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Moving Towards Equality : a Strategy for Getting Queer Japanese Citizens Protection and Increased Visibility

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*Moving towards equality: A strategy for getting queer Japanese citizens
protection and increased visibility.*

Darell Hayes

International Immersion Program: Japan

Substantive Research Paper

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I. INTRODUCTION

Japan's lesbian, gay, bisexual and transgender (LGBT) movement is nascent. Looking at several facts: (1) Japan's history—there was no religious animus towards LGBT persons¹, (2) great amount of people publicly support LGBT people², and (3) prominent members of the Japanese political class have been welcoming of LGBT movements³, one could expect Japan to be much further along when it comes to LGBT rights. But, it is not. And, even though LGBT persons face “invisibility, marginalization, silent prejudice and stigmatization,”⁴ LGBT persons have received little attention from the Japanese government or their peers.

But, if the United States, a country with a history of religious animus towards same-sex unions can move that quickly, it is not unlikely to assume that similar swift progress can be made in Japan. In June 2015, the United States joined 21 countries (mostly in Europe and the Americas) in legalizing same-sex marriage.⁵ This is a remarkable fact for several reasons. First, only eight years earlier, public acceptance of gay marriage was lagging in many areas across the United States. State laws banning same-sex marriage passed in several states. And legal challenges to these same sex marriage bans were mostly unsuccessful up until

¹ Buddhism and Shintoism, Japan's major religions, were tolerant and did not speak directly on LGBT culture.

² Equaldex, *LGBT Rights in Japan* (2015), available at <http://www.equaldex.com/region/japan> (showing that 42.4% of Japanese people support gay marriage).

³ Prime Minister Abe's wife has walked in the Tokyo pride parade for the past several years.

⁴ GayJapanNews et. al, *The Violations of the Rights Lesbian, Gay, Bisexual and Transgender Persons in JAPAN: A Shadow Report*, (October 2008), available at <http://www.iglhrc.org/sites/default/files/159-1.pdf>

⁵ Pew Research Center, *Gay Marriage Around the World*, (June 26,2016), available at <http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/>

Windsor v. United States, a case challenging the federal Defense of Marriage Act which entitled only straight married couples to certain federal benefits.

This short paper has four parts and argues that Japanese LGBT organizations should pursue a three-pronged approach. They should (1) argue in courts for broad, human-rights centered protections LGBT that focus on addressing the needs of the most vulnerable members of the LGBT population, (2) use popular referendums to face politicians and courts to grapple with their issues, and (3) create a culture of LGBT visibility. This strategy provides a mechanism for bringing about social, cultural and legal change.

Part II of this paper provides a brief history of LGBT rights in Japan. Having a solid understanding of where LGBT persons fit into the Japanese cultural fabric and political landscape contextualizes the legal framework. For LGBT organizations to be successful, they will have to navigate, exploit, and shape the Japanese people's understanding of its culture.

Part III looks at the current Japanese legal landscape. First, it discusses various obstacles that LGBT persons may face in getting married, housing, employment, and healthcare. Later this part takes a deeper look at the status of legal challenges to obtain same-sex marriage and more broadly, anti-discrimination protection.

Part IV is a comparative look at the LGBT rights movement in the United States. First, this part development into LGBT movement's dual strategy of (a) LGBT-focused legislation and (b) LGBT impact litigation. Second, it identifies best

practices that could be particularly useful for LGBT organizations in Japan.

Finally, it fleshes out the three-pronged approach described.

II. HISTORY OF LGBT RIGHTS IN JAPAN

This part reviews how LGBT people have been treated in Japan. It is divided into three sections. Section A looks at how Japan had a culture of acceptance and tolerance for LGBT people, in particular its gay men. Section B looks at how views towards LGBT people changed during the Meiji period as Japan attempted to modernize. And, Section C looks at Post-World War II Japan and how the current challenges that LGBT people face in Japan.

A. Pre-Meiji Period: Relative Tolerance for Japanese Gay Boys.

Japan has a different social and legal history than its Western counterparts. First, most people practice religions that were mostly accepting or tolerant of LGBT person. For example, both Buddhism and Shintoism do not condemn LGBT persons per se. Second, because of this lack of religious animosity, there was a heightened LGBT visibility within pre-Meiji Japanese society. So, art, in particular during the Tokugawa period, “provided extensive representations of the varieties of homosexual love practiced.”⁶ Remarkably, gay love was shown between men of a privileged class. So, in the Samurai class, homosexuality was accepted and depicted among seniors (masters) and juniors (servants). In a very significant way, gay male love was embedded in the Japanese culture. And, as Japan attempted to move away

⁶ Teiko Tamaki, *National Report: Japan*, 19 AM. U. J. GENDER SOC. POL'Y & L. 251 (2011): 251-264, 258 (the *National Report: Japan*). (quoting M. McLelland, *Male Homosexuality in Modern Japan*).

from feudal culture depictions of gay love soured and acceptance of it quickly evaporated.

B. The Meiji Period: A Move Towards Intolerance.

For most of Japan's history, the Japanese have been relatively accepting of LGBT persons, gay men in particular. For example, popular literature during this time depicts gay activity in student dormitories.⁷ Attitudes towards LGBT people began to change as Japan adopted more Western attitudes and legal practices. And, during this period, Japanese law became mostly a composite of the French and German legal code.⁸

European conceptions of LGBT persons were informed by their ties to Christianity. Across Europe LGBT persons were viewed as sinners and engaging in a gay relationship or "activity" was treated as a punishable crime. As European medical science advanced, theories about LGBT persons evolved too. Homosexuality began to be viewed as a psychological disorder. Fortunately, this meant that engaging in homosexual activity was decriminalized. But, homosexual activity was still considered a disorder.⁹ And, homosexuality being viewed as abnormal behavior is what took hold in Japan. There are two main reasons for this change. First, the Japanese wanted to seem urbane and culturally modern. Second, the Japanese wanted to re-shape how its society was structured and gay culture reinforced feudal

⁷ Sechiyama Kaku, *Rainbow in the East: LGBT Rights in Japan*, Nippon.com (May 28, 2015), available at <http://www.nippon.com/en/currents/d00174/> (remarking that gay activity was written about in Mori Ogai's *Vita Sexualis*).

⁸ *National Report: Japan*, 252.

⁹ Anthony DiStefano, *Suicidality and Self-Harm Among Sexual Minorities in Japan*, *Qual Health Res* (2008): 1429-1441.

relationships. So, gay culture and gay people had to be suppressed in order to develop a national identity.

Before the Meiji period, gay art flourished. But during the Meiji period, “[h]omosexual desire was no longer celebrated in literature, theater, and art; rather, it was discouraged as one of the ‘evil customs’ of the past, a national embarrassment given attitudes in the modern West.”¹⁰ So, ironically, it was in a quest to be viewed as modern in the eyes of its Western peers that Japan rapidly changed its views.

Other theorists contend that homosexuality had to be disavowed because it was modeled after and reinforced the feudal relationship between a lord and his retainer. So, “with the fall of the feudal order, these values and institutions (homosexuality, more broadly and male prostitution, in particular) were for the most part either weakened or eradicated.”¹¹ To further this goal, information campaigns were carried out by the elite. For example, newspapers in Japan and those covering Japan advocated that LGBT persons be imprisoned for their behavior.

Unfortunately, in this move to unify Japan, LGBT persons became to be viewed as “sick” and/or “abnormal”. And, this characterization still acts as a major barrier to LGBT persons gaining adequate respect and concern in the Japanese social fabric.

¹⁰ Koichi, *Gay Samurai: The History of Homosexuality*, (Sept. 30, 2015), available at <https://www.tofugu.com/japan/gay-samurai/>

¹¹ *Ibid.*

C. Post World War II and the Modern Japanese State.

“Put simply, promoting the rights of sexual and sexual identity minorities in healthcare, housing, or even simple awareness is “biymo”, Japanese for sensitive complicated, delicate.”¹² LGBT organizations face a myriad of barriers in modern-day Japan.

Some contend that the LGBTQ rights organizations face governmental pressure. This manifests itself in several ways. First, the Japanese government is very much interested in promoting policies that promote family growth and policies that promote LGBT equality are, by proxy, anti-family. Second, because the Japanese government is heavily invested in *Abenomics* (the popular name to describe Japanese domestic policies and its PR campaign aimed at integrating women into the workforce to fill the labor gap), it could not also, at the same time, pursue a strategy to integrate LGBT people.

Some scholars argue that “same-sex couple are not even included in the category of “family.”¹³ The logic is simple. Same-sex couples cannot procreate naturally. And, LGBT persons and same-sex couples are not allowed to take use of Assisted Reproductive Technology.¹⁴ Nor are they allowed to adopt children.¹⁵ Therefore, in a very literal sense, LGBT persons are barred, by government policy, from forming families with children.

¹² Nancy Snow, *Telling Japan's Story to the World*, PUBLIC DIPLOMACY MAGAZINE (Winter 2015): 29-31, 29.

¹³ *National Report: Japan*, 262.

¹⁴ *Ibid* at 261.

¹⁵ *Ibid* at 261.

Another bar is the inability of Japanese same-sex couples to register in the Japanese Family Registration Book or (the “Koseki”).¹⁶ Cultural beliefs as to what constitutes a family is bound up in the Koseki. From a legal standpoint too, the Koseki, has important ramifications. As a “marriage becomes effective by notification thereof in accordance with the provisions of the Family Registration Act.”¹⁷ So, “family” is tied to biological functions and cultural norms. And, LGBT persons face social barriers (stigma and social exclusion) which are backed by law (e.g., Koseki legislation, prohibitions on adoption and ART use) that make it harder to advocate for change.

So, Japanese LGBT organizations face a dual challenge: (1) they cannot rely on promoting LGBT marriage rights or other equal rights on the premise that they protect LGBT families because they do not have families and (2) they cannot look to other forms of government support because the government has its hands full promoting women and some would see this as opportunity to usurp the women’s right agenda.

III. SOCIAL BARRIERS AND LEGAL CHALLENGES TO LGBT RIGHTS IN JAPAN.

LGBT persons face bias, stigmatization and ultimately, discrimination under current Japanese law. The first section below describes in detail how Japanese LGBT persons are discriminated against in a variety of different facets of their life.

¹⁶ *Ibid* at 262.

¹⁷ *Ibid* at 262.

The second section homes in on same sex marriage because there are constitutional and administrative barriers to reform.

A. Areas of Discrimination.

Marriage inequality. Art. 24 states that “marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with equal rights of husband and wife as a basis.”¹⁸ Aside from the constitutional text, some scholars have asserted that there are three social explanations that justify denying affording same-sex the same benefits as a mixed sex marriage.

The first explanation is more traditional. Here, the government cannot extend marriage benefits to same-sex couples because they are non-ideal. That is government provides benefits to heterosexual couple because they help the Japanese government further an important policy goal, procreation and growth in nuclear policies. So, similar to arguments advanced in the United States, marriage cannot be extended to same sex couples because there is no “intention” to create a nuclear family.¹⁹

The second explanation is more recent. It is expresses on view popular in the current Japanese legal academy. On this second view, there is not necessarily a need to include same-sex couples as being eligible for marriage. Because unmarried heterosexual couples already enjoy some benefits, these same benefits could be given to same-sex couples without significant legal change. The options that could

¹⁸ Art. 24. Japanese Constitution.

¹⁹ *National Report: Japan*, 262.

accomplish this goal are: (a) civil unions (that do not specify whether a couple is same sex or mixed sex), (b) civil unions (but, only for same sex couples), and (c) other protections that stop short at full marriage benefits (i.e., civil union plus for same sex couples).²⁰ Now, this view has some appeal because it does not upset the current constitutional regime. But, in each of these formulations, there is embedded an idea that same-sex couples are different in-kind than their mixed sex peers. So, gays, lesbians and transgendered folks, on this account, are akin to a “separate, but equal” standard.

Finally, the third reason, is the most sympathetic and egalitarian conception. It does not necessarily argue that marriage benefits should not be afforded to same sex couples. It argues that there should not be distinctions in any sort of partnership arrangement. So, legal marriages, common law marriages, same sex partnerships, and co-habitation should all be viewed equally.²¹ And each of these arrangements are entitled to similar treatment because they express an individual’s choice as to how to connect with other individuals. So, not privileging any of these institutions over one another actually enables individuals, regardless of their sexuality, to choose freely among choices. This view is attraction. But, only if Japanese law also extends the privileges equally to each of these arrangements are LGBT persons any better off. Because Japanese law currently does not extend benefits regardless of arrangement type, LGBT persons are still worse off and subject to marriage inequality.

²⁰ *National Report: Japan*, 254.

²¹ *Ibid.*

Each of these arguments acts as a bar to extending same-sex marriage benefits and the rights and protections that come with that to LGBT persons. More importantly, each of these explanations will continuously reappear in different aspects of the laws affecting LGBT persons.

Employment discrimination. Put simply, there are no protections for LGBT person in employment.

Mental health and healthcare. Japanese's health care laws regarding LGBT persons are interesting for several reasons. First, there are prohibitions on some activities. Second, there are numerous barriers to accessing healthcare for LGBT persons in Japan. And, Third, Japan's carve-out for transgender persons creates special problems. First, there are some flat-out prohibitions on conduct. So, men who have sex with men (or gay men) are often banned from donating blood. Second, there are social barriers to accessing health-care. Third, and perhaps, most frighteningly is how carve-outs for transgender persons creates special problems in accessing medical care. Japan has created special laws to deal with transgender people. In one sense, these laws are meant to be paternalistic – and provide some protections to the transgender community. But, in another sense, they work off a very flawed and dangerous assumption that transgender people are in need of medical help because their behavior and the gender-identity and sex assignment is one that is medically abnormal. Most importantly, this limited access to health for

LGBT persons in Japan is especially problematic because reported suicide attempts and completed suicides are remarkably high.²²

Public accommodation/Housing. One area where LGBT persons seem to have heightened protections is public accommodations. The “Fuchu Youth House” case is the first and few cases that addresses LGBT issues.²³ In the Fuchu case, a group of LGBT persons were denied lodging at a public youth study camp because staff members (whom were employed by the Tokyo Metropolitan Board of Education) believed, without sufficient evidence, that the people would engage in gay activities (including sexual ones). The Court granted compensation to the LGBT group because the Board of Education had illegally discriminated against them. The Court alluded to the public’s changing beliefs about LGBT people and the need to protect LGBT person’s minority rights.

But, unfortunately business have not been vigilant about keeping their doors open to LGBT and courts have been reluctant to take more LGBT discrimination in public accommodations cases. Despite the initial success of “Fuchu”, LGBT people cannot rely on it as precedent.

B. Special Focus on Same-Sex Marriage.

In Japan, conversations about same-sex marriage are just beginning. There are two main legal changes when same-sex marriage.

Japanese Constitutional Issues. While most legal scholars agree that Article 24, which defines marriage as between a man and a woman does not provide textual

²² *Suicidality and Self-Harm Among Sexual Minorities in Japan*: 1429-1441.

²³ *National Report: Japan*, 256.

justification to extending marriage rights to same sex couples. But, that may not be the only way to read Article 24. Using a whole document approach, Article 24 should be read to take into account Articles 13 and 14. Article 13 states that “[a]ll of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.”²⁴ Art. 13 operates in a similar fashion to the equal protection clause in the United States.

Like the equal protection clauses, there’s further refinement of the basic egalitarian principle. Article 14 of the Japanese Constitution goes further stating that “[a]ll 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.”²⁵ But, reading the document holistically, one could see Articles 13 and 14 being read into Article 24 and saying that because they substantively conflict the most plausible reading is that sex-based distinctions as a requirement for marriage does not render all persons equal under the law. However, few challenges have been made to show that Art. 24 meaningfully interacts with Arts. 13 and 14.

The Civil Code. With limited exceptions (i.e., the carve-outs for those deemed to have a Gender Identity Disorder), because same sex couples are not socially or

²⁴ Art. 13 of Japanese Constitution.

²⁵ Art. 14 of Japanese Constitution.

legally determined to be partners have very little administrative or civil code remedies available to them.

IV. LEARNING AND BORROWING FROM US LGBT JURISPRUDENCE AND POLITICAL STRATEGY.

This part reviews how LGBT organizations in Japan can learn from the US LGBT movement. It is divided into three sections. Section A looks at what Japanese lawyers can learn from the successful *Obergefell* challenge. Section B looks at how LGBT organizations could also employ the same political lobbying and PR strategy as the Human Rights Campaign. And, Section C looks at how LGBT organization can try to change Japanese culture through information and other PR campaigns.

A. Legal Strategy: Learning from *Obergefell*.

Obergefell v. Hodges held that the Fourteenth Amendment requires all fifty states to issue and recognize marriages between any two people – including those of the same sex as opposed to only mixed sex couples. This landmark ruling diverged from other equal protection jurisprudence because it uses a human rights approach as its core basis.

What is important in the *Obergefell* is the Court’s recognition that marriage is a “fundamental right inherent in the liberty of the person.”²⁶ More importantly, Justice Kennedy decision places a premium on allowing human dignity to flourish and be protected.

²⁶ *Obergefell v. Hodges*, 576 U.S. ____ (2015)

This has several implications that LGBT organizations in Japan can take use of. First, Japan's Constitution embeds within the Article 24 an ideal of dignity too. So, again reading the document holistically and contrasting the dignity of a more expansive reading with the indignity of being denied marriage rights because of a sex-based distinction. This is a risky strategy. First, legal scholars in the United States believe that Kennedy's reasoning in *Obergefell* is very faulty, especially the focus on dignity. Second, the concept of dignity has an elasticity to it – so, it can be used to both justify and deny protections.²⁷

But, even with these concerns, if Japanese pursue an equally aggressive political and cultural strategy, it could pressure its Courts to act in concert with a growing national mood.

B. Political Strategy: Borrowing from the Human Rights Campaign.

Some conclude that the landmark rulings in *Obergefell* and *Windsor* only happened because of the lobbying, protests, and political efforts of the on-the-ground operations. For example, the Human Rights Campaign developed full-on PR and political strategy to press a national marriage rights agenda. At its heart, it supported candidates through campaigns funds an other intense lobbying. Second, it developed a marriage center which tracked political developments regarding how LGBT rights were legislative fairing (e.g., bill tracking) in each state. Third, it bankrolled impact litigation organizations, coordinated planning amongst various

²⁷ See, e.g., Lawrence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16 (Nov. 10, 2015), available at <http://harvardlawreview.org/2015/11/equal-dignity-speaking-its-name/>.

LGBT groups, and pressured corporations for support through its Human Rights Index.

Japan has started to move in this direction. In March 2015, a majority of the Shibuya ward legislators, which has a population of 217,000 Japanese people and 9,000 foreigners, passed an ordinance that recognized same-sex partnerships as “the equivalent of marriage.”²⁸ The ordinance guaranteed LGBT couples the same rights as mixed sex married couples including hospital visitation and apartment rentals. This legislation is said to have been the result of an immense amount of lobbying by LGBT interest groups in the Tokyo area.

C. Culture Strategy: Getting prominent LGBT folks to come-out.

Like their American counterparts, many straight Japanese have attitudes similar to this “I don’t mind the idea (of an LGBT person), but I don’t really want to think about it.”²⁹ But, LGBT people actual would like to see greater representations of themselves in different areas of Japanese social life. That is ultimately the major conundrum of advancing LGBT rights culturally. Even for fair, good-intentioned people, there is a reluctance to “see” gay people as having complex identity and experiences like their own.

LGBT visibility is a major problem in Japan. Professor Tamaki argues that “if same sex couples remain in the close or continued to be ignored by society, there

²⁸ Yuri Kageyama, *Tokyo’s Shibuya ward votes to recognize same sex marriage*, The Associated Press, (Mar. 31, 2015), available at <http://globalnews.ca/news/1913137/tokyos-ward-votes-to-recognize-same-sex-marriage/>

²⁹ *How does Japan Treat Gay People*, SLATE (May 28, 2015), available at http://www.slate.com/blogs/quora/2015/05/28/how_does_japan_treat_gay_people.html

will be no potential for them to enjoy any legal rights in Japan.”³⁰ So, coming out has dual aims. First, it gets LGBT people out of the shadows and demanding their rights. Second, it forces their LGBT peers to recognize the plight of their LGBT citizens and change their behavior.

LGBT organizations can use several different methods to (a) get more people to come out and (b) make Japanese citizens more supportive of people when they do come out. One way that it can increase LGBT visibility is to find and pressure LGBT media personality to come-out. One of the major successes of the LGBT movement in the United States was the ability of the movement to get major closeted personalities to share their experiences. From Apple’s Tim Cook to George W. Bush’s Political Advisor Ken Mehlman, having these diverse LGBT personalities “out” reinforced the narrative that LGBT persons were apart of every community. So, it was much harder to paint LGBT persons as others if they were fathers, mothers, sisters, brothers, and famous persons across industry and political affiliation. Another potential way that organizations can build a more inclusive culture is information campaigns. In the United States, the Trevor Project was able to get prominent persons – both straight and LGBT – to talk about their experiences and promote stories that showed that life got better for LGBT persons. Information campaigns have always been apart of the LGBT movement.

³⁰ *National Report*, 264.

It is not clear that Japanese LGBT organizations have acted in concert to promote a singular positive message about being LGBT. For that reason, it is imperative that they do so soon.

V. CONCLUSION

Japan is behind its Western counterparts on legalizing same-sex marriage, transgender policies, and protections for LGBT persons in housing, employment and broader social protection.³¹ In regards to same-sex marriage, many see Art. 24 that states “[m]arriage 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” as the main bar.³²

Some of the reasons for this lag are historical. Even though Japan was more tolerant towards LGBT persons and its dominant religions (i.e., Buddhism and Shintoism) were relatively silent on LGBT issues, Japan’s turn towards the West had and continue to have a devastating effect on LGBT rights. Because Japanese political and legal leaders are reluctant to address the issues, a cultural and legal strategy must be pursued LGBT persons.³³ This type of strategy was pursued in the United States over the last 10-to-15 years. As such, Japan could look once again to its peer to advance the rights of LGBT persons leading to same-sex marriage and other important rights.

³¹ Andy Sharp and Nao Sano, *Japan’s Gay Marriage Push Faces Constitutional Barriers*, BloombergBusiness (Feb. 18, 2015), available at <http://www.bloomberg.com/news/articles/2015-02-19/japan-s-gay-marriage-push-faces-constitutional-barrier>

³² *Ibid.*

³³ *Ibid.*