article 8 is to protect individuals against arbitrary interference by public authorities, it may also impose on a State certain positive obligations to ensure effective respect for the rights protected by Article 8."<sup>59</sup> In that case, the applicants—couples living in stable same-sex relationships—had no opportunity to enter into a civil union, registered partnership, or marriage in Italy. Because of the lack of any legal framework to have their relationships recognized and protected under Italian law, the Court held that Italy had failed to comply with its positive obligation to ensure respect for the applicants' private and family life<sup>60</sup>.

The ECtHR also noted that sensitive moral and ethical issues were involved and that member states enjoyed a certain margin of appreciation regarding the choice of legal status to recognize and protect same-sex couples<sup>61</sup>. However, the Court held that the Italian government had overstepped its margin of appreciation and failed to fulfill its positive obligation to ensure that the applicants had a legal mechanism to formalize their relationship<sup>62</sup>. Thus, Article 8 of the Convention had been violated.

Following the decision in *Oliari*, the Italian Parliament enacted a law<sup>63</sup> in 2016 recognizing civil unions of same-sex couples (*unioni civili tra persone dello stesso sesso*). Although that decision pivotally impacted the establishment of a legal framework in Italy for recognizing and protecting same-sex relationships, some<sup>64</sup> have argued that it can prompt discrimination by recognizing two parallel institutions, for it allows member states to decide which legal framework of recognition—marriage or other forms (e.g., civil unions or registered partnerships)—to adopt, as long as the core rights relevant to couples in a stable, committed relationship are provided.

### 3.2 Transgender Families

The ECtHR has stated that requirements for sterilization surgery in the process of gaining legal recognition of gender identity violate the right to respect for private life. In the case of *X and Y v. Romania* (2021)<sup>65</sup>, the domestic courts had refused to recognize the applicants' gender reassignment on the grounds that the applicants had not had gender reassignment surgery. The ECtHR held that Article 8 of the Convention had been violated when Romanian authorities refused to legally recognize the applicants' gender reassignment in the absence of gender reassignment surgery, which the Court argued amounted to unjustified interference with their right to respect for their private life<sup>66</sup>. The Court additionally held that the Romanian authorities' refusal in the case had upset the fair balance to be struck by the state between the general interest and the interests of the applicants<sup>67</sup>.

Concerning the parental rights of transgender people, the ECtHR has decided that restrictions of parental rights based on a parent's gender identity are incompatible with the Convention. In the case of *A.M. and Others v. Russia* (2021)<sup>68</sup>, the applicant—a Russian transgender woman who, before transitioning, had married a cisgender woman and had two children with her—had her parental rights and access to her children restricted by domestic courts following her divorce. Her former wife argued that her gender status had caused irreparable harm to the children's mental health and morals<sup>69</sup>. For that reason, the applicant complained, citing Articles 8 and 14 of the Convention, that the restriction of her parental rights had not been necessary in a democratic society and had been discriminatory.

The ECtHR stated that measures totally depriving the applicant of their family life with the child were inconsistent with the aim of reuniting them and should be applied only in exceptional circumstances<sup>70</sup>. In that case, domestic courts, upon the request of the children's mother, applied the most restrictive measure possible and completely deprived the applicant of any contact with her children<sup>71</sup>. The Court considered that the domestic courts thus failed to make a balanced, reasonable assessment of the respective interests and that the restriction of the applicant's parental rights and of her contact with her children had not been necessary in a democratic society<sup>72</sup>. The Court also noted that the applicant's gender identity had played a significant part in the domestic courts' decisions concerning the restriction of her parental rights<sup>73</sup> and that the applicant had therefore been treated differently from other parents concerning contact rights because of her gender identity<sup>74</sup>. For those reasons, the Court held that there had been a violation of Article 8 and a violation of Article 14 taken in conjunction with Article 8.

In April 2023, the ECtHR also decided on the legal recognition of transgender parents in two cases brought against Germany. In both cases, the Court ruled against the applicants—a transgender woman (MtF) in the first case<sup>75</sup> and a transgender man (FtM) in the second<sup>76</sup>—and found no violation of their right to respect for private and family life. The Court held that the birth registration of transgender parents raises moral and ethical issues, on which there is no European consensus, thereby allowing national authorities a wide margin of appreciation<sup>77</sup>.



### 3.3 Stepfamilies

Concerning stepfamilies and second-parent adoptions, the ECtHR has decided that such adoptions have to be accessible to both different-sex and same-sex couples, provided that they are in a similar situation. In the case of *X and Others v. Austria* (2013)<sup>78</sup>, two women in a stable same-sex relationship complained about Austria's refusal to grant one partner the right to adopt the other partner's child without severing the mother's legal relationship with the child. Under the Austrian Civil Code, second-parent adoption by unmarried different-sex couples was legally possible, whereas the same form of adoption by (unmarried) same-sex couples was not.

In that case, the ECtHR first emphasized the applicants' argument that although *de facto* families based on a same-sex couple exist, they are refused the possibility of obtaining legal recognition and protection<sup>79</sup>. The Austrian government argued that member states have a wide margin of appreciation to regulate that issue given the lack of European consensus on second-parent adoption by same-sex couples<sup>80</sup>. However, the Court also stated that when it comes to issues of discrimination on the grounds of sex or sexual orientation to be examined under Article 14 of the Convention, the state's margin of appreciation is narrow<sup>81</sup>.

Moreover, the ECtHR stated that the case did not concern the general question of same-sex couples' access to second-parent adoption but the difference in treatment between unmarried different-sex couples and same-sex couples in respect of that type of adoption<sup>82</sup>. In that light, the Court found that the government had failed to give convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the child's interests<sup>83</sup>.

When analyzing whether the difference in treatment in that case was to be interpreted as being discriminatory, the ECtHR took into account the principle of proportionality and found that there was no reasonable relationship of proportionality between the means employed—that is, different treatment based on sexual orientation—and the aim sought to be achieved—that is, the protection of the child's best interests and protection of the family in the traditional sense. For that reason, the Court held that the distinction was incompatible with the Convention and that Article 14 of the Convention had been violated in conjunction with Article 8 when the applicants' situation was compared with that of an unmarried different-sex couple in which one partner wished to adopt the other partner's child<sup>84</sup>.

Following the ECtHR's decision, in August 2013 Austria approved a law<sup>85</sup> to change its Civil Code to allow second-parent adoption—that is, when one partner adopts the biological child of the other partner—for same-sex couples. However, same-sex couple's access to joint adoption—that is, when a couple jointly adopts a child who is not biologically linked to them—remained restricted to different-sex couples. Only in December 2014, did the Austrian Constitutional Court decide<sup>86</sup> to allow joint adoption by same-sex couples. At that point, Austria granted equal rights for same-sex couples to create families through second-parent adoption and joint adoption but not the right to

marry. Not until January 2019 did same-sex marriage<sup>87</sup> become legally possible in Austria<sup>88</sup>.

### 3.4 Families Formed Using ART

Prior to 2015, French courts had consistently denied the recognition of cross-border surrogacy arrangements and any way of establishing a legal parent-child relationship between the intended parents and the children born abroad through surrogacy. In the cases of *Mennesson v. France* (2014)<sup>89</sup> and *Labassee v. France* (2014)<sup>90</sup>, the ECtHR considered whether the refusal to grant legal recognition in France to a parent-child relationship that had been legally established in the United States between the intended parents and the children born through surrogacy violated Article 8 of the Convention.

The ECtHR recognized that member states, in principle, have to be afforded a wide margin of appreciation due to the sensitive ethical questions raised by surrogacy arrangements and the lack of consensus in Europe on the lawfulness of such arrangements or the legal recognition of relationships between intended parents and children conceived abroad<sup>91</sup>. However, the Court stated that because the legal parent-child relationship is related to essential aspects of the individual's identity, the margin of appreciation afforded to France needed to be reduced<sup>92</sup>. In that case, by preventing both the recognition and establishment under French law of the legal relationship between the children and their biological father under French law, France had overstepped the permissible limits of its margin of appreciation<sup>93</sup>. The Court concluded that the children's right to respect for their private life had thus been violated<sup>94</sup>.

At the same time, in an advisory opinion<sup>95</sup> issued in 2019, the ECtHR stated that a child's right to respect for private life does not necessarily require the registration of the foreign birth certificate recognizing a legal parent-child relationship with the intended mother. According to the Court, depending on the circumstances of each case, other means, including the child's adoption by the intended mother, may also serve to ensure the child's best interests<sup>96</sup>. Furthermore, in the case of *D v. France* (2020)<sup>97</sup>, the Court held that in refusing to record the details of the child's foreign birth certificate naming the intended mother as the legal mother in the French register of births, France had not overstepped its margin of appreciation. According to the Court, the child's adoption by the intended mother constituted, in the present case, an effective and sufficient mechanism enabling the legal relationship between the intended mother and the child to be recognized<sup>98</sup>.

Some critics have highlighted<sup>99</sup> such differential treatment of intended fathers and intended mothers regarding the recognition of legal parent-child relationships that allows the direct legal recognition of the foreign birth certificate concerning legal paternity but requires an additional procedural step of adoption, as is done in Japan<sup>100</sup>, to have legal maternity recognized. As Mélanie Levy notes<sup>101</sup>, "Pushing for the registration of foreign birth certificates designating the intended genetic father, while accepting that the intended genetic mother must adopt her child, equates to gender discrimination, which is incompatible with Articles 8 and 14 ECHR." She also notes<sup>102</sup> that the additional procedural step of adoption "creates an obstacle for recognizing the social parent, who plays an equal role in the creation of nontraditional families."

#### 4. Conclusion

In the past few years, Europe has experienced the development of jurisprudence from the ECtHR regarding the protection of family members in nontraditional families. This jurisprudence could serve as an inspiration for the creation of safeguards for nontraditional family members in other countries, including Japan.

Although some<sup>103</sup> have underscored that the ECtHR has always taken a cautious approach in matters of family law, the Court has used various legal mechanisms, including the principle of proportionality, the doctrine of positive obligations, the European consensus doctrine, and the doctrine of margin of appreciation, to create a flexible and adaptive rights protection system to balance competing private and public interests and ensure equal treatment for all families. The margin of appreciation<sup>104</sup>, or the amount of discretion available to domestic legislators and courts, may vary—sometimes widely, sometimes narrowly—depending on the level of consensus among European countries on the issues and the significance attributed to balancing the competing rights. As Shai Dothan notes<sup>105</sup>, the margin of appreciation and emerging consensus are “competing doctrines,” and the ECtHR utilizes the emerging consensus to establish “the minimal human rights standards” all member states must follow.

In Japan, as recent case law has shown, courts tend to allow for a wide margin of appreciation that respects the policy choices of the Parliament when deciding whether an interference is proportionate and justified. Moreover, existing laws have been interpreted to fit the model of a traditional family, based on the premise that a two-parent family, with one male father and one female mother, is in the best interests of the children. That interpretation can prevent parents from enjoying equal parental rights due to their sexual orientation, gender identity, marital status, and/or ability to reproduce, as well as deny children the right to have a parent-child relationship legally recognized along with regular contact and visitation.

Japan’s courts do not have a legal instrument similar to the European Convention on Human Rights and its Article 8 to guide them in requiring the government to adopt measures to secure the right to respect for private and family life for nontraditional family members. However, the Japanese Constitution and its Articles 13, 14, and 24, combined with the legal mechanisms used by the ECtHR, do offer some possibilities. That trend has manifested in past cases concerning the discrimination against children born outside of marriage<sup>106</sup> and, more recently, decisions concerning same-sex marriage<sup>107</sup> and gender reassignment surgery<sup>108</sup>. Japan’s courts place significant importance on current social circumstances (*shakaiteki jōkyō*) when determining whether a provision lacks rationality (*gōrisei o kaku*) and violates human rights. For example, in the 2019 judgment<sup>109</sup> on the requirement for surgery to legally change one’s sex, the Supreme Court concluded that the social circumstances at that time were not sufficient to lead to a decision of violation of Articles 13 and 14 of the Constitution. In this judgment, the concurring opinions of two Justices highlighted, among other points, the recent efforts in schools and companies to accommodate transgender individuals based on their gender identity<sup>110</sup>. They also pointed out that the ECtHR had deemed

the surgical requirement a violation of the European Convention on Human Rights in the 2017 case of *A.P., Garçon and Nicot v. France*<sup>111</sup>. However, the concurring opinions stated that, despite these circumstances, it cannot be definitively concluded that the surgical requirement violates Article 13 of the Japanese Constitution, although it is undeniable that doubts regarding such violation exist<sup>112</sup>. On the other hand, in the 2023 judgment<sup>113</sup> on the same issue, the Grand Chamber of the Supreme Court held unanimously that the surgical requirement violates Article 13 of the Constitution. The Court considered various changes in social circumstances, including the enactment of the 2023 programmatic law<sup>114</sup> aimed at promoting understanding of the LGBTQ community and the aforementioned 2017 ECtHR case of *A.P., Garçon and Nicot v. France*. Within just a few years, the Supreme Court has changed its position and interpreted nearly identical social circumstances as evidence of a certain level of social consensus. This interpretation has justified a narrower margin of appreciation and led to the loss of rationality in the surgical requirement.

In order to fully understand the social and cultural differences between Japan and Europe, and to gain a deeper understanding of the minimal human rights standards or the common ground factor in Japan's case, further doctrinal analysis is necessary. However, such analysis is beyond the scope of this article. Nonetheless, the ECtHR's jurisprudence on the protection of family members in nontraditional families is undoubtedly significant and can serve as a source of inspiration for the development of Japan's jurisprudence.

Despite the delicate moral and ethical issues raised, Japan's courts should assume an important role in adjusting existing laws to the new social and family conditions in order to effectively protect the rights of children and the status of family members in nontraditional families.

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## Notes and References

- 1 A portion of this article was presented at the International Society of Family Law's 18<sup>th</sup> (Golden Jubilee) World Conference at the University of Antwerp, Belgium, on July 13, 2023, Session 2 "Changing Perspectives in National Family Law 4: Asia" (C.102).
- 2 In recent years, there have been several changes to the law, including the 2013 amendment to the Civil Code, which provided equal inheritance rights for illegitimate children, and the 2004 amendment to the Ordinance for Enforcement of the Family Register Act, which abolished discriminatory registration on the family register (*koseki*). See, e.g., Shigenori Matsui, "Never Had a Choice and No Power to Alter": *Illegitimate Children and the Supreme Court of Japan*, 44 GA. J. INT'L & COMPAR. L. 577 (2016). Furthermore, the Civil Code was amended in 2022 to abolish the waiting period for remarriage (Article 733) and to provide changes in the presumption of legitimacy (Article 772) and in the proceedings to rebut the presumption (Articles 774 to 778). See Minpō tō no ichibu o kaisei suru hōritsu

- [Act to Amend Parts of the Civil Code and Other Laws], Law No. 102 of Dec. 16, 2022 (Japan).
- 3 Mīnpō no ichibu o kaisei suru hōritsu [Act to Amend Parts of the Civil Code], Law No. 222 of Dec. 22, 1947 (Japan).
  - 4 Act for Implementation of J.Y. Interpretation No. 748, Laws & Regulations Database of the Republic of China (Taiwan), *available at* <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000008>.
  - 5 Concluding observations on the seventh periodic report of Japan, Nov. 30, 2022, CCPR/C/JPN/CO/7, para 8-11, *available at* [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FJPN%2FCO%2F7&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FJPN%2FCO%2F7&Lang=en).
  - 6 *Id.*
  - 7 *See, e.g.*, the statement made by Rahm Emanuel, the U.S. ambassador to Japan, on support from foreign missions for LGBTQI+ equality, May 12, 2023, *available at* <https://jp.usembassy.gov/statement-by-ambassador-emanuel-on-foreign-mission-lgbtqi-support/>.
  - 8 Seiteki shikō oyobi jyenda aidentiti no tayōsei ni kansuru kokumin no rikai no zōshin ni kansuru hōritsu [Act to Increase the Public Understanding of Diversity in Sexual Orientation and Gender Identity], Law No. 68 of June 23, 2023 (Japan).
  - 9 *See, e.g.*, the statement made by The Japan Alliance for LGBT Legislation (J-ALL), an organization that has been advocating for an LGBT anti-discrimination law in Japan, June 19, 2023, *available at* <https://lgbtetc.jp/news/2878/>.
  - 10 Shibuya ku danjo byōdō oyobi tayōsei o sonchō suru shakai o suishin suru jyōrei [Shibuya City Ordinance to Promote a Society in which Members Respect Gender Equality and Diversity], Ordinance No. 12, March 31, 2015 (Japan).
  - 11 Collaborative Study of LGBT Partnership Coverage in Japan, Niji Bridge, *available at* <https://nijibridge.jp>.
  - 12 *See, e.g.*, Tōkyōto patonashippu sensei seido [Tokyo Partnership Oath System] (2022), *available at* [https://www.soumu.metro.tokyo.lg.jp/10jinken/base/upload/item/list\\_municipality\\_category\\_4.pdf](https://www.soumu.metro.tokyo.lg.jp/10jinken/base/upload/item/list_municipality_category_4.pdf).
  - 13 Articles 13 (pursuit of happiness), 14 (equality under the law), and 24 (freedom of marriage).
  - 14 Tokyo, Osaka, Nagoya, Sapporo and Fukuoka.
  - 15 Sapporo Chihō Saibansho [Sapporo Dist. Ct.] March 17, 2021, TKC Law Library, LEX/DB, Ref. No. 25568979, held the ban unconstitutional. Osaka Chihō Saibansho [Osaka Dist. Ct.] June 20, 2022, TKC Law Library, LEX/DB, Ref. No. 25592785, held the ban constitutional. Tokyo Chihō Saibansho [Tokyo Dist. Ct.] Nov. 30, 2022, TKC Law Library, LEX/DB, Ref. No. 25593967, declared the laws to be in unconstitutional state (*iken jōtai*). Nagoya Chihō Saibansho [Nagoya Dist. Ct.] May 30, 2023, TKC Law Library, LEX/DB, Ref. No. 25595224, held the ban unconstitutional. Fukuoka Chihō Saibansho [Fukuoka Dist. Ct.] June 8, 2023, TKC Law Library, LEX/DB, Ref. No. 25595450, declared the laws to be in unconstitutional state (*iken jōtai*).
  - 16 *See, e.g.*, Tōkyōto satooya nintei kijun kaisetsu [Interpretation concerning the standards for certification of foster parents in Tokyo], March 31, 2022 (Japan), *available at* [https://www.fukushi.metro.tokyo.lg.jp/kodomo/satooya/seido/hotfamily/satooya/s\\_kijun.files/ninteikizyunkaisetu.pdf](https://www.fukushi.metro.tokyo.lg.jp/kodomo/satooya/seido/hotfamily/satooya/s_kijun.files/ninteikizyunkaisetu.pdf).
  - 17 *See, e.g.*, Dōsei kappuru netto de seishi zō [Increasing number of same-sex couples using donor sperm through the Internet], Yomiuri Shimbun, Osaka Chōkan, Sept. 20, 2021 (Japan), at 30.
  - 18 Teikyō seishi o mochiita jinkōjusei ni kansuru kenkai [Guidelines for the use of semen donor insemination], Nihon Sanka Fujinka Gakkai [Japan Society of Obstetrics and Gynecology], April 2006 (Japan), *available at* [https://www.jsog.or.jp/modules/statement/index.php?content\\_id=3](https://www.jsog.or.jp/modules/statement/index.php?content_id=3).
  - 19 Akitomo Shingae *et al.*, *Report on the Survey on Understanding the Actual Conditions of Childbirth and Childrearing among Sexual Minorities in Japan: From the Results of an Internet Survey Conducted in*

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- 20 *Id.* at 68.
- 21 *Id.* at 70-71.
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- 24 Nagoya Kōtō Saibansho [Nagoya High Ct.] Aug. 26, 2022, TKC Law Library, LEX/DB, Ref. No. 25572344.
- 25 Hanzai higaishatō kyūfukin no shikyūtō niyoru hanzai higaishatō no shien ni kansuru hō [Act on Support for Crime Victims, etc. Such as Payment of Crime Victims Benefit], Law No. 36 of 1980 (Japan), Art. 5, 1 (1).
- 26 Aki Tashiro, Dōsei patona izoku kyūfukin fushikyū to byōdō gensoku, 1583 JURIST 15 (2023).
- 27 Utsunomiya Chihō Saibansho [Utsunomiya Dist. Ct.] Sept. 18, 2019, TKC Law Library, LEX/DB, Ref. No. 25570471. Tokyo Kōtō Saibansho [Tokyo High Ct.] March 4, 2020, TKC Law Library, LEX/DB, Ref. No. 25570944. Saikō Saibansho [Sup. Ct], Mar. 17, 2021, 2nd petty bench, TKC Law Library, LEX/DB, Ref. No. 25569621.
- 28 *Id.*
- 29 *Id.*
- 30 *Id.*
- 31 Seidoitsusei shōgaisha no seibetsu no toriatsukai no tokurei ni kansuru hō [Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder], Law No. 111 of July 16, 2003 (Japan), *translated in* Japanese Law Translation [JLT DS], *available at* <https://www.japaneselawtranslation.go.jp/en/laws/view/2542/en>.
- 32 *Id.*
- 33 Tokyo Katei Saibaisho [Tokyo Fam. Ct.] Feb. 28, 2022, TKC Law Library, LEX/DB, Ref. No. 25591787.
- 34 On the other hand, the Japanese Supreme Court has reversed the decisions of lower courts and recognized a transgender man (FtM) as the legal father of a child born to his wife through donated sperm. The Court used existing laws concerning presumption of paternity—a child born in wedlock is presumed to be the child of the mother’s husband—to justify its decision, despite the fact that the transgender man and the child had no genetic connection. *See* Saikō Saibansho [Sup. Ct], Dec. 10, 2013, 3rd petty bench, TKC Law Library, LEX/DB, Ref. No. 25446084.
- 35 Tokyo Kōtō Saibaisho [Tokyo High Ct.] Aug. 19, 2022, TKC Law Library, LEX/DB, Ref. No. 25572339.
- 36 *Id.*
- 37 Saikō Saibansho [Sup. Ct], Oct. 19, 2007, 3rd petty bench, TKC Law Library, LEX/DB, Ref. No. 28132476.
- 38 Article 3, paragraph (1), item (iii) of the Act. *See supra* note 31.
- 39 Article 3, paragraph (1), item (iv) of the Act. *See supra* note 31.
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- 41 *Id.*

- 42 Saikō Saibansho [Sup. Ct], Oct. 25, 2023, grand bench, TKC Law Library, LEX/DB, Ref. No. 25573119. This is the twelfth time since 1947 that a legal provision has been declared unconstitutional by the Supreme Court. *See infra* note 106.
- 43 *Id.*
- 44 *Id.*
- 45 *Id.*
- 46 Osaka Kōtō Saibansho [Osaka High Ct.] Feb. 3, 2006, TKC Law Library, LEX/DB, Ref. No. 28112260.
- 47 Kyoto Katei Saibansho [Kyoto Fam. Ct.] Aug. 24, 2005, TKC Law Library, LEX/DB, Ref. No. 28112261.
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- 49 *Id.*
- 50 Shinji Nozawa, *Similarities and Variations in Stepfamily Dynamics among Selected Asian Societies*, 41(7) JOURNAL OF FAMILY ISSUES 913, 917-921 (2020).
- 51 *See, e.g.*, Marcelo de Alcantara, *Surrogacy in Japan: Legal Implications for Parentage and Citizenship*, 48 FAMILY COURT REVIEW 417-430 (2010); Marcelo de Alcantara, *National Reports: Japan, in INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL* 247-253 (Katarina Trimmings and Paul Beaumont eds., Hart Publishing, 2013).
- 52 Saikō Saibansho [Sup. Ct], March 23, 2007, 2nd petty bench, TKC Law Library, LEX/DB, Ref. No. 28130826, *translated in* Judgments of the Supreme Court, *available at* [https://www.courts.go.jp/app/hanrei\\_en/detail?id=883](https://www.courts.go.jp/app/hanrei_en/detail?id=883).
- 53 *Id.*
- 54 *Id.*
- 55 Seishokuhojoiryō no tekiyōto oyobi koreni yori shushōshita ko no oyakokankei ni kansuru minpō no tokurei ni kansuru hō [Act on Assisted Reproductive Technology Offering and the Special Provisions of the Civil Code Related to the Parent-Child Relationship of a Child Born As a Result of the Treatment], Law No. 76 of Dec. 11, 2020 (Japan), Art. 9, *translated in* Japanese Law Translation [JLT DS], *available at* <https://www.japaneselawtranslation.go.jp/en/laws/view/4367/je>.
- 56 Jens M. Scherpe, *The Present and Future of European Family Law* (Edward Elgar, 2016) 6-7.
- 57 Article 8 (1) states that everyone has the right to respect for his private and family life, his home and his correspondence. Article 8 (2) states that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Council of Europe, *available at* <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=005>.
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- 59 *Id.*, para 159.
- 60 *Id.*, para 164.
- 61 *Id.*, para 177.
- 62 *Id.*, para 185.
- 63 Legge 20 maggio 2016, No. 76 [Law No. 76 of May 20, 2016 (Italy)], *available at* <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2016-05-20;76>.
- 64 *See, e.g.*, Nazim Ziyadov, *From Justice to Injustice: Lowering the Threshold of European Consensus in Oliari and Others versus Italy*, 26 (2) INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 631(2019).
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- 68 App No. 47220/19 (ECtHR, July 6, 2021).
- 69 *Id.* para 14.
- 70 *Id.* para 58.
- 71 *Id.* para 59.
- 72 *Id.* para 61.
- 73 *Id.* para 74.
- 74 *Id.* para 76.
- 75 *A.H. and Others v. Germany*, App No. 7246/20 (ECtHR, Apr. 4, 2023). The judgment is available in French.
- 76 *O.H. and G.H. v. Germany*, App No. 53568/18 and 54741/18 (ECtHR, Apr. 4, 2023). The judgment is available in French and German.
- 77 *See* Legal Summary, Register of the Court, *available in English at* [https://hudoc.echr.coe.int/fre#\(%22itemid%22:\[%222002-14049%22\]\)](https://hudoc.echr.coe.int/fre#(%22itemid%22:[%222002-14049%22])).
- 78 App No. 19010/07 (ECtHR, Feb. 19, 2013).
- 79 *Id.*, para 145.
- 80 *Id.*, para 147.
- 81 *Id.*, para 148.
- 82 *Id.*, para 149.
- 83 *Id.*, para 151.
- 84 *Id.*, para 153.
- 85 Adoptionsrechts-Änderungsgesetz 2013 (AdRÄG 2013) [Adoption Law Amendment Act 2013] (Austria), *available at* [https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2013\\_I\\_179/BGBLA\\_2013\\_I\\_179.pdf](https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2013_I_179/BGBLA_2013_I_179.pdf).
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- 88 Since Jan. 1, 2010 two persons of the same sex may enter a registered partnership in Austria. *See* Eingetragene Partnerschaft-Gesetz (EPG) [Federal Act on Registered Partnership], Dec. 30, 2009 (Austria).
- 89 App No. 65192/11 (ECtHR, June 26, 2014). The judgment is available in French.
- 90 App No. 65941/11 (ECtHR, June 26, 2014). The judgment is available in French.
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- 101 Levy, *supra* note 99, at 170.
- 102 *Id.* at 177.
- 103 *See e.g.*, Scherpe, *supra* note 56, at 25-30, 124.
- 104 *See* Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, June 24, 2013 (entry into force on August 1, 2021).
- 105 Shai Dothan, *Judicial Deference Allows European Consensus to Emerge*, 18 CHICAGO JOURNAL OF INTERNATIONAL LAW 2, 397-400 (2018).
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- 107 *See supra* note 15.
- 108 *See supra* note 42.
- 109 *See supra* note 40.
- 110 *Id.*
- 111 App No. 79885/12, 52471/13, and 52596/13 (ECtHR, Apr. 6, 2017). *See* paras 124–135 and Article 61-6 of the French Civil Code. *See also supra* note 40, *tokubetsu kōkoku riyūsho*.
- 112 *See supra* note 40.
- 113 *See supra* note 42.
- 114 *See supra* note 8.

