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# Is Japan Ready to Legalize Same-Sex Marriage?

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*Cornell Law School, LL.M. 2014, ya96@cornell.edu*

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# Is Japan Ready to Legalize Same-Sex Marriage?

Yuki Arai\*

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## I. INTRODUCTION

2013 was a remarkable year for same-sex couples around the world. In addition to the historic decision of *U.S. v. Windsor*,<sup>1</sup> wherein the exclusion of same-sex couples from marriage under the Defense of Marriage Act<sup>2</sup> was held unconstitutional, and the following legislative changes in several states, more and more countries in the world, such as Uruguay, France, New Zealand, and England, opened marriage to same-sex couples. As globalization has enabled people in different regions to share values and ideas, the recognition of same-sex marriage seems to be expanding. In Japan, however, same-sex marriage is scarcely discussed, and the recognition of the rights of gays and lesbians has not advanced as in other parts of the world. Historically, gays and lesbians were not subject to religious or criminal persecution. Moreover, Japan is known to have

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<sup>1</sup> *United States v. Windsor*, 133 U.S. 2675 (2013).

<sup>2</sup> Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended in 1 U.S.C. § 7 and 28 U.S.C. § 1738C), *invalidated* by *U.S. v. Windsor*, 669 F.3d 169 (2d Cir. 2012).

held a rich culture of male same-sex activity in pre-modern times<sup>3</sup> – As opposed to today, when many people seem indifferent to, or unaware of, the presence of gays and lesbians in Japan.

This paper considers whether it is possible for Japan to legalize same-sex marriage in the near future. Section I will discuss the historical background of the treatment of gays and lesbians in Japan. It explains how male same-sex activity in pre-modern times differs from the concept of gay rights today. It also discusses the emergence of homophobia and the treatment of sexual orientation in postwar Japanese society, as well as the social meaning of marriage in Japan. Section II will describe the current legal institution surrounding same-sex relationships in Japan, emphasizing that the Japanese legal system does not provide for any formal institution for same-sex couples. It also discusses possible bases for legal challenges asking for marriage equality for same-sex couples. Section III will analyze the “step-by-step” approach that the Netherlands and England used to legalize same-sex marriage in 2001 and 2013 respectively. Finally, after comparing the situations of these two European countries, Section IV will consider the possibility for Japan to open marriage to same-sex couples.

## II. THE HISTORY OF SAME-SEX RELATIONSHIPS IN JAPAN

It is impossible to discuss same-sex marriage without understanding how gays and lesbians are positioned in society. This Section discusses the history of how gays and lesbians have been treated in Japanese society and introduces the general meaning of marriage in Japanese society.

### A. *Pre-modern Same-sex Relationships in Japan*

*Nanshoku*, also pronounced as *danshoku*, literally means male eroticism, and generally stands for the male same-sex relationships that existed in pre-modern Japan.<sup>4</sup> According to Hajime Shibayama,<sup>5</sup> whose primary field of study is male same-sex relationships in the Edo period (1603–1868),<sup>6</sup> same-sex relationships in pre-modern Japanese history<sup>7</sup> can

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<sup>3</sup> See generally GARY P. LEUPP, *MALE COLORS: THE CONSTRUCTION OF SAME-SEX RELATIONSHIPS IN TOKUGAWA JAPAN* 27 (1997). In this paper, pre-modern times refer to any era before modernization occurred and the Meiji period began.

<sup>4</sup> See generally HAJIME SHIBAYAMA, *EDO DANSHOKU KŌ [MALE-MALE SAME-SEX RELATIONSHIPS IN THE EDO PERIOD]* (1992).

<sup>5</sup> A Japanese writer, among whose most well-recognized pieces is *Edo Danshoku Kō* tha provides a precise examination about *nanshoku* in a cultural context.

<sup>6</sup> The Edo period stands for the period from 1603 to 1868 when the Tokugawa Shogunate controlled the nation, which was then divided into smaller regions each ruled by samurai serving for Tokugawa.

<sup>7</sup> In the paper, pre-modern time refers to Japanese history from the ancient times until the country experienced modernization in 1867.

be divided into three stages, based upon which people in a community played the primary role in each stage.<sup>8</sup>

The oldest recorded same-sex relationship in Japan surprisingly goes back as far as a thousand years ago, during the Kamakura period (1185–1333).<sup>9</sup> A form of male same-sex relationships in this stage is understood as the “*chigo nanshoku*” [child-based male-eroticism].<sup>10</sup> The *chigo nanshoku* had an aspect of a master-servant relationship between priests and young boys who were raised in temples under supervision of these priests.<sup>11</sup> Another form of the *chigo nanshoku* was widely observed in the *samurai* [warrior] class, where superior *samurai* would have sexual relationships with their pageboys. Significantly, these male same-sex relationships in the *samurai* class represented *chugi* [loyalty or devotion], which was not so much sexual attraction but rather loyalty from pageboys towards their masters that connected them both emotionally and physically.<sup>12</sup>

The second stage of pre-modern same-sex relationships is the heterosexual-type *nanshoku*, a concept established in the middle of the eighteenth century, wherein feminine-acting courtesan boys became the major object of adult male same-sex desire.<sup>13</sup> Same-sex relationships spread outside the Buddhist community and the *samurai* class towards the end of the Edo period (1603–1867), due to the cultural influence of the theatrical troupes and the integration of different social classes, mainly through marriages between the *samurai* class and the merchant class.<sup>14</sup>

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<sup>8</sup> SHIBAYAMA, *supra* note 4. The explanations of the three different stages of male-male same-sex relationships in this paper are from Shibayama’s study in this book unless expressly cited from different sources.

<sup>9</sup> The Kamakura period stands for the period from 1185 to 1333 when the first feudalism was established in the nation by Minamoto no Yoritomo, known to be the first Shogun.

<sup>10</sup> The literal meaning of *chigo* in Japanese is “little child.” The word includes the sense of affection.

<sup>11</sup> SHIBAYAMA, *supra* note 4. Priests would have sexual relationships with their trainee boys, as a means to demonstrate their affection towards the boys rather than to objectify them sexually.

<sup>12</sup> SHIBAYAMA, *supra* note 4, at 37. In these *chigo nanshoku*, the beauty of young boys was the focus. Existing records indicate that male same-sex relationships might have been considered superior to opposite-sex relationships at that time. LEUPP, *supra* note 3, at 30–31, 184–85. Buddhism was the dominant faith in the *samurai* society; and under Buddhist doctrine, women were not only secondary to men in terms of social status but also strongly believed to be likely to corrupt men. *See also* MIKITO UJIIE, *BUSHIDŌ TO EROSU [THE JAPANESE WARRIORHOOD AND EROTICISM]* 17 (1995).

<sup>13</sup> SHIBAYAMA, *supra* note 4, at 37. *See also* LEUPP, *supra* note 3, at 132.

<sup>14</sup> *See generally* UJIIE, *supra* note 12, at 96. Due to the nationwide industrial development by efforts of merchants, the merchant class gained financial power. Wealthy merchants would enter into familial relationships with the *samurai* class in order to

The lines, which were once strictly drawn between each social class (*samurai* on the top, followed by farmers with lands, craftsmen, and merchants), became shallower.

Towards the very end of the Edo period, around the former half of the nineteenth century, the traditional concepts shared in the two previous pre-modern *nanshoku* were gradually destroyed by the continuing interactions among different social classes and the commercialization of same-sex relationships.<sup>15</sup> As a result, the privilege and dignity of the male same-sex relationships in the *samurai* class was lost, and same-sex relationships began to be treated as mere entertainment in the cultural context.<sup>16</sup>

All these types of pre-modern same-sex relationships should not be considered the same as what we understand as same-sex relationships today, which generally refer to sexual desire or behavior involving or characterized by sexual attraction between people of the same sex. Unlike same-sex relationships as generally understood today, *nanshoku*, pre-modern Japanese same-sex relationships, were not much of a form of sexual relationships based on love, but they were rather a significant representation of the culture and traditions of the society.<sup>17</sup> *Nanshoku* emerged as an alternative to heterosexuality under the particular circumstances of pre-modern Japanese society. First, Buddhist doctrine regarded women as unclean, thus heterosexuality was seen as a dangerous and unpredictable emotion. In addition, there was a profound mistrust of opposite-sex relationships under the influence of the Confucian scholarship, which largely dominated the Tokugawa intellectual life, condemning such relationships as irrelevant and disruptive. Second, it was not common for men and women to interact with each other in the same community, especially in the higher social classes.<sup>18</sup> This long-term separation of communities of men from female company, and with the absence of powerful ideological constraints, led to widespread same-sex activity. The fact that it was among the same sex was not an essential factor for *nanshoku* as described above, and it was only after the modernization of society that people began to categorize *nanshoku* as a kind of same-sex relationship, ignoring how it developed under the

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enhance their social status, which was also beneficial for *samurai*, most of whom were in need of financial support. For this reason, many social norms that used to be separate and not shared between those two classes began to be integrated.

<sup>15</sup> LEUPP, *supra* note 3, at 167–93.

<sup>16</sup> One example of this is the expansion of the *kagama* services [male prostitutes; also referred to as *wakashu*] in the late eighteenth century. LEUPP, *supra* note 3, at 74.

<sup>17</sup> SHIBAYAMA, *supra* note 4. Today, many studies expressly demonstrate that male same-sex relationships played significant roles in establishing Japanese cultures (literature and arts in particular).

<sup>18</sup> SHIBAYAMA, *supra* note 4, at 43.

particular circumstances of Japanese society. While same-sex relationships today are understood as sexual orientation, an immutable nature that a person cannot change, *nanshoku* was something much closer to a lifestyle or culture. In sum, the nature of *nanshoku* was quite different from what we globally understand as same-sex relationships today. The reason why sexual desire toward the same-sex was so deeply rooted in Japanese society is still debatable.<sup>19</sup>

When it comes to general tolerance towards *nanshoku* in Japanese society, it is important to understand that there was no religious opposition to same-sex relationships, which is quite different from the history of countries where same-sex relationships were prosecuted as sodomy.<sup>20</sup> In Japanese history, same-sex relationships have never been faced with severe religious opposition.

### B. *Same-sex Relationships and Modernization*

Modernization took place soon after the Edo period ended after nearly three hundred years in 1868, and the Meiji period (1868–1912) began when Japan rushed into modernization under the control of a newly established imperial government.<sup>21</sup> Traditions and customs which had long been cherished in people's lives were replaced by Western values. In addition, the development of armed forces created a gender role for men to

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<sup>19</sup> Shibayama concludes his research with the opinion that Japanese people's traditional tendency to highly admire momentary beauty, such as the short life of a flower, can be related to the idea of admiring the also momentary beauty of boys. Indeed, the short period of time in a boy's life between being a child and growing into a man can be deemed quite similar to a flower's life. Leupp, on the other hand, argues that most pre-modern Japanese "men engaged in *nanshoku* because it was pleasurable, convenient, not forbidden nor regarded as immoral, and suggested by the nature of power relationships of the time."<sup>19</sup> He also opines from a completely different perspective that men are simply more androgynous than women, which may explain why in ancient civilizations the right to dress in the clothes of the opposite sex and institutionalization of same-sex behavior were often accorded to men rather than to women. LEUPP, *supra* note 3, at 201.

<sup>20</sup> See generally UJIE, *supra* note 12, at 4. Because Japanese society has never been dominated by a religion in which same-sex relationships are deemed as sin, gays and lesbians have not been openly exposed to religious opposition. The social circumstances, such as the separation of male and female members in society and the fact that the female population was much smaller than the male, are also said to have led to an increase in same-sex activity. After modernization, although Western values were largely imported into society, Christianity did not become a dominant religion in Japan. Thus, the Christian view that takes same-sex activity as sin was not spread in the society.

<sup>21</sup> GARY P. LEUPP, MALE HOMOSEXUALITY IN EARLY MODERN JAPAN: THE STATE OF THE SCHOLARSHIP 202 (Katherine O'Donnell et al. eds., 2006) ("A consensus developed within the Japanese ruling elite that Japan must absorb Western learning in order to obtain the respect of Western nations and to reverse the terms of the unequal treaties."). Westernization was strongly encouraged. Westernization seemed to have been the only means for Japan to survive without being terrorized by the powerful Western countries.

be physically and emotionally strong, for which the possibility of male corporeal beauty was removed.<sup>22</sup> The modern spirit emerging from such social changes led to the disappearance of *nanshoku*. The blind import of Western values can also be observed in the establishment of the modern legal system. In 1873, the Criminal Code, the Meiji Legal Code of 1873, made sodomy a criminal act under Article 266.<sup>23</sup> This was the first and only time in the history of Japanese law that same-sex activity was criminalized.<sup>24</sup>

It was towards the end of the Meiji period into the Taisho period (1912–1925), when the Westernized systems became prevalent in Japanese society, leading to negative treatment of same-sex relationships.<sup>25</sup> As a result, the understanding of same-sex relationships became identical to that of today. Therefore, same-sex relationships were suddenly faced with the possibility of oppression under the influence of Westernization and yet in the absence of religious or culturally-based reason.

### C. *The Post-war Understanding of Same-sex Relationships*

The defeat of Japan in WWII led to the American occupation, during which a new constitution was drafted along Western lines. Although anti-same-sex statutes and regulations were still common in many Western countries at that time, they were not introduced into

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<sup>22</sup> See JONATHAN D. MACKINTOSH, *HOMOSEXUALITY AND MANLINESS IN POSTWAR JAPAN* 8 (2010).

<sup>23</sup> MARK J. MCLELLAND, *HOMOSEXUALITY IN MODERN JAPAN—CULTURAL MYTHS AND SOCIAL REALITIES* 26 (2000).

<sup>24</sup> This statute, however, was soon eliminated in 1881 by supervision of Boissonade, the French scholar who worked as a counsel advisor for the establishment of the modern legal system in Japan. Social stigma against same-sex relationships was lacking in Japanese society, and, thus, the statute did not function in practice (as the number of arrests under this statute was very low. *Id.*

<sup>25</sup> See generally UJIE, *supra* note 12, at 148. See also MCLELLAND, *supra* note 23, at 24. A notable novelist representing the literary circles at that time, Ōgai Mori, presents same-sex relationships as a deviant and dangerous passion in an autobiographical passage as he looks back at his male-male sexual experience in school days in his widely recognized book, *Wita sekusuarisu* [*Vita Sexualis*] (1909). Mori refers to his own same-sex experience during his school days which took place in the end of the Meiji era, expressing unpleasantness, which indicates that by that time, Japanese elites had come to share the Westernized view that same-sex relationships were abnormal, as a surreptitious underground phenomenon brought to light by investigative journalists or moral reformers. For more details about Mori, see also LEUPP, *supra* note 3, at 203.

Japanese law.<sup>26</sup> The Japanese legal and political system kept ignoring same-sex relationship.<sup>27</sup>

From the late 1960's to the first half of the 1970's, Japanese society saw some influence from the European and American sexual revolution, though these movements were not quite effective in Japan.<sup>28</sup> Although the international gay and lesbian movements, which began in the U.S. in 1969, were seen in Japan, they were seen as a foreign issue, having little to do with Japanese people's lives.<sup>29</sup> Attempting to build a Western style movement in Japan, where a classification based on sexual orientation was traditionally unrecognized, was a dubious venture.<sup>30</sup> During the same period, same-sex relationships began to appear in manga fiction, novels, and pornography, but Japanese media avoided discussion of same-sex relationships in terms of legal reform or human rights, which generally took up considerable space in the U.S. and Europe.<sup>31</sup> The economic growth starting in the 1950's significantly added a new perspective to the gender roles in Japanese society, which also affected the social position of same-sex relationships. Japanese society has traditionally expected men to be masculine and strong and women to be

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<sup>26</sup> The primary purpose of the American occupation was to mitigate any future danger that Japan might resort to another war against the U.S., particularly considering the tension between the U.S. and the Soviet Union at that period. Therefore, not all the existing Japanese legal systems needed modification. *See generally* UJIE, *supra* note 12, at 148.

<sup>27</sup> MCLELLAND, *supra* note 23, at 27.

<sup>28</sup> The first Japanese gay and lesbian rights pressure groups such as OCCUR, Ugoku gei to rezubian no kai [organization of active gays and lesbians] were established in the 1970's. OCCUR, for example, placed its focus on changing terms to describe same-sex relationships, which were considered discriminatory, such as "okama" [men whose sexual aspects are feminine; the closest meaning in English would be "faggot"] and "onabe" [no-gender-normative women]. OCCUR demonstrated that the usage of these terms was related to homophobia in Japanese society. Although OCCUR might have been influential in shaping the view of Japan in international contexts, its following among Japanese gays and lesbians was very limited. *See* Wim Lunsing, *The Politics of Okama and Onabe: Uses and Abuses of Terminology Regarding Same-sex Relationships and Transgender*, in *GENDERS, TRANSGENDERS AND SEXUALITIES IN JAPAN* 82 (Mark McLelland & Romit Dasgupta eds., 2005).

<sup>29</sup> MACKINTOSH, *supra* note 22, at 37.

<sup>30</sup> MCLELLAND, *supra* note 23, at 245. McLelland refers to the Japanese culture as "unknown," indicating that sexual identity in Japan should not be regarded to the same extent as in Western countries, where same-sex relationships had been faced with religious oppression, unlike in Japan.

<sup>31</sup> MACKINTOSH, *supra* note 22, at 7. For example, the purposes of homophile magazines vary around the world. While their primary purposes are deemed to be education and political reform in the U.S. and social contacts promotion in Europe, in Japan, neither of these purposes seem to have been sought.



modest wives and mothers.<sup>32</sup> After the 1950's, this traditional gender role became linked to an image of men as a "salaryman," a good breadwinner and taxpayer.<sup>33</sup> The figure of the salaryman soon developed the ideal icon of fatherhood,<sup>34</sup> and gays, who did not fulfill this image, were, as a result, labeled as "failures" in society.

#### D. *History Concerning Lesbians in Japan*

Sexuality has almost invariably been seen from the male perspective in Japan.<sup>35</sup> This may result from a sort of male supremacy, which dominated Japanese society in pre-modern times, based on orthodox Buddhist doctrine that regarded women as unclean.<sup>36</sup> Likewise, academic studies concerning same-sex relationships have also been centered on male same-sex relationships, and records of female same-sex relationships are very limited.<sup>37</sup>

Towards the late 1970's, lesbians also began to gather some attention in the cultural context, though the entertainment exposure of lesbians was also less than that of gays. Some recent studies have shown that attitudes of heterosexual men are less antagonistic against lesbians than gays.<sup>38</sup> For this reason, heterosexual men will likely be more supportive of improving situations for lesbian relationships than gay

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<sup>32</sup> YOKO TOKUHIRO, MARRIAGE IN CONTEMPORARY JAPAN 79 (2010) [hereinafter TOKUHIRO, MARRIAGE].

<sup>33</sup> Futoshi Taga, *Rethinking Japanese Masculinities: Recent Research Trends*, in GENDERS, TRANSGENDERS AND SEXUALITIES IN JAPAN, *supra* note 28, at 160.

<sup>34</sup> *Id.* at 163. *See also* TOKUHIRO, MARRIAGE *supra* note 32, at 56.

<sup>35</sup> MCLELLAND, *supra* note 23, at 34.

<sup>36</sup> LEUPP, *supra* note 3, at 38. *See also* MCLELLAND, *supra* note 23, at 26. The male-perspective sexuality can even be observed in the Japanese language. For instance, "nanshoku" [classical term that literally means male-eroticism] is understood as male same-sex activity, whereas the contrasting term 'joshoku' [literally female-eroticism] refers to opposite-sex activity, not female same-sex activity. Similarly, 'homo prei' [gay play, referring to sex between men] is paralleled by "lezu prei" [lesbian play, referring to sex between a women and a straight man dressed in the female clothes].

<sup>37</sup> YASUNOBU AKASUGI ET AL., DŌSEIKON, DP HŌ WO SHIRUTAME NI [TO UNDERSTAND SAME-SEX MARRIAGE AND DOMESTIC PARTNERSHIP] 182 (2013).

<sup>38</sup> *See generally* DAVID A. MOSKOWITZ ET AL., HETEROSEXUAL ATTITUDES TOWARDS SAME-SEX MARRIAGE 333 (2010). It suggests a possibility that heterosexual men value lesbian relationships as more erotic and exciting compared with gay relationships, supported by the evidence showing that heterosexual men are particularly sexually aroused by lesbian pornography, while their female counterparts did not show any difference in their reactions to gay and lesbian pornography. *See also* Masaharu Takumi, *Dare ga dōseiai wo ken'o surunoka* [Who Dislikes Same-sex Relationships?] <http://blade24.eco.osakafu-u.ac.jp/~murasawa/takumi10.pdf> (last visited Apr. 3, 2014). Takumi points out a similar attitude of Japanese heterosexual men, especially the older generation, who negatively perceive gay relationships in particular.

relationships.<sup>39</sup> This distinction seems to have been completely ignored by activists who fight for rights of gays and lesbians, but they should make the most of it to establish rhetorical strategies for their lobbying activities. In Japan, it is heterosexual men, who are, most of the time, responsible for recognizing legal rights in the legislature. Future lobbying activities to these heterosexual men could emphasize the fact that many lesbian couples form stable, long-term relationships, as well as make an effort to present examples of gay couples that challenge stereotypical images of them as sexually deviant.

E. *Attitudes towards Sexual Orientation in Japanese Society*

In Japan, sexual orientation is considered to be both a very private issue and also a kind of hobby or play.<sup>40</sup> Since same-sex relationships are not a subject of overt discrimination, it is possible to conclude that people generally do not mind presenting them simply as a topic in entertainment, and society accepts this without causing any moral taboo about such inclusion.<sup>41</sup> Also, since they have never experienced overt opposition in society, most gays and lesbians have not been very interested in establishing their identities and advocating for the recognition of their rights affirmatively. For this reason, no significantly influential degree of gay and lesbian rights activism has taken place in Japan.

Most individuals in Japan tend to focus on the fact that a person is “gay” or “lesbian” and obliterate all of his or her other characteristics. In this sense, being gay or lesbian becomes a master trait for the person once their sexuality is known.<sup>42</sup> With this kind of general reaction in the background, many gays and lesbians are very reluctant to come out to the public. Given that Japanese society has treated same-sex relationships merely as an object of entertainment, it does not leave much doubt that many gays and lesbians feel that they have little to gain by becoming publicly associated with such an uncomfortable image given to them in the entertaining tone.

As mentioned, sexuality in Japanese society, whether opposite-sex or same-sex in orientation, is considered a highly private matter and not something to be divulged in public.<sup>43</sup> It is generally considered to be embarrassing to discuss sexuality, even among family and friends. This

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<sup>39</sup> *Id.* at 332–33.

<sup>40</sup> MCLELLAND, *supra* note 25, at 199.

<sup>41</sup> Interview with Mameta Endo, Representative of Idaho-net (Mar. 1, 2014). Idaho-net is an organization inspired by the international day against homophobia and transphobia (whose main activities are to change Japanese society for the better by reducing phobia against gays, lesbians, bisexuals, and transgenders).

<sup>42</sup> MCLELLAND, *supra* note 25, at 195.

<sup>43</sup> *Id.*

attitude towards sexuality is another reason that gay and lesbian rights movements have not been very active in Japan.

The recognition of legal rights for same-sex couples cannot be separated from the general attitude in society towards same-sex relationships. With more acceptance and understanding from society, recognition will become more possible. Homophobia is caused by stereotypical thoughts about gays and lesbians, which arise from a sort of opposite-sex proclivity cohere by heterosexual people treating gays and lesbians as inferior and abnormal, and as an out-group, in order to secure the superiority and normality of heterosexual people in society.<sup>44</sup> In Japan, the lack of understanding about same-sex relationships and the continuing usage of same-sex relationships only in the entertainment context, also contribute to this negative attitude towards gays and lesbians.<sup>45</sup> Therefore, only with an effort to overcome these realities of people's perceptions can the discussion of the recognition of legal rights for same-sex couples be fruitful.

With respect to gay and lesbian rights movements, it is unclear whether the Western model wherein advocacy for rights by improving unjust treatment is an appropriate strategy for activating rights advocacy for gays and lesbians in Japan.<sup>46</sup> Japanese gays and lesbians do not face systematic opposition from the government, churches, or the legal system, unlike many gays and lesbians in other countries.<sup>47</sup> They are not punished simply for being gay and lesbian; and, as long as one remains in the closet, it is possible to go on living a secret life. Hence, by outing themselves, gays and lesbians do not necessarily create more space and visibility but instead align themselves, in the public imagination at least, with a number of negative images and stereotypes that actually hinder their self-expression. As McLelland claims, for these reasons, movements by gays

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<sup>44</sup> See MACKINTOSH, *supra* note 22, at 39, 76.

<sup>45</sup> Informant, Endo, who is actively involved in lobbying for the recognition of legal rights for sexual minorities, points out that Japanese society will not change unless more people become aware about the reality wherein gays and lesbians are treated unequally. Also, in 2011, the former Tokyo Metropolitan Governor, Shintarō Ishihara, made the following comment as presenting his stance concerning the Tokyo Metropolitan Ordinance Regarding the Healthy Development of Youths, which aims at regulating the manga and anime industries: “we have got homosexuals casually appearing even on television. Japan has become far too untamed...I think homosexuals have something missing from them somehow. It may be something genetic. I feel sorry for them.” Also, watching a gay parade in San Francisco, he stated “I saw a parade made up of gays, and I really felt sorry for them. There were pairs of men and women, but it certainly did feel like they were deficient somehow.” See *Japan: Governor Should Retract Homophobic Comments*, HUMAN RIGHTS WATCH, <http://www.hrw.org/news/2011/02/01/japan-governor-should-retract-homophobic-comments> (last visited Apr. 23, 2014).

<sup>46</sup> MCLELLAND, *supra* note 23, at 4.

<sup>47</sup> *Id.* at 239.

and lesbians themselves seeking the recognition of their rights have been lacking in Japanese society.<sup>48</sup> However, when it comes to the issue of same-sex marriage, which will directly impact the daily lives of gays and lesbians who wish to have legal recognition with their partners, remaining silent will be unlikely to improve their situation.

#### F. *Marriage and Family*

There has been little discussion about same-sex marriage in Japan. This silence seems to result from social stigma against same-sex relationships caused by the traditional ideas regarding marriage, in addition to the homophobia discussed above.

Traditionally, gender images of men as masculine and strong breadwinners and women as modest wives and wise mothers have dominated people's minds.<sup>49</sup> Such images were created mainly by the establishment of the *ie seido* [family system] and the *koseki seido* [family register system]. The *ie seido* was established with the primary purpose to define obligations of household members to the male head, who held title to family property and had rights over and responsibilities for other family members.<sup>50</sup> Prior to the establishment of the *ie seido*, in 1871, the *koseki seido* started, in which all the citizens were registered as family units and placed under governmental control.<sup>51</sup> The *koseki seido* initially purported to fulfill the needs of conscription, but more importantly, this new registration system allowed the idea of the *ie seido* to spread widely. The registered paternal head of household, usually the eldest son in the family, would have patriarchal authority over the rest of the family. Under these two systems, a new social hierarchy emerged, which placed people in the order of age, gender, and position in the family.<sup>52</sup>

The strong connection between marriage and family, emphasized by the *ie seido* [family system], is not merely a relic of pre-war traditions but is also strongly related to Japanese dominant faith: the worship of ancestral spirits. For example, Kunio Yanagida<sup>53</sup> perceived the diminishment of a family lineage as a public wrong in his well-known treatise in 1907, stating that "lineage between one and his ancestors, in

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<sup>48</sup> *Id.*

<sup>49</sup> MACKINTOSH, *supra* note 22, at 9.

<sup>50</sup> Yoko Tokuhiko, *Delayed Marriage in Contemporary Japan: A Qualitative Study* 68–69 (April 2004) (unpublished Ph.D. thesis, University of Hong Kong) (available at <http://hdl.handle.net/10722/133985>) [hereinafter Tokuhiko, *Delayed Marriage*]; See also TOKUHIRO, MARRIAGE, *supra* note 32, at 17–18.

<sup>51</sup> Tokuhiko, *Delayed Marriage*, *supra* note 50.

<sup>52</sup> TOKUHIRO, MARRIAGE, *supra* 32, at 19.

<sup>53</sup> Kunio Yanagida (1875–1962) is one of the most significant anthropologists in Japanese history, whose study focused on Japanese folklore.

another word, the recognition of his *ie*, is no less than a relation between an individual and the state . . . and diminishing one's family [due to the lack of a successor] would make it difficult for him to prove his existence as a Japanese citizen."<sup>54</sup> Yanagida considered the continuation of a lineage as an important basis of supporting the state and also emphasized the importance of worshiping ancestral spirits. Although such emphasis on worship of ancestral spirits in the prewar period, represented by Yanagida's idea, was connected with nationalist fever leading to the war, worship of ancestral spirits itself is quite common among ordinary Japanese people even today.<sup>55</sup> Within this background, the idea of continuing one's family lineage through marriage is still commonly shared in Japanese society. Therefore, in Japan, marriage is never merely a private matter but also requires a deep consideration regarding family.<sup>56</sup>

The meaning of marriage itself also evolved at the same period, strongly influenced by the social hierarchy created by these two systems, the *ie seido* and the *koseki seido*. The function of marriage as the continuation of one's family lineage was emphasized<sup>57</sup> and, thus, the matching process was strictly controlled by family members through a form of arranged marriage, *miai*.<sup>58</sup> Free choice in marriage was hardly accepted, and not obeying the expectations of one's family was treated as an act of rebellion, something strongly discouraged. After the WWII, the

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<sup>54</sup> See generally Kunio Yanagida, *Jidai to Nosei [Time and Agriculture Planning]* 38 (1910), <http://kindai.ndl.go.jp/info:ndljp/pid/991509/1> (last visited Apr. 3, 2014). Another significant scholar, Nobushige Hozumi more affirmatively emphasized the importance of worship of ancestral spirits, perceiving it as the basis of Japan's national ideology in the Meiji period. He claimed that ancestor ritual is the origin of *ie*, society, and state.

<sup>55</sup> Most people visit their family graves regularly as an important family event, and some families have *butsudan*, a family ancestral shrine, at home and make offerings every morning. The author's family follows this custom, too and I do not think we are particularly religious. In general, worship of ancestral spirits is not perceived as a religious practice in Japan. It is rather just a custom or tradition without any religious meaning. The strong tie of family, the belief that one should emphasize his or her family the most, has been a commonly shared value in society.

<sup>56</sup> *Yuinō*, a Japanese traditional custom referring to exchange of engagement gifts, is a good example that illustrates a strong connection between marriage and family. In *yuinō*, both sets of parents of the couple gather and exchange gift items. *Yuinō* has significance as the introduction of the two families. The fact that many married couples, especially in cases where the husband is the elder son from a family in the countryside, eventually live with the husband's parents also shows that one cannot consider marriage as a completely separate concept from family.

<sup>57</sup> Tokuhiko, *Delayed Marriage*, *supra* note 50, at 69. See also TOKUHIRO, MARRIAGE, *supra* note 32, at 138.

<sup>58</sup> It was only after the 1960's that the number of love marriages exceeded that of arranged marriages for the first time. See Tokuhiko, *Delayed Marriage*, *supra* note 50, at 251. See also TOKUHIRO, MARRIAGE, *supra* note 32, at 17, 93.

*ie seido* was abolished, along with other prewar systems, while the *koseki seido* still remained. While the traditional idea of marriage may have been weakened in the last few decades, as increasing educational and career opportunities for women improved their social status, many people are still influenced by the strong tie between marriage and family.<sup>59</sup> As mentioned in Section I, gays and lesbians do not fall within any of the roles in marriage and family that are expected by society, which leads them to be considered as “failures” and subject to discrimination.

The difficulty gays and lesbians have with respect to coming out in Japanese society is deeply connected to the social pressure on single individuals to get married and form a family. Because marriage is considered a significant development for a person to be recognized as an adult or *ichininmae* [attaining adulthood] in society, massive pressure is put upon those who remain unmarried after a certain age, and this pressure also affects their parents.<sup>60</sup> Thus, although coming out to one’s family may ease the pressure from parents themselves wishing for their sons or daughters’ marriage, parents would still be bothered by inquiries about their adult children’s single status. Hence, when a gay or lesbian comes out to the family, he or she puts the family, not only him or herself, in a difficult position in terms of their social network.<sup>61</sup> This is one reason that gays and lesbians are quite reluctant to come out.

In Japan, moreover, marriage is not just a system for a loving couple to express their commitment and obtain legal rights and duties. Beyond an individual choice to marry a particular person he or she wishes, marriage also has a significance to continue one’s family lineage.<sup>62</sup> Therefore, this adds to the challenge of coming out given the fact that same-sex couples are unable to continue their family lineage through procreation.<sup>63</sup> It will likely cause majoritarian reluctance in Japanese

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<sup>59</sup> MCLELLAND, *supra* note 25, at 39. For instance, the vast majority of today’s young generation tends to follow a homogeneous life path, consisting of marrying “on schedule,” which is approximately the age of twenty-five to thirty. In ideal marital life, the wife quits her job and gives birth to children soon after marriage. Many married couples also live with their (in general the husband’s) parents. *See also* Tokuhiko, *Delayed Marriage*, *supra* note 50, at 69–71.

<sup>60</sup> *See* MACKINTOSH, *supra* note 22, at 231. In Japanese society, whether or not a young individual is married is one of the most frequently discussed topics in daily conversations, especially among their parents’ generation. Communities are highly interested in marriage of their young neighbors.

<sup>61</sup> MCLELLAND, *supra* note 25, at 198.

<sup>62</sup> Tokuhiko, *Delayed Marriage*, *supra* note 50, at 69.

<sup>63</sup> In Japan, regardless of regions (big cities or the countryside), the husband’s lineage is generally prioritized. For example, while married couples are required to unite their surname to either the husband’s or the wife’s under the Civil Code, 97% of the couples chose the husband’s surname in 2006. *See* Table 13, *Konin Dōkō no Tamenteki Bunseki [Pleiotropic Observation Concerning Marriage]*, THE MINISTRY OF HEALTH,

society to open the institution of marriage to same-sex couples, especially by the older generation, who mainly account for the voting population in Japan.<sup>64</sup>

In terms of systems, Japan may be a comfortable society for gays and lesbians to live in because its legislation takes a hands-off approach to same-sex relationships and, thus, same-sex couples are able to form relationships and enjoy their sexual liberties without fear of legal recrimination.<sup>65</sup> Nonetheless, many gays and lesbians consider Western nations better environments, where people can express their sexualities more openly.<sup>66</sup> The social circumstances in Japan described above, including homophobia and the strong relationship between marriage and family, lead to gays and lesbians being characterized as “failures.” Coupled together with a lack of sufficient experience by gays and lesbians of rights movements, this has all contributed to cause the frustration that gays and lesbians feel today.

Gays and lesbians in Japan can be categorized as a vulnerable group in society, although they have not been legally discriminated against. Specifically, because of the lack of opportunity to have their relationships formally recognized as explained in details in the next Section, gays and lesbians in Japan in fact face injustice and inequality. In order to discuss the possibility of legalizing same-sex marriage in Japan, this awkward, cold silence surrounding gays and lesbians existing in Japanese society must be carefully considered. In the next Section, the situation concerning same-sex relationships in the present Japan legal system is explained.

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LABOR AND WELFARE (2006),

<http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/tokusyu/konin06/konin06-2.html#2-8> (last visited Apr. 3, 2014). In Japan, where every citizen is registered by family units based on their surnames under the *koseki seido* [family register system], the choice of a surname in marriage has a significant social meaning that the one giving up his or her original surname leaves the family for good and enters the other’s family. Also, although legislation may enable same-sex couples to have access to artificial insemination, it will not be considered equal to the concept of “continuation” in the social context because Japanese society has historically emphasized the importance of the parent-child relationship based on natural procreation. See TOKUHIRO, MARRIAGE, *supra* note 32, at 29.

<sup>64</sup> In 2013, while the voting rate was 38% among those in their 20s, it was 74% and 63% among those in their 60s and 70s respectively (and Japan is one of the most aging societies in the world). *Senkyo Seido Sonota [Other Information Concerning Election]*, THE MINISTRY OF INTERNAL AFFAIRS AND COMMUNICATIONS (2013) [http://www.soumu.go.jp/senkyo/senkyo\\_s/news/sonota/nendaiabetu/](http://www.soumu.go.jp/senkyo/senkyo_s/news/sonota/nendaiabetu/) (last visited Apr. 3, 2014).

<sup>65</sup> MCLELLAND, *supra* note 23, at 213.

<sup>66</sup> See generally MCLELLAND, *supra* note 25, at 200.

### III. THE CURRENT SITUATION CONCERNING SAME-SEX RELATIONSHIPS IN JAPAN

This section introduces how same-sex relationships are positioned in the present Japanese legal system and explains the difficulties in daily life that same-sex couples have.

#### A. *The Present Legal System*

Same-sex marriage is not recognized under the current Japanese law.<sup>67</sup> Although there is no statute in Japanese law that expressly provides a definition of “marriage,” Article 24 of the Japanese Constitution, in pertinent part, stipulates that “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.”<sup>68</sup> Although it is controversial whether or not this statute intends to prohibit marriage between individuals other than men and women, the dominant theory today holds that such a marriage for same-sex couples would likely require an amendment of Article 24.<sup>69</sup> Regulation of same-sex marriage through registered partnership would be constitutional, but to date there have been no attempts at recognizing legal rights for same-sex couples.<sup>70</sup>

With this lack of legal recognition, same-sex couples residing in Japan face quite a few difficulties and inconveniences in their daily lives. Apart from the fact that same-sex couples have no means to legally prove

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<sup>67</sup> Unlike the U.S. where marriage is governed by state laws, in Japan, the Civil Code has a nationally uniformed control over marriage.

<sup>68</sup> NIHONKOKU KENPŌ [KENPŌ][CONSTITUTION], art. 24, para. 1.

<sup>69</sup> See Macarena Sáez, *Same-sex Marriage, Same-sex Cohabitation, and Same-sex Families Around the World: Why “Same” is so Different*, 18<sup>th</sup> Annual Congress of the International Academy of Comparative Law General Report, 19 AM. U. J. GENDER SOC. POL’Y & L. 1, 1 (2010). Some scholars claim that no amendment would be required to legalize same-sex marriage because Article 24 does not intend to limit marriage to only between a man and a woman; rather, the legislature simply did not suppose that same-sex marriage would ever be pursued when the Constitution was drafted in 1947. In fact, at that period, discussion about the recognition of same-sex marriage was not taking place outside Japan. In addition, the primary purpose of Article 24 in the Constitution was to ensure Japanese citizens freedom of marriage—denying the pre-wartime tradition in which individuals, women in particular, were forced to comply with the decisions of their families regarding marriage. See also Interview by Yuki Arai with Takako Uesugi, lawyer who is a member of Pātonāshipu Hō Netto [Partnership Law Japan] (Apr. 1, 2014). Pātonāshipu Hō Netto is a network that lobbies for a registered partnership act. The network primarily focuses on holding workshops and symposiums on current issues and possible activities leading to legalization. For more information about Pātonāshipu Hō Netto, see Partnership Law Japan, *About Us-Partnership Law Japan*, <http://partnershiplawjapan.org/aboutus/english> (last visited Apr. 21, 2014).

<sup>70</sup> Sáez, *supra* note 69, at 19. See also Teiko Tamaki, *Distribution of “Matrimonial” Property of Married, Cohabiting and Same-sex Couples in Japan*, 1 HŌSEI RIRON 41, 21 (2009).



their relationships to society, which is possible for opposite-sex couples through the legal institution of marriage, and they cannot enjoy spousal rights and benefits provided by law, such as inheritance rights and spousal deductions in taxation.

Same-sex couples are ineligible for most of the services that provide benefits for married couples.<sup>71</sup> For example, public housing (*kōei jūtaku*: apartments built and managed by the public housing corporations, intended to support families with low incomes) is generally not accessible to same-sex couples. *Kōei jūtaku hō* [the public housing law] limits tenants to those who have “families,” from which same-sex couples are excluded.<sup>72</sup> Similarly, it is not possible for same-sex couples to apply for a housing loan jointly.

Same-sex couples generally cannot act as each other’s surrogate in emergency situations or upon death.<sup>73</sup> For example, a same-sex partner cannot generally make important decisions regarding medical treatments, life extension measures and organ donations for a person, who is no longer able to express decisions by him or herself. Similarly, the surviving partner of a same-sex couple cannot be the beneficiary of the partner’s pensions and life insurance.

Additionally, the spousal visa is the legal status for a foreign resident whose spouse is a Japanese citizen. The term “spouse” in the Immigration Control and Refugee Recognition Act is more strictly examined than in the Civil Code, so that an actual relationship as a married couple as well as the legal status of marriage are required for a spousal visa (various other factors, such as the financial condition of the couple and whether the couple has a child, are also considered). Therefore, a Japanese same-sex couple legally married in another country is not recognized as a married couple under Japanese law.<sup>74</sup>

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<sup>71</sup> An increasing number of these services have recently become available also to couples in *jijitsukon* [common-law marriage].

<sup>72</sup> *Kōei jūtaku hō* art. 23 stipulates “[having] a family with whom the tenant plans to live or already lives.” And opposite-sex couples in common-law marriage are included in this definition of a family, while the official has expressly stated that same-sex couples are ineligible. *Kōei jūtaku hō* [Act on Public Housing], Law No. 193 of 1951, art. 23 (Japan).

<sup>73</sup> See Kō Kaneko (ed.), *Dōsei pātonāshipu ni kansuru giron* [Discussion About Same-sex Partnership] 7 SYNODOS (2013), <http://synodos.jp/society/6356> (last visited Feb. 18, 2014). It presents an example where the police did not tell a man in his thirties of his long-term partner’s sudden death at work because they were not a family. The partner’s family did not invite him to the funeral. In addition, he had no access to the deceased partner’s bank account, which was their shared financial resource. After the partner’s death, thus, there was nothing left for him.

<sup>74</sup> Only since 2009, the Ministry of Foreign Affairs has begun to provide *koninyōken-gubisho* [a legal document that proves the eligibility of the person for marriage] to those who wish to conduct same-sex marriage in another country, which enabled Japanese citizens to at least legally marry in a country where same-sex marriage

Although these and other inconveniences are significant for same-sex couples, these problems have not been widely recognized outside of gay and lesbian communities in Japan. Three minor political parties have modified their manifestos and now propose to recognize legal rights of sexual minorities, including same-sex couples, but none of them have presented any specific agendas so far.<sup>75</sup> Moreover, the present Japanese government, led by the Liberal Democratic Party of Japan (LDP),<sup>76</sup> is very conservative, especially towards issues concerning gender and family, as well as the recognition of legal rights for the vulnerable in society.<sup>77</sup> Therefore, an affirmative legislative movement concerning the recognition of legal rights for same-sex couples cannot be expected to take place anytime soon as long as the LDP dominates the majority.

### B. *Unique Alternative Measures*

In light of this background, alternative means for protecting same-sex relationships have been found and used by same-sex couples in Japan, primarily through contracts, adoption and incorporation.

First, same-sex couples can enter into a contractual relationship through a notary deed. The notary deed between same-sex partners usually stipulates that the couple will serve as surrogates for each other concerning important matters such as property management, nursing care, and medical decisions, all of which are recognized as spousal rights in the Civil Code as well as for couples in common-law marriage, as recognized in the case law.<sup>78</sup> A notary deed is strongly reliable because it can be validly executed only in a notary office with the notarization of a public

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is legal.

<sup>75</sup> For details of the manifestoes, see NEW KOMEITO, [https://www.komei.or.jp/policy/various\\_policies/pdf/manifeto2010\\_a4.pdf](https://www.komei.or.jp/policy/various_policies/pdf/manifeto2010_a4.pdf), JAPANESE COMMUNIST PARTY, [http://www.jcp.or.jp/seisaku/2010\\_1/sanin\\_bunya/2010-00-28.html](http://www.jcp.or.jp/seisaku/2010_1/sanin_bunya/2010-00-28.html), and SOCIAL DEMOCRATIC PARTY, [http://www5.sdp.or.jp/policy/policy/election/2010/manifeto2010\\_03.htm](http://www5.sdp.or.jp/policy/policy/election/2010/manifeto2010_03.htm) (last visited Feb. 19, 2014). They all state no more than that they “care about sexual minorities.”

<sup>76</sup> For more information about Lib Dems, see LIBERAL DEMOCRATIC PARTY OF JAPAN, <https://www.jimin.jp/english/> (last visited Apr. 5, 2014).

<sup>77</sup> For example, Lib Dems is the only political party, which explicitly dissents from the introduction of the system allowing a married couple to retain separate surnames, even though there has been strong public support for this system for the past several years.

<sup>78</sup> Although there is no statute in the Civil Code about common-law marriage, it is recognized in the case law. The Japanese Supreme Court considers common-law marriage as a quasi-marriage status, and, thus, both parties’ intent to get married in the future is required for a valid common-law marriage as well as a fact that they have remained a couple for an extensive period of time. This point differs from the definition of common-law marriage in American legal context. Some statutes concerning spousal rights are applicable by analogy to couples in common-law marriage.

notary,<sup>79</sup> and it effectively binds the couple. Ultimately, however, it depends on a third party's judgment whether or not to follow the notary deed. The use of notary deeds by same-sex couples remains limited due to the lack of knowledge and high expense of formation.

Second, same-sex couples can create kinship, family rights, and obligations through adoption. Typically, an older partner adopts a younger partner through a regular adoption arrangement. This creative technique of becoming a family is a loud secret in Japanese society,<sup>80</sup> which has historically been relatively tolerant of adoption.<sup>81</sup> An adoption of this kind, however, could be annulled as *kōjō ryōzoku* [harmful to public morals].<sup>82</sup> Where the purpose of the adoption system is to form a parent-child relationship, the use of this system solely to protect a same-sex relationship, may not be most appropriate, especially where the parent-child relationship assumes some level of protection versus equality in a marriage.

All of these alternative measures certainly would enable same-sex couples to enjoy some legal rights in the present legal system. However, couples are forced to project a false reality of their relationships in order to enjoy legal rights through systems designed for completely different purposes. The emotional burden placed upon same-sex couples in giving up honest recognition of their relationships through legal loopholes should not be ignored. Until a system intended to recognize legal rights for same-sex couples is established, this contradiction will not be resolved.

However, this measure would not sufficiently extend legal rights for same-sex partners, compared with the other measures mentioned above because the legal protection provided for common-law marriage is relatively limited. For instance, the Japanese Supreme Court has denied application of the statute concerning the distribution of property among married couples<sup>83</sup> to a case wherein a common-law marriage was annulled

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<sup>79</sup> The Minister of Justice appoints public notaries. Those who have more than thirty years' experience practicing as lawyers are generally appointed as public notaries.

<sup>80</sup> Sáez, *supra* note 69, at 19 ("Japanese people just know about this practice. Several websites briefly explain the procedure, and society seems content with the status quo.").

<sup>81</sup> The continuation of the family was prioritized in Japan, especially in the samurai society and in families who carry on the traditional arts. Under such a circumstance, it was common for many families to adopt (adult) children.

<sup>82</sup> MINPŌ [MINPŌ] [CIV. C.] art. 90. Although there is no information about how many adoptions have actually been annulled for this reason, interested parties, such as family members of a deceased partner and the Social Insurance Agency, could file a lawsuit seeking to invalidate the adoption to deny the heirship of the remaining partner.

<sup>83</sup> See Saikō Saibansho [Sup. Ct.] Mar. 10, 2000, no. 3, 54 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 71. In this case, the remaining partner was denied the right of succession to the property of her deceased partner.

by the death of one party of the couple.<sup>84</sup> Therefore, there is little merit for same-sex couples to have the common-law principle extended to their relationships.

C. *Legal Bases of Same-Sex Couples' Challenges to Exclusion from Marriage*

There has been no lawsuit filed by a same-sex couple asking for equal access to marriage in Japan.<sup>85</sup> In Japan, as the general understanding of Article 81 of the Constitution demonstrates, every court has the power of judicial review on the condition that it must accompany a specific case. For this reason, unless a case is filed wherein inequality of the exclusion of a same-sex couple from marriage is directly questioned, it is impossible to examine the constitutionality of the present legal institution of marriage that excludes same-sex couples. If there is one in the near future, either Articles 24 and/or 14<sup>86</sup> of the Japanese Constitution will likely be the basis for the challenge asking to change the current legal system that excludes same-sex couples from marriage.

First, with respect to Article 24, the primary issue will be whether the article limits marriage to between a man and a woman.<sup>87</sup> If the Japanese Supreme Court holds that Article 24 does not prohibit same-sex marriage, although such a decision is not legally binding on the parliament, the present laws and relating systems can be modified to open marriage to same-sex couples.

Sexual orientation can be considered a status that a person cannot change with his or her own effort, which is related to the person's social status.<sup>88</sup> Although there has been no case law that explicitly categorizes

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<sup>84</sup> MINPŌ [MINPŌ] [CIV. C.] art. 768.

<sup>86</sup> NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 14, PRIME MINISTER OF JAPAN AND HIS CABINET, [http://www.kantei.go.jp/foreign/constitution\\_and\\_government\\_of\\_japan/constitution\\_e.html](http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html) (last visited Apr. 3, 2014) ("All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin...").

<sup>87</sup> For example, a same-sex couple may file a lawsuit, claiming the unconstitutionality of the Family Registration Law, under which their registration of marriage is rejected. However, my informant, Uesugi, thinks that the current Japanese government considers same-sex marriage unconstitutional under Art. 24 because one gay couple residing in Tokyo had their document of marriage rejected recently and the administrator told them that their marriage was not admitted under Art. 24.

<sup>88</sup> See generally Tatsumi Hōritsu Kenkyūsho, *Shushi Kihan Handobukku: Kōhō-kei* [Handbook of Points and Rules: Public Law] 38 (2011). If sexual orientation is treated as "social status," discrimination based on it is generally subject to intermediate scrutiny. The intermediate scrutiny is generally applicable to discrimination based on sex or social status among the categories stipulated in Art. 14. Regarding the burden of proof, as the Japanese Supreme Court has not explicitly shifted the burden to the government in

sexual orientation as “social status,” in 1993, OCCUR<sup>89</sup> was awarded compensation for damages by the Tokyo metropolitan government in a case wherein members of OCCUR were denied the use of a metropolitan accommodation for their meeting.<sup>90</sup> This case was remarkable in that a court referred to gays and lesbians for the first time in Japanese legal history.

With respect to exclusion of same-sex couples from marriage, however, discriminating between people whose sexual orientation is towards the opposite sex versus the same sex can be perceived to be an unreasonable distinction. Therefore, it can be seen as discrimination based on “sex,” rather than on “social status” under Article 14. In terms of judicial scrutiny, however, this distinction may not be so significant because discrimination based on both “social status” and “sex” will likely be subject to intermediate scrutiny.<sup>91</sup>

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intermediate scrutiny in case law, the claimant contesting the constitutionality must prove that the statute or state action does not have a significant purpose or even if it does, the statute or state action is not substantially related to that purpose. By contrast, discrimination based on race and religion is usually subject to strict scrutiny, wherein a state must prove that the purpose of the statute or state action is essential and there is no alternative means to accomplish that purpose. The easiest scrutiny, the reasonable standard, is applicable for testing constitutionality of a statute or state action aiming at improving public welfare (which conflicts with an individual’s constitutional right). See NOBUYOSHI ASHIBE, *KENPŌ* [CONSTITUTIONAL LAW] 52 (Kazuhiko Takahashi ed., 2011).

<sup>89</sup> A Japanese organization advocating gay and lesbian rights. See Lunsing, *supra* note 28, at 82.

<sup>90</sup> See generally Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] Mar. 30, 1994, Hei 3 (wa) no. 1557, 1509 HANREI JIHŌ 65, 80. In the trial, the Tokyo metropolitan government used only the ordinance prohibiting men and women from accommodating in the same room to justify the rejection of OCCUR’s request for use in order to avoid a direct discussion about discrimination concerning Art. 14 of the Constitution. The government’s substantial reason for the rejection was, however, to avoid trouble with other organizations (prior to the rejection, OCCUR had trouble with a Christian group and a young boys’ soccer team that were using the faculty at the same time, both of which demonstrated strong opposition to gays and lesbians). The Tokyo District Court held the Tokyo metropolitan government unreasonably rejected OCCUR’s request—the court concluded that the metropolitan government failed to present reasonable grounds to apply the ordinance—thus, the metropolitan government was liable for the damage caused to OCCUR (under the Local Autonomy Law).

<sup>91</sup> Moreover, the Supreme Court of Japan made it clear that Art. 14 does not purport to limit categories of prohibited discrimination to those based on the stipulated factors. For this reason, it may be possible for a same-sex couple to directly claim discrimination based on sexual orientation without having to categorize it on an existing basis to establish a constitutional claim. The Ministry of Justice has recently devoted effort to recognizing sexual orientation as an important basis regarding discrimination. See Tomoya Ohno, *Dōseikon to Byōdōhogo* [Same-sex Marriage and Equal Protection], 17 KYŌIKU-KEI BUN-KEI NO KYŪSHŪCHIKU KOKURITSU DAIGAKU RENGOUKAN RONBUNSHŪ [KYŪSHŪ AREA COLLEGIATE NETWORK OF EDUCATIONAL THESES] 10, 10 n.3 (2009).

Under either American intermediate scrutiny, or Japanese strict rational scrutiny, the claimant must prove that the government does not have a significant purpose for the statute or state action in question, or even if it does, the statute or state action is not substantially related to that purpose in order to contest the constitutionality.<sup>92</sup> Therefore, in a lawsuit wherein a claimant contests the constitutionality of the present marriage system under Article 14, he or she must first prove that the governmental purpose of the present legal institution of marriage, which excludes same-sex couples, is not significant. Second, even if the purpose is significant, the claimant can claim unconstitutionality by arguing that to limit marriage to opposite-sex couples and exclude same-sex couples is not substantially related to the purpose. The purpose of the present legal institution of marriage can be considered the preservation of the traditional value that one should continue and, thus, respect the family lineage through marriage. Although traditional values supported by the majority in a society need not necessarily be abandoned as outmoded, since those traditions generally represent what the society has preserved as important values reflecting its culture, to preserve them solely because of their traditional status should not be legitimate justification for upholding unequal treatment towards a group in the society, who has been disadvantaged by those traditions.<sup>93</sup> With respect to this point, Forde-Mazrui argues that:

Traditionalists assume that, on balance, continuing traditions is more likely to have good consequences than changing them. . . [The fact that a] social practice has been in existence for considerable time does not reveal whether circumstances have reached a point at which retaining the tradition is doing more harm than good . . . Many traditions have reflected prejudicial attitudes inconsistent with contemporary notions of equality.<sup>94</sup>

Therefore, in Japan, while the traditional value of marriage itself may be cherished, the idea to preserve it cannot serve as a significant state interest. Furthermore, limiting marriage to opposite-sex couples will be unlikely to survive intermediate scrutiny as substantially related to that

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<sup>92</sup> Tatsumi Hōritsu Kenkyūsho, *supra* note 88, at 38.

<sup>93</sup> Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 310 (2011).

<sup>94</sup> *Id.* Forde-Mazrui also explains that “[e]ven if opposite-sex marriage has been dominant in our society, . . . [a]ny time-tested experience would . . . also support . . . other relationships” and emphasizes that traditions may not be preserved merely because of their time-tested experience.” *Id.* at 310.

state interest, even if the preservation of the current value of marriage is determined to be significant.

If the emphasis on natural procreation is withdrawn, the core idea behind the traditional value of marriage that one should respect his or her family, especially ancestors, as described in detail earlier, can still be accomplished while allowing same-sex couples to enter the institution of marriage. Presently, marriage already does so for opposite-sex couples, who are able to marry regardless of their procreative ability. Thus, preserving traditional values will unlikely be adversely affected by opening marriage to same-sex couples. Given this, homophobia is a possible reason for exclusion of same-sex couples from marriage. Once discussion about same-sex marriage begins in Japan, supporters of same-sex marriage must emphasize this point to deny the substantial relation between the purpose of the present marriage system and the limitation of marriage to opposite-sex couples.

Other than directly contesting the constitutionality of the present legal institution of marriage that excludes same-sex couples, it is also possible to contest whether or not a particular legal system is applicable to same-sex couples. For example, it is possible for a cohabiting same-sex couple to claim that public housing should be accessible to them, not only to opposite-sex couples. This kind of legal challenge will in fact cost less time and expense for a claimant than filing a constitutional lawsuit, which is often avoided due to the great expense and low probability of winning.<sup>95</sup>

Although the legal barriers preventing same-sex marriage seem low, social acceptance towards same-sex marriage is yet undeveloped. The relationship between marriage and family dominates the general view towards marriage and this value does not seem to be changing anytime soon. Whether the legal status of same-sex marriage can easily be changed, the introduction of registered partnership can certainly be accomplished within the present legal system. With this situation in Japan in the background, the next Section studies how the Netherlands and England, which legalized same-sex marriage by using a “step-by-step” approach in 2001 and 2013 respectively, succeeded in both cultivating a legal foundation and advancing social acceptance to welcome same-sex marriage.

#### IV. WHAT IS NECESSARY TO LEGALIZE SAME-SEX MARRIAGE?

This section explains the approach that England (England and Wales in this paper; “England” hereinafter) and the Netherlands used in order to legalize marriage for same-sex couples in 2001 and 2013

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<sup>95</sup> See generally ASHIBE, *supra* note 88, at 52. For example, in general, a claimant bears the burden of proof in a challenge to discrimination subject to intermediate scrutiny, which often causes difficulty to the claimant.

respectively. The purpose of studying the situations in these two European countries is to seek the conditions that appear necessary for a country to legalize same-sex marriage.

#### A. Comparative Approach

The Netherlands was the first country in the world to legalize same-sex marriage.<sup>96</sup> It also has both a parliamentary cabinet system and a bicameral legislature, like Japan.<sup>97</sup> Also, England is a country that shares significant similarities with Japan in terms of geographical characteristics and political structure.<sup>98</sup> Both Japan and England are islands, and their sizes are about the same. England also has a parliamentary cabinet system and a bicameral legislature. For these reasons, the Netherlands and England are chosen for comparison. Of course, differences of social structure in each country cannot be ignored. However, taking these similarities into consideration in studying how these countries have legalized same-sex marriage may prove helpful in addressing what Japan should consider should it chose to open marriage to same-sex couples.

Professor Kees Waaldijk, the chief scholar of the Dutch movement towards equal treatment of same-sex families, proposes that states generally take a “step-by-step” approach to open marriage to same-sex couples.<sup>99</sup> According to Waaldijk, the states that already legalized same-sex marriage have taken the following three steps: (1) decriminalization of same-sex activity initiated by the repeal of sodomy laws; (2) enactment of antidiscrimination laws protecting gays and lesbians; and (3) culmination in the eventual legalization of same-sex marriage.<sup>100</sup> Waaldijk suggests that making small changes towards the final recognition of same-sex marriage is essential for a state to open marriage fully for same-sex couples and that any legislative change advancing the recognition and acceptance of same-sex marriage will only be enacted if that change is either perceived as small or sufficiently reduced in impact by some

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<sup>96</sup> Sáez, *supra* note 69, at 2.

<sup>97</sup> For more detail of the country information about the Netherlands used in this paper, see *About the Netherlands*, DUTCH EMBASSY IN JAPAN, <http://japan.nlembassy.org/you-and-netherlands/about-the-netherlands.html>. See also *The Kingdom of the Netherlands Kiso Data*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, <http://www.mofa.go.jp/mofaj/area/netherlands/data.html#part2>.

<sup>98</sup> *Id.*

<sup>99</sup> Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-marriage, and Semi-marriage for Same-sex Couples in European Countries*, 38 NEW ENG. L. REV. 124 (2004).

<sup>100</sup> Kees Waaldijk, *Small Change: How the Road to Same-sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437, 440 (Robert Wintemute & Mads Andenæs eds., 2001).



accompanying minor legislative changes that reinforce the condemnation of same-sex marriage.<sup>101</sup>

This approach may have been successful, as there are times that a once unacceptably radical value needs to be widely recognized before society as a whole accepts it. His hypothesis is, however, based on European countries where many, if not all, cultural and social aspects are similar. Since the meaning of marriage in a society creates a significant difference concerning the possibility of the legalization of same-sex marriage, while following his approach in this article's comparative study of the Netherlands and England, the cultural differences between these two European countries and Japan regarding how people perceive marriage will also be considered. Therefore, the following three points will be discussed with respect to each country: (1) the legal and social treatments of gays and lesbians, (2) events concerning the legalization of same-sex marriage, and (3) the social meaning of marriage.<sup>102</sup>

Both the Netherlands and England took a step-by-step approach to legalizing same-sex marriage. The first and second steps of Waaldijk's approach seem to be quite significant in order to cultivate a social value that gays and lesbians should be treated equally in countries where same-sex activity used to be prosecuted as a crime. The impact of the legislation in bringing about public awareness that any discrimination based on sexual orientation is prohibited was significant. Along with this improvement of the legal status of gays and lesbians, rights movements by gays and lesbians themselves were also quite active both in the Netherlands and England,<sup>103</sup> which enhanced social support for same-sex marriage.

Regarding the meaning of marriage, in both Dutch and English societies, marriage is generally seen as a matter of an individual's choice. People consider marriage as a legal institution to enjoy spousal benefits and duties as well as a social status, through which they can express their life-long commitment to their partners.

In Europe, moreover, the regional movement towards protection and recognition of same-sex relationships is extremely advanced. First, Article 21 of the Charter of Fundamental Rights of the European Union (the "EU Charter") stipulates that "any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or *sexual orientation*

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<sup>101</sup> *Id.* at 439–40.

<sup>102</sup> *Id.* at 437, 439.

<sup>103</sup> For more information about gay and lesbian rights movements in the Netherlands and England, see *The Netherlands*, U.S. DEP'T OF STATE, <http://www.state.gov/j/drl/rls/hrrpt/2006/78830.htm>; *The Gay Rights Movement*, BBC ARCHIVE, [http://www.bbc.co.uk/archive/gay\\_rights/](http://www.bbc.co.uk/archive/gay_rights/).

shall be prohibited.”<sup>104</sup> As this explicit anti-discrimination clause demonstrates, steady progress towards more favorable treatment of gays and lesbians has been made in Europe as a whole.<sup>105</sup> Second, the case law of the European Court of Human Rights (ECHR) plays a significant role in the harmonization of European legal regimes in the field of family law by establishing minimum standards that can be applied to any member state.<sup>106</sup> Although the case law is not always consistent due to the necessary compromises caused by the difficulty of uniting various cultures and social structures of the member states, the European community has demonstrated autonomy in its interpretation of human rights to be protected.<sup>107</sup>

In *Karner v. Austria*,<sup>108</sup> the ECHR made it clear for the first time that distinction between opposite-sex and same-sex unmarried couples in the enjoyment of rights is discrimination against a same-sex relationship, not

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<sup>104</sup> 2000 O.J. (C 364) 1, 13, available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

<sup>105</sup> Kees Waaldijk, *Towards the Recognition of Same-Sex Partners in European Union Law: Expectations Based on Trends in National Law*, in LEGAL RECOGNITION OF SAME - SEX PARTNERSHIP. A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 635, 640 (Mads Andenaes & Robert Wintemute eds., 2001) (stating that “the EU is gradually recognizing same-sex relationships [*sic*] in law”).

<sup>106</sup> The ECHR in Strasbourg is where equality claims of same-sex partners in the member states often turn as a last resort after having their claims rejected by their national courts or the European Court of Justice (ECJ). See Robert Wintemute, *Strasbourg to the Rescue? Same-Sex Partners and Parents Under the European Convention*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW, *supra* note 105, at 437, 713.

<sup>107</sup> See Bea Verschraegen, *The Right to Private and Family Life, the Right to Marry and to Found a Family, and the Prohibition of Discrimination*, in LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE: NATIONAL, CROSS-BORDER AND EUROPEAN PERSPECTIVES 255–70 (Katharina Boele-Woelki & Angelika Fuchs eds., 2012). In 2010, for example, the European Court of Human Rights ruled that the right to marry protected by Art. 12 of the ECHR did not require member states to introduce same-sex marriage:

[T]he main source of increased equality for same-sex couples in Europe will be the national legislatures and courts. Only when sufficient change has occurred in the member states, with respect to a particular issue, will the Court identify a “European consensus” and require dissenting member states to comply with it... The Court could be said to be a mirror that reflects the light of human rights consensus into the darker corners of Europe. Same-sex partners...in countries that lag behind and “emerging consensus” on legal recognition of same-sex partnerships could find that Strasbourg [referring to the Court] will, eventually, come to the rescue. See generally Kees Waaldijk, *Small Change: How the Road to Same-sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW, *supra* note 105, at 437, 728.

<sup>108</sup> App. No. 40016/98, Eur. Ct. H.R. July 24, 2003, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61263>.

just against a gay or lesbian individual, who is protected in isolation from his or her partnership, and that a weighty reason may be required for justification for such different treatment.<sup>109</sup> Furthermore, as Toner explains, protection of the traditional family may be a permissible reason to defend such different treatment, but it will now be an uphill battle to establish this and it is made clear that this kind of argument cannot and should not be used to justify any and every difference between same-sex and opposite-sex couples. . . [T]he “protection of the traditional family” and marriage could not justify differential tenancy succession protection [on the facts of *Karner v. Austria*].<sup>110</sup>

Moreover, EU law has traditionally strengthened the rights of migrant families, ensuring that family units can stay together when moving across borders within the EU.<sup>111</sup> However, although there was serious debate as to whether same-sex relationships should be included in the concept of “family”, the 2006 implementation of the law on EU citizens’ migration rights,<sup>112</sup> which was deemed to be a good opportunity to clarify the concept of “family,” ended up as a compromise that did not deliver much progress for the recognition of legal rights for same-sex couples.<sup>113</sup> Nonetheless, the situation surrounding same-sex couples in Europe as a whole is becoming more favorable than it was before.<sup>114</sup>

In sum, the Netherlands and England seemed to have been ready for change when they legalized same-sex marriage. The two societies were more accepting of opening marriage to same-sex couples than they had been before, in part due to the increase of public awareness about the difficulties with which same-sex couples had to deal, and the result that

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<sup>109</sup> Helen Toner, *Migration Rights and Same-Sex Couples in EU Law: A Case Study*, in LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE: NATIONAL, CROSS-BORDER AND EUROPEAN PERSPECTIVES 285, 292 (Katharina Boele-Woelki & Angelika Fuchs eds., 2012).

<sup>110</sup> *Id.* at 293.

<sup>111</sup> *Id.* at 285.

<sup>112</sup> Directive 2004/38, O.J. (L 158) 77 Apr. 30, 2004, available at <http://www.refworld.org/docid/4a54bbb0.html>.

<sup>113</sup> Toner, *supra* note 109, at 286-287 (explaining that ““spouse” in Article 2 was left undefined, even though there was serious discussion about whether same-sex spouses should be included”, and concluding that “the question was too sensitive and contentious to be addressed explicitly in the legislation.”).

<sup>114</sup> Toner, *supra* note 109, at 308. In addition to the movements described, the International Commission on Civil Status (CIEC), a European intergovernmental organization whose goal is to solve civil status problems arising among different states in Europe, has elaborated the Convention on the Recognition of Registered Partnerships. Verschraegen addresses issues arising when individuals are registered in another state or whose registered partnership has been dissolved in another state. Intergovernmental movements to advance the recognition of legal rights for same-sex couples are outstanding in Europe. Verschraegen, *supra* note 107, at 255, 260.

more people began to consider that the enjoyment of the symbolic value of marriage should be expanded to same-sex couples.<sup>115</sup> Legislative foundations were also established to welcome same-sex couples into the legal institution of marriage without major confusion, since registered partnerships had already been introduced as an interim measure. In comparing the experiences in the Netherlands and England with that in Japan, Japan seems far away from being ready for the legalization of same-sex marriage. The next part explains the differences between these two European countries and Japan, and why the opening of same-sex marriage may be more difficult in Japan.

#### V. THE POSSIBILITY FOR JAPAN TO LEGALIZE SAME-SEX MARRIAGE

Both the Netherlands and England preceded the recognition of same-sex marriage by making small legislative changes rather than one radical change. They both began with the decriminalization of same-sex activity and then enacted anti-discrimination laws applicable to gays and lesbians. When tolerance towards gays and lesbians had permeated society, they moved to the establishment of registered partnerships providing some initial legal rights to same-sex couples and then gradually reduced the gaps between marriage and registered partnership. This incremental approach helped gain growing social acceptance for opening marriage to same-sex couples. With these steps as the basis, the legalization of same-sex marriage was finally accomplished. Therefore, the legalization was in fact a relatively small change in both legal and social contexts so that the impact on people seemed more acceptable. Comparing the situations of these two countries with that of Japan, this Part discusses the possibility for Japan to legalize same-sex marriage.

Waldijk's approach seems to fit a society where gays and lesbians have been the subject of historic discrimination. Both the Netherlands and England fall within this category because same-sex activity used to be criminalized and there was also religious discrimination against gays and lesbians in England. In Japan, on the other hand, gays and lesbians have not really been persecuted either legally or religiously, as discussed in Parts I and II. Therefore, the first two steps of Waldijk's approach are both missing in Japan. Same-sex activity was never criminalized in Japan, so decriminalization is not required. Additionally, there are no laws treating gays and lesbians in a discriminatory way, so anti-discrimination laws have not been enacted. Thus, increasing public awareness about the difficulties that same-sex couples have to deal with in their daily lives and gaining support for change may be much harder to develop. In fact, in today's Japanese society, the issue of same-sex marriage is hardly

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<sup>115</sup> In addition to the influence of decriminalization of same-sex activity and enactment of anti-discrimination legislation, affirmative gay and lesbian rights movements in the Netherlands and England contributed to increasing public awareness.

discussed. Because of their unawareness and ignorance of the necessity for change, most people are indifferent to the issue of same-sex marriage.

The absence of previous discrimination also caused the silence of gay and lesbian rights movements in Japan.<sup>116</sup> One informant, Endo, points out that Japanese gays and lesbians have not felt firm motivation and necessity to claim the protection and recognition of their rights because they have never been faced with overt discrimination legally or religiously.<sup>117</sup> Also, because sexuality is an extremely private matter that is rarely discussed in public, gays and lesbians are generally reluctant to advocate for the recognition of their rights.<sup>118</sup> However, same-sex couples in Japan in fact feel injustice and inequality because of the lack of opportunity to have their relationships formally recognized, just as do same-sex couples in any other society where their legal rights are not recognized. Thus, it is expected that Japanese society will face the issue of the recognition of legal rights for same-sex couples, and that demand for an affirmative legislative movement will grow in the near future.

Given this, the establishment of a registered partnership system designed for same-sex couples should be the first step.<sup>119</sup> While the legal recognition of same-sex marriage is generally considered to require an amendment of Article 24 of the Constitution, registered partnership can be introduced with just the enactment of a new law under the present legal system.<sup>120</sup> As there are many issues to address concerning the recognition of same-sex relationships (e.g. parenting rights, pensions and inheritance),

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<sup>116</sup> See Part I in this paper for more about the gay and lesbian right movements in Japan. The fact that there are alternative legal loopholes for same-sex couples to enjoy at least some legal rights (adoption and notary deeds) may be another reason for the inactiveness of group movements.

<sup>117</sup> See Endo, *supra* note 41. In addition to establishing idaho-net, a Japanese organization advocating for International Day Against Homophobia and Transphobia, Endo actively participates in lobbying to improve gender equality in Japanese society.

<sup>118</sup> See Section I *infra* for details.

<sup>119</sup> The Dutch style registered partnership that is available for both opposite-sex and same-sex couples does not seem to be demanded in Japan. In order for the introduction of a registered partnership system to emphasize the gap between the new system and marriage, it must raise public awareness about the exclusion of same-sex couples from marriage, and, therefore, provide an opportunity for society to reconsider the current value of marriage and whether such a value should still be maintained, preventing the accomplishment of marriage equality. To design a registered partnership system only for same-sex couples will likely make the gap between opposite- and same-sex couples in marriage more clear. See also Uesugi, *supra* note 69.

<sup>120</sup> Some scholars suggest that an amendment of Art. 24 of the Constitution is not necessary for the legalization of same-sex marriage; the author agrees. As explained in Part II, the only purport of Art. 24 is to deny the pre-war value that did not provide individuals, women in particular, freedom of choice regarding marriage. Thus, it is possible to interpret that Art. 24 does not intend to limit marriage to between a man and a woman.

establishing registered partnerships with limited legal protections compared to marriage and then carefully extending the range of protections seems the most reasonable path to follow. In fact, both the Netherlands and England devoted much effort to gradually making registered partnership closer to marriage as a legal institution, which seemed to work well in both countries.

Japanese registered partnerships should be limited to same-sex couples. First, the Dutch registered partnership that is available to both opposite-sex and same-sex couples does not seem to be highly demanded in Japanese society, where the value of marriage is emphasized and other forms of relationships (including common-law marriage, which is in fact legally and socially considered “quasi-marriage”) often face social stigma as inferior to marriage.<sup>121</sup> Second, in order for the introduction of registered partnership to emphasize the reality wherein same-sex couples have no access to marriage and to raise public awareness, it is better to institute registered partnership as a “marriage-like” system for same-sex couples. The introduction of such registered partnerships will be an opportunity for society to reconsider the current value of marriage and whether such a value should be maintained despite preventing the accomplishment of marriage equality by same-sex couples.

In order to establish a registered partnership system, however, powerful movements by both the legislature and private groups that support the recognition of same-sex relationships are essential. In the Netherlands and England, the regional movements to harmonize the legal recognition of same-sex couples by intergovernmental organizations such as the ECHR seem to have placed significant pressure on the governments to adopt same-sex marriage. An affirmative effort of this kind is unlikely to be made by the present Japanese government, which is already reluctant to recognize any legal rights for same-sex couples.<sup>122</sup> Moreover, because East Asia lacks a regional intergovernmental organization, such as the EU in Europe, there is little incentive for international harmonization.<sup>123</sup> If

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<sup>121</sup> See TOKUHIRO, MARRIAGE, *supra* note 32, at 87. See also Uesugi, *supra* note 69. Uesugi explains that *Pātonāshippu Hō Netto* aims at establishing a registered partnership system available both to opposite- and same-sex couples, but their primary intent is only to solve other problems concerning marriage all together, such as the movement to allow couples to retain separate family names (which has been struggling for more than eight years since it was first suggested in the parliament due to opposition from Lib Dems).

<sup>122</sup> For details regarding the reluctant attitude of the Liberal Democratic Party of Japan, see Part II in this paper. There was one lesbian member of the Diet (Kanako Otsuji; her term expired in July, 2013); she has been the only one who came out about sexuality in the Japanese parliament. See Endo, *supra* note 41.

<sup>123</sup> There is the Association of Southeast Asian Nations (ASEAN) in Japan’s neighboring region, but ASEAN primarily focuses on the development of economic situations in the Southeast Asia and rarely deals with human rights issues.

more countries legalize same-sex marriage, however, the problem of international law (whether a same-sex marriage in a foreign country should be recognized as marriage in Japanese law or not) may arise, and the expectation of Japanese legislation to address same-sex marriage may be greater.<sup>124</sup> Gays and lesbians in Japanese society, therefore, will have to deal with lobbying activities and efficient usage of social media proactively in order to gain public support.<sup>125</sup>

While the legal introduction of “registered partnerships” is moving forward, it is possible to develop a solid foundation in Japanese society that will welcome the recognition of legal rights for same-sex couples. Sometimes, legislation can change society. For example, in Japan, in 2003, the Act on Special Cases in Handling Gender for People with Gender Identity Disorder was introduced, under which people with gender identity disorder were allowed to change genders by fulfilling some requirements in the act. Most people did not even know about the disorder, but the legislation was on a speedy track to passage.<sup>126</sup> Public awareness about the disorder was largely increased by the legislation. In addition to governmental campaigns to gain public attention, the media began to feature the disorder, which greatly improved people’s knowledge about it.<sup>127</sup> Similarly, it is possible that the introduction of registered partnership legislation will draw public awareness about the difficulties

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<sup>124</sup> See Section II in this paper, which explains about the difficulty for international same-sex couples residing in Japan.

<sup>125</sup> The following activities related to the success in the Netherlands provide a “how-to” guide for activists in other countries: “(1) a group of dedicated gay and lesbian leaders formed around the newspaper; (2) progressive and openly gay members of parliament strategized and supported the activist efforts; (3) grassroots activists pushed local municipalities to create partner registries that raised public consciousness of the issues for gay and lesbian couples; (4) public support for gay and lesbian couples was strong; and (5) the founding of a national governing coalition without Christian Democratic parties helped to pave the way to registered partnership, and, eventually, marriage equality.” M. V. LEE BADGETT, *WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE* 23, 177 (2009). Except (5), as Japan does not have any major political party supported by a religious group, the rest of the factors will be crucial to move forward the legal recognition of same-sex relationships in Japan.

<sup>126</sup> The Liberal Democratic Party of Japan created a study group in 2000, responding to the lobbying activities of some senators, and only in three years, which is quite short a period of time for Japanese legislation, the group soon proposed the act to parliament and it was passed.

<sup>127</sup> At the time of the legislation, a very popular TV drama, “*San-nen B-gumi Kinpachi Sensei*” [*Mr. Kinpachi of Class 3B*] treated the issue of gender identity disorder, which called forth a great public response. As a sixth grade student at that time, the author also learned about the disorder for the first time through the drama.

that same-sex couples have faced, and public support for the full recognition of their relationships may develop.<sup>128</sup>

Nevertheless, whether Japan will succeed in accomplishing the last step according to Waaldijk's approach — the legalization of same-sex marriage after the introduction of registered partnership — is a matter of concern. The distance from the introduction of registered partnership to the full recognition of same-sex marriage seems as if it would be much greater in Japan than it was in the Netherlands and England due to the difference regarding the social meaning of marriage. In the Netherlands and England, after the gaps between marriage and registered partnership were reduced by legislation, the only remaining difference between the two institutions was the symbolic value of marriage, which could not be obtained through registered partnership. In these two countries, marriage is a private matter concerning an individual's right concerning life choice as mentioned earlier. In Japan, however, marriage is not just a system for a loving couple to express their commitment and obtain legal rights and duties. Beyond an individual choice to marry a particular person he or she wishes, marriage also has significance with respect to continuation of one's family lineage as described in Part I.129. Therefore, the fact that same-sex couples are unable to continue their family lineage through natural procreation will likely cause opposition or reluctance toward same-sex marriage.

Unlike in Japan, there is much less family pressure toward marriage in the Netherlands and the UK.<sup>130</sup> In these countries, since the only difference between marriage and registered partnership was the emotional and expressive values of marriage, with the gradual change in people's value that marriage should no longer be limited to between a man and a woman, society could welcome the opening of same-sex marriage. In Japan, however, for the reasons above, it may be difficult, or at least take much more time, for social values regarding marriage to change. In fact, a governmental survey conducted in 2012 showed that one of the

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<sup>128</sup> On the other hand, the introduction of registered partnership seems to have as a danger weakening the call for same-sex marriage. Once a registered partnership system with identical legal protection as marriage is established, public opinion may come to conclude that registered partnership is sufficient for the time being and further debate about same-sex marriage will be weakened; at least many people will expect same-sex couples to give up on marriage and accept registered partnership as long as they can enjoy the same legal rights.

<sup>129</sup> For details regarding the traditional value of marriage in Japanese society, see Section I in this paper, which explains the meaning of marriage in Japanese society.

<sup>130</sup> See EMMANUEL TODD, *THE EXPLANATION OF IDEOLOGY: FAMILY STRUCTURES AND SOCIAL SYSTEMS*, Map 1, Map 2 (David Garrioch trans., Basil Blackwell Ltd. 1985). These maps demonstrate that Japan has an "authoritarian family" structure while the Netherlands and England have "absolute nuclear family" structure, which leads to the difference of family pressure on an individual's life.



main reasons to marry among single people was that they wished to relieve their parents and relatives of pressure from inquiries about their adult children's single status in their social network.<sup>131</sup> The preservation of the traditional meaning of marriage has not been legally recognized as legitimate justification for the exclusion of same-sex couples from marriage in Japan (simply because there has never been a lawsuit or even political discussion of the issue), but the idea that the traditional value of marriage should be maintained will likely be the main reason for the reluctance of many people to the opening of same-sex marriage.<sup>132</sup>

By reconsidering the validity of preserving the traditional value of marriage, the introduction of registered partnership would be a significant step. Some people are concerned that the introduction of registered partnership may weaken public support for same-sex marriage because same-sex couples will be able to recognize their relationships and enjoy some legal rights as if they were married.<sup>133</sup> However, it is better to take such a risk and provide legal protection to same-sex couples than to do nothing and ignore the reality where they have no direct means to recognize their relationships.

## VI. CONCLUSION

The legalization of same-sex marriage is a drastic change that will not be accomplished in a day. It will require support through gradual changes of people's general social attitudes and the cultivation of a legal regime that can welcome same-sex couples to enter the legal institution of marriage. Along with accelerated globalization, people today in different societies seem to share the same values. In this sense, Europe is a good example of people in once different cultures and traditions sharing changing values. In addition to the values of freedom and equality, new values in peoples' minds that differ from traditional ideas, such as diverse ideas of family and marriage, seem to have expanded throughout the region. In East Asia, and specifically Japan, this kind of value globalization is lacking, which may explain the indifference of many Japanese people towards same-sex marriage.

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<sup>131</sup> See generally Kekkō, *Kazokukōsē ni kansuru Ishikichōsa* [Attitude Survey Concerning Marriage and Family Structure], THE CABINET OFFICE (2012), <http://www8.cao.go.jp/shoushi/cyousa/cyousa22/marriage-family/pdf-zentai/s2-1-3.pdf>.

<sup>132</sup> Both of my informants agree about this point. Also, the Japanese Supreme Court generally seems to be very reluctant to rule a law or state action's unconstitutionality. For example, the discriminatory treatment of illegitimate children concerning inheritance under the Civil Code had been held constitutional for decades since lawsuits asking for change were filed until it was finally held unconstitutional in 2013. The main reason supporting its constitutionality was the importance of preserving the traditional concept of marriage.

<sup>133</sup> Uesugi, *supra* note 69.

Japan seems to be far behind other countries with respect to same-sex marriage. The fact that gays and lesbians have not been religiously or criminally persecuted ironically brought about a lack of public awareness about their legal difficulties and the need for the legal recognition of same-sex couples, for which Japanese gays and lesbians might have missed an opportunity to push for equality, compared with other parts of the world where gays and lesbians have historically been persecuted and thus necessarily motivated to advocate for their rights. Others in society, most of whom are simply unaware of the reality wherein same-sex couples have difficulties because they are of the same-sex, have little incentive to call for change. As explained in Part I, the meaning of marriage in Japan differs significantly from the countries that already legalized same-sex marriage. For this reason, opening marriage to same-sex couples is more difficult, or at least it will take more time in Japan. In Japanese society today, the idea that marriage is a significant decision of one's life in relation to his or her family, through which his or her family lineage continues, is highly respected. Even with some influence or pressure of globalization, a sudden change of this value cannot be easily imagined. For this reason, my answer to the question of whether Japan is ready to legalize same-sex marriage would be: no.

However, whether the Japanese people should preserve the traditional value of marriage, and the necessity to recognize legal rights for same-sex couples, are two different issues. While the former requires careful consideration, the latter can be accomplished immediately by the introduction of registered partnership. Traditional values that are supported by the majority in a society need not necessarily be abandoned as anachronistic, but they cannot be a legal basis to justify unequal treatment. In Japan, the current social meaning of marriage has never been officially used to justify exclusion of same-sex couples from marriage -- since there has never been a lawsuit or even political discussion of the issue -- but it is highly likely that the traditional value of marriage is one of the reasons preventing the opening of same-sex marriage. In this situation, Japan should respond immediately to the necessity of recognizing legal rights for same-sex couples. This can be accomplished by the introduction of registered partnerships.

As explained in Part II, since there is no formal legal institution to recognize same-sex relationships, same-sex couples in Japan use alternative legal means, such as adoption and contracts, in order to ensure some of their legal rights. If registered partnerships were introduced, even though it would be an interim measure that could not provide the symbolic meaning of marriage, the situation of same-sex couples will be improved. In order to ensure the introduction of registered partnership, Japanese gays and lesbians must become more active to gain both public awareness and support in parliament. They must begin with advancing social recognition of their existence, as many Japanese people are indifferent to gays and

lesbians, let alone same-sex marriage. With respect to this point, it will be necessary to change the attitude of the Japanese media. Japanese media has treated gays and lesbians as entertainment, rather than purporting to educate their audience.<sup>134</sup> Considering the great influence media generally has, if this attitude of Japanese media is changed to a more educational tone, the public awareness and, thus, support for the legal recognition of same-sex relationships, will be effectively increased.

While the two countries introduced in Part III, the Netherlands and England, smoothly accomplished the legalization of same-sex marriage after the introduction of registered partnership, Japan will likely experience more hardship in that process because of the social attitude that strongly relates marriage to family. Nonetheless, the introduction of registered partnerships has many possibilities to change the present situation for the better. Same-sex couples can be relieved from the difficulties they have faced due to the lack of a legal system to formally recognize their relationships, and this can also raise public awareness about reconsidering whether the current understanding of marriage should still be maintained. Therefore, the introduction of registered partnerships embraces a bright possibility to lead Japan to be more ready for same-sex marriage.

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<sup>134</sup> There is little or even no moral taboo in Japanese society about treating gays and lesbians merely as objects of entertainment due to the lack of overt discrimination.