

The Lost Discussion on Sexual Difference in Marriage Law in Prewar Japan

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I. Introduction

If you ask a Japanese civil law scholar whether or not marriage between same-sex parties is allowed under the current Civil Code, they would likely give you a negative answer. Since the 1980s, when the first legal studies on same-sex couples appeared, a wall of silence isolates this topic from mainstream discussions. Few scholars dare to step into this legal quandary and those who do dare to venture into the unknown find themselves giving oversimplified explanations or avoiding clear statements. Nevertheless, even the apparent marriage equality supporters do not budge: there is no room for marriage between same-sex parties under the current Civil Code.

Outside academia, the situation is not any different. Until February 14, 2019, same-sex couples had not yet challenged the courts as to why marriage between same-sex parties should not be permitted under the current Japanese legal system. A glance at the legal arguments presented by the recent social-cause oriented lawsuits reveals that even lawyers, who should be freer than scholars to question issues for which they do not necessarily have a clear answer, succumb to the pressure imposed by that absolute silence. From the second half of the 20th century until the beginning of this century, most civil law handbooks did not mention sexual difference as a condition for legal marriage. Therefore, it seemed that the discussion concerning the sexual difference of contracting parties was something strange to Japanese family law. Given that the oldest

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reference to same-sex marriage found in the second half of the 20th century refers to Wagatsuma's handbook, which, in turn, cites Nakagawa, it seems then, that it all started with Nakagawa. However, Nakagawa does not leave us with more than an outdated legal theory (the “substantial intention theory [実質的意思説]”) condensed into an awkward metaphor: “*In the same manner people cannot marry a book, people cannot marry a person of the same-sex, because there would be no intention to marry*” (中川, 1942, p. 189).

This assumption – the very belief that the discussion on sexual difference as a condition for legal marriage is something relatively new – is, however, unwarranted. In fact, the sexual difference between the spouses was a rather standard topic mentioned in prewar civil law handbooks. In this paper, I summarize some of the discussions related to the restriction of same-sex marriages in the process of codification (II) and in the prewar civil law academy (III). Finally, I will make a few remarks as to the meaning of these findings (IV).

II. Sexual Difference in the Civil Code

Neither the Boissonade Code (1890) nor the Meiji Code (1898) has any provision restricting marriage between same-sex parties. Furthermore, this topic was not discussed in the minutes of the Codification Committee (法典調査会民法議事速記録). Therefore, outwardly, it seems that Meiji lawmakers have not even conceived the idea of such a thing as marriage between same-sex parties. However, if we take a step deeper into materials relating to the civil law handbooks of the Boissonade and pre-Meiji codes, we find that this was not the case: the Boissonade Code had a consistent structure denying the validity of marriages that, for some reason, had been contracted by same-sex parties.

The Statement of Reasons for the first draft of the Boissonade Code makes a clear reference the “marriage between two men or two women (両男又ハ兩女ノ間ノ婚姻)” in connection to the grounds for “inexistence (不成立)” of marriage provided for by Article 85, item (i): “*the marriage contracted due to mistaken identity or at a time of insanity shall be inexistent.*” It reads:

Are there any other cases of inexistence of marriage beyond these two? Since marriage is a community formed by men and women, it is obvious that a marriage contracted between two men or two women would be inexistent, therefore we need not spell it out. (民法草案人事篇理由書, 1888, p. 74-75)

From this passage, we may infer that in the Boissonade Code the grounds of inexistence were not circumscribed to what was clearly spelled out in the Code: in the legal system envisioned by this old code, the theory of marriage inexistence was supposed to work as a ‘safety’ valve for unwritten conditions such as gender or the number of spouses. Although the few passages discussing this topic fail to make it clear – partially because it seems the very concept of ‘marriage inexistence’ was not fully understood by Japanese scholars –, a brief look at the French civil law handbooks from that time reveals that the concept of inexistence was supposed to fit into the bundle of provisions regarding the validity of contracted marriages.

After the establishment of the *Code Napoléon*, the French legal academy built an unwritten principle to the effect that there shall be no nullity without text, i.e.: all grounds for nullity must be spelled out in the code (“*pas de nullité sans texte*”). This unwritten principle, however, would make it impossible to deny the validity of marriages not celebrated before the judge, marriages contracted without a valid consent from both parties, and marriages contracted between same-sex parties. In order to fix this problem that French scholars themselves envisaged a new concept, the notion of inexistence, to address all the ‘conditions’ lawmakers had ‘forgotten’ to spell out in the code. Inexistence was thus not the same as nullity, as Japanese scholars misunderstood it, but rather it was developed to supplement the concept of ‘nullity’, which was subject to the principle “*pas de nullité sans texte.*”

Drawing from French scholars – who ironically had rejected the concept of inexistence a few decades later –, the drafters of the Code Boissonade decided to spell out the two main grounds for inexistence: intention to marry (or valid

consent) and notification of marriage (civil celebration). As clearly put in the Statement of Reasons, lawmakers deemed unnecessary to spell out sexual difference out as grounds for inexistence because they believed that, following the French teaching, those grounds were not required to be limited to those listed in the code. Japanese scholars, however, misunderstood the concept of ‘inexistence’ as being a mere synonym for ‘nullity’ in French. In their minds, apparently, “inexistence” was a perfect synonym for “nullity” (奥田, 1893, p. 108). This misconstruction together with the relatively low importance given to the topic led lawmakers to a technical error: they decided to replace the word ‘inexistence(不成立)’ for ‘nullity(無効)’ and write down the principle “pas de nullité sans texte.”

Art. 778. Marriage is **void(無効)only in the following cases:**

- i) if one of the parties has no intention to marry due to mistaken identity or other cause; or
- ii) if the parties do not lodge notification of marriage(...).

By understanding the concept of “inexistence” as a perfect synonym for “nullity” and limiting all the grounds for “nullity” to those spelled out in Article 778, lawmakers made it technically impossible to deny the validity of marriages contracted by same-sex parties. Indeed, in retrospect, it is possible to argue that it would suffice to apply to the concept of “inexistence” with the same meaning it was used in France. Nevertheless, perhaps because the notion of “inexistence” had already been deemed to be equivalent to “nullity” in such a blunt manner, prewar civil law scholars took the discussion to a different level.

III. Sexual Difference in Civil Law

Regardless of the era (Meiji, Taisho or Showa), all authors start from the assumption that marriage is a union between a man and a woman. However, the legal grounds for blocking marriage between same-sex parties oscillated between two main positions. The first theory claims that sexual difference is an

unwritten requirement (hereinafter, “unwritten requirement theory”). The second position is that the lack of sexual difference between the parties results in a lack of intention to marry, which is spelled out in the code (hereinafter, “intention to marry theory”).

In the Meiji Era (1868-1912) the earliest reference to the matter after the promulgation of the Meiji Code was Kakihara’s handbook (柿原、1898-99). Kakihara opens the chapter about marriage law by defining marriage and thereby excluding same-sex couples from its scope. In his words,

No matter what kind of union is formed between a man and a man or a woman and a woman, there exists no marriage. From ancient times to the present, there are no examples of marriage contracted between same-sex parties. Needless to say, marriage can only be contracted between both sexes due to a natural need. In this regard, the legislator did not spell it out because such a provision would be useless. (柿原、1898-99, p. 137).

Although Kakihara was probably right in his assertion that lawmakers thought it was so obvious there was no need to write it down, he failed to notice the inconsistency such a construction would result with regards to the limitation on the grounds for nullity. As a matter of fact, Kakihara seems to ignore such limitation, even though Kenjiro Ume had already reaffirmed it in his “Essential of the Civil Code Vol. 4” (梅、1896-1901, p.114).

This disregard for the text of the law is also seen in Sakamoto’s lecture notes. In contrast to Kakihara who simply makes reference to a ‘natural need’, Sakamoto argues that marriage between same-sex parties would be contrary to a) the purpose of the institution which lies in reproduction, and b) public order and morality (坂本, p. 166). Indeed, in light of the view towards homosexuality back then, there would be room to rule a marriage void on grounds of violation of public order and morality if the reasons for nullity were not limited to the lack of marriage notification and intention to marry. Nevertheless, that was not the case, and this view was soon ‘challenged’ by Makino Kikunosuke. Makino also

excludes same-sex couples from the definition of marriage (牧野, 1908, p. 167-168). He does not stop there, however, equating gender to an intention to marry: *“If marriage is contracted between two men or two women.... such marriage is void because, obviously, there cannot exist any intention to marry at all.”* (牧野, 1908, p. 198).

In the first part of the Taisho Era (1912-1926) references to marriage between same-sex parties became scarce. Nevertheless, even though there is no mention to the topic, it is not possible to ignore Hozumi Shigeto’s “Digest of Family Law” (穂積, 1917). That is not only because Shigeto became one of the most renowned family law scholars from prewar Japan, but also because for the first time in the Japanese civil law scholarship, an author stated that the purpose of marriage was NOT reproduction:

The purpose (of marriage) is not always to conceive a child. That is why infertility has not been made a ground for divorce or nullity; marriages between people unable to have children or aged are not forbidden. (穂積, 1917, p. 61)

This view clearly influenced other scholars, who made sure to expresser their approval (柳川, 1924, p. 169; 外岡, 1924, p.114-115; 遠藤, 1924, p. 81, 和田, 1925, p. 19-20、森本, 1926, p. 44) and, sometimes, disapproval thereof (野上, 1928, p.118-119). Although it is still unclear whether it was a reaction from Hozumi’s audacious dissociation of marriage from reproduction or by the social boom in studies on homosexuality (or the scientific difference between genders), the fact is that a few years after that, the topic began to be discussed or mentioned in almost all civil law handbooks. In this period, sexual difference was relativized by women’s movements (婦人運動) and advancements in the medical field. Moreover, authors feared that science might put an end to ‘sexual differences,’ as such differences would be explained through causes embedded in social structures.

It is possible to note this scientific development in the first mention to

gender differences in this period. In his family law handbook (岡村, 1922), Tsukasa Okamura discuss for the first time a hypothesis wherein one of the parties is intersex (called “hermaphrodite [半陰陽]” at the time). Without presenting any reason or argument, Okamura does not refrain from clearly stating that in such cases there would be no need to prove the equivalence of sexes. According to him, proving that sex/gender was unknown would suffice (岡村, 1922, p. 96-97).

The first author to notice the connection between untying marriage and reproduction (or sexual intercourse) and allowing or not marriage between same-sex parties seems to be Mojuro Tonooka. The ‘solution’ found by Tonooka was to argue that “(although sexual intercourse) is not a factor absolutely necessary in marriage (...) the rights and duties that rise between the couple are always related to sexual-intercourse (Regulated Sexual Relation)”... therefore, “Since the institution of marriage or the union between the husband and the wife is based on the physiological difference between the sexes, marriage (can only be) a union between a man and a woman (... and) the love between same-sex parties could never turn into a marriage.” (外岡, 1924, p. 113-115). Nevertheless, Tonooka falls short of maintaining logical consistency with regards to the grounds for nullity: even though he does not ignore the limitations, he does not explain what would happen if a marriage were contracted between same-sex parties. One year later, after expressing a view similar to Okamura, Uichi Wada – likely because he was fully aware of this inconsistency – clearly stated that understanding sexual equivalence as grounds for nullity was merely his own opinion, something relatively rare in civil law handbooks even nowadays:

Although there is no specific provision in the Civil Code concerning same-sex marriage, i.e. marriage between men or marriage between women, such provision was merely omitted because it is obvious that the sex of the parties needs to be different as a marriage requirement. (The silence) does not intend to allow sexual equivalence between the parties. Indeed, also with

regards to nullity and annulment of marriage, there are no provisions saying that a marriage contracted between same-sex parties should be voided or annulled (...) Nevertheless, **I believe that** the marriage between same-sex parties **should be construed** as being void even though there is not a provision spelling it out in the code. (和田, 1925, p. 281)

This expression, “I believe that... should be construed as... (余は...と解する)” is not only unusual in the civil law writings in general, but also extremely abrupt in relation to Wada’s own style. It is an euphemistic way of saying that “although I cannot give a convincing explanation, my opinion is...”. Although there are many other issues – such as his views regarding intersex or feminism which are particularly important when discussing gender differences in marriage – to be addressed with regards to Wada’s work, delving into it would be out of the scope of this article.

In the end of the Taisho period, Arata Iwata finally established the interpretation that would become the standard method of denying the validity of marriage between same-sex parties until the end of the 20th century while keeping the consistency with the limitation on grounds for nullity: he argued that there would exist no intention to marry in case “the other party was of the same sex or of a neutral (sic) sex.” (岩田, 1926, p. 25-26). Nevertheless, Iwata only indicated the solution and did not go into any details as to why it should be construed like that. The first time something similar to the “substantial intention” theory appeared was in Hisayuki Nokata’s “Commentary on Family Law” (野上, 1928) in the beginning of the Showa Era (1926-1989). This theory is attributed to Zennosuke Nawagawa and became the basis for refuting intention to marry between same-sex parties – According to Nokata:

The intention to marry consists of the establishment of the civil status of ‘marriage couple (husband and wife; 夫婦)’, which is determined only by social views (...) marriage between same-sex parties is void because it is impossible to understand such intention as an intention to marry in

conformity with social views. (野方, 1928, p.159-160)

Indeed, Iwata, and for that matter also Makino two decades earlier, had already pointed out that the equivalence of sex between the parties would result in the nullity of their marriage due to lack of intention. Nevertheless, because Makino used the notion of “carnal mistake,” borrowed from the Statement of Reasons from the Boissonade code, that interpretation failed to explain the lack of validity in cases where the parties were not mistaken as to the sex of their spouses. In contrast to that, Nokata made reference to the “social view” of marriage, which, according to him, was the only means of determining the ‘contents’ of marriage, and consequently, the ‘content’ of the intention to marry. This passage itself is of extreme importance because it demonstrates that a) the so-called “substantial intention” theory is historically deeply related to refuting marriage between same-sex couples and that b) it cannot be necessarily attributed to Zennosuke Nakagawa’s family law doctrine (“law of personal status [身分法]”). Nevertheless, Nokata’s commentary also stands out with regards to his views on how the relationship between marriage and reproduction should be understood. In contrast with the wide acceptance of Hozumi’s view that reproduction was not a legal purpose of marriage under Japanese law, Nokata clearly stated that *“it cannot be generalized based on an exception that reproduction is not one of the purposes of marriage. That would be tantamount to saying that the spiritual union (精神的結合) is not one of the purposes of marriage because our code does not spell it out as grounds for divorce.”* (野方, 1928, p. 118-119).

Zennosuke Nakagawa, who supposedly created the “substantial intention theory”, only published his “Outline of the Law of Personal Status” in 1930 (中川, 1930). Although the “substantial intention theory” came to be understood as an essential part of the recognition of civil effects of marriage for unmarried couples – that was one of Nakagawa’s main contributions to Japanese family law –, in his original work, Nakagawa is only worried about distinguishing family relationships from patrimonial relationships. He does not really address

how the intention to marry should be construed or what should be its contents. The first time he refers to something similar to the “view commonly accepted by society (社会通念)” is in his civil law textbook published in 1933 (中川, 1933) in which he states that “(*the intention to marry*) is the intention to build a relationship that is considered as marriage according to normal social judgment (社会の正常的な判断)...” (中川, 1933, p. 55-56). Even though Nakagawa does not refer to Nogami, the lack of such a discussion in his previous work – he does not question the definition of the intention to marry in his later work either (中川, 1941) –, and the very fact that he only mentions marriage between same-sex parties in connection to the abovementioned passage indicates that he has not given further thought to that matter and is merely writing down a commonly accepted view.

In 1935, summarizing all the civil law doctrine and case law at the time, Kihachiro Takakubo’s “Overview of Legal Doctrine and Case Law – Vol 5-2: Family Law: Part 1” (高窪, 1935) clearly states that the most commonly accepted view (通説) is that “*the parties to marriage must be a man and a woman.*” The very reference to a “most commonly accepted view” indicates that, although there were no specific studies, the topic was being widely discussed by civil law scholars. This “pandect” of Japanese law also indicates the definition of “intention to marry” had not been discussed prior to Nogami’s commentary (高窪, 1935, p. 415).

Although there are a few other authors that should be mentioned in the Showa Era, it might be important to mention the only scholar who refused to accept Nogami’s view pointing out a fundamental issue within it: Shiko Yakushiji. In Yakushiji’s words:

Marriage must be a union between one man and one woman. Therefore, a marriage agreement made between same-sex persons runs afoul of the essence of marriage and shall be deemed void. Some scholars say that this is a case of nullity on the grounds of lack of intention to marry because there would exist no intention towards a marriage as it is commonly accepted by

society (...) Nevertheless, if a person who is biologically male is raised as a female due to a mistake of the parents and, believing to be a female, that person marries a male, that person's intention to marry would exist in light of the intention to marry as commonly accepted by society. Hence, such an agreement should be construed as being void on the grounds that it is contrary to the essence of marriage. (薬師寺, 1939, p. 418)

As soon as 1939, Yakushiji had already realized that explaining the marriage impediment concerning same-sex couples through the intention to marry as determined by a general 'common sense' was not enough to deny the validity of all marriages contracted by same-sex parties. He could probably not imagine that this "general common sense" regarding marriage would change and make his criticism even more pertinent. Nevertheless, he was unable to propose an alternate solution for preventing marriages between same-sex parties without ignoring the limitations on the grounds of nullity imposed by the Civil Code.

In 1942, Zennosuke Nakagawa finally fully adopted the "substantial intention theory," which would become the "most commonly accept view" for rest of the 20th century, and came up with his aforementioned metaphor according to which marrying a person of the same-sex would be like marrying science or marrying a book.

IV. Final Remarks

In his family law textbook, Omura Atsushi, reflecting a the commonly accepted view, points out that "this issue (marriage between same-sex parties) has barely been put into question in Japan," and, on a footnote, added that "Recently, the number of textbooks mentioning same-sex marriage is increasing." (大村, 2010, p. 134). The short analysis made by this study is enough to demonstrate that this widely accepted assumption is simply not true: the issue was widely discussed in prewar Japan, being mentioned in most civil law handbooks. More importantly, it demonstrates that the "substantial intention theory" was the only solution found by prewar scholars after a three-decade long

controversy.

Perhaps because marriage between same-sex parties stopped being discussed altogether, few or no civil law scholars made the connection between the “substantial intention theory” and same-sex marriage after the Second World War. The “substantial intention theory” was absorbed by Zennosuke Nakagawa’s family law theory, and its most important function became determining whether a *de facto* marriage exists or not. With the increasing criticism towards Nakagawa’s theory on *de facto* unions, the “substantial intention theory” lost its ruling position among civil law scholars who, failing to notice its connection to the same-sex marriage issue, criticized it as being completely arbitrary and proposed entirely new theories, which, in turn, do not provide legal grounds for denying the validity of marriage between same-sex couples.

It might be argued that this legal discussion ceased because of the new Constitution of 1946 that states in Article 24 that ‘marriage is contracted based only on the mutual consent of both sexes.’⁽¹⁾ If scholars and lawyers believed that Article 24 prohibited same-sex marriage, there would be no need to justify this prohibition in the Civil Code. Nevertheless, this prohibitive construction of Article 24 seems to have surfaced after the topic began to be discussed again in the 1980s, and I could not find any scholar who actually defended such interpretation⁽²⁾. As a matter of fact, as soon as 1949, Sakae Wagatsuma, the most eminent civil law scholar of postwar Japan, had already stated that the only purpose of this provision was to guarantee that that “the free will of the contracting parties does not be bound by others.” (我妻, 1949, p. 56).

Rather than an obstruction to same-sex marriage, by introducing gender

(1) Art. 24. Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.

(2) The earliest mention usually used as a reference is Minoru Ishikawa’s paper, one of the earliest legal papers on same-sex marriage in Japan. Notwithstanding, even in this paper, which is marked by what under current standards would be deemed discriminatory language, the author only says that Art. 24’s wording ‘could’ be used to exclude same-sex couples from the institution of marriage (Ishikawa, 1984, p. 60). It seems that such interpretation has never been truly espoused by any scholar, only mentioned as a possibility.

equality and individual dignity as basic principles of family law, the new Constitution makes it difficult to deny marriage between same-sex couples within the Civil Code. Indeed, under the Meiji Code, the civil status of a “husband” and that of a “wife” entailed different rights and duties, which were supposed to complement each other. In contrast to that, the new Constitution prevents the legislator from establishing such distinction, thereby dissociating the married status from the sexual difference between the spouses. Under the “substantial intention theory,” it would seem contrary to the constitution to divide the intention to marry into the “intention to become a husband” and the “intention to become a wife.”

Does this explanation mean that the current Japanese Civil Code allows marriage between same-sex couples? The answer to that question seems to be yet unsure. It does not seem to have a legal construction preventing marriages between same-sex couples from happening that does not fall into contradictions or one that do not arbitrarily impose the interpreter’s view on marriage. Apart from an scholarly interest in deepening our understanding of the structure of marriage law – which is of extreme importance –, what we need to ask ourselves is whether is it worthy to go through so much trouble, and fall into contradictions or bring back old views that had already been overcome a long time ago, only to prevent same-sex couples from contracting marriage or to deny the validity of same-sex marriages contracted outside of Japan.

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<Summary>

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‘Until very recently, there was almost no discussion concerning marriage between same-sex couples in Japan.’ I have stated that a few times in my prior works not only because it is a widespread belief among Japanese legal scholars, but because during my master research, I looked into it and, indeed, I did not find any papers on the topic. The scarce literature almost forced me to change my research topic. Nevertheless, three years after I finished my master thesis, I randomly stumbled upon a paper referring to a prewar civil law handbook that apparently mentioned something about the issue. I quickly learned that it was merely the end of the thread of a legal discussion that stretched back to the very codification process of the Japanese civil code. Bringing back this lost discussion, identifying its origins in French Law, rediscovering its place within Japanese family law, and demonstrating its implications became the topic of my doctoral degree. In this paper, I summarize part of my findings concerning prewar Japan in an attempt to shed some light on a matter that appears to have been avoided by legal scholars in Japan: can Japanese marriage law as provided in the Civil Code really be construed as requiring sexual difference as a substantial condition for marriage? First, I analyze references to the issue in the codifying process (II). Next, I describe the scholarly discussions carried out from the end of the Meiji Era to the early 1940s, before the end of World War II (III). Finally, I make some remarks as to the meaning this seemingly old controversy may have with regards to the current discussion (IV).

