

OH-EBASHI LPC & PARTNERS

NEWSLETTER 2023 Summer Issue

Articles

1 Business and Human Rights in Japan

Kochi Hashimoto



2 Diversity & Inclusion: LGBTQ+ Status in Japan

Daisuke Yamamoto



Oh-Ebashi Newsletter Editorial Team

➔ [Seigo Takehira / Partner](#)

➔ [Hajime Taniuchi / Partner](#)

➔ [Yuichi Urata / Partner](#)

➔ [Jason Jiao / Partner](#)

➔ [Takashi Hirose / Partner](#)

➔ [Hisako Matsuda / Registered Foreign Lawyer](#)

➔ [Miriam Rose Ivan L. Pereira / Counsel](#)

For inquiries, questions or comments, please contact us at newsletter_japan@ohebashi.com.

[Website] <https://www.ohebashi.com/en/> 



Business and Human Rights in Japan



Kochi Hashimoto
kochi.hashimoto@ohebashi.com

A. Introduction

What is the status of “business and human rights” in Japan? While there is a growing movement in Western countries to legislate on human rights and environmental issues, particularly in the supply chain, Japan has yet to pass a law on corporate responsibility to respect human rights in the supply chain and is instead taking a soft law approach on this issue.

In this article, I will present the current status of efforts in Japan to address business and human rights and how such efforts are actually working.

B. Overall Picture of Efforts in Japan to Respect Human Rights

Business and human rights began to attract international attention in 2011 when the United Nations adopted the Guiding Principles on Business and Human Rights (the “**UN Guiding Principles**”). In response, countries developed national action plans on human rights in supply chains, mainly in Europe and the United States (“U.S.”), such as the Modern Slavery Act 2015 in the United Kingdom, French Corporate Duty of Vigilance Law, German Supply Chain Due Diligence Act, Canada’s Modern Slavery Act, and the California Transparency in Supply Chains Act in the U.S. There has been a noticeable movement toward the legalization of due diligence in supply chains, mainly in Europe and

the U.S.

In October 2020, the Japanese Government formulated the “National Action Plan on Business and Human Rights (2020-2025)” (the “**Plan**”), which lists the following items as sectoral action plans that cut across matters related to the three pillars of the UN Guiding Principles (i.e., the State’s obligation to protect human rights, corporate responsibility to respect human rights, and access to remedy): labor, protection and promotion of children’s rights, human rights in the context of the development of new technologies, the rights and role of consumers, equality under the law (e.g., persons with disabilities, women, and sexual orientation and gender identity), and acceptance and coexistence with foreign nationals.

The government has been promoting the Plan to the industrial sector. A survey conducted in 2021 by the Ministry of Economy, Trade and Industry (“**METI**”) and the Ministry of Foreign Affairs of Japan on the status of human rights efforts in the supply chain of listed Japanese companies found that approximately 70% of the 760 companies that responded indicated that they have a human rights policy in place, with over 50% of the respondents answering that they have implemented human rights due diligence.

The government has published the “Guidelines on Respecting Human Rights in Responsible Supply



Chains” (the “**Guidelines**”)¹ in September 2022 while METI has published the “Practical Reference Materials on Respecting Human Rights in Responsible Supply Chains, etc.” (the “**Practical Reference Material**”) in April 2023.

The Guidelines provide a basic framework for soft law on business and human rights in Japan. As to the Practical Reference Material, while it is not an exhaustive document on business and human rights, it provides (a) key points to consider in formulating a human rights policy, and (b) reference examples of the implementation flow for identifying and assessing risks of human rights violations in the first step of human rights due diligence for companies that are going to take full-fledged initiatives to respect human rights.

In the next section, I will explain the Guidelines.

C. Guidelines on Respecting Human Rights

1. Overview

Based on the UN Guiding Principles, the OECD Guidelines for Multinational Enterprises, the ILO MNE Declaration and other international standards, the Guidelines were designed to help deepen the understanding of business enterprises in Japan and encourage their efforts by explaining in a concrete and easy-to-understand manner the activities that they are expected to undertake to respect human rights, and which should be tailored to their actual circumstances.

The Guidelines make no distinction on entity size or sector and are intended to cover all entities. Further, unlike the European Union’s proposed Corporate Sustainability Due Diligence Directive and rules enacted in several European countries, the Guidelines

do not directly address environmental due diligence. They do, however, mention that the UN General Assembly has declared access to a clean and healthy environment as a universal human right in 2022.

The scope of the efforts to respect human rights has been described to include the company, group companies, suppliers (companies on the supply chain and other business partners, without being limited to direct business partners), etc., in Japan and overseas. In the Guidelines, the “supply chain” includes both “upstream,” which relates to the procurement and securing of raw materials, resources, equipment and software for the company’s products and services, and “downstream,” which relates to the sale, consumption and disposal of the company’s products and services.

To fulfill their responsibility to respect human rights, the Guidelines require companies to (a) formulate a human rights policy, (b) conduct human rights due diligence (“**human rights DD**”), and (c) remedy cases where the companies have caused or contributed to an adverse human rights impact.

2. Formulation of a human rights policy

Companies are required to formulate a human rights policy that clearly indicates to their internal and external stakeholders their commitment to fulfill their responsibility to respect human rights.² This is closely related to a company’s management philosophy as it indicates the company’s basic approach to its overall efforts to respect human rights.³

In this context, the “human rights” to be respected by companies refer to internationally recognized human rights, including at least those expressed in the International Bill of Human Rights and the principles

1. A provisional translation of the Guidelines is available at https://www.meti.go.jp/english/press/2022/pdf/0913_001a.pdf.

2. *Id.*, p. 8.

3. *Id.*, p. 16.



concerning fundamental rights listed in the ILO Declaration on Fundamental Principles and Rights at Work.⁴ It should be noted, however, that these are only some of the major human rights and reference to and understanding of other international standards may also be required where necessary.

3. Human rights DD

Human rights DD refers to a series of steps where a company (a) identifies adverse impacts on human rights related to its corporate activities, (b) prevents or mitigates such impacts, (c) evaluates the effectiveness of its efforts, and (d) provides explanations and discloses information. The Guidelines indicate that companies should not stop once these four steps of human rights DD have been implemented, but rather, they should make it an ongoing process to prevent and mitigate adverse impacts on human rights while constantly engaging in dialogue with their stakeholders.⁵

4. Remedy

The Guidelines require companies to implement a remedy or cooperate in the implementation thereof when it becomes clear that they are causing or contributing to any adverse human rights impact.⁶

However, if a company's business, products or services are only "directly linked" to an adverse impact, such company is not required to play a remedial role or to even implement any remedies. Nevertheless, the Guidelines note that in this case, the company should still try to prevent or mitigate the adverse impact by working with the other companies that caused or contributed to such adverse impact.⁷ It was also pointed out that, in practice, it may be difficult in many cases to distinguish whether a case falls under the "potential" or "directly linked" category.

D. Future Developments

Since it has been pointed out that Japan is lagging behind Europe and the U.S. in the development of a legal system for this area of business and human rights, at the end of April of this year, a nonpartisan group at the Diet has reportedly decided to push the government to pass a law to require companies to conduct human rights DD. The group is aiming to submit the bill at the extraordinary session of the Diet in the fall. Companies should keep an eye on future developments concerning the said bill.

4. *Id.*, p. 9.

5. *Id.*, pp. 16-31.

6. *Id.*, p. 33.

7. *Id.*



Diversity & Inclusion: LGBTQ+ Status in Japan



Daisuke Yamamoto

daisuke.yamamoto@ohebashi.com

Japan is considered to be behind when it comes to the adoption of LGBTQ+ policies. In 2020, Japan ranked 34th out of 35 countries in the LGBTQ+ index for OECD countries.¹ Despite this, Japan is now beginning to show signs of change as will be discussed in this article.

A. Transgender Status in Japan

1. Constitutionality of the Gender Identity Disorder Special Cases Act

In Japan, the Gender Identity Disorder Special Cases Act is the only legally binding national law that relates to sexual minorities. This law sets forth five requirements for transgender people to change their gender in the family register system to the gender that conforms to their gender identity.

The requirements are that the person must: (a) be over eighteen (18) years of age, (b) not be married, (c) not have minor children, (d) be permanently sterilized,

and (e) have a physical appearance with genitalia that approximates that of the changed sex. These requirements have been criticized as being too strict for transgender people.

The Supreme Court has ruled that there is no violation of the Constitution concerning the requirement under item (b) in 2020,² item (c) in 2021,³ and item (d) in 2019.⁴ However, in another case concerning the requirement under item (d), the Supreme Court expressly stated in December 2022 that the case will be heard by the Grand Bench of the Supreme Court.⁵ Generally, Supreme Court decisions are rendered by a petty bench of five justices. However, when the Supreme Court rules on a new constitutional matter, all fifteen (15) Supreme Court justices, the Grand Bench of the Supreme Court, must hear the case in court. Thus, it is expected that the Grand Bench of the Supreme Court will make a new constitutional decision on the requirement under item (d).

1. OECD, "Over the Rainbow? The Road to LGBTI Inclusion," OECD iLibrary, 2020, at https://www.oecd-ilibrary.org/sites/8d2fd1a8-en/1/3/3/index.html?itemId=/content/publication/8d2fd1a8-en&_csp_ =08ffc7de174b956fd7b0b0d5b75479ab&itemIGO=oecd&itemContentType=book#figure-d1e9771.

2. Supreme Court, March 11, 2020, Shin Hanreikaisetsu Watch, Kempo No. 215 at http://lex.lawlibrary.jp/commentary/pdf/z18817009-00-012152298_tkc.pdf.

3. Y. Shibamura, "Japan top court rules gender alteration ban for parent of underage child constitutional," The Mainichi, December 3, 2021, at <https://mainichi.jp/english/articles/20211203/p2a/00m/0na/035000c>.

4. K. Doi, K. Knight, "A Silver Lining in Japan's Supreme Court Transgender Ruling," Human Rights Watch, March 1, 2019, at <https://www.hrw.org/news/2019/03/01/silver-lining-japans-supreme-court-transgender-ruling>.

5. The Yomiuri Shimbun, "Supreme Court to decide on constitutionality of gender reassignment surgery requirement," December 9, 2022, at <https://japannews.yomiuri.co.jp/society/crime-courts/20221209-75776/>.



2. Treatment and discrimination of transgenders in the workplace

In the so-called Ministry of Economy, Trade and Industry (“METI”) Transgender Toilet Use Restriction Case, which was a lawsuit filed by a transgender female employee who was restricted from using the women’s restrooms at her workplace, the Tokyo High Court decided that the METI restriction was not illegal.⁶ However, on June 16 of this year, the Supreme Court accepted the appeal on this case and decided to hear arguments in court.⁷ Since a court hearing before the Supreme Court is required to change a conclusion of the High Court, the Supreme Court is expected to issue its first ruling that discrimination against a transgender person is illegal.

B. LGB+ Status in Japan

1. Overview

A significant number of local governments have adopted Partnership Certification Systems⁸ because they want to recognize same-sex couples. However, these certification systems are not legally binding. Notably, the Japanese Prime Minister, Mr. Fumio Kishida, even recently said, “*I don’t think disallowing same-sex couples to marry is an unjust discrimination by the state.*”⁹

Although Japan has not introduced

anti-discrimination laws to protect LGBTQ+, LGBTQ+ is becoming an important political issue as evidenced by the dismissal of an aide to the prime minister who made discriminatory remarks.¹⁰ Furthermore, lawsuits on this topic are on the rise as further described below.

2. Status of LGBTQ+ lawsuits in Japan

In Japan, when a person in a male-female marriage has an affair with a third party, the innocent spouse has the right to claim damages against the said third party for breaking the family peace. Although Japan has not adopted a same-sex marriage act, in 2021, the Supreme Court recognized that this same right to claim damages applied to same-sex couples who got married abroad.¹¹

Regarding visas, in 2019, the Ministry of Justice issued a one-year resident visa to a Taiwanese man who lived with a Japanese man for twenty-five (25) years.¹² In 2022, one court granted a “designated activities visa,” which is a long-term resident visa, to an American man who was legally married to a Japanese man in the U.S.¹³

The Tokyo, Osaka and Sapporo High Courts are currently hearing lawsuits claiming that not allowing same-sex marriages is unconstitutional. Related to this, the Sapporo District Court's decision of 2021¹⁴

6. Kyodo News, “Japan court rules toilet use limit for transgender official legal,” May 27, 2021, at <https://english.kyodonews.net/news/2021/05/cb976699595f-japan-court-rules-toilet-use-limit-for-transgender-official-legal.html>.

7. K. Toyama, “Japan’s highest court to rule on transgender use of washrooms,” The Mainichi, April 26, 2023, at <https://mainichi.jp/english/articles/20230426/p2a/00m/0na/012000c>.

8. Marriage for All Japan, “Same-sex partnerships in Japan,” at <https://www.marriageforall.jp/en/marriage-equality/japan/>.

9. M. Yamaguchi, “Japan PM: Ban on same-sex marriage not discrimination,” AP News, March 1, 2023, at <https://apnews.com/article/japan-kishida-lgbtq-samesex-marriage-discrimination-43baf7af74baf0d8b908124b19eabf0e>.

10. Nikkei Asia, “Japan PM Kishida sacks aide over anti-LGBT comments,” February 4, 2023, at <https://asia.nikkei.com/Politics/Japan-PM-Kishida-sacks-aide-over-anti-LGBT-comments>.

11. S. Abe, “Same rights for same-sex couples, says Supreme Court,” The Asahi Shimbun, March 20, 2021, at <https://www.asahi.com/ajw/articles/14286286>.

12. M. Osumi, “Justice Ministry overturns deportation order for gay Taiwanese man without visa,” The Japan Times, March 22, 2019, at <https://www.japantimes.co.jp/news/2019/03/22/national/justice-ministry-overturns-deportation-order-gay-taiwanese-man-without-visa/>.

13. The Asahi Shimbun, “Editorial: Same-sex couples of Japanese and foreigners need equality in Japan,” October 11, 2022, at <https://www.asahi.com/ajw/articles/14739594>.



was encouraging as it was the first district court decision to clearly state that not allowing same-sex marriages violates the Equal Protection Clause of the Constitution, stating that *“the only difference between heterosexual persons and homosexual persons is their sexual orientation, which cannot be chosen or changed by one’s own will. In light of this, there should be no difference in the legal benefits that persons of any sexual orientation can enjoy.”* Recently, the Nagoya District Court similarly ruled that the refusal to recognize same-sex marriages violates the Equal Protection Clause (Article 14(1) of the Constitution), and Article 24(2) of the Constitution, which guarantees the freedom of marriage.¹⁵

On the other hand, an Osaka District Court decision¹⁶ concluded that not allowing same-sex marriages is not a violation of the Constitution, citing the fact that the original purpose of marriage is to bear and raise

children. The court also considered insignificant the disadvantages that homosexuals suffer from not being able to marry. In two other cases, the Tokyo District Court and the Fukuoka District Court ruled that the absence of any legal protections for same-sex marriages is an *“unconstitutional state”*¹⁷ or a *“state of unconstitutionality,”*¹⁸ but these courts did not categorically declare the restriction on same-sex marriages unconstitutional.

C. Conclusion

As shown in the discussion above, Japan is clearly starting to change. Soon, Japanese politicians, judges, practitioners and activists will have to respond to every issue concerning the status of LGBTQ+ in Japan.

Companies that wish to promote diversity and inclusion should continue to monitor the developments in Japan on this front.

14. LGBT & Allies Network, *“March 17, 2021: Sapporo District Court Rules Lack of Marriage Equality Violates Article 14 of the Constitution (English Translation of Court’s Decision),”* March 21, 2021, at <http://llanjapan.org/news/1701>.

15. The Asahi Shimbun, *“Nagoya court: Denial of same-sex marriage is unconstitutional,”* May 30, 2023, at <https://www.asahi.com/ajw/articles/14920465>.

16. LGBT & Allies Network, *“June 20, 2022: Osaka District Court Ruled Lack of Marriage Equality Does Not Violate the Constitution (English Translation of Court’s Decision),”* August 11, 2022 at <http://llanjapan.org/news/topics/1981>.

17. NHK World – Japan, *“Tokyo court upholds same-sex marriage ban but also offers hope for equal rights,”* December 5, 2022, at <https://www3.nhk.or.jp/nhkworld/en/news/backstories/2152/>.

18. E. Lies, *“Japan ruling on same-sex marriage disappoints but ‘a step forward,’”* Reuters, June 8, 2023, at <https://www.reuters.com/world/asia-pacific/japan-court-rules-that-not-allowing-same-sex-marriage-is-state-2023-06-08/>.

[Back to List of Articles](#) ➔

DISCLAIMER

The contents of this Newsletter are intended to provide general information only, based on data available as of the date of writing. They are not offered as advice on any particular matter, whether legal or otherwise, and should not be taken as such. The authors and Oh-Ebashi LPC & Partners expressly disclaim all liability to any person in respect of the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this Newsletter. No reader should act or refrain from acting on the basis of any matter contained in this Newsletter without seeking specific professional advice.