

2014

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Recommended Citation

Arai, Yuki, "Is Japan Ready to Legalize Same-Sex Marriage?" (2014). *Cornell Law School LL.M. Student Research Papers*. Paper 4.
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Is Japan Ready to Legalize Same-Sex Marriage?

2013 was a remarkable year for same-sex couples around the world. In addition to the historic decision of *U.S. v. Windsor*,¹ wherein the exclusion of same-sex couples from marriage under the Defense of Marriage Act 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. Since globalization has enabled people in different regions to share values and ideas, the recognition of same-sex marriage unexceptionally seems to be expanding. In Japan, however, same-sex marriage is scarcely discussed, and the recognition of rights of gays and lesbians is not advanced. Historically, gays and lesbians were not subject to religious or criminal persecution. Moreover, Japan is known to have embraced a rich culture of male same-sex activity in pre-modern times. On contrary, today, many people seem indifferent to, or even unaware of the presence of gays and lesbians.

This paper aims at considering whether it is possible for Japan to legalize same-sex marriage in the near future. In Part I, the history concerning gays and lesbians in Japan is introduced. 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. Part II describes the current situation concerning same-sex relationships in Japan, specifically the present legal system wherein same-sex couples have no formal institution to recognize their relationships. Possible bases of legal challenges asking for marriage equality for same-sex couples are also discussed. Part III looks into the “step-by-step” approach that the Netherlands and England used to legalize same-sex marriage in 2001 and 2013 respectively. In the last part, Part IV, after comparing the situations of these two European countries, the possibility for Japan to open marriage to same-sex couples is considered.

¹ 699 F.3d 169 (2d Cir. 2012).

I. HISTORY CONCERNING SAME-SEX RELATIONSHIPS IN JAPAN

Without understanding how the parties to a same-sex marriage, gays and lesbians, are positioned in society, it is impossible to discuss same-sex marriage. This Part therefore discusses the history of how gays and lesbians have been treated in Japanese society. Also, the general meaning of marriage in Japanese society is introduced.

A. The Three Stages of Pre-modern Same-sex Relationships in Japan

According to Hajime Shibayama, a Japanese folklorist, whose primary field of study is male same-sex relationships in the Edo period (1603-1868), same-sex relationships in pre-modern Japanese history² can be divided into three stages, based on which people in which community played the primary role in each stage.³

The oldest recorded same-sex relationship in Japan surprisingly goes back as far as a thousand years ago, the Kamakura period (1185 – 1333). A form of male same-sex relationships in this stage is understood as the “*chigo*-based *nanshoku*” [child-based male-eroticism].⁴ *Nanshoku*, also pronounced as *danshoku*, literally means male eroticism, and generally stands for the male same-sex relationships that existed in pre-modern Japan.⁵ The *chigo*-based *nanshoku* is understood to have had an aspect of a master-servant relationship. It began within a sort of trainer-trainee relationship between priests and young boys who were raised in temples under supervision of these priests.⁶ Priests would have sexual relationships

² In the paper, pre-modern time refers to Japanese history from the ancient times until the country experienced modernization in 1867.

³ HAJIME SHIBAYAMA, EDO DANSHOKU KŌ [Male-male same-sex relationships in the Edo period] (1992). 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.

⁴ The literal meaning of *chigo* in Japanese is “little child.” The word includes the sense of affection.

⁵ SHIBAYAMA, *supra* note 3, at 34.

⁶ *Id.* at 106. See also GARY P. LEUPP, MALE SAME-SEX RELATIONSHIPS IN EARLY MODERN JAPAN: THE STATE OF THE SCHOLARSHIP 133 (Katherine O’Donnell et al. eds., 2006).

with their trainee boys, as a means to demonstrate their affection towards the boys rather than to objectify them sexually. Another form of the *chigo*-based *nanshoku* was widely observed in the *samurai* [warrior] class after the Age of Provincial Wars in the fifteenth century. Superior *samurai* would have sexual relationships with their pageboys. Significantly, these male same-sex relationships in the *samurai* class represented *chugi* [loyalty or devotion]. It was not so much sexual attraction but rather loyalty from pageboys towards their masters that connected them both emotionally and physically.⁷

In the *chigo*-based *nanshoku*, beauty of young boys was the focus, the idealization of which was accelerated by theatrical troupes who spread legendary stories of warriorhood emphasizing beautiful youth as an object of admiration through plays.⁸ Existing records indicate that male same-sex relationships were actually considered superior to opposite-sex relationships at that time.⁹ 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, by seducing men to distract their reasonable decisions.¹⁰ Such beliefs developed male same-sex relationships in the *samurai* society.

The second stage of pre-modern same-sex relationships is the heterosexual-type *nanshoku*, a concept established in the middle of the eighteenth century. In this stage, feminine-acting boys as courtesans became the major object of adult male same-sex desire.¹¹ The Buddhist value that male same-sex relationships were superior to opposite-sex relationships still remained. Same-sex relationships spread to the ordinary people towards the end of the

⁷ SHIBAYAMA, *supra* note 3, at 37.

⁸ Leupp, *supra* note 6, at 132.

⁹ *Id.* See also KIMITO UJIE, BUSHIDŌ TO EROS [The Japanese Warriorhood and Eroticism] 17 (1995).

¹⁰ UJIE, *supra* note 9, at 18.

¹¹ LEUPP, *supra* note 6, at 132.

Edo period (1603 - 1867) under the Tokugawa Shogunate [regime], 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.¹² Wealthy merchants began to adopt customs into their lives that had long been enjoyed only by the *samurai* class, including same-sex relationships.¹³ The lines which were once strictly drawn between each social class (*samurai* on the top, followed by farmers with lands, craftsmen, and merchants) began to be shallow.

The third stage of pre-modern same-sex relationships is the modern *nanshoku*, which emerged towards the very end of the Edo period, around the former half of the nineteenth century. The traditional concepts shared in the previous pre-modern *nanshoku* were gradually destroyed by the continuing interactions among different social classes and the commercialization of same-sex relationships. As a result, the privilege and dignity of the male same-sex relationships in the *samurai* class were lost, and same-sex relationships began to be treated as mere entertainment in the cultural context.¹⁴

All these types of pre-modern same-sex relationships, however, should not be considered the same as what we understand as same-sex relationships today. Same-sex relationships today refer to sexual desire or behavior involving or characterized by sexual attraction between people of the same sex, which is a Westernized concept. Unlike same-sex relationships today, pre-modern Japanese same-sex relationships were not only a form of sexual

¹² UJIE, *supra* note 9, at 96.

¹³ 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 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.

¹⁴ One example of this is the expansion of the *kagama* services [male prostitutes; also referred to as *wakashu*] in the late eighteenth century.

relationships based on love, but they were also a significant representation of the culture and traditions of the society.¹⁵ In this sense, the long history concerning same-sex relationships in Japan should not be regarded as continuation of a single type of same-sex relationships, but it should rather be understood that different types of same-sex relationships in accordance with social factors in each stage existed.

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 them as an irrelevant and disruptive element. Second, it was not common for men and women to interact with each other in the same community, especially in the higher social classes.¹⁶ This long-term separation of communities of men from female company in the absence of powerful ideological constraints led to widespread same-sex activity between men. Therefore, *nanshoku* had an aspect of an alternative of opposite-sex relationships and it arose largely to compensate for men's lack of female companionship. *Nanshoku*, however, came to influence the structure of male desire and its vitality no longer required the absence of women.¹⁷ For this reason, it can be suggested that *nanshoku* was not particularly distinguished from heterosexuality. The fact that it was among men was not an essential factor for *nanshoku* as described above, and it

¹⁵ See SHIBAYAMA, *supra* note 3. Today, many studies expressly demonstrate that male same-sex relationships played significant roles in establishing Japanese cultures (literature and arts in particular).

¹⁶ *Id.* See also LEUPP, *supra* note 6, at 133. In the *samurai* class wherein *nanshoku* saw its best flourishing, men would spend most of their youthful times being separated from women. They would be raised in masculine communities in their *han* [province] to learn the lifestyle and morality *samurai* were expected to respectfully follow.

¹⁷ Indeed, *nanshoku* remained vigorous even after the institution of female courtesans was established. See LEUPP, MALE COLORS: THE CONSTRUCTION OF SAME-SEX RELATIONSHIPS IN TOKUGAWA JAPAN 199 (1997).

was only after the modernization of society that people began to categorize *nanshoku* as a form of same-sex relationships, ignoring how it developed under the particular circumstances of Japanese society. In sum, the nature of *nanshoku* was quite different from what we understand as same-sex relationships today. 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.

The reason why this sort of peculiar sexual desire was deeply rooted in Japanese society is still debatable. 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.¹⁸ 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.¹⁹

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.²⁰ In Japanese history, same-sex relationships have never been faced with severe

¹⁸ *Id.* at 201.

¹⁹ *Id.*

²⁰ UJIE, *supra* note 9, 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 exposed to religious opposition. The dominant

B. Same-sex Relationships and Modernization

Modernization took place soon after the Tokugawa Shogunate ended after nearly three hundred years in 1867, and the Meiji period (1868 – 1912) began. Under the newly established imperial government, Japan rushed into modernization, wherein Westernization was strongly encouraged. Westernization seemed to have been the only means for Japan to survive without being terrorized by the powerful Western countries.²¹ 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 be physically and emotionally strong, for which the possibility of male corporeal beauty was removed.²² The modern spirit emerging from such social changes led to the disappearance of *nanshoku*. The blindly 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 266.²³ This was the first and only time in the history of

religion in pre-modern Japanese society was Buddhism. In Buddhist doctrine, sexual activity as a whole was in fact sin. However, interestingly, by the early thirteenth century, the doctrine had been modified by elite priests (who themselves were keen on *nanshoku*) and, thus, same-sex activity was permitted so long as a person was careful not to be completely absorbed in it. See YŪ HAYAMIZU, *HEIANBUKKYŌ TO MAPPŌSHISŌ* [Buddhism in the Heian period and “the end of the world” belief] 68 (2006). Also, at the same period of time, 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, led to an increase in same-sex activity. See Kazuhiro Nakane, *Jōdoshinkyō ni okeru Shōzō-mappō-kan ni tsuite* [about the “end of the world” belief in Buddhism], in *NIHONJIN NO SHUKYŌ TO SHOMINSHINKŌ* [Japanese religions and common beliefs] 328, 329 (Humio Yoshimuro ed., 2006). 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.

²¹ See LEUPP, *supra* note 17, at 202 (“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.”).

²² JONATHAN D. MACKINTOSH, *SAME-SEX RELATIONSHIPS AND MANLINESS IN POSTWAR JAPAN* 8 (2010).

²³ MARK J. MCLELLAND, *MALE SAME-SEX RELATIONSHIPS IN MODERN JAPAN – CULTURAL MYTHS AND SOCIAL REALITIES* 26 (2000).

Japanese law that same-sex activity was criminalized.

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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.²⁵ 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 the 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 Japanese law.²⁶ Thus, there was no change in the official policy, for which the Japanese legal and political system kept ignoring same-sex relationships. 27

From the late 1960's to the first half of the 1970's, Japanese society saw some influence

²⁴ 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.*

²⁵ UJIE, *supra* note 9, 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 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. *See also* LEUPP, *supra* note 17, at 203, which explains that educators regarded same-sex desire as a primitive and violent urge to be suppressed through spiritual cultivation.

²⁶ 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. *Id.*

²⁷ MCLELLAND, *supra* note 23, at 27.

of the European and American sexual revolution, though these movements were not quite effective in Japan.²⁸ Although the international gay and lesbian movements, which began in the U.S. in 1969, were not totally unrecognized in Japan, they were seen just as a foreign issue, having little to do with Japanese people's lives.²⁹ Attempting to build a Western style movement in Japan, where a classification based on sexual orientation was traditionally unrecognized, was a dubious venture.³⁰ At the same period, same-sex relationships began to appear in manga fiction, novels, and pornography, but Japanese media have tended to avoid discussion of same-sex relationships in terms of legal reform or human rights, which generally take up considerable space in the U.S. and Europe.³¹ 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 social has traditionally expected men to be masculine and strong and women to be modest wives and mothers. After the 1950's, this traditional gender role became linked to an image of men was a "salaryman," a good breadwinner and taxpayer.³² The figure of the salaryman soon developed the ideal icon

²⁸ The first Japanese gay and lesbian rights pressure groups such as OCCUR 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* 81, 82 (Mark McLelland & Romit Dasgupta, eds., 2005).

²⁹ MACKINTOSH, *supra* 22, at 37.

³⁰ McLELLAND, *supra* 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 faced with religious oppression, unlike Japan.

³¹ MACKINTOSH, *supra* 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. Japanese homophile magazines do not purport to link their publishing with any political movement such as human rights, nor do they intend to provide educational information about same-sex relationships, but they simply feature a variety of articles, art and erotica.

³² Futoshi Taga, *Rethinking Japanese masculinities: Recent research trends*, in McLelland & Dasgupta, *supra* note 28, at 153, 160.

of fatherhood,³³ and gays, who do not fulfill this image, were, as a result, labeled as “failures” in society.

The early 1990’s saw a flourishing period of same-sex relationships in media, which is referred to as the “gay boom.”³⁴ Popular Japanese media represent gays as simultaneously funny, sympathetic, dangerous, and despicable, and sometimes as a threat to the family and society.³⁵ Such media interest in same-sex relationships has provided opportunities for gays and lesbians to describe their own experiences and gain public awareness about their existence, thus, not only the demerits of media interest should be emphasized. The social and political influence of such representation, however, is questionable. The representation in the media created the stereotype of gays and lesbians as gender inverters and also increased the discourses dealing with same-sex relationships, while the visibility of gay- and lesbian-identified individuals on a grass-roots level did not increase.³⁶ Gays and lesbians themselves have a negative view towards the representation of their lifestyle in this way. Many of them generally reject the images offered by such popular culture acknowledging them to be the products of fantasy, ignorance or prejudice. Ubiquity of these images has made many gays and lesbians reluctant to come out about their sexual orientation because they think that people have only negative views towards them.³⁷ The increasing media exposure of same-sex relationships simply displayed an interesting or newsworthy minority to the majority gaze.³⁸ Once gays and lesbians appeared outside the framing of entertainment, they were often faced with stigma

³³ *Id.* at 163. See also YOKO TOKUHIRO, MARRIAGE IN CONTEMPORARY JAPAN 56 (2010).

³⁴ MACKINTOSH, *supra* 22, at 4.

³⁵ *Id.* at 3. For example, one of the most popular genres of manga fiction, novels, and pornography in Japan is “Boys Love,” which features same-sex activity between good-looking male characters. These contents treat gays as mere entertainment, emphasizing their sexual activity in the absence of educational or informational tone.

³⁶ *Id.* at 36.

³⁷ *Id.* at 57.

³⁸ *Id.* at 42.

merely based on ignorance of people.³⁹ For example, the recognition of same-sex relationships as a physiological or psychiatric illness lasted until 1994, when the Japanese Society of Psychiatry and Neurology finally modified its official stance on same-sex relationships, no longer classifying it as paraphilia.⁴⁰

As a matter of fact, it was also the postwar time when homophobia accelerated in Japanese society. For example, the usage of the contemporary everyday term, “*jōshiki*” [common sense], isolated those who challenge opposite-sex relationships, which were (and still are) perceived to be the standard.⁴¹ People often describe opposite-sex relationships as “*nōmaru*” [normal], in contrast to same-sex relationships as abnormal. These terms are the style of writing, at which the media excel.⁴² Same-sex relationships, therefore, are deemed to be something beyond “common sense” and targeted for disapproval.⁴³ Disease, perversion, inversion and depravity have been the major images associated with same-sex relationships. Yet, unlike in most Western countries, same-sex activity is not regulated in Japan.⁴⁴ Continuously from pre-modern times, there is no religious opposition to same-sex relationships, either. Nonetheless, Japanese society has typically perceived same-sex relationships as

³⁹ *Id.* See also Anthony S. DiStefano, *Suicidality and Self-harm among Sexual Minorities in Japan*, 1429 QUALITATIVE HEALTH RESEARCH 10, 10 n.18 (2008).

⁴⁰ DiStefano, *supra* note 39, at 11.

⁴¹ MACKINTOSH, *supra* 22, at 30.

⁴² *Id.*

⁴³ *Id.* at 32. Mackintosh argues that the anti-same-sex relationships attitude which emerged in the post-war time was a disturbing emotion and ugly sentiment that drifted beneath the “common sense” surface of civilized responsibility to which most aspired as a public face. The vague sense of aloof disdain that could burst forth as bigoted, intolerant hatred formed the darker side of the everyday life of people in the post-war society.

⁴⁴ MCLELLAND, *supra* note 23, at 39.

abnormal and dismissed them merely as entertainment relief with little educational or informational effort to gain understanding towards them.⁴⁵

D. History Concerning Lesbians in Japan

Sexuality has almost invariably been seen from the male perspective in Japan.⁴⁶ This may result from a sort of male supremacy based on the orthodox Buddhist doctrine to regard women as unclean, which dominated Japanese society in pre-modern times.⁴⁷ 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.

Compared with gays, lesbians are said to have a tendency to establish very private relationships without creating communities, which may be another reason why their existence in society is less visible than that of gays.⁴⁸ Nonetheless, in pre-modern and post-war times, the path lesbians have taken was similar to that of gays, only with less influence.⁴⁹ Towards the

⁴⁵ *Id.* at 36. See also Tomoya Ohno, *Dōseikon to Byōdōhogo* [Same-sex Marriage and Equal Protection], 17 KYŌIKU-KEI BUN-KEI NO KYŪSHŪCHIKU KOKURITSU DAIGAKU RENGOUKAN Ronbunshū [The Kyūshū Area Collegiate Network of Educational Theses] 10, 10 n.3 (2009).

⁴⁶ McLelland, *supra* 23, at 34 (“Sexuality in Japan is almost inevitably understood from a male standpoint.”).

⁴⁷ *Id.* 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 woman and a straight man dressed in the female clothes].

⁴⁸ See YASUNOBU AKASUGI et al., *DŌSEIKON, DP HŌ WO SHIRUTAME NI* [To understand Same-sex Marriage and Domestic Partnership] 81 (2013).

⁴⁹ *Id.* at 181. *Seitōsha*, established in 1911, was the first Japanese institution by women, primarily lesbians. The institution’s interest lay in representations and performances of a “new kind of love” unrestricted by old concepts and traditions through literature. Then in 1971, *Wakakusa no Kai* [young leave party], was established, which, however, did not identify with any political movement, as its primary purpose was self-assistance among lesbians within their community.

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 more favorable towards lesbians than gays.⁵⁰ For this reason, heterosexual men will likely be more supportive of lesbian relationships than gay relationships. 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. Thus, for example, future lobbying activities to these heterosexual men can 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 to 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.⁵¹ As already mentioned in this Part, the current treatment of same-sex relationships is lighthearted in an entertaining, not an educational or informational, tone. This peculiar attitude illustrates that sexual orientation is generally understood as a hobby or play that people do not take seriously. It also seems to be deeply linked to the fact that Japanese

⁵⁰ 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 keno surunoka* [who dislikes same-sex relationships?], <http://www.eco.osakafu-u.ac.jp/~murasawa/takumi10.pdf> (accessed on April 3, 2014 by searching for homophobia, Japan in Google index). Takumi points out a similar attitude of Japanese heterosexual men, especially the older generation, who negatively perceive gay relationships in particular.

⁵¹ MCLELLAND, *supra* note 23, at 192.

society has lacked any religious opposition to same-sex relationships. Since same-sex relationships are not a subject of discrimination, people do not mind presenting them simply as a topic in entertainment, and society accepts this without causing any moral taboo about such treatment.⁵² Also, since they have never experienced severe opposition, most gays and lesbians have not been very interested in establishing their identities and advocating the recognition of their rights affirmatively. For this reason, any significantly influential degree of gay and lesbian rights activism never took place in Japan .

With lack of sufficient educational knowledge about gays and lesbians and under the influence of media that treats their sexual orientation as deviant in an entertainment tone, most people perceive gays and lesbians with either shock or horror, or consider them to be pitiable and failures.⁵³ Most people 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 it is known to the public.⁵⁴ 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 amusement, it is natural that many gays and lesbians feel that they have little to gain by becoming publicly associated with such an uncomfortable image.

Furthermore, as already mentioned, in Japanese society, sexuality, whether opposite-sex or same-sex in orientation, is considered a highly private matter and not something to be divulged in public.⁵⁵ It is generally considered to be embarrassing to discuss sexuality, even

⁵² Interview by Yuki Arai with Mameta Endo, representative of idaho-net, 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, bis, and transgenders) (Skype, March 1, 2014).

⁵³ MCLELLAND, *supra* note 23, at 192.

⁵⁴ *Id.*

⁵⁵ *Id.* at 196.

among family and friends. This 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 where by heterosexual people treat gays and lesbians as inferior and abnormal, and as an outgroup, in order to secure the superiority and normality of heterosexual people in society. 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.⁵⁶ Only with an effort to overcome these realities 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 is an appropriate strategy for improving the situation for gays and lesbians in Japan. As mentioned, Japanese gays and lesbians do not face systematic opposition by the government,

⁵⁶ My 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. See note 52, *supra*. 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 on April 23, 2014 by searching for Ishihara, anti-gay on Google index).

church and legal system which affects many gays and lesbians in other countries.⁵⁷ 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 ally themselves, in the public imagination at least, with a number of negative images and stereotypes that actually hinder their self-expression. As McLlelland claims, for these reasons, movements by gays and lesbians themselves seeking the recognition of their rights have been lacking in Japanese society.⁵⁸ However, when it comes to the issue of same-sex marriage, which will directly impact the daily lives of gays and lesbians who have beloved partners, they should not stay silent.

F. Marriage and Family

As already mentioned, 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.⁵⁹ 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 in 1898, 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.⁶⁰ Prior to the establishment of the *ie seido*, in 1871, the *koseki seido* started, in which all the citizens were registered as family units

⁵⁷ MCLELLAND, *supra* note 23, at 239.

⁵⁸ *Id.*

⁵⁹ MACKINTOSH, *supra* note 22, at 9.

⁶⁰ TOKUHIRO, *supra* note 33, at 17-18.

and placed under governmental control.⁶¹ 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. 62

The traditional meaning of marriage also evolved at this period, strongly influenced by the social hierarchy created by these two systems. The function of marriage as the continuation of one's family lineage was emphasized⁶³ and, thus, the matching process was strictly controlled by family members through a form of arranged marriage, *miai*.⁶⁴ Free choice in marriage was hardly accepted, and not obeying the expectations of one's family was treated as an act of rebellion, which was strongly discouraged. Following Japan's defeat in WWII, the *ie seido* was abolished, along with other prewar systems, while the *koseki seido* still remains. Although the emphasis on this traditional idea about 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.⁶⁵ As mentioned in Part 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.

⁶¹ *Id.*

⁶² *Id.* at 19.

⁶³ TOKUHIRO, *supra* note 33, at 55.

⁶⁴ It was only after the 1960's that the number of love marriages exceeded that of arranged marriages for the first time. *See id.* at 92.

⁶⁵ *See* MCLELLAND, *supra* note 23, at 39. For instance, the vast majority of today's young generation tend 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.

The difficulty gays and lesbians have with respect to coming out in Japanese society are 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.⁶⁶ 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 regarding their social network.⁶⁷ For this reason, gays and lesbians are quite reluctant to come out. Therefore, having a same-sex relationship openly, which necessarily accompanies coming out, is not an easy choice for gays and lesbians.

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.⁶⁸ Therefore, the fact that same-sex couples are inevitably unable to continue their family lineage through procreation without exterminating their bloodline.⁶⁹ It will likely cause

⁶⁶ See TOKUHIRO, *supra* note 33, at 56. 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.

⁶⁷ MCLELLAND, *supra* note 23, at 198.

⁶⁸ For details regarding the *ie seido*, see the earlier part of Section F of Part I.

⁶⁹ 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, Labor and Welfare (2006), <http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/tokusyuu/konin06/konin06-2.html#2-8> (last visited April 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

majoritarian reluctance in Japanese society to open the institution of marriage to same-sex couples, especially by the older generation, who mainly account for the voters' population in Japan (due to the age structure). 70

The strong connection between marriage and family, initially developed by the *ie seido* [family system] discussed above, is not merely a relic of pre-war traditions but is also strongly related to Japanese common faith, the worship of ancestral spirits. For example, Kunio Yanagida⁷¹ perceived the diminishment of a family lineage as a public sin in his well-known treatise in 1907, stating that “lineage between one and his ancestors, in 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.”⁷² Yanagida considered the continuation of a lineage as an important basis of supporting the state and also emphasized the importance of worshipping 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 familiar to ordinary Japanese people even today.⁷³

“continuation” in the social context because Japanese society has historically emphasized the importance of the parent-child relationship based on natural procreation. See TOKUHIRO, *supra* note 33, at 29.

⁷⁰ 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/nendaibetu/ (last visited April 3, 2014).

⁷¹ Kunio Yanagida (1875-1962) is one of the most significant anthropologists in Japanese history, whose study focused on Japanese folklore.

⁷² KUNIO YANAGIDA, *JIDAI TO NOSEI* [Time and Agriculture Planning] 38 (1910), <http://kindai.ndl.go.jp/info:ndljp/pi/991509/1> (last visited April 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.

⁷³ 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. My 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 religion 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. See also Nanrin Kyo, *Sorei, Ie, soshite Kindai no “Kazoku Kokka”* [ancestral spirits, household, and the modern “family state”], in Yoshimuro, *supra* note 20, at 448. Although the origin of this common faith definitely lies in Buddhism, as the

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. *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*, the both parents of the couple gather and exchange *Yuinō* has a 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 (usually the husband's) parents also shows that one cannot consider marriage as a completely separate concept from family.

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 recrimination.⁷⁴ Nonetheless, many gays and lesbians consider Western nations better environments, where people can express their sexualities more openly.⁷⁵ 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,” and gays and lesbians have lacked sufficient experience of rights movements, all of which have caused the frustration that gays and lesbians feel today.

Summary

parishioner system became common after pre-modern times in the Tokugawa Shogunate, the Buddhist aspect was lost and only the tradition of worshiping ancestral spirits remained. It has been only half a century since academic research on religions began without any political pressure in Japan, and study in this field has much left to be revealed. *Id.*

⁷⁴ MCLELLAND, *supra* note 23, at 216.

⁷⁵ *Id.* at 200.

Some people argue that same-sex relationships have historically been widely accepted in Japan, and thus that the society today is tolerant towards the existence of gays and lesbians. However, as observed in this Part, pre-modern same-sex relationships, *nanshoku* and same-sex relationships today must be understood as two completely separate concepts. The latter have faced homophobia created by the images of gender, family, and marriage associated with the paternal and hierarchal systems regulating family. Gays and lesbians in post-war society have suffered from the label pressed on them as “failures” because there is no place for them to fit themselves in the existing images of how men, women, and family members.

Thus, gays and lesbians in Japan can be in fact categorized as a vulnerable group in society although they have not been formally discriminated against. To discuss same-sex marriage in Japan, this awkward, cold silence surrounding gays and lesbians must be considered. In the next Part, the situation concerning same-sex relationships in the present Japan legal system is explained.

II. THE CURRENT SITUATION CONCERNING SAME-SEX RELATIONSHIPS IN JAPAN

This Part 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. In the end, potential legal bases of challenges by same-sex couples asking for marriage equality (there has never been such a lawsuit in Japan) are discussed.

A. The Present Legal System

Same-sex marriage is not recognized under the existing Japanese legal system. Although there is no statute in Japanese law that expressly provides a definition of “marriage,”

Article 24 of the Japanese Constitution 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.”⁷⁶ 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 24.⁷⁷ Regulation of same-sex marriage through registered partnership would be constitutionally acceptable, but to date there have been no attempts at, nor even discussion about, recognizing legal rights for same-sex couples.⁷⁸

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 officially prove their relationships to society, which is generally possible for opposite-sex couples through the legal institution of marriage, and that they cannot enjoy spousal rights and benefits provided by law, such as inheritance rights and spousal deductions in taxation, there are also many other situations where same-sex couples experience hardship.

⁷⁶ Kenpō [Constitution] art. 24. The Prime Minister of Japan and His Cabinet, http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html (last visited Feb. 17, 2014).

⁷⁷ See Macarena Sáez, *Same-sex marriage, same-sex cohabitation, and same-sex families around the world: Why “Same” is so different*, 18th 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 Art. 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 Art. 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. For details regarding this point, see ITAFUMI NAGAI, DŌSEI PĀTONĀ SEIKATSU DOKUHON [Guidebook for same-sex couples] 16 (2009). See also Interview by Yuki Arai with Takako Uesugi, lawyer who is a member of Pātonāshipu Hō Netto [Partnership Law Japan] (e-mail, April 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 About Us --- PARTNERSHIP LAW JAPAN, <http://partnershiplawjapan.org/aboutus/english> (last visited April 21, 2014 by searching for Pātonāshipu Hō Netto in Google index).

⁷⁸ Sáez, *supra* note 77, at 19. See also Teiko Tamaki, *Distribution of “Matrimonial” Property of Married, Cohabiting and Same-sex Couples in Japan*, 1 HOUSEI RIRON 41. 21, 21 (2009).

First, same-sex couples are ineligible for most of the services providing benefits for married couples.⁷⁹ 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.⁸⁰ Similarly, it is not possible for same-sex couples to apply for a housing loan jointly. Since it is challenging for same-sex couples to merely live together in the same household, due to homophobia, or the socially negative image towards same-sex relationships, discussed in Part I, the current situation surrounding same-sex couples in Japan, particularly concerning residence, is quite difficult.⁸¹

Second, same-sex couples generally cannot act as each other’s surrogate in emergency situations or upon death.⁸² For example, important decisions regarding medical treatments, life extension measures and organ donations of a person who is no longer able to express decisions by him or herself cannot generally be made by his or her partner. Similarly, the remaining partner of a same-sex couple cannot be the beneficiary of the survivor’s pensions and life insurance.

In addition, in cases of international same-sex couples wherein one partner is Japanese and the other is a foreign citizen, the foreign partner is ineligible to obtain the status for

⁷⁹ An increasing number of these services have recently become available also to couples in common-law marriage.

⁸⁰ *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. See Nagai, *supra* note 77, at 40-41.

⁸¹ Gay couples, in particular, likely experience negative responses when seeking a lease together. In Japan, while it is not uncommon for females to share a house, it is quite rare for males to do so. Thus, lessors likely become suspicious and reluctant to welcome male couples as tenants. Especially when it is obvious that the male applicants are a gay couple, the lessor becomes concerned about whether the remaining tenant may end up being insolvent once the relationship is ended and his partner leaves. *See id.* at 35-37.

⁸² *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 a man in his thirties was not told of his long-term partner’s sudden death at work by the police 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.

residence as a Japanese citizen's spouse.⁸³ The spousal visa is the legal status for a foreign resident whose spouse is a Japanese citizen and "spouse" in the Immigration Control and Refugee Recognition Act is more strictly examined than in the Civil Code, so that a factual relationship as a married couple, as well as the legal status of marriage, are required (various other factors, such as the financial condition of the couple and whether the couple has a child, are also considered).

A same-sex partner, who is not recognized as a "spouse" in the Civil Code (harmonizing its concepts with Article 24 of the Japanese Constitution, the Civil Code interprets marriage as a sexually united relationship between a man and a woman recognized as such in society),⁸⁴ cannot obtain a spousal visa. Similarly, a Japanese same-sex couple legally married in another country is not recognized as a married couple once they enter Japan.⁸⁵

Although these and other inconveniences are crucial for same-sex couples, who are eager for reform, 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.⁸⁶ Moreover, the present Japanese government, occupied by the members of the Liberal Democratic Party of Japan (Lib Dems),⁸⁷ is very

⁸³ NAGAI, *supra* note 77, at 88.

⁸⁴ See SHINPAN CHŪSHAKU MINPŌ <21> SHINZOKU 1 [the Civil Code notes <21> family 1] 158 (2010) (Michio Aoyama & Tōru Arichi eds., 2010) (1989).

⁸⁵ 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 is legal.

⁸⁶ For details of the manifestoes, see New Komeito, https://www.komei.or.jp/policy/various_policies/pdf/manifesto2010_a4.pdf, Japanese Communist Party, 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/manifesto2010_03.htm (last visited Feb. 19, 2014). They all state no more than that they "care about sexual minorities."

⁸⁷ For more information about Lib Dems, see the Liberal Democratic Party of Japan, <https://www.jimin.jp/english/> (last visited April 5, 2014).

conservative, especially towards issues concerning matter concerning gender and family as well as the recognition of legal rights for the vulnerable in society.⁸⁸ 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 Lib Dems dominate the majority.

B. Unique Alternative Measures

In light of such a background, alternative means for protecting same-sex relationships have been found and used by same-sex couples in Japan. As the following explains in detail, contracts, adoption and incorporation are the main means employed.

First, same-sex couples can enter into a contractual relationship through a notary deed. Such a 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 and also for couples in common-law marriage, which is recognized in the case law.⁸⁹ A notary deed is strongly reliable because it can be validly executed only in a notary office with the notarization of a public notary,⁹⁰ and it effectively binds the couple. Ultimately, however, it depends on a third party's judgment whether or not to follow the notary deed. Due to the lack

⁸⁸ 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.

⁸⁹ 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 held out as a couple for an extensive period of time. This point differs from the definition of common-law marriage in American legal context. *See* Saikō Saibansho [The Supreme Court] April. 11, 1957. no.5, 12 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 789 (Japan). Some statutes concerning spousal rights are applicable by analogy to couples in common-law marriage.

⁹⁰ Public notaries are appointed by the Minister of Justice. Those who have more than thirty years' experience practicing as lawyers are generally appointed as public notaries.

of knowledge about this notary system and the costs it requires, the number of notary deeds used by same-sex couples remains small.

Second, same-sex couples can create kinship, family rights, and obligations through adoption. Once an older partner adopts a younger partner through a regular adoption arrangement,⁹¹ technically the couple forms a parent-child relationship, which enables them to enjoy the same legal rights, duties of support and succession as in any other adopted parent-child relationship.⁹² This creative technique of becoming a family is a loud secret in Japanese society,⁹³ which has historically been relatively tolerant of adoption.⁹⁴ An adoption of this kind, however, could be annulled as *kōjō ryōzoku* [harmful to public morals].⁹⁵ Whereas the purpose of the adoption system is to form a parent-child relationship, the validity of using this system solely to protect a same-sex relationship, in which both parties are equal, unlike a parent-child relationship where a parent is assumed to protect the interests of his or her child, can be called into question. Moreover, those who have previously formed a parent-child relationship through adoption are ineligible to get married to each other in the future, which will likely cause a legal problem for couples when same-sex marriage is legalized.⁹⁶

Another alternative for same-sex couples to enjoy some rights is through the formation of a corporation. Since the present Corporate Law came into force in 2005, the regulations on

⁹¹ There are two types of adoption: regular adoption and special adoption. Unlike special adoption, a strict procedure for adopting an underage child, regular adoption allows an adult to adopt another adult, which is a simple procedure conducted before a municipal officer, not requiring a court authorization. *See Sáez, supra* note 77, at 19.

⁹² *See* NAGAI, *supra* note 77, at 156-7.

⁹³ Sáez, *supra* note 77, at 19 (“Japanese people just know about this practice. Several websites briefly explain the procedure, and society seems content with the status quo.”).

⁹⁴ 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.

⁹⁵ Minpō [The Civil Code] 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 claiming invalidity of the adoption to deny the heirship of the remaining partner.

⁹⁶ In Japan, an adopted adult remains eligible to inherit from his or her biological parents.

corporation formation have been relaxed to a large extent, such that it is now theoretically possible for same-sex couples.⁹⁷ The significant merit of this approach is that it can resolve financial problems same-sex couples struggle with, such as inheritance, social welfare and insurance.⁹⁸ Although they must fulfill complicated requirements annually,⁹⁹ this approach can be very useful for extending legal rights, property rights in particular, to same-sex couples.¹⁰⁰

All of these alternative measures certainly have merits for same-sex couples by enabling them 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 to give up having their relationships recognized for what they really are and to use a legal loophole should not be ignored. Until a system intended to recognize legal rights for same-sex couples is established, this contradiction will not be resolved.

Some scholars argue for the recognition of rights to same-sex couples through the common-law marriage principle recognized in the case law.¹⁰¹ 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

⁹⁷ In order to form a corporation, the minimum capital for incorporation was lowered to one yen. There is no requirement for increasing the capital. *See* Nagai, *supra* note 77, at 171.

⁹⁸ *Id.* at 172. The couple is able to make various contracts under the name of their corporation, which enables them to ensure the access of the remaining partner of the deceased to these financial benefits.

⁹⁹ The annual settlement of accounts, the corporation tax, and the business tax are examples. *See id.* at 173.

¹⁰⁰ However, since a person who is already a board member of a company may not become a boarding member of another, this loophole may not be utilized by those who have such positions in their workplaces.

¹⁰¹ *See* Yasuhiko Watanabe, *Dōsei Tōroku Pātonāshipu Shian* [The proposal of a possible registry of same-sex partnership] 9 DŌSHIYA HŌGAKU 53. 3727, 3765 (2013). Watanabe suggests various possibilities to recognize legal rights for same-sex partners in his research (wherein he concludes that Japan need to establish registered partnership, a completely new system) and the application of the common-law marriage is one of his suggestions.

concerning the distribution of property among married couples¹⁰² to a case wherein a common-law marriage was annulled by the death of one party of the couple.¹⁰³ Therefore, same-sex couples would not be able to enjoy any legal protection concerning inheritance if the common-law marriage principle is applied to same-sex couples. By contrast, the existing doctrines, such as adoption, enable same-sex couples to secure some legal benefits concerning inheritance. In addition, there is strong opposition from gay and lesbian activists to including same-sex couples into the institution of common-law marriage because they are concerned that such insertion will strengthen the characteristic of common-law marriage as quasi-marriage and social stigma against same-sex couples will only become more severe.¹⁰⁴ 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.¹⁰⁵ In Japan, every court has the power of judicial review in 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

¹⁰² Minpō art. 768.

¹⁰³ See Saikō Saibansho [The Supreme Court] March. 10, 2000. no.3, 54 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 71 (Japan). In this case, the remaining partner was denied the right of succession to the property of her deceased partner.

¹⁰⁴ See note 89, *supra*. Although common-law marriage is legally recognized as quasi-marriage, differing from the U.S., where it is a marriage, an idea persists in society that perceives common-law marriage as secondary or inferior to marriage. See also Interview with Uesugi, *supra* note 77.

¹⁰⁵ The number of lawsuits wherein sexual orientation is concerned is quite limited in the first place. See SEITEKI MAINORITI HANREI KAISETSU [casebook about sexual minority] (Hiroyuki Taniguchi, et. al, eds., 2011). The casebook explains about the cases wherein discrimination based on sexual orientation was in question, most of which are foreign, not Japanese, cases.

excludes same-sex couples. If there is one in the near future, either Article 24 or Article 14¹⁰⁶ 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.¹⁰⁷ 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.

Second, with respect to a claim based on Article 14, it is necessary to define the basis of discrimination in question. On this point, many scholars suggest that being gay or lesbian should be treated as “social status,”¹⁰⁸ since sexual orientation can be considered a status a person cannot change with his or her own effort accorded to the formation of the person’s social value (being recognized as gay or lesbian will likely cause a social stigma).¹⁰⁹ Although there

¹⁰⁶ Kenpō [Constitution] art. 14., the Prime Minister of Japan and His Cabinet, http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html (last visited April 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...”).

¹⁰⁷ 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.

¹⁰⁸ The definition of “social status” is controversial. First, the case law defines it as a status that a person obtains in society. Some scholars argue that a “social status” is a status with a certain social valuation that a person continually obtains in a society and that he or she is unable to be separated from it. *See* NOBUYOSHI ASHIBE, KENPŌ [Constitutional Law] 49 (Kazuhiko Takahashi ed., 2011) (1993).

¹⁰⁹ *See* TATSUMI HŌRITSU KENKYŪSHO, SHUSHI KIHAN HANDOBUKKA: 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 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 are no other alternative means to accomplish that purpose. The easiest

has been no case law that explicitly categorizes sexual orientation as “social status,” in 1993, OCCUR¹¹⁰ 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.¹¹¹ This case was remarkable in that a court referred to gays and lesbians for the first time in Japanese legal history. The District Court of Tokyo held that gays and lesbians generally suffered in society because of their sexual orientation.¹¹²

With respect to exclusion of same-sex couples from marriage, however, discriminating between people whose sexual orientation is towards the opposite sex and gays and lesbians 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” is generally subject to intermediate scrutiny. 113

In intermediate 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

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* ASHIBE, *supra* note 108, at 52.

¹¹⁰ A Japanese organization advocating gay and lesbian rights. *See* note 28, *supra*.

¹¹¹ Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] March 30, 1994, Hei 3 (wa) no. 1557, 1509 HANREI JIHŌ 65, 80 (Japan). 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).

¹¹² *Id.*

¹¹³ 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* Ohno, *supra* note 45.

state action is not substantially related to that purpose in order to contest the constitutionality. 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 the 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 the traditions.¹¹⁴ With respect to this point, Forde-Mazrui, a law professor in the U.S. 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.¹¹⁵

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, to limit marriage to opposite-sex couples will unlikely survive

¹¹⁴ Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 310 (2011).

¹¹⁵ *Id.* at 310. 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.*

intermediate scrutiny as substantially related to that purpose even if the preservation of the current value of marriage is determined to be significant.

Thus, the purpose of the present legal institution of marriage. The core idea behind the traditional value of marriage is 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 if the emphasis on natural procreation is withdrawn. The present marriage in fact already does so for opposite-sex couples, who are able to marry regardless of their procreative ability, which is to preserve the traditional value, will unlikely be adversely affected by opening marriage to same-sex couples. In sum, the exclusion of same-sex couples from marriage is likely based on irrational fear towards gays and lesbians, which is a reflection of homophobia. 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 for 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

Summary

Although the legal barriers preventing same-sex marriage do not seem too serious since there is possibility that amending Article 24 of the Japanese Constitution may not be necessary in order to legalize same-sex marriage, the introduction of registered partnership can certainly be accomplished within the present legal system. On the other hand, 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. With this situation in Japan in the background, the next part 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.

III. WHAT IS NECESSARY TO LEGALIZE SAME-SEX MARRIAGE?

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

A. Comparative Approach

¹¹⁶ See note 110, *supra*. 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.

The reasons the Netherlands and England were chosen are: (1) The Netherlands is the first country in the world that legalized same-sex marriage.¹¹⁷ It also has both a parliamentary cabinet system and a bicameral legislature, like Japan;¹¹⁸ and (2) England is a country that shares significant similarities with Japan in terms of geographical characteristics and political structure.¹¹⁹ Both Japan and England are islands, and their sizes are about the same. England also has a parliamentary cabinet system and a bicameral legislature. Differences of social structure in each country can, of course, not 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 in order to open marriage to same-sex couples.

Regarding what is necessary for a state to legalize same-sex marriage, 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.¹²⁰ According to him, the states that already legalized same-sex marriage have taken the following three steps: (1) decriminalization of same-sex activity, which is the first change, initiated with the repeal of sodomy laws; (2) enactment of antidiscrimination laws protecting gays and lesbians; and (3) culmination in the eventual legalization of same-sex

¹¹⁷ Sáez, *supra* note 77, at 2.

¹¹⁸ For more detail of the country information about the Netherlands used in this paper, *see About the Netherlands*, the Dutch Embassy in Japan, <http://japan.nlembassy.org/you-and-netherlands/about-the-netherlands.html> (last visited March 13, 2014). *See also The Kingdom of the Netherlands Kiso Data* [Basic data of the Netherlands], the Ministry of Foreign Affairs of Japan, <http://www.mofa.go.jp/mofaj/area/netherlands/data.html#part2> (last visited March 13, 2014).

¹¹⁹ For more detail of the country information about England used in this paper, *see United Kingdom of Great Britain and Northern Ireland Kiso Data* [Basic data on England], the Ministry of Foreign Affairs of Japan, <http://www.mofa.go.jp/mofaj/area/uk/data.html#02> (last visited March 13, 2014).

¹²⁰ 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. 4, 4. (2004).

marriage.¹²¹ 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 accompanying minor legislative changes that reinforce the condemnation of same-sex marriage.¹²²

This approach seems reasonable because in general society can accept a new value that was once perceived as unacceptably radical only when such a value has become widely recognized. 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 my 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—(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—will be discussed with respect to each country.

B. The Netherlands

¹²¹ 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).

¹²² *See id.* at 439-440.

The path the Netherlands took to become the first country to legalize same-sex marriage in 2001 will be examined in this section. In the country's gay and lesbian-friendly environment, the effectiveness of the step-by-step approach of Waaldijk seems to have been demonstrated very well.

1. Legal and Social Treatment of Gays and Lesbians

In the Netherlands, same-sex activity was decriminalized as early as 1811.¹²³ In 1992,¹²⁴ an anti-discrimination law protecting gays and lesbians was passed for the first time in the country's history, by the amendment of the Penal Code to explicitly prohibit discrimination based on sexual orientation.

True to its reputation as being the first country to open up marriage to same-sex couples, the Netherlands is often referred to as a society and jurisdiction that has been particularly generous to minorities, including gays and lesbians.¹²⁵ Waaldijk observes that this gay and lesbian-friendliness in Dutch society is related to the fact that the country has traditionally embraced many kinds of minorities, and the interaction among these minorities politically, socially, and academically has been more active than in any other country in the world.¹²⁶ He also claims that the Dutch democracy, which has a very weak centralization of administrative

¹²³ Waaldijk, *supra* note 120, at 4. This decriminalization resulted from the integration into the then French empire, which decriminalized same-sex activity in 1791. Similarly, a few other countries under the influence of the French empire, such as Belgium and Luxembourg, decriminalized same-sex activity at the same time. *Id.*

¹²⁴ A general anti-discrimination law was introduced in 1983. *See* Marianne DelPo Kulow, *Same Sex Marriage: Scandinavian Perspective*, 24 LOY. L.A. INT'L & COMP. L. REV. 419, 428 (2002), <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1516&context=ilr>. (last visited April 2, 2014). In 1994, the General Equal Treatment Act also broadened its protection against sexual orientation discrimination.

¹²⁵ Kees Waaldijk, *supra* note 121, at 439.

¹²⁶ *Id.* *See also* VIRGINIE GUIRAUDON, et al., MONITORING ETHNIC MINORITIES IN THE NETHERLANDS (2005), http://ics.uda.ub.rug.nl/FILES/root/Art.s/2005/PhaletK-Measuring/PhaletK-Measuring-2005.pdf?origin=publication_detail (last visited March 10, 2014).

power, contributed to Dutch people's generosity towards same-sex relationships.

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2. The Recognition of Same-sex Marriage

From the early 1980's, Dutch law increasingly extended legal rights and obligations enjoyed by married couples to informally cohabiting couples;¹²⁸ because these laws did not make any distinction between different-sex or same-sex cohabiting couples, there was never a need for a specific law on same-sex cohabitation.¹²⁹ Since cohabitation is quite common in the Netherlands, it seems to have been possible to recognize legal rights for same-sex couples through the improvement of the legal regime concerning cohabitation. However, the positions of married spouses and cohabiting partners are significantly different. Cohabiting partners generally have to prove that they have been living together for an extensive period of time and yet, for example, some private pension funds will not pay pensions to cohabitants' surviving partners.¹³⁰ Financial benefits that are fully recognized for married couples, such as inheritance and death duties, are still difficult for cohabiting partners to obtain.¹³¹ Thus, even though cohabitation had been recognized to a large degree in the Dutch legal regime, there still remained reasons why the exclusion of same-sex couples from marriage was seen as discriminatory.

¹²⁷ Waaldijk, *supra* note 121, at 439. The Dutch Constitutional Law explicitly provides administrative power to districts and the unitary state system has been decentralized since the middle of the nineteenth century. Although each district is required to follow laws passed on the national and the state levels, it has a wide range of autonomy.

¹²⁸ Cohabitation is a stable sexual relationship between individuals living together. It is often referred to as "common law marriage." See Catherine Fairbairn, *Home Affairs Part, House of Commons Library*, "Common law marriage" and cohabitation (Nov. 11, 2013), file:///C:/Users/Yuki%20P/Downloads/sn03372.pdf (accessed on April 2, 2014 by searching for England, cohabitation in Google index).

¹²⁹ Waaldijk, *supra* note 120, at 5.

¹³⁰ Waaldijk, *supra* note 121, at 442.

¹³¹ *Id.*

In the early 1990's, the differences in legal protections between marriage and cohabitation began to be widely noted, leading to pressure for change. Along this line, the exclusion of same-sex couples from marriage led to several lawsuits, most of which focused on privileges of marriage, such as partner immigration, widow's pensions, tax benefits and adoption; all these lawsuits were unsuccessful.¹³² In one case, wherein the right to marriage itself was claimed by a lesbian couple, the Dutch Supreme Court¹³³ ruled that the exclusion of same-sex couples from marriage was not unjustified and therefore was not discriminatory.¹³⁴ The court, however, did refer to the possibility that there might be insufficient justification for the fact that some consequences of marriage are unavailable in law to same-sex couples in a lasting relationship.¹³⁵ Following this decision very quickly, the Advisory Commission for Legislation issued a report about the legal recognition of same-sex marriage, by order of the Minister of Justice, who was under pressure to address this matter from the majority in

¹³² *Id.* at 443.

¹³³ The Dutch Supreme Court is composed of one chief judge, six semi-chief judges and twenty-five judges. Its only role is to consider whether the law in question was appropriately applied; it does not have the authority of constitutional judicial review. *See* Jichi Kokusai Kyokai, *Oranda no Chihōjichi* [The Local Autonomy of the Netherlands] 15 (June, 2005), <http://www.clair.or.jp/j/forum/series/pdf/j22.pdf> (accessed on March 2, 2014 by searching for Oranda [the Netherlands], Chihōjichi in Google index).

¹³⁴ *See* P. J. BIRKINSHAW et al., *EUROPEAN PUBLIC LAW* 238 (2012), <http://dare.uva.nl/document/467669> (last visited March 11, 2014). It explains that “the ladies wishing to contract a marriage invoked the wording of the relevant provision of the Civil Code, which does not literally exclude the contracting of a marriage between persons of the same sex, and argued that not allowing such a marriage would conflict with Art. 23 International Covenant on Civil and Political Rights (ICCPR) and 12 European Convention on Human Rights (ECHR) as well as anti-discrimination clauses in human rights treaties and the Constitution... Even if later social developments would lend support to the view that the impossibility of a lawful marriage between two women or men would no longer be justified, this would not legitimize an interpretation which deviates from the unequivocal intent of the act of parliament... Certain legal consequences attributed to marriage which are not attributed to a lasting partnership between two persons of the same sex may be insufficiently justified. But this is not the issue in this litigation – an issue which as a rule can only be resolved by the legislature.” (“Art. 23 ICCPR. (1) The family is the natural and fundamental unit of society and is entitled to protection by society and the State. (2) The right of men and women of marriageable age to marry and to found a family shall be recognized. (3) No marriage shall be entered into without the free and full consent of the intending spouses. (4) States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.” “Art. 12 ECHR. Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”).

¹³⁵ *Id.*

parliament.¹³⁶ Subsequently, local authorities began to offer registration of same-sex partnerships, which had only symbolic but no legal significance due to the absence of parliamentary legislation at that time.¹³⁷ Meanwhile, the recognition of legal rights for same-sex couples was actively supported by both the Social Democrats (who were the party in power) and influential persons in lesbian and gay communities, such as popular gay magazines, which enhanced public opinion supporting same-sex marriage.¹³⁸ In 1992, under such social pressure, the Advisory Commission for Legislation recommended the introduction of a registered partnership regime, along the lines of the model introduced by the Danish legislature in 1989.¹³⁹ This model was carefully modified in order to fit Dutch society,¹⁴⁰ and, in 1997, the Registered Partnership Adjustment Act was enacted (effective in 1998), amending hundreds of provisions of Dutch law by changing any reference to marriage or spouse into a reference to marriage and registered partnership.¹⁴¹ Under this new registered partnership, both opposite-sex and same-sex couples were allowed to register their relationships.¹⁴²

With the introduction of registered partnership, the Netherlands thereby created a new civil status. The uniqueness of the Dutch registered partnership lies in that it is available to both opposite-sex and same-sex couples. By doing so, it was the Dutch government's intention to avoid stigmatization of same-sex couples as condemned to "second-class" marriage under this new registered partnership.¹⁴³ It was also beneficial for opposite-sex couples because they

¹³⁶ Waaldijk, *supra* note 121, at 443.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See Waaldijk, *supra* note 120, at 5. Contrary to the Danish model, however, the Dutch legislature chose to make registered partnerships equally available to same-sex partners and to different-sex partners.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Frederik Swennen & Aven Eggermont, *Same-Sex Couples in Central Europe: Hop, Step and Jump*, in Wintemute & Andenæs, *supra* note 121, at 27. Regarding this point, Professor Cynthia Grant Bowman of Cornell Law School told me, based on her own interviews in the Netherlands, that the highly developed idea of equality in

were now able to enjoy the formal recognition of their relationships in a manner other than marriage.¹⁴⁴ In fact, today, not all Dutch opposite-sex couples necessarily desire to get married, yet many wish to formalize their relationships; and the registered partnership continues to be used by opposite-sex couples more than by same-sex couples.¹⁴⁵

In the beginning of the registered partnership system, the range of legal rights recognized for registered partners was narrower than that for married couples.¹⁴⁶ With respect to rights and duties concerning marriage, such as financial and parenting rights, the Dutch legislature changed references step by step, subsequently reducing the gap between marriage and registered partnership, leaving very little difference by the time it finally legalized same-sex marriage in 2001. The Kortmann Committee, an expert commission composed of scholars and professionals, was formed in order to examine the differences between registered partnership and marriage and to study means to reduce any unequal and unjust gaps between the two.¹⁴⁷ The creation of the Kortmann Committee was the Dutch government's response to the resolution passed by the Lower House of the Dutch Parliament (*Tweede Kamer*) in 1996 calling for the opening of same-sex marriage.¹⁴⁸ In 1999, for example, following a recommendation

Dutch society may also contribute to this unique form of registered partnership so that everyone may enjoy the same opportunity.

¹⁴⁴ See Ian Curry-Sumner, *A Patchwork of Partnerships: Comparative Overview of Registration Schemes in Europe*, in Wintemute & Andenæs, *supra* note 121, at 71, 75. Curry-Sumner explains that “the Dutch government has sought to combine the claims from the homosexual community to be granted the rights and benefits of marriage, with the claims from the heterosexual community for a purely secular state recognized institution other than marriage.”

¹⁴⁵ *Id.* at 78.

¹⁴⁶ Waaldijk, *supra* note 121, at 448.

¹⁴⁷ *Id.* at 449. See also WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE 83 (2006) (“under pressure from lesbian and gay activists, the Dutch government addressed the inequalities between registered partnership and marriage, especially those related to rights over children reared in partnered households...the Netherlands created an expert commission, the Kortmann Committee, to examine the pros and cons” [of the recognition of legal rights for registered same-sex partners].).

¹⁴⁸ *Id.* at 84. *Tweede Kamer* is elected directly by Dutch citizens over the age of 18. The fact that *Tweede Kamer* was affirmative towards the recognition of same-sex marriage illustrates that the majority of Dutch society was in favor of same-sex marriage.

by the Kortmann Committee, the Civil Code was amended to permit joint adoption of Dutch children by same-sex couples and adoption of the child of one partner by the other in same-sex couples.¹⁴⁹ In this manner, all of the controversial gaps between marriage and registered partnership were closed, leading to the legal rights recognized by these two institutions being equal by 2000.¹⁵⁰

The quite receptive attitude and movement of the Dutch government towards same-sex marriage claims was mainly because public opinion strongly favored equal marriage rights; also, religious opposition in the Netherlands was not as forceful as in other European countries such as France or Germany.¹⁵¹ The Netherlands does not have a state church, so religious weddings were never an issue to be addressed by Parliament.¹⁵² Consequently, in 2001, the Netherlands became the first country in the world to legalize same-sex marriage.¹⁵³ In Dutch law, the Civil Code now explicitly provides that marriage can be contracted by two persons of the opposite or the same sex.

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3. The Social Meaning of Marriage

¹⁴⁹ *Id.* at 83 (“A child being cared for and brought up in a lasting relationship of two women or two men, has a right to protection in that relationship, including legal protection.”).

¹⁵⁰ Waaldijk, *supra* note 121, at 449.

¹⁵¹ ESKRIDGE, JR. & SPEDALE, *supra* note 148, at 84. More than 40% of Dutch citizens have no particular religious faith (the main religions are Catholic (31%) and Protestant (21%)), and churches have lost influence in people’s daily lives. Also, the Netherlands has the Council of State, and the government must ask for the advice of the Council of State (which is not legally binding, but the government is expected to follow its advice). *See* Jichi Kokusai Kyokai, *supra* note 133, at 4, 14.

¹⁵² ESKRIDGE, JR. & SPEDALE, *supra* note 147, at 299. *See also* Waaldijk, *supra* note 121, at 429 (“since the Netherlands does not have a state church, the state is unable to legislate a requirement authorizing any church to perform marriage ceremonies. Although in practice...many [churches] will refuse to marry [same-sex] couples, this is a reflection of the individual church’s choice, and not a matter of law.”).

¹⁵³ Sáez, *supra* note 77, at 2.

¹⁵⁴ Art. 1:30(1) CC, amended on April 1, 2001.

As in any other society, in the Netherlands marriage has been considered an institutional framework for procreation in history, tradition and religious beliefs.¹⁵⁵ Although registered partnership was welcomed as a significant step in resolving inequality, many same-sex couples did not register their partnerships when registered partnership became available, because they preferred to wait for real marriage.¹⁵⁶ Interestingly, the main user-group of registered partnership is opposite-sex couples, many of whom state that they preferred registered partnership over marriage, not just out of aversion to marriage as a traditional institution, but rather because it seems less binding and can be arranged more quickly and less expensively.¹⁵⁷ This fact demonstrates that there surely is a difference in the meaning of marriage and registered partnership at least in social context (in law, theoretically, marriage and registered partnership can be made equally binding and can cost exactly the same amount of money and time).¹⁵⁸

Reasons for couples to choose marriage, such as romantic impulses and practical needs (such as housing and child-bearing), are relatively the same in many societies. Regarding the meaning of marriage, Dutch people seem to emphasize the following two values: the legal framework (spousal benefits) and the symbolic value that a couple demonstrate their

¹⁵⁵ Frederik & Aven Eggermont, *supra* note 143, at 21.

¹⁵⁶ See Waaldijk, *supra* note 121, at 449 (explaining the survey conducted by the Ministry of Justice, showing that 80% of the same-sex partners who registered would have chosen to marry if that option had been available and 62% of them answered that they would like to convert their partnership into a marriage once that would be possible).

¹⁵⁷ *Id.*

¹⁵⁸ In Dutch law, registered partnership is different from marriage in that it can be terminated by mutual consent as long as the couple has a notary (an attorney in the Netherlands) sign their agreement on maintenance of the economically weaker partner and division of pension rights, while married couples must go to court to obtain a divorce (even a non-fault one). See CYNTHIA G. BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 202 (2010).

commitment to each other, family members and friends, and society.¹⁵⁹ Marriage, therefore, seems to be connected deeply to the pursuit of individual happiness.

The exclusion of same-sex couples from the legal institution and symbolic meaning of marriage was considered discriminatory in the Netherlands even after registered partnership was introduced and almost identical legal rights as marriage were recognized for same-sex couples.¹⁶⁰ According to Waaldijk, the introduction of registered partnership:

did not silence the call for the opening up of marriage. On the contrary, the social and political pressure increased. In retrospect, it seems that the whole legislative process leading to the introduction of registered partnership...served to highlight the remaining discrimination caused by the exclusion of same-sex couples from marriage: the awkward exceptions, and the separate and unequal social status of registered partnership as compared to marriage. With the introduction of the very marriage-like institution of registered partnership, the number of legal reasons not to open marriage to same-sex couples was...approaching zero.¹⁶¹

In short, the symbolic value of marriage cannot be achieved by registered partnership, and this fact provided the main support for the argument that the introduction of registered partnership had not accomplished full equality for same-sex couples. According to some same-sex couples, however, the tolerant social and legal climate in the Netherlands dulled the political point of marriage.¹⁶²

C. England

¹⁵⁹ M. V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE 23, 30 (2009) (explaining that couples wish to express their commitment through a marriage, a statement both to a partner and to others, including the society itself, which cannot be accomplished by registered partnership).

¹⁶⁰ Waaldijk, *supra* note 121, at 448.

¹⁶¹ *Id.* at 447.

¹⁶² BADGETT, *supra* note 159, at 32.

How England legalized same-sex marriage in 2013 can also be explained by Waaldijk's step-by-step approach. The presence of strong religious opposition, represented by England's state church, the Church of England, is, however, a significant difference from the situation in the Netherlands.

1. Legal and Social Treatment of Gays and Lesbians

It was not until 1967 that same-sex activity was decriminalized in England.¹⁶³ The opponents of decriminalization claimed that it would bring a danger to the moral structure of society, although they could never identify the nature of such harm.¹⁶⁴ Apart from the religious aversion in their background, this kind of thinking is similar to the "Japanese homophobia" discussed in Part I.

Nearly fifty years after the decriminalization of same-sex activity, the Equality Act 2010 explicitly prohibited any general discrimination based on sexual orientation, thus establishing anti-discrimination legislation for gays and lesbians.¹⁶⁵ This remarkable legislation was accomplished through the amendment of the anti-discrimination legislation in the fields of employment, property, housing, education, and the like. Debates on the recognition of legal rights for same-sex couples arose as English society began to have more diverse ideas about

¹⁶³ Sexual Offences Act 1967 (c60).

¹⁶⁴ Lord Goddard, a former Lord Chief Justice, described sodomy as "one of the gravest crimes that can be committed" though he could not explain why. On the contrary, the Earl of Arran, a representative in the House of Lords, made an outstanding speech that "lest the opponents of the Bill think that a new freedom, a new privileged class, has been created, let me remind them that no amount of legislation will prevent homosexuals from being the subject of dislike and derision, or at best of pity. We shall always, I fear, resent the odd man out." John Eekelaar, *Perceptions of Equality: The Road to Same-Sex Marriage in England and Wales*, INT. JNL. OF LAW, POLICY AND THE FAMILY, POLICY AND THE FAMILY 1, 2 (2014).

¹⁶⁵For details of the Equality Act 2010, see <http://www.legislation.gov.uk/ukpga/2010/15/contents> (last visited April 2, 2014).

marriage.¹⁶⁶ Changes to accommodate new types of families, including both opposite-sex cohabitants and same-sex couples, which could not be encompassed within traditional concepts of family, began to be called for.

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2. The Legal Recognition of Same-Sex Marriage

In England, cohabitation is very common. The number of same-sex cohabiting couples was steadily increasing,¹⁶⁸ but that is merely because cohabitation was the only available form of relationship to them. However, unlike in the Netherlands, English cohabiting couples are not given as many legal protections as married couples. The position of cohabiting couples is quite unstable.¹⁶⁹ Professor Bowman explains that “cohabitants in England lack most of the rights of married couples.”¹⁷⁰ For example, upon dissolution of their relationships, cohabitants have no guaranteed rights to ownership of each other’s property, which are available to married couples on divorce.¹⁷¹ Such difficulty is also seen in parenting rights. A cohabiting father does not acquire parental responsibility for his child automatically at birth, and, although he can do so through an agreement with the mother’s consent, few actually use this means.¹⁷² For the

¹⁶⁶ Eekelaar, *supra* note 164, at 3. *See also* Curry-Sumner, *supra* note 144, at 99 (noting that “the election of a Labor Government in 1997, which has also offered the United Kingdom its first openly gay cabinet minister, has certainly improved the situation and the future prospects of reform.”).

¹⁶⁷ Eekelaar, *supra* note 164, at 3. *See also* Ben Clements, *Partisan Attachments and Attitudes towards Same-Sex Marriage in Britain*, 67 *PARLIAMENTARY AFFAIRS* 232, 235 (2013). The British Social Attitudes Survey (BSA) 2008 showed that 33% of English citizens supported same-sex marriage, 37% supported registered partnership only and 26% opposed legal recognition. Based on the YouGov survey in 2012, 43% supported same-sex marriage, 32% supported registered partnership only and only 15% opposed legal recognition. The general picture from these survey is that support for same-sex marriage was increasing in England. *Id.*

¹⁶⁸ Clements, *supra* note 167, at 5.

¹⁶⁹ Fairbairn, *supra* note 128, at 3 (stating that “although cohabitants do have some legal protection in several areas, cohabitation gives no general legal status to a couple, unlike marriage and civil partnership from which many legal rights and responsibilities flow.”).

¹⁷⁰ BOWMAN, *supra* note 158, at 177.

¹⁷¹ *Id.* *See also* Fairbairn, *supra* note 128 (explaining that the court cannot override the general legal framework concerning property and divide a cohabiting couple’s property).

¹⁷² BOWMAN, *supra* note 158, at 177.

practical needs caused by these situations, social pressure calling for the recognition of legal rights for cohabitants and for same-sex couples had grown.

The English parliament wanted to avoid opposition to the recognition of same-sex marriage, even though it realized the need to recognize legal rights for same-sex couples.¹⁷³ As a result, the Civil Partnership Act 2004 was passed as a compromise, to avoid the immediate recognition of same-sex marriage while responding to the social pressure for change. In recognizing legal rights for same-sex couples in this limited way, the English government seems to have been influenced by pressure from the Church of England (the state church). Although the Church of England accepted the government's justification for registered partnership, it asserted that it was in the interests of society for marriage to continue to enjoy a unique status, allowing only opposite-sex couples to marry.¹⁷⁴

The English civil partnership was available to same-sex couples who were: (1) of the same-sex; (2) both over the age of sixteen; (3) both single; and (4) not having any relationship for which marriage would be prohibited. Unlike the Netherlands, the English civil partnership is a legal institution only for same-sex couples, and so it can be perceived as a "separate but equal" or "quasi-marriage" institution solely for same-sex couples. With respect to the legal rights and duties of marriage, the English legislature took similar steps as the Dutch legislature did. It gradually filled in the gaps between marriage and registered partnership. For example, regarding succession to tenancies on death of the tenant, in 1999 the House of Lords held that a

¹⁷³ Eekelaar, *supra* note 164, at 7 (explaining that while Baroness Scotland's statement in the introduction of the Civil Partnership Act (it was a bill in the House of Lords at that time), "we have considered the specific problems faced by same-sex couples as a result of the failure to give legal recognition to their relationships. We found that problems can arise in a wider range of areas than might immediately first spring to mind...", was addressing the difficulties of same-sex couples quite specifically, English government's consultation paper in 2003 merely referred to a more general well-being objective: "the opportunity to register [same-sex] partnership indicated to the partners that their relationship was socially acceptable.").

¹⁷⁴ *Id.*

gay partner fell within the definition of “family,” and in 2004 it stretched the expression “living...as his or her wife or husband” so as to include same-sex partners.¹⁷⁵ In 2002, same-sex couples were permitted to jointly adopt a child.¹⁷⁶

In England, the road between the introduction of registered partnership and the legalization of same-sex marriage seems to have been longer than in the Netherlands because of the religious opposition.¹⁷⁷ The opponents, mainly those who held religious views that marriage should be limited to a man and a woman, argued that the traditional significance of marriage should be maintained, whereas supporters of same-sex marriage emphasized the need to change such traditional views. Regarding the religious opposition, one of the most obvious grievances of same-sex couples was that civil partnership cannot be formed in a religious ceremony.¹⁷⁸ The English government consulted with various groups in society about their views towards same-sex marriage, trying to find a compromise. The Church of England maintained that the consequences of opening marriage to same-sex couples would not be beneficial for society as a whole, arguing that civil partnership already provided same-sex couples with a sufficient framework for exercising the virtues of fidelity and mutuality that could be perceived as equal to marriage.¹⁷⁹ Similarly, the Roman Catholic Church asserted that

¹⁷⁵ *Id.* at 5. The influence of the European Court of Human Rights was significant too. At the same period of time, the European Court of Human Rights held that denying residence or contact on the sole ground of sexual orientation was unlawful discrimination. For details of this decision, see *Salgueiro da Silva Mouta v. Portugal*, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58404#{\"itemid\":\[\"001-58404\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58404#{\) (last visited March 14, 2014).

¹⁷⁶ *Id.*

¹⁷⁷ Swennen & Eggermont, *supra* note 143, at 26, which states that “the discussion about the introduction of same-sex marriage, therefore, inevitably centered on the symbolic significance of marriage.”

¹⁷⁸ Eekelaar, *supra* note 164, at 9 (“in 2011, the government issued the consultation on how the power to allow civil partnerships to be registered in religious buildings should be implemented. It, however, did not propose to alter the provision that the registration should not occur during a religious ceremony, but it could [only] occur before or after it.”).

¹⁷⁹ *Id.* (explaining that according to the Church of England, extending marriage to same-sex couples would further dilute the significance of marriage by excluding the fundamental complementarity of men and women from the social and legal definition of it).

the recognition of same-sex marriage would have the potential to harm the stability of society.¹⁸⁰ While centering on the uniqueness of marriage, they failed to provide any specific indication of the ways in which social stability might be affected.¹⁸¹ The government responded to these religious opponents with a brief statement: “we recognize that there is a broad range of strongly held views on this issue. After taking into account the responses the government continues to believe that same-sex couples should have access to a civil marriage ceremony.”¹⁸² This led the churches to feel that they were not being taken seriously.¹⁸³ Public support for same-sex marriage was relatively divided, compared with the situation in the Netherlands. By the time the government presented the proposal concerning the recognition of same-sex marriage, 56 percent of British citizens were in favor of it, while 46 percent opposed it.

In the legal context, lawsuits filed by concerned individuals were proving unsuccessful. For example, although the impact of the Human Rights Act 1998 on the request for equal access to marriage by same-sex couples was presumed to be significant,¹⁸⁴ the cases of *Wilkinson v. Kitzinger* and *M v. Secretary of State for Work and Pensions* held that the availability of civil partnership already satisfied the relevant human rights requirements.¹⁸⁵ In this sense, the availability of registered partnership with almost identical rights as marriage enabled the

¹⁸⁰ *Id.*

¹⁸¹ *See id.* at 9. In contrast, the Royal College of Psychiatrists supported the government’s proposal to open marriage for same-sex couples, presenting a wide range of research that demonstrated lesbian, gay, and bi people suffered significantly higher levels of mental illness than the rest in society, to which they believe unequal treatment contributed. Its report (testimony), therefore, concluded that marriage equality would certainly reduce the discrimination, and thus mental health of LGBs would be improved, contributing to the good of society as a whole: “LGB persons make up a population that suffers from worse mental health than heterosexual people. To withhold marriage equality is to treat this minority differently on the basis of their sexual orientation. This discrimination contributes to the minority stress experienced by LGB persons, an important factor in their health disadvantage.” *Id.*

¹⁸² *Id.* at 8.

¹⁸³ *Id.*

¹⁸⁴ *See* Karen Bullock & Paul Johnson, *The Impact of the Human Rights Act 1998 on Policing in England and Wales*, BRIT. J. CRIMINOL. 1, 21 (2011) (explaining that “any discrimination against same-sex couples would be strictly prohibited under the Human Rights Act 1998 [which made the ECHR legally binding in England].”).

¹⁸⁵ *Id.*

English legislature to gain time to seek a legal means that would satisfy same-sex couples' desire to obtain the symbolic values of marriage as well as to deal with religious opposition while forestalling legal challenges by same-sex couples.

Although legal rights for same-sex couples had been recognized by the introduction of civil partnership, the name of marriage, and its symbolic significance, was unavailable unless marriage itself was opened up to same-sex couples. With the introduction of civil partnership, the absence of same-sex marriage might have had very thin adverse effects on concerned individuals in the legal context, but there was also less evidence that the recognition of same-sex marriage would cause any harm to society.¹⁸⁶ Rejecting the religious opposition, Parliament passed the Marriage Act 2013.¹⁸⁷ While this remarkable legislation was welcomed by gay and lesbian communities and their supporters, strong resistance by the opponents still remained.¹⁸⁸ Nevertheless, same-sex marriage was subsequently legally recognized on March 13, 2014 by the Marriage (Same Sex Couples) Act 2013,¹⁸⁹ finally opening marriage to same-sex couples.

3. The Social Meaning of Marriage

With respect to the meaning of marriage, English society seems to share many aspects with Dutch society. Marriage is generally a matter of a person's individual choice to marry a

¹⁸⁶ *Id.*

¹⁸⁷ *Same-sex marriage becomes law in England and Wales*, BBC News (July 17, 2013), <http://www.bbc.com/news/uk-politics-23338279> (accessed on March 14, 2014 by searching for England, law, same-sex marriage in Google index).

¹⁸⁸ *Gay Marriage Bill Expected To Become Law By The End of The Week*, HUFFPOST (July 15, 2013), http://www.huffingtonpost.co.uk/2013/07/15/gay-marriage-house-of-lords_n_3599456.html (accessed on March 14, 2014 by searching for England, law, same-sex marriage in Google index) (stating that "Tory Lord Framlingham [who voted against the act] told peers that it was a deeply sad day given gay marriage was now almost law and said millions of people's lives would be made less happy as a result.").

¹⁸⁹ For details of the act, *see* [legislation.gov.uk](http://www.legislation.gov.uk), <http://www.legislation.gov.uk/ukpga/2004/33/contents> (last visited March 14, 2014).

particular person he or she wishes.¹⁹⁰ But how important is it, given the widespread acceptance of cohabitation? The public support for same-sex marriage in England was relatively divided, compared with the situation in the Netherlands. By the time the government presented the proposal concerning the recognition of same-sex marriage in 2012 (The Equal Marriage Proposal), 56 percent of British citizens were in favor of it.¹⁹¹ The superiority of marriage that the religious opponents emphasized in their arguments against same-sex marriage ironically added to the sense of exclusion and injustice felt by same-sex couples and also increased public support for change.¹⁹²

Summary

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,¹⁹³ which enhanced social support for same-sex marriage.

¹⁹⁰ BADGETT, *supra* note 159, *passim*.

¹⁹¹ Eekelaar, *supra* note 164, at 11. *See also* HM Government, Equal marriage: The Government's response (2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/133262/consultation-response_1_.pdf (accessed on April 2, 2014 by searching for Equal marriage, UK government in Google index).

¹⁹² Eekelaar, *supra* note 164, at 2 ("With marriage held out as such a prize, it is scarcely surprising that homosexuals [*sic*] perceive their exclusion from it as a serious injustice.").

¹⁹³ For more information about gay and lesbian rights movements in the Netherlands and England, *see Netherlands, The*, U.S. Department of State, <http://www.state.gov/j/drl/rls/hrrpt/2006/78830.htm> (accessed on April 2, 2014 by searching for gay right movements, Netherlands in Google index) and *The Gay Rights Movement*, BBC Archive,

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 and 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 more advanced than in any other region in the world. 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* shall be prohibited."¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶ Although the case law is not always consistent due to the necessary compromises caused by the difficulty of uniting various cultures and social structures

http://www.bbc.co.uk/archive/gay_rights/ (accessed on April 2, 2014 by searching for gay right movements, UK in Google index).

¹⁹⁴ 2000 O.J. (C 364) 1, 13, *available at* http://www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed on April 5, 2014 by searching for EU Charter in Google index) (emphasis added).

¹⁹⁵ Kees Waaldijk, *Towards the Recognition of Same-Sex Partners in European Union Law: Expectations Based on Trends in National Law*, in BIRKINSHAW et al., *supra* note 134, at 640 (stating that "the EU is gradually recognizing same-sex relationships [*sic*] in law.").

¹⁹⁶ 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 Wintemute & Andenæs, *supra* note 121, at 713.

of the member states, the European community has demonstrated autonomy in its interpretation of human rights to be protected.¹⁹⁷ Wintemute explains the role of the ECHR as follows:

[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”,¹⁹⁸ 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.¹⁹⁹

In *Karner v. Austria*,²⁰⁰ 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 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.²⁰¹ Furthermore, Toner explains that:

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

¹⁹⁷ Bea Verschraegen, *The Right to Private and Family Life, The Right to Marry and to Found a Family, and The Prohibition of Discrimination*, in Wintemute & Andenæs, *supra* note 121, at 257. 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. *Id.*

¹⁹⁸ Wintemute explains that “consensus” is an integral part of the Court’s “living instrument” approach to interpreting the Convention, whereby its interpretation of the Convention evolves with changing social and legal conditions in Europe (which are influenced by developments in national law in the member states and vice versa) and that since the Convention is the first and forever system for the protection of human rights, the Court must have regard to the changing conditions in the member states and respond to emerging consensus as to the standards to be achieved. Wintemute & Andenæs, *supra* note 121, at 713.

¹⁹⁹ *Id.* at 728-29.

²⁰⁰ 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> ((accessed on April 5, 2014 by searching for *Karner v. Austria* in Google index).

²⁰¹ 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., 2nd ed., 2012).

“protection of the traditional family” and marriage could not justify differential tenancy succession protection [on the facts of *Karner v. Austria*].²⁰²

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.²⁰³ Although whether same-sex relationships should be included in the concept of “family” has been a serious issue, the 2006 implementation of the law on EU citizens’ migration rights,²⁰⁴ 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.²⁰⁵ Nonetheless, the situation surrounding same-sex couples in Europe as a whole is becoming more favorable than it was before.²⁰⁶

As discussed above, both the Netherlands and England seem 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 because public awareness about the difficulties with which same-sex couples had to deal was increased and more people began to consider that the enjoyment of the symbolic value of marriage should be provided to

²⁰² *Id.* at 293.

²⁰³ *Id.* at 285.

²⁰⁴ Directive 2004/38, O.J. (L 158) 77 April 30, 2004, available at <http://www.refworld.org/docid/4a54bbb00.html> (accessed on May 24, 2014).

²⁰⁵ Toner, *supra* note 201, at 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.”).

²⁰⁶ *Id.* 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. *See* Verschraegen, *supra* note 197, at 260.

same-sex couples too.²⁰⁷ 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 these situations 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, due to which the opening of same-sex marriage may be more difficult in Japan.

4. THE POSSIBILITY FOR JAPAN TO LEGALIZE SAME-SEX MARRIAGE

Using Waaldijk's approach, both the Netherlands and England indeed preceded the recognition of same-sex marriage by making small legislative changes rather than making 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 legal rights to same-sex couples and then gradually reduced gaps between marriage and registered partnership, meanwhile gaining 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 bearable. Comparing the situations of these two countries with that of Japan, this Part discusses the possibility for Japan to legalize same-sex marriage.

²⁰⁷ 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.

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 Part I and II. Therefore, the first two steps of Waldijk's approach are both missing in Japan. Same-sex activity was not criminalized in the first place so decriminalization was not required, and there was no law treating gays and lesbians in a discriminatory way, so anti-discrimination law has 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 discussed. Because of their unawareness and ignorance of the necessity for change, most people are indifferent to the issue.

The absence of previous discrimination also caused the silence of gay and lesbian rights movements in Japan.²⁰⁸ My 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 severe discrimination, such as religious opposition.²⁰⁹ Also, because sexuality is an extremely private matter that is rarely discussed in public, gays and lesbians are generally reluctant to advocate the recognition of their rights.²¹⁰ 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

²⁰⁸ About the gay and lesbian right movements in Japan, *see* Part I in this paper. 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.

²⁰⁹ *See* note 52, *supra*.

²¹⁰ *See* Part I in this paper for details.

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 demand for an affirmative legislative movement will grow in the near future.

In this sense, the establishment of a registered partnership system designed for same-sex couples should be the first step.²¹¹ 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 only by the enactment of a new law under the present legal system.²¹² Besides, since there are many issues to address concerning the recognition of same-sex relationships (such as parenting rights, pensions and inheritance), establishing registered partnerships with limited legal protection compared to marriage and carefully extending the range of protection 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 the 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

²¹¹ 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* Interview with Uesugi, *supra* note 77.

²¹² Some scholars suggest that an amendment of Art. 24 of the Constitution is not necessarily a requirement for the legalization of same-sex marriage; I agree. 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.

socially considered “quasi-marriage,” often face social stigma as inferior to marriage.²¹³ Second, in order for the introduction of registered partnership to emphasize the reality wherein same-sex couples have no access to marriage and 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, 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.²¹⁴ Moreover, because a regional intergovernmental organization such as that in Europe is totally lacking in East Asia, there is little incentive for international harmonization.²¹⁵ If 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) will arise and the expectation

²¹³ See TOKUHIRO, *supra* note 33, *passim*. See also Interview with Uesugi, *supra* note 77. 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).

²¹⁴ 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 (Kanakano Otsuji; her term expired in July, 2013); she has been the only one who came out about sexuality in the Japanese parliament. See Interview with Endo, *supra* note 52.

²¹⁵ 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.

of Japanese legislation to deal with same-sex marriage will be greater.²¹⁶ 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.²¹⁷

While the legal introduction of registered partnership 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 are allowed to transfer 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 (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). 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 the disorder.²¹⁸ Similarly, thus, it is possible that the introduction of registered

²¹⁶ See Part II in this paper, which explains about the difficulty for international same-sex couples residing in Japan.

²¹⁷ 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. BADGETT, *supra* note 159, at 177. 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.

²¹⁸ 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. I, as a sixth grade student at that time, also learned about the disorder for the first time through the drama.

partnership legislation will draw public awareness about the difficulties that same-sex couples have faced, and public support for the full recognition of their relationships may develop.²¹⁹

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 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 a significance with respect to continuation of one's family lineage as described in Part I.²²⁰ Therefore, the fact that same-sex couples are unable to continue their family lineage through natural procreation will likely cause opposition or reluctance to same-sex marriage.

Unlike this situation in Japan, in the Netherlands and the UK, there is much less pressure

²¹⁹ 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.

²²⁰ For details regarding the traditional value of marriage in Japanese society, *see* Part I in this paper, which explains the meaning of marriage in Japanese society.

from family toward marriage.²²¹ 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 main reasons to marry among single people was that they wish to relieve their parents and relatives of pressure from inquiries about their adult children's single status in their social network, and the biggest concern after marriage for single women was the relationship with the husband's family.²²² Unless this deep relation between marriage and family is somehow weakened, it will likely be difficult to accept same-sex couples into the institution of marriage. The preservation of the traditional meaning of marriage has not been 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.²²³

²²¹ 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.

²²² *Kekkon, 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> (last visited April 3, 2014).

²²³ 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. See Saikō Saibansho [The Supreme Court] September. 4, 2013. no.6, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1320 (Japan).

Meanwhile reconsidering the validity to preserve 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, but it is better to take such a risk and provide legal protection to same-sex couples than to ignore the reality wherein they have no direct means to recognize their relationships and to do nothing.²²⁴

CONCLUSION

The legalization of same-sex marriage is a drastic change that can never be accomplished in a day. It is supported by 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 and the relating systems. Along with accelerated globalization, today people in different societies often share the same values. Globalization of values is worthwhile as it enables active interactions among various people. In this sense, Europe is a good example where people in once different cultures and traditions share changes in values. In addition to the values of freedom and equality, new values in peoples' mind that are different from traditional ideas, such as diverse ideas of family and marriage, seem to have expanded throughout the region. When it comes to East Asia where Japan is located, this kind of globalization is lacking, which may explain the indifference of many Japanese people towards human rights issues that are not personally relevant to themselves.

²²⁴ My informant, Uesugi, also emphasizes the importance of changing the reality in Interview, *supra* note 77.

On the issue of same-sex marriage, Japan seems to be far behind other countries. 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 need for the legal recognition of same-sex couples. Japanese gays and lesbians, who were not motivated to advocate for their rights due to lack of discrimination in society, have thus missed an opportunity to establish their identity and push for equality. 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. To people outside of Japanese society and culture, the strong relation between marriage and family may seem to be an anachronistic value that should be abandoned, but in Japanese society today, the idea that marriage is an important 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 whether Japan is ready to legalize same-sex marriage would be no.

Nonetheless, whether or not Japanese people should preserve the traditional value of marriage and the necessity to recognize legal rights for same-sex couples are different issues. While the former requires careful consideration, the latter is able to and need to 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 anachronism because they are generally what the society has cultivated with its culture, 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 obvious that the traditional value of marriage is one of the reasons preventing the opening of same-sex marriage. In this situation, what should be done immediately is to respond to the necessity to recognize legal rights for same-sex couples. This can be accomplished by the introduction of registered partnership.

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 their legal rights to some extent. If registered partnership were introduced, even though it is an interim measure that cannot 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 since many Japanese people are indifferent to gays and lesbians, let alone same-sex marriage. With respect to this point, change of the attitude of Japanese media will be necessary. Japanese media has treated gays and lesbians in an entertaining tone, rather than purporting to provide their audience with educational information about them, mainly because there was no moral taboo on doing so due to the lack of religious discrimination against gays and lesbians in society. Considering the great influence media generally has, if this attitude of Japanese media is changed to a more educational tone, 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 partnership has many possibilities to change the present situation for the better. Same-sex couples will be relieved from the difficulties they have faced due to the lack of a legal system to formally recognize their relationships, and this will also raise public awareness to reconsider whether the current meaning of marriage should still be maintained. Therefore, the introduction of registered partnership embraces a bright possibility to lead Japan to be more ready for same-sex marriage.