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A Valentine Present for Japanese Same- Sex Couples

Same-sex marriage may not be achievable unless more Japanese LGB individuals overcome the social taboo and come out

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Is it possible that Japan lags behind other affluent democracies in recognizing same-sex marriage because it lacks their histories of religiously inspired hatred of, and violence, against same-sex couples? Although the issue is complicated, there is a plausible argument that Japan's history of tolerance, even celebration, of same-sex relationships may hinder rather than accelerate the full legal and social inclusion of lesbian and gay couples.

The narrative goes something like this. The American movement toward acceptance and inclusion of LGB people in society was stalled until October 1988, when Matthew Shepard, a gay University of Wyoming student, was viciously beaten, burned, and left to die on a log fence in Laramie. The brutality of the crime and the stark images of Shepard hanging almost lifeless in freezing weather

forced many Americans to face on an emotional level the virulence that could grow out of passionate religious opposition to gay relationships. It also galvanized members of the LGB community to set aside their fears, come out to their families and neighbors, and fight for acceptance. What followed was 25 years of activism highlighted by the worldwide commercial and artistic success of the play, *The Laramie Project*. This activism largely succeeded in normalizing gay lives and relationships, and culminated in the Supreme Court decision in *Obergefell* recognizing marriage equality.

If this interpretation is even partially correct, it presents difficult questions for Japanese advocates of marriage equality. Japan's history has none of the fervent condemnation of same-sex relationships. On the contrary, male-on-male sex was celebrated in Tokugawa Japan, and samurai were expected to take young boys as lovers. Then came the "black ships" of Commodore Perry, but even Christian missionaries and their military sponsors could not convince Japan to criminalize sodomy for more than a mere eight years at the end of the nineteenth century. Media treatment of sexual orientation did become negative; the celebration of male-male sexuality ended, to be replaced by indifference and stigma. But Japan did not have the stomach to criminalize what had been acceptable behaviour.

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however, require mobilization, which in turn requires courage.

Unlike most of the world, therefore, LGB Japanese have not suffered any tragedy similar to Shepard's murder to dramatize the pain of social exclusion they suffer, or galvanize them to action, or, perhaps most important, force the general population to understand the pain of isolation that their LGB compatriots feel. Violence is rare, although there has been at least one murder-robbery at a gay cruising spot in Tokyo. More common is bullying in school, and shame and ostracism if someone is involuntarily outed. Politicians complain that same-sex couples may not be "productive" in addressing Japan's low birth rate, but the moral condemnation of politics elsewhere is absent.

Many societies, including Asian-leader Taiwan, have recognized gay marriage without the high cost of virulent religious opposition on the scale of the United States. They have done so, not as a reaction to hatred, but as the vindication of positive social values. Indeed, many interpret *Obergefell* not as the triumph of legal advocacy that American preoccupation with judicial activism might lead one to believe, but as recognition of a broad-based attitudinal change engendered by an explicit strategy among American gays to normalize their existence. Gays did this by presenting themselves as not only entitled to liberty and individual rights, as argued by their lawyers, but also as worthy of enjoying the social benefits common to all citizens and willing to

assume the social responsibilities that married couples shoulder in every society.

The point is not that legalizing same-sex marriage requires murder and hatred. It does, however, require mobilization, which in turn requires courage. In the United States and some other places, courage was born of desperation and fear for their lives. The question facing gay marriage advocates in contemporary Japan is whether the current indifference, occasional mockery, and social ostracism they face can generate the commitment necessary for LGB Japanese to be more open about their sexuality. A *geibuumu* starting in the 90s saturated television with gay personalities and ostentatious exoticism, making LGBT individuals visible in the same sense that minstrel shows made African Americans visible. Yet there remains a taboo against the open expression of same-sex relationships. To use the phraseology of Japanese LGB advocates, they do not "exist." They are co-workers, grandparents, neighbors, and wives and husbands, but they must hide their sexual identity to enjoy acceptance in the non-LGB world. Fewer than 20% of Japanese in a 2019 national survey said that they knew a gay person, as opposed to almost 90% in the US. Perhaps more telling, 78.8% of LGB respondents had not come out to anyone. Even though rarely expressed in violence, the depth of the taboo is hard to exaggerate. In their discussion of the chances of success in litigation, one of the reservations raised by advocates was that potential plaintiffs may be reluctant to appear openly in court.

It was partly the desire to spark a social movement that led thirteen same-sex couples to file suit on February 14, 2019, in district courts across Japan, asking the Japanese judiciary to find that the Constitution requires marriage equality. The doctrinal basis is strong. Article 13 requires that “all of the people shall be respected as individuals”; Article 14 guarantees gender equality; and Article 24 requires both that “marriage shall be based only on the mutual consent of both sexes” and that family laws “shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.” While the equality argument is equivalent to approaches in other jurisdictions, the combination of individual dignity, marriage freedom, and gender equality was directed at the prewar subjugation of the individual to the family and women to men that many observers believed contributed directly to the militarism that led to World War II. As such, the plaintiffs emphasize the interdependence of gender equality and individual choice and the necessity of all Japanese to be free from both governmental and social restrictions on the fundamental institution of marriage.

The outcome is far from certain, however. Article 24 uses the phrase “husband and wife,” and while the government has not argued that the Constitution prohibits same sex marriage, it has argued that it does not require it. For the plaintiffs to prevail may require the judiciary to conclude that excluding same-sex couples from the dignity

of marriage violates the common morality of Japanese society. That, in turn, may require more Japanese LGB individuals to come out and have the difficult conversations with family and friends that their American counterparts have had over the last several decades.

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