Diversity on the Bench in Japan from LGBT[1] Perspective

Fall, 2017

Shusaku Tatara

Table of Contents

[1] Collective reference to Lesbian, Gay, Bisexual, and Transgender individuals.

I. Introduction

Diversity on the bench, the idea that the courts consist of judges with diverse backgrounds, is crucial. A diverse judiciary can improve the quality of the decision-making process and outcomes, secure the legitimacy and impartiality of the courts, and establish the public's confidence in the judiciary. Now diversity on the bench should be emphasized in Japan more than before. It is not only because Japanese society has been facing with the declining birth rate and the shortage of human resources, but also because the number of applicants for law school has been decreasing to the point where people see the situation as a crisis of legal education. These situations make it compelling to create the mechanism by which more diverse talented young people will want to become a legal professional and ultimately to come to the bench.

As a member of the legal profession and the judiciary, judges should engage in efforts for

realizing a diverse judiciary. Especially, Japanese judges should stop being faceless and attract youth by getting them understand the important and meaningful role that the judiciary plays in the nation and by showing that the judiciary appreciate the value of diversity. Japanese judiciary should start to consider how to draw a lot of talented youth from the widest possible range of backgrounds to the courts. Japanese judges have not been active in engaging extrajudicial activities. However, extrajudicial activities would bolster the public confidence in the judiciary, rather than impairing the judicial independence, political neutrality nor impartiality.

I need to stress that every effort and program for a diverse judiciary will be beneficial for everyone. The concept of diversity encompasses not only differences in gender or race/ethnicity, but also every difference in individuals such as sexual orientation/gender identity, age/generations, disabilities, socio-economic statuses, and any other backgrounds. While discussions on diversity in Japan has been focusing on empowering women or supporting their success in their professional career, what diversifying an organization really means is to create an organizational culture or atmosphere where people respect and accept each difference as a strength of the organization. In other words, this is to realize the most important constitutional value, human dignity. We should keep in mind that efforts and programs for a diverse judiciary must be based on this principle. Although it would be inevitable that those efforts and programs involve minority issues, the primary purpose for those should be to raise awareness and to change mindset to think that each difference, even not easily or visually recognized, is a merit or strength for all. Everyone is beneficiary of the diverse organization.

In this paper, I discuss the value of diversity on the bench as a general matter, then, discuss some specific issues regarding LGBT diversity on the bench. Given the growing number of cases involving LGBT people and the fact that a significant number of LGBT people exist in Japanese society, I believe the Japanese courts need to demonstrate that their decisions reflect the values and perspectives of LGBT people, by accommodating LGBT judges into the process. It is easily predictable that more legal issues regarding LGBT people, such as parenting, separation, and same-sex marriage, will come to the courts as LGBT people get more visible and advocacy for their rights gets active influenced by the experiences that the global society has seen.

I believe it necessary to refute any negative views against LGBT judges. Some might be worried if they should not come out in the workplace (it is common that gay employees are asked not to come out) or if they are discriminated based on their sexuality. Other might be worried about being attacked on their appearance of impartiality solely based on their sexuality. Based on the established legal theory in Japan, it is implausible to see that the Japanese courts would accept any arguments excluding LGBT people from coming to the bench or LGBT judges from

handling cases. However, this cannot prevent people who have explicit or implicit hostility against LGBT people from making such arguments. They might claim: LGBT judges can never be a diverse talent because being LGBT is irrelevant to their responsibility or role as a judge and their sexualities should be kept in private; LGBT people is not qualified because being LGBT is inconsistent with the judge's duty to maintain integrity; LGBT judges should recuse themselves in cases regarding LGBT rights or family matters. Such problems have not been discussed in Japan but should be identified and analyzed thoroughly as legal issues. By so doing, LGBT people can enter the judiciary without any concern and with sense of safety. This contributes to a diverse judiciary at the end of the day.

We should tackle the problems of implicit bias, which exists in subconscious level of mind as a discomfort or antipathy against members of out-group, as opposed to those of in-group. Recent research has disclosed that implicit bias prevents from creating a diverse organization. It can be said that implicit bias not only causes obstacles to women's empowerment or their professional success but also generates negative reactions against advocates for disability rights. It is crucial to recognize that all of us have implicit bias and that we have a consensus to make efforts for reducing influence by implicit bias. That is a key to creating an atmosphere where everyone is treated with respect and dignity.

Japanese legal profession including judges should increase their visibility in Japanese society so that people will have more opportunities to understand what legal profession is, who they are, and how meaningful and indispensable their roles in our society are. People say that Japanese judges are "nameless and faceless".[2] The idea that judges should not excuse has been a norm supposed by many judges. No official judicial code of conduct exists. Extrajudicial activities have not been active nor encouraged. It is time to start discussion for changing the status quo.

For expounding these ideas, in Part II, I discuss the value of diversity on the bench, which has not been discussed much in Japan. After briefing Japanese current situation, I show and analyze the discussion made in the U.S., and then, make a case that these discussions are valid in Japanese judiciary. In Part III, focusing on LGBT judges among diverse groups of judges, I make strong arguments that we should pay more attention to their value as a diverse judge. I also refute potential counterarguments against LGBT judges. In Part IV, I discuss the measures for a diverse judiciary. Specifically, I discuss on how to tackle the problems of implicit bias as a measure to create an organizational culture or atmosphere where everyone can have the feeling "I belong here", and, also discuss the importance of increasing visibility of judges and

[2] Daniel H. Foote, Na mo nai kao mo nai shihō: Nihon no saiban wa kawaru no ka [Nameless Faceless Justice: Will Japan's Courts Change?] (Masayuki Tamaruya trans., NTT Shuppan, 2007).

active participation of extrajudicial activities. I touch on special value of increasing visibility of LGBT judges.

I use and cite materials and cases in the U.S. in this paper partly because I had an opportunity to stay in the U.S. for my research and partly because the topics discussed here has not been paid much attention to in Japan and accordingly only limited materials are available in Japan. Experience and theory in the U.S. has been always useful in Japanese jurisprudence. Japanese courts have frequently referred to opinions of the U.S. Supreme Court when facing new legal issues.[3] As long as the theories are consistent with Japanese legal culture and principles, Japanese courts will continue to look to American theories as a useful material. I recognize that my paper has some limitations. My observation might not be so solid because it is made only on two countries, Japan and the U.S. And even the analysis on two countries is not comprehensive both because of the limited ability to collect and analyze English material and because, as I wrote this paper while I am in the U.S., I could only get limited information on Japanese situation. Even such limitations, I believe this paper would present a new perspective on discussion regarding the future of legal education and legal profession, especially judges in Japan.

II. Diversity on the Bench in General

In Japan, people started to use the word, "Daibāsithi", a Japanese pronunciation of "diversity." However, the word has been used in the context of women's empowerment and the active discussion has been made only in private sectors, but not in legal profession.

Despite this current trend, Japan consciously has sought for legal profession with diverse backgrounds. The legal reform since 1990s emphasized the importance to nurture legal

[3] It is well known that Japanese Supreme Court Justices and researchers who support Justices' work refer to foreign materials in handling their cases. Japanese Supreme Court once adopted Lemon Test in a case of separation church and state. In a freedom speech case involving hostile audience situation, it adopted "clear and present danger" test. In another freedom speech case, a justice referred to "actual malice" doctrine. On the other hand, Japanese Supreme Court has adopted a different approach in equal protection cases, partly because Japanese Constitution promotes social welfare under the article 25. In discrimination cases, JSC hasn't used the three-tiered approach developed in the U.S., despite that it knows the American approach very well. Instead, it has used a balancing test even if the disparate treatment is based on sex. Furthermore, in case of governmental benefits, the review is going to be the most deferential one, a rational basis review, even if the disparate treatment is based on sex. As for the recent marriage cases, the Court did not seem to recognize "the right to marry" as developed in American case law. The Court did not use the direct Japanese translation of "the freedom to marry," instead, "the freedom regarding getting married." The Court held that the freedom regarding getting married is worth being guaranteed not because the freedom is one of the pursuit of the happiness but because men and women should be treated in marriage context under the article 24, along with the benefits coming from marital relationship and the public's respect of marriage relationship. As the proverb, "as each country has its own flowers, each country has each legal system," the Court has developed its own jurisprudence based on Japanese legal culture and society.

professionals who have diverse backgrounds, and the court system has tried to improve the quality of decision-making by securing that judgement come out of interplay of diverse perspectives and viewpoints. Contrary to the popular belief, Japan has appreciated the value of diversity in the legal profession and on the bench, even if it has not paid due attention to the value of legitimacy relevant to fair representation, which is central to the value of diversity in the government body.

In this section, I provide the basic information on Japanese legal education and on the process of appointment of judges in Japan, along with statistics. Then, I observe the accumulated discussion on the value of diversity on the bench in the U.S., and, drawing a parallel to the U.S., I consider the situation regarding diversity on the bench in Japan. I also add some observation on when a group is qualified as a diverse group, or for benefit from so called diversity programs.

1. Japanese Legal Education and Demographics

(1) Japanese Legal Education: Pathways to the Bench

If you want to be a judge, at first, you need to graduate from a law school as professional graduate school supervised by the Ministry of Education, Culture, Sports Science and Technology (MEXT). It is not a requirement to have any legal background to enter a law school. If you have legal knowledge and get admitted by a law school, you can enter 2-year course. Otherwise, 3-year course is standard the same as J.D. programs in the U.S. After graduation, you are qualified to take the bar exam.

Second step is to pass the bar exam managed by the Ministry of Justice. The passing rate has been around 25% recently. You can take the exam 5 times within 5 years after graduation of law school. [4] There is an alternative path for those who don't graduate from a law school for reasons. This path was originally designed for people with financial difficulties. This path requires the applicants to pass another exam, "preliminary exam." The passing rate is as low as 2~3%. This alternative path has been regarded as a relic of the old bar exam which existed by 2010 and had not required applicants to have even a bachelor degree to be qualified and whose passing rate had been around 2~3%. Now the number of applicants for the preliminary exam is over 10,000. On the other hand, the enrollment in law schools has sharply dropped from 5767 in 2004 to 1857 in 2016.

After successfully passing the bar exam, you need to become a legal apprentice and to complete legal practical training program organized by the Supreme Court. The training program is

[4] This rule changed in 2015. It used to be 3 times within 5 years, so called, "3 strikes out system."

mandatory for all who want to be a lawyer, a prosecutor and a judge. During the training program, you learn five subjects: civil trial, criminal trial, prosecution, civil advocacy, and criminal defense. The places of the training program are not only in the legal training and research institute (The Institute)[5] in Wako-city, Saitama, but also a court and a prosecutor office and law firm(s) in a specific prefecture assigned by the Supreme Court. After passing the final exam, you are qualified for becoming a legal professional. Traditionally it has been rare to fail the final exam but it has been an issue that recently the number of unsuccessful legal apprentices has been increasing.[6]

Most of the judges have been appointed from those who just finished their training program as a legal apprentice. There have been small number of lawyers who are appointed as a judge every year. My personal impression is that there are not so many people who want to become a judge from their youth and that most people who eventually choose to become a judge is those who have found being judge great and meaningful job through their interaction with judges who have classes in law schools, teach them as a lecturer in the Institute, and take care of them in the assigned court and so on. The appointment process is provided in the article 80 of the Constitution. "The judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court."[7] This procedure represents the principle of separation of powers. However, unlike in the U.S., candidates are not subject to public confirmation hearing and "advice and consent" by either house is not a reequipment. As a conventional matter, the Cabinet has given full deference to the nomination by the Supreme Court. As for which court a newly appointed judge works for, it is the Supreme Court who decides. Unlike in the U.S., members of the political branches do not involve in that decision. Judges have a regular job rotation across the nation every couple of years. Within about 10 years after the appointment, judges move between district courts and family courts, both of which are a court of trial level. After about 10 years, judges start to work in a high court, and go back and forth between appellate level courts (high courts) and trial level courts.

(2) Demographics

I made a chart below showing the number of judges and male/female ratio. In Japanese legal profession, women representation has improved to a certain degree but considering that women is a half of the nation's talent pool, the representation is still rather low.

[5] All legal apprentices are divided into classes of about 65. Each class has 5 teachers corresponding to 5 subjects; 2 judges, 1 prosecutor, and 2 lawyers.
[6] See, Report of Dai 6 Kai Hōsō Yōsei Seido Kaikaku Renraku Kyōgikai [the 6th Conference of the Legal Education Reform], Feb.8, 2017, http://www.moj.go.jp/housei/shihouseido/housei10_00155.html
[7] Nihonkoku Kenpō [Kenpō][Constitution], art 80 (Japan).

Year	Judges			Newly Appointed Judges						Legal Apprentices*				
				From Legal Apprentices					From Lawyer					
	Total	Male	Female	Total	Male		Female		Total	Total	Male		Female	
1991	2022			96	76	79.2%	20	20.8%		506	448	89%	58	11%
1992	2029			65	49	75.4%	16	24.6%	6	508	438	86%	70	14%
1993	2036			98	78	79.6%	20	20.4%	7	506	434	86%	72	14%
1994	2046			104	86	82.7%	18	17.3%	7	594	510	86%	84	14%
1995	2058			99	65	65.7%	34	34.3%	2	633	510	81%	123	19%
1996	2073			99	73	73.7%	26	26.3%	5	699	557	80%	142	20%
1997	2093			102	76	74.5%	26	25.5%	5	720	565	78%	155	22%
1998	2113			93	72	77.4%	21	22.6%	2	726	582	80%	144	20%
1999	2143			97	79	81.4%	18	18.6%	4	729	562	77%	167	23%
2000	2213			169	121	71.6%	48	28.4%	3	1530	1132	74%	398	26%
2001	2243			112	81	72.3%	31	27.7%	3	975	694	71%	281	29%
2002	2288			106	76	71.7%	30	28.3%	5	988	719	73%	269	27%
2003	2333			101	72	71.3%	29	28.7%	10	1005	780	78%	225	22%
2004	2385			109	74	67.9%	35	32.1%	8	1178	901	76%	277	24%
2005	2460	83.5%	16.5%	124	90	72.6%	34	27.4%	4	1187	908	76%	279	24%
2006	2535	83.1%	16.9%	115	80	69.6%	35	30.4%	5	1477	1117	76%	360	24%
2007	2610	82.6%	17.4%	118	75	63.6%	43	36.4%	6	2376	1808	76%	568	24%
2008	2685	81.4%	18.6%	99	63	63.6%	36	36.4%	4	2340	1721	74%	619	26%
2009	2760	80.4%	19.6%	106	72	67.9%	34	32.1%	6	2346	1711	73%	635	27%
2010	2805	79.7%	20.3%	102	70	68.6%	32	31.4%	1	2144	1581	74%	563	26%
2011	2850	79.1%	20.9%	102	68	66.7%	34	33.3%	5	2152	1555	72%	597	28%
2012	2850	78.1%	21.9%	92	64	69.6%	28	30.4%	6	2080	1601	77%	479	23%
2013	2880	77.5%	22.5%	96	58	60.4%	38	39.6%	4	2034	1506	74%	528	26%
2014	2944	76.9%	23.1%	101	72	71.3%	29	28.7%	3	1973	1530	78%	443	22%
2015	2944	76.0%	24.0%	91	53	58.2%	38	41.8%	1	1766	1348	76%	418	24%
2016	2755	74.4%	25.6%	78	48	61.5%	30	38.5%	3	1762				

In the judiciary, women representation among judges in 2016 is about 25%. The representation has increased according to the increase of the number of newly appointed female judges.[8] Looking at women representation among legal apprentices, main resources of judges, after marking the highest (29%) in 2001, it has never been over 30%.[9] Additionally, although I could not find any data showing women representation of law students, it can be estimated that women representation of law students is slightly lower than that of legal apprentice because, in most years since 2000, female applicants for the bar exam have scored a slightly higher passing rate than male applicants.[10]

In the U.S., women representation among judges increased from 22.8% in 1990 to 36.4% in 2010, and minority representation also increased from 7.5% in 1990 to 24.2% in 2010[11] (for African American from 3.4% to 12.5%, for Hispanic from 2.5% to 7.8%, and for Asian American 1.4% to 3.9%.).[12] Women representation among law school graduates exceeded 40% in the mid-1980s and it has been from 45% to 49% since late 1990s.[13]

[8] See, Bengoshi Hakusho [Lawyer's White Paper] (2016).
[9] Id.
[10] See, Report by Hōmu Daizin Kanbō Zinzika [the Personnel Division of the Ministry of Justice].
[11] Elizabeth Chambliss, Demographic Summary, IILP Review 2014: The State of Diversity and Inclusion in the Legal Profession,17(2014). In this report, judges include judges, magistrates, and other judicial workers.
[12] Id. at 17.
[13] See Chambliss, supra note 11, at 20.

I could not find any statistics showing any other characteristics other than gender. This might indicate that the awareness of diversity on the bench, if any, has been only limited to gender diversity or female empowerment.

2. The Value of Diversity on the Bench

Why does diversity on the bench matter? I expound the value and benefit based on the discussion accumulated in the U.S. I hope this section offers a great insight in considering the same kind of issues in Japan, more specifically speaking, what our current problems are and what the Japanese judiciary should be.

(1) Legitimacy

Diversity on the bench is a mandate as a democracy. By making an important decision-making institution more representative of the greater community, a diverse judiciary fosters the legitimacy of the courts among the public.[14] The system should secure a fair representation of all people that the system serves. Prof. Allison Lehrer says;

> The United States was founded on the principle that a representative government is the ideal form of government – the public should be able to vote for representatives that they feel will best represent their interests. The federal judiciary is slightly different than the executive and legislative branches of government. Judges are not elected - they are appointed by the president and confirmed by the Senate. The judiciary interprets laws and determines constitutionality, and therefore its decisions impact the American people. Consequently, the federal judiciary should be held to the same standards of representative government as the elected branches.[15]

Citing the words by the first female British judges, "it matters because democracy matters," she stresses her point that diversity on the bench is a fundamental principle as a democratic nation.[16]

In legitimacy justification, the appearance matters. The trust and legitimacy in the judiciary is formed by the public's perception of the judiciary. How the judiciary looks in the eyes of the

---

[14] Kevin R. Johnson and Luis Fuentes-Rohwer, Diversity, Impartiality, and Representation on the Bench Symposium: Article: A Principled Approach to the Quest For Racial Diversity on the Judiciary, 10 Mich. J. Race & L. 5, at 28.
[15] Allison Lehrer, Diversity: The Appointment of Women to the Federal Courts, 4 (2011)
[16] Id.

general public and whether the demographic of the judges reflects the diversity in the real life is the most important. Especially for groups that traditionally have been shut out of the justice system, legitimacy is a special concern.[17] This illustrates that the appearance matters and that the judiciary with weaker democratic backbone is more required to convey their appreciation of diversity on the bench and show their efforts to realize a diverse judiciary.

(2) Better Decision-Making

The value of judicial diversity is its potential to improve judicial decision-making.

a. Decisions Based on Diverse Perspectives and Viewpoints

Diverse perspectives and viewpoints in the process of decision making improve the quality of decision-making itself. Diverse perspectives and viewpoints can make possible deeper and more deliberate consideration necessary for a better decision. In the context of racial diversity on the bench, Prof. Ifill said that "the creation of a racially diverse bench can introduce traditionally excluded perspectives and values into judicial decision-making. The interplay of diverse views and perspectives can enrich judicial decision-making,"[18] adding that "minority judges can play a key role in giving legitimacy to the narratives and values of racial minorities."[19]

It cannot be emphasized enough that how to see the world differs according to each experience. This is a truism but people often overlook. If there are 100 people, there are 100 different experience and they see the world in 100 different ways. However, people often assume that everyone share the same viewpoint and idea.[20] As the U.S. Supreme Court held in *Grutter v. Bollinger*;[21]

> Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.[22]

---

[17] See Johnson & Fuentes-Rohwer, supra note 14, at 30.
[18] Sherrilyn A. Ifill, Racial Diversity on the Bench: Beyond Role Models and Public Confidence, 57 Wash & Lee L. Rev. 405, 410(2000).
[19] Id.
[20] Brian Sims, Rep. of the Pa H. R., Remarks at ABA Section of Litigation Inaugural LGBT Forum: How to Handle a Hostile Political Environment: Advice and Tips from Officials on How Attorneys Can Position Themselves to Navigate Hostile Laws Impacting the LGBT Community (May 3, 2017).
[21] 539 U.S. 306(2003).
[22] *Id.* at 333.

It is reasonable to think that where there is stigma against minority groups and they have to live facing shame on who they are, such experience under negative or hostile atmosphere would get them a different perspective or to be more sensitive to certain matters than others without such experience.[23] Of course, this does not mean the assumption, which the U.S. Supreme Court rejected, "members of the same racial group - regardless of their age, education, economic status, or the community in which they live - think alike, share the same political interests, and will prefer the same candidates at the polls."[24] Rather, this does mean one simple thing, each individual has different experience and therefore see the world differently.

This benefit is not limited to the cases heard by a multi-judge panel[25] where judges bring their different perspectives together to consider the cases. Judges educate each other on a daily basis. Justice Sonia Sotomayor said "every time I had a question coming before me, I'd read opinions of judges in my district, district court judges across the country, circuit court judges. We educate each other in our opinion writing."[26] Other than education through opinion writing, it happens that a judge consults colleagues on ongoing cases for reaching a better decision.[27] This demonstrate that the judiciary composed of judges with diverse backgrounds and perspectives is a better organization in terms of making a better judicial decision-making.

b. Influence on Other Judges

Diverse judges influence on their peer judges' attitude.[28] The courts composed of judges with diverse backgrounds and perspectives give each judge an opportunity to realize that they have a bias or prejudice, misunderstanding or negative attitude against what they have not experienced or do not know and that they need to tackle things that has potential to distort a decision-making. Diverse judges play an important role to reduce and mitigate such feelings against minorities and they contribute to create a judiciary that makes it possible to achieve a

---

[23] See dissenting opinion by Justice Sotomayor in *Schuette v. Coal.to Def. Affirmative Action*, 134 S. Ct. 1623 (2013). "Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, 'No, where are you really from?', regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: 'I do not belong here.'" *Id.* at 1638.

[24] *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

[25] In Japan, in a trail level, most of the cases are heard by a single judge but some cases are by a 3-judge panel pursuant to statutory requirement or based on an internal administrative decision. Appellate hearing must be heard by a 3-judge panel. En banc hearing exists only in the Supreme Court (Grand Bench as opposed petty bench), but not in high courts in Japan.

[26] Justice Sonia Sotomayor, talk in Univ. of Wis. L. Sch. (Sep. 8, 2016).

[27] Hon. Pamela K. Chen, Judge of D. for E.D.N.Y., Remarks at The LGBT Bar Association of Greater New York's 6th Annual Judicial Reception; Out on the Bench: Perspectives, Challenges, and Opportunities Relating to LGBT Diversity in the Judiciary (June 14, 2017).

[28] See Hon. J. Paul Oetken, Judge of D. for S.D. N.Y., Remarks at supra note 27.

better and bias-free decision-making.

This function can be embodied through professional discussion with minority judges. Namely Professors Johnson and Fuentes-Rohwer pointed "the mere presence of a minority in the deliberations over a case can dramatically change the dynamics of the discussion. One minority jurist sitting on a panel in civil rights case can change the tenor of the discussion by challenging stereotypes, limiting improper discussion, and adding important information,"[29] adding that "a racial minority may moderate anti-minority views."[30]

Daily interaction with minority judges contribute to reducing negative bias against minorities to some extent. This effect is supported by research results. For example, a negative attitude or stereotype can be reduced by exposing ourselves to coutertypical associations[31] and negative biases against some group may be decreased by juxtaposing them with countertypical settings.[32] Being a judge working in the courtroom can be a perfect example of countertypical associations and settings. Furthermore, research shows that intergroup interaction decrease prejudice[33] and intergroup contact reduces people's anxiety about each other, promotes empathy, and encourages friendship, all of which result in more positive attitudes toward one another.[34] Greater intergroup contact with members of an outgroup can lead to lower attitudinal bias.[35] Seeing minority judges in the court and having daily interaction with them can reduce negative stereotypes and biases against minorities. This effect might be subtle but has an impact on the overall institutional culture.

c. Empathy

I want to add the value of empathy which minority judges have with people. Empathy plays a key role in securing the quality of decision-making because it signals "an ability to be mindful of the consequences of their decisions on people's lives and, in a phrase that was repeated frequently, to put oneself in the shoes of others."[36] President Obama supported this idea, stating that he "view[s] that quality of empathy, of understanding and identifying with people's hopes

[29] Johnson & Fuentes-Rohwer, supra note 14, at 26-27.
[30] Id. at 27.
[31] Jerry Kang et al., Implicit Bias in the Courtroom, 59 UCLA L. Rev. 1124, 1169(2012).
[32] Id. at. 1171.
[33] Thomas F. Pettigrew & Linda R. Tropp, A Meta-Analytic Test of Intergroup Contact Theory, 90 J. Personality & Soc. Psychol. 751 (2006).
[34] Nicole E Negowetti, Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection, 15 Nev. L.J. 930, 952((2015); see also Laurie A. Rudman et al. "Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. Personality and Soc. Psych, 856, 866(2001).
[35] Jerry Kang & Mahzarin R. Banaji, Fair Measures: A Behavioral Realist Revision of "Affirmative Action", 94 Calif. L. Rev. 1063, 1103 (2006).
[36] Kris Franklin, Empathy and Reasoning in Context: Thinking About Antigay Bullying, 23 Tul. J.L. & Sexuality 61, 63 (2014).

and struggles, as an essential ingredient for arriving at just decisions and outcomes."[37]

Some narratives support these benefits. It is said that Justice Thurgood Marshall, the first African American Supreme Court Justice, "reflected the sentiments of many African Americans and others outside the mainstream, and no doubt reflected Justice Marshall's life experiences."[38]

> *Justice Marshall characteristically would tell us things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our own experience.*[39] – Justice Bryon White[40]

> *His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.* [41] – Justice Sandra Day O'Connor

d. Empirical Data

I show two empirical data corroborating that the court composed of diverse judges can improve the quality of decision-making.

(a) Difference in Gender of Judges

First, in the context of gender diversity, empirical analysis reveals that judges' gender matters to case outcomes.[42] The research was on all sexual harassment and sex discrimination cases decided by the federal courts of appeals between 1999 and 2001 where the plaintiff's cause of action fell under Title VII of the Civil Rights Act of 1964.[43] The data indicate that the presence of a female judge significantly increased the probability that the plaintiff would prevail, with a low dissenting rate on mixed-gender panels.[44] Specifically, adding a female judge to the panel

---

[37] Remarks on the Retirement of Supreme Court Justice David Souter, 2009 Daily Comp. Pres. Doc. 317 (May 1, 2009).
[38] Johnson & Fuentes-Rohwer, supra note 14, at 13.
[39] Id.
[40] He once wrote in *Bowers v. Hardwick,* "to claim that a right to engage in such conduct (same-sex intimate conduct) is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious." 478 U.S. 186, 194 (1986). I wish that he had had any gay colleague at that time.
[41] Sandra Day O'Connor, A TRIBUTE TO JUSTICE THURGOOD MARSHALL: Thurgood Marshall: The Influence of a Raconteur 44 Stan. L. Rev. 1217(1992).
[42] Jennifer L. Peresie: Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts, 114 Yale L.J.1759, 1761 (2005).
[43] Id. at 1767.
[44] Id. at 1768-1769.

more than doubled the probability that a male judge ruled for the plaintiff in a sexual harassment case (increasing the probability from 16% to 35%) and nearly tripled this probability in sex discrimination cases (increasing it from 11% to 30%).[45]

This evinces a simple fact that difference in sex can lead difference in views. More importantly this result indicates that gender diversity on the bench can result in better decision-making. As the researcher pointed out, it is reasonably assumed that the female judge changes the possible range of the consensus view,[46] male judges view female judges as more credible and persuasive in gender-coded cases based on their viewpoints and past experience, and male judges likely will defer to the female judges' preferences, particularly where the male judges are uncertain about cases.[47] These possible explanations of the results support one of the benefits of diversity on the bench, a better decision-making.

(b) Difference in Gender of Judges' Children

Second, a recent research showed that gender of judges' children matters to case outcomes.[48] The research was on about 4000 cases decided by 224 federal court of appeals judges between 1996 and 2002 (cases including 990 gender-related cases involving discrimination against women or women's rights,[49] and 3000 cases randomly picked up.). This research revealed that male judges who have a daughter or two are likely to decide cases involving women's right in favor of more than those who only have sons or no children.[50]

This research shows that "the personal relationships can in fact affect judges' voting."[51] More importantly, diversity in experience on the bench can contribute to a better-decision making. As the researchers concluded, the most plausible explanation of the results is learning, that is, "by having a daughter - and by interacting with her and her peers- judges may learn about these issues, and this additional knowledge in turn informs their opinions."[52] The researchers ruled out the other 3 possible explanations; protectionism, [53] lobbying, [54] and preference

[45] Id. at 1777.
[46] Id. at 1782.
[47] Id. at 1783.
[48] See Adam N. Glynn & Maya Sen, Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?, 59 AM. J. POL. SCI. 37, 45-47 (2015)
[49] See id. at 43. The 990 cases do not include cases brought by men or LGBT plaintiffs and are classified 4 categories as follows.:1) employment discrimination based on gender by private actor, 2) employment discrimination based on pregnancy, 3) reproductive rights or abortion, 4) claims made under Title IX.
[50] See id. at 45-47.
[51] Id. at 52.
[52] Id. at 40.
[53] Id. at 41. Judges might "want to protect their daughters from possible gender-based discrimination, resulting in increased progressive views on employment or pregnancy discrimination law,." and "want to protect their daughter from possible predators, including criminal predators,"
[54]. Id. Judges might want to avoid "costs associated with holding views antithetical to the views of close family

realignment.[55] Protectionism can be ruled out because there is no conservative shift in criminal cases which would have happened if this explanation were valid.[56] Lobbying can be ruled out because the liberal shift in favor of women's rights comes primarily from having one girl and the number of daughters (corresponding to the power of lobbying) seemed not relevant.[57] Preference realignment can be ruled out because liberal shift coming from having a daughter was found only in male judges' votes, not in female judges'. Learning theory is the most plausible because female judges have firsthand experience with the difficulties of being female and in the workplace and knowledge on the challenges of being young and in need of reproductive rights services.[58] This research showed that interaction with others having a different perspectives and experience can give better understanding their experience, improve empathy towards them and change original views.

(3) Impartiality

Diversity on the bench also encourages judicial impartiality. The judiciary can "achieve structural impartiality when judicial decision-making includes a cross- section of perspectives and values from the community. The balance of these diverse perspectives ensures that no one perspective dominates legal decision-making, and lessens the opportunity for bias to taint judicial decision-making."[59] It can be concluded that "the interaction of diverse perspectives in legal decision-making may be the best way to achieve judicial impartiality."[60]

Some people would be concerned about the tension between a diverse judiciary and impartiality. However, "impartiality in reality has never meant that a judge must abandon all of the knowledge and experience he has gained in his professional and personal life."[61] Otherwise, it would deny judges' humanities. In *Republican Party v. White*,[62] the Supreme Court stated, "[i]t is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular legal view. --- A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law."[63]

---

members because they are scolded or otherwise socially penalized at home." 1

[55] Id. at 42. Judges "with daughters might have a pecuniary interest in seeing employment discrimination against their daughters be outlawed."

[56] Id. at 51

[57] Id.

[58] Id.

[59] Ifill, supra note 18, at 411.

[60] Id. at 457

[61] Id.

[62] 536 U.S. 765 (2002).

[63] *Id.* at 777.

If minority judges are criticized for bringing their own perspectives to bear on issues regarding the minority issues such as discrimination and so forth, it follows that we must assume that non-minority judges also bring their own perspectives to their decision-making, which must be equally scrutinized.[64] It there is any argument claiming that male and non-minority judges are better than judges such as female judges, LGBT judges, or judges with disabilities, the argument is only supported by bigotry, not by constitutionally legitimate value. .

(4) Role Model

Minority judges are a role model for minority people. While this role has been emphasized as a role that minority judges play, this might not be a value of diverse judiciary nor a reason to promote a diverse judiciary. However, the role as a role model is important. Minorities are facing unfair prejudice, which cause them to lose their confidence and make it difficult for them to have a hope for the future and to navigate a successful life. For such minorities, it is important to see people who have had overcome similar situations and attained the prestigious position in the society. Such an experience would give minority youth a realistic image of success and great inspiration not to give up their hopes for the future and their efforts for successful career and life. Especially in a society where judges are respected as an important prestigious position, along with the perception of the public associated with the position and responsibilities of judges, minority judges are a perfect role model for minority youth who are future legal professionals.

In the U.S, where judges come to the bench thought more democratic processes than in Japan after building an outstanding professional achievement, along with the public image as a successful lawyer, American judges are role models who received public recognition on their value. On the other hand, because Most of the Japanese judges come to the bench without any experience of practicing law, they might not be able to be a role model for young lawyers. Besides, in terms that they are faceless in relation to the public, it might be difficult to be seen as a role model to young people in general. However, as a member of the judiciary that fortunately still enjoy high level of trust of the public,[65]and given that they are appointed after passing the difficult bar exam and complete the practical training with a grade above a certain standard, Japanese judges are in a position respectable enough to be a role model for young people who want to be a member of the legal profession or are still considering about their future career. Therefore, even in Japan, judges can be a role model for young people.

[64] Ifill, supra note 18, at 459.
[65] Giin, kanryō, daikigyō, keisatu to no Sinraido [Survey on the Degree of Trust in Members of the Diet, Public Officials, Big Companies, Police Officers etc.], Central Research Services, Inc. (2012).

(5) Other Values Discussed Outside of the Judiciary

I introduce two other values about diversity in the legal profession in the U.S. The two values are worth noting, even if not specifically related to diversity on the bench.

a. Nation's Leader Rationale

One argument is that, in the U.S., the legal profession has produced a lot of nation's leaders such as Presidents, members of Congress and so on. This rationale appeared in *Grutter v. Bollinger*[66] where the constitutionality of the affirmative action in law school admissions was an main issue. The Court said, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[67] Although the demography of national leadership in Japan is quite different from that in the U.S., it is true even in Japan that nation's leaders should understand the Constitution, current legal framework and practice when they govern the nation. Although these are not exhaustive for a leader, having legal literacy or being legally educated is one of the crucial qualities for leaders. As a highly-qualified profession for a national leader, the legal profession is a high potential human resource of our leaders. In that sense, nation's leader rationale can be invoked in the future according the shift in the demography.

b. Business Case

The other claims that diversity is profitable. The strength of this rational is worthwhile paying attention to for promoting a diversity program. Research shows that the more diverse the organization becomes, more business and more profit will generate. [68] Diverse organizations can reduce risks of discrimination lawsuits or losing clients interested in diversity issues, [69] and can attract more diverse and talented candidates and retain them, thereby reducing a waste of the training cost.[70] I found this rational more frequently in the discussion on the diversity in big law firms. By emphasizing the tangible benefits, this rational can make it easier to get more cooperation and understanding from the majority without causing discomfort who tend to be reluctant to engage in diversity program promoted only based on the abstract idea that diversity

[66] Supra note 21.
[67] *Id.* at 332.
[68] Sheryl L. Axelrod, Banking on Diversity: Diversity and Inclusion as Profit Drivers- The Business Case for Diversity, June 12, 2014, ABA Section of Litigation (2014).
[69] Id.
[70] Id.

is good.

The judiciary does not seek for being profitable. However, the judiciary needs to draw talented and diverse people into the courts for strengthening the institution. In Japan, it is said that the number of applicants for court officers has been decreasing. Such circumstances also support the necessity to create a court where people can make the most of their capacities, feeling respected and accepted.

3. Discussion on Diversity on the Bench in Japan

As I pointed earlier, in Japan, the issue of diversity has not been discussed much, and when it is, the conversation is limited to gender disproportion on the bench. In addition to this, I can point out several things. First, even if not emphasized, the idea of a diverse judiciary has been accepted and appreciated in Japanese society. Namely, the court system is designed to hear and decide legal disputes through an interplay of multiple viewpoints and this ideal has been shared among Japanese judges. Second, the idea seems to focus on a better-decision making and public trust in the judiciary, not so much on fair representation in related to legitimacy rationale. Third, Japan has unique circumstances making it urgent to promote diversity on the bench; the declining birth rate and the sharp decline of the number of applicants for law school.

(1) Indications of the Values of Diversity

It is true that discussion on diversity issue is not active, but the Japanese court system and legal education are designed to appreciate the value of diversity in the legal profession and on the bench.

a. Increase in Female Judges

One indication is the increase in female judges. In the Supreme Court, the first female was appointed in 1994. Her successor and its successor was female. In 2010, the Court had 2 female justices for the first time in its history, and since 2013, the Court had 3 female Justices.[71] As shown in the chart supra, the number of female judges in the lower courts has been increasing. Considering this growth in gender equality, the Japanese judiciary seems to appreciate diversity, and that the benefits recognized in the U.S. would apply similarly to the Japanese context. It can be said that the judiciary seeks to bolster its legitimacy by securing fair representation and make it capable to make a better decision-making by securing diverse perspectives coming from unique and different experiences as a woman.

[71] The number decreased from 3 to 2 in January 2017.

b. Composition of Hearing Panel

Compositions of hearing panel in each level reflect the value of diversity on the bench. In the Supreme Court, as a conventional matter, among 15 Justices, 6 justices are from the lower courts, 4 from private practice, 2 from the public prosecutor office, 2 from the administrative agency, and 1 from academia.[72] Each of 3 Petty Bench is composed of 5 justices who are balanced in their backgrounds. In lower courts, 3 judge-panel consists of judges who differ in age, experience, and backgrounds. This way, the cases are expected to be heard and solved through an interplay of multiple viewpoints.

c. Qualification of Judges Stipulated in Court Act

The Japanese Court Act, which provides not only the jurisdiction and the organizations of the courts but also the qualifications for appointment of judges, expects that judges will be appointed from a variety of professionals. Although the reality has been far from the ideal and the career system has been established, the idea that judges should have varied experience and backgrounds has been emphasized and confirmed at times, especially since legal reforms started in the late 1990s.

d. Out-Court Engagement

Since 2004, as a one of the measures of human resource development for young judges, the Supreme Court has encouraged young judges to have out-of-court engagements to gain a wider range of experience, knowledge and perspective which might be difficult to be acquired through the daily adjudication work in court. This project is based on the recognition that the judiciary needs judges who have diverse and rich experiences and perspectives, and the Supreme Court basically requires all the judges with less than 10-years on the bench to have 2 or more years of out-of-court experience, which is now one of the factors for reappointment review which happens 10 years after the first appointment. Out-of-court engagement includes working in other government agencies as a government attorney, in law firms as a private attorney, in diplomatic missions abroad as a diplomat, studying abroad, and so on.

e. Law School

Our law school system, introduced in 2004, is consistent with the idea of a diverse judiciary. Before we had law school, the overwhelming majority of the legal professionals were people

[72] The breakdown has been slightly changed over time.

who studied law at the undergraduate level and had no working or professional experience before passing the bar exam. The law school system is designed to shift legal education from the undergraduate to the graduate level, to admit people who have diverse academic, professional or social backgrounds, and to produce diverse legal professionals. The law schools are expected to admit more candidates who learned diverse academic disciplines such as medicine, economics, business, engineering or who have working experience after getting an undergraduate degree (hereinafter non-traditional law student, as opposed to traditional law student.). MEXT issued a guideline requiring law schools to make efforts to admit those people more than 30 % among the enrollment.[73] Some law schools have special admissions policies to draw those people. Office for Legal Reform under Cabinet Secretariat reaffirmed that the law schools are a core of legal education, stating that it is necessary to start create conditions enabling more talented people to hope to be a member of the legal profession and to actively engage in diverse areas in the society. [74] It is reasonable to assume that when people appreciate the diversity in the legal profession, which are human resources for judges, people similarly appreciate the diversity on the bench.

f. Citizen Participation in Court Proceedings

There are several proceedings in which citizens participate to bring their perspectives and experience in judicial decision-making. One is saiban-in trial, or Japanese type of jury trial, introduced in 2011. 3 judges and 6 citizens consist of one special panel to hear serious criminal cases. The special panel decides not only whether a defendant is guilty or not guilty but also what sentence is appropriate. Another is the labor tribunal proceeding where one judge and two experts both from management side and worker side form a labor tribunal committee and the committee adjudicates an individual labor dispute within 3 hearings.[75] The arbitration traditionally conducted as a court procedure with cooperation of 2 citizens is also consistent with the diversity value.

These factors show that the idea of a diverse judiciary should be accepted and appreciated in Japanese society.

(2) Ideal Judicial Work Japanese Judges Have Sought For

Ideal judicial work Japanese judges traditionally have been pursuing matches the value of diversity on the bench.

[73] Kokuji [Notice], No. 53 of 2003, art. 3, par. 1 (Japan).
[74] Report to Hōsō yōsei kaikaku komon kaigi [Advisory Board of Legal Reform] (May 21, 2015).
[75] As far as I know, each hearing last approximately 30 minutes to a couple of hours at the longest.

First is the importance of having diverse perspectives for making a better decision-making. In addition to the above-mentioned systematic measures securing to putting diverse perspectives into the process of decision-making, a lot of Japanese judges have emphasized this point. Judge Shogo Takahashi said, "it is said that a judge should see things with a flexible mind and from multiple and diverse perspectives. Having prejudice and discarding possibilities seen from other perspectives is strictly refrained."[76] Supreme Court Justices also stated the similar idea in their words.[77] Chief Justice Itsuro Terada recently said in his remark at the annual conference that when Japan are experiencing social change and increase of awareness of rights among the public, in order to make a persuasive ruling grasping accurately the real situations giving rise to the dispute, "consideration from multiple perspectives" is required, that deliberation among 3 judges consisting a hearing panel should be vitalized, and that judges should actively and voluntarily engage in any efforts to improve the discussion or opinion exchange within and outside of the judiciary.[78]

Second, the virtue of understanding the feelings of and having an empathy with people before the courts has been transmitted to present judges through generations. A famous oft-read book, "Book of Judicial Work (Saiban no Sho)"[79] said in the context of criminal trial, "since no matter how hard a judge may try, the judge cannot realize how inmates are suffering in the prison, it is necessary for the judge to encourage to find a way to feel their experience closer." [80] Furthermore, the book emphasized the value of empathy, by saying that "it never be possible for our judgements to embrace a light and power" [81] only because they are "lawful judgements"[82] and that "only thing left in the brain of the judge after failing to get defendant impressed might be a simple feeling of completion of occupational task, not compassion, empathy, nor sympathy."[83] This idea is resonated with the words by other judges, "judgements relied on logic not reflecting the reality never win the confidence in the judiciary,"[84] or, "I

---

[76] Hon. Shogo Takahsahi, Saibankan Rinri [Judicial Ethics], Yamanashi Gakuin L.J. 69 (2016).
[77] See, e.g.,J. Toshimitu Yamazaki, "Every day I would like to pay attention to how the society is changing, and to consider issues from various perspectives with as broad view as possible." http://www.courts.go.jp/saikosai/about/saibankan/yamasaki/index.html; J. Hiroyuki Kanno, "I try to observe things from various perspectives." http://www.courts.go.jp/saikosai/about/saibankan/kanno/index.html; J. Saburo Tokura points out that "we never forget to have awe that there are things immeasurable by our own knowledge or experience" and that we should avoid any risk to "transform these only by our own value or experience." http://www.courts.go.jp/saikosai/about/saibankan/tokura/index.html
[78] Chief Justice Isturo Terada, Remarks at the Annual Conference of Chief Judges of the lower courts (June 21, 2017).
[79] Hon. Shōtarō Miyake, Yōtokusha (1948).
[80] Id. at 38.
[81] Id. at 180.
[82] Id.
[83] Id.
[84] Yukio Nozaki, Address at Heisei gannen hanjiho jūnen saishū zitumu kenkyū;Minji saiban wo kangaeru, [Training Course for Judges with 10-year experience ; Reflection on Civil Trial] (Oct., 18,1989)

wonder if people might feel uneasy about whether the judge really understand the truth of the case. It is easy to understand this by imaging how we get uneasy when we go to see a doctor."[85]

The importance of recognizing different experience of each individual as a foundation to offer a useful perspective for a better decision-making has been appreciated. Judge Kunio Harada stated in his book, "a student that I have taught who once dropped out of high school overcame the hardship and passed the bar exam at the first attempt. The student would have a deeper understanding on issues regarding truant children. People who have a family member with disabilities would come up with a great idea on the disability policies. For the legal profession, every variety of life experience is nourishment."[86] This supports the value of judges who have a unique experience that other judges usually do not have.

The importance of learning and improving by interacting different people outside of the judiciary has been emphasized. Japanese judges "are expected to improve themselves by cultivating broad interests in variety fields other than legal area so that they can acquire diverse and rich knowledge and experience and deeper insights into social phenomena."[87] Another judge pointed out that "it is not inconsistent with the judicial independence but rather it is encouraging for judges to create their own viewpoints by way of grasping things from multiple perspectives, acquiring knowledge and experience about changing and developing law and society each other, and deepening the awareness of issues by discussion among judges, which is very meaningful in order that the judiciary meet the demands and expectations from the public."[88] The remark by Chief Justice Terada cited above also affirms the value of interacting with others. The value can be easily realized by creating a more diverse judiciary.

(3) Observation on Discussion in Japan

I made clear that Japanese society and judiciary appreciate the value of diversity on the bench. However, there are some differences from discussion made in the U.S. One is that thorough discussion has not been made. The other is the fair representation rationale has gotten little attention.

a. No Deepened Discussion

[85] Hon. Shigeru Sato, Address, Kōsosin kara mita minzi saiban [Civil Trial from the perspective of Appellate Court] (Oct. 8, 1993).
[86] Hon. Kunio Harada, Saiban no hijō to ninjō [Mercy and Merciless in the Judicial Work], Iwanami Sinsho, 16 (2017).
[87] Chief Justice Isturo Terada, supra note 78.
[88] Hon. Masato Monguchi, Hōsō Rinri; Netsu Kyōsitu [Judicial Ethics: Passionate Classroom], 782 Hōsō 2 (2015).

I could not find any serious discussion on why diversity on the bench is important, even though the value seems to have been appreciated as an interpretation of the whole legal system in Japan. Common sense tells us that if we are not conscious about the value of something, we tend to give less priority to it and forget it in the end. Unless the value and importance about something is shared and appreciated among people at deeper level and repeatedly affirmed among the members, the value or the efforts for realizing the value is set back by the voluminous oppositions when it comes to concrete measures for embodying the value, while people would say that "we agree with the value itself." I believe we need to have thorough discussion on diversity in the legal profession and on the bench like in the U.S. in order to make people get real understanding how important the diversity is. I suspect that there might not be a deeper discussion or consensus on the value of diversity, which eventually led the unbalanced cutback of enrollment of law schools against potential non-traditional law students whom law schools were supposed to educate and train to be a diverse member of the legal profession.

b. Less Focus on Fair Representation

I feel it is natural in the U.S. that fair representation rational coming from the principle of democracy has been emphasized for a long time as a principle value of the diversity. The U.S. is a country where not only gender diversity but also racial/ethnic diversity is visible and that has a history that the government officially restricted civil rights based on gender, race/ethnic, sexual orientation or gender identity and so on and that people have stood up and fought against those unfair treatments for achieving social change. That Japan has not had similar experience and is not so visibly diverse a country as the U.S. might lead less focus on fair representation rational. However, as Japan is a democratic country, we should recognize that fair representation is a value based on the Constitution. Furthermore, there is a reason that Japanese judiciary should be sensitive to legitimacy. That is Japanese judiciary has less democratic foundation than the U.S. in terms of the appointment process of judges. To maintain and improve the public trust in the judiciary, the judiciary need more voluntary efforts to win the trust. The judiciary should be more sensitive to how the judiciary looks in the eye of the public. As the judiciary has shown by the efforts in increasing female judges, it should explicitly demonstrate to the public the appreciation of diversity value and the efforts for realizing judicial diversity.

(4) Unique Circumstances in Japan

The circumstance which make the it urgent to promote diversity program in the U.S. is a rapid change in the nation's racial demographic makeup. More minority babies than white babies were born in 2011,[89] and it is estimated that sometime after 2040, there will be no racial

[89] William H. Frey, The "Diversity Explosion" Is America's Twenty-First-Century Baby Boom, in Our

majority in the U.S.[90] This gives a strong force for diversifying the law schools and the legal profession.

On the other hand, Japan has different circumstances: the declining birth rate, and the sharp decline of the applicants for the law schools by higher rates than that of population.

a. Declining Population

The population of 18 years old has been declining from 205 million in 1992 to 120 million in 2015.[91] Supposed that the current birth and death rate will not change, it is estimated that it would go down to 101 million in 2030 and to 73 million in 2050.[92] With the persistently declining birthrate and the growth of the aging population, companies are facing a serious shortage of human resources, which is a matter of life and death and, they are trying to survive "the war for talent" on a global scale, making efforts to attract talented employees within and outside of Japan.[93] The legal profession should be aware of being a part of this competition and start to craft a strategy for winning this competition.

b. Decline of and Less Diverse Applicants for Law Schools

I made a chart based on the material published in 2016 by the Special Committee for the Law Schools set up by the Central Council for Education

Compelling Interests: The Value of Diversity for Democracy and a Prosperous Society, 16 (Earl Lewis & Nancy Cantor eds., 2016).

[90] Id.

[91] Material by MEXT.

[92] Statistics by Kokuritu Shakai Hosho Zinko Mondai Kenkyu Sho [National Institute of Population and Social Security Research] (Jan, 2012)

[93] Miki Ōtaka, Daibāsithi maneijimento ha ryūkō ka soretomo keiei no nīizu ka [Whether The Diversity Management Is Just a Trend or the Business Needs], 9 Waseda Bus. Sch. Rev. 30, 31(2009).

	Applicants	Enrolled Students										
		Duration of Program (2 years or 3 years)					Numbers of Students with working experience					
Year	Total	Total	2 years		3 years		Total		2y Program		3y program	
2004	72,800	5767	2350	40.7%	3417	59.3%	2792	48.4%	1038	44.2%	1754	51.3%
2005	41,756	5544	2063	37.2%	3481	62.8%	2091	37.7%	687	33.3%	1404	40.3%
2006	40,341	5784	2179	37.7%	3605	62.3%	1925	33.3%	718	33.0%	1207	33.5%
2007	45,207	5713	2169	38.0%	3544	62.0%	1834	32.1%	717	33.1%	1117	31.5%
2008	39,555	5397	2066	38.3%	3331	61.7%	1609	29.8%	597	28.9%	1012	30.4%
2009	29,714	4844	2021	41.7%	2823	58.3%	1298	26.8%	464	23.0%	834	29.5%
2010	24,014	4122	1923	46.7%	2199	53.3%	993	24.1%	348	18.1%	645	29.3%
2011	22,927	3620	1916	52.9%	1704	47.1%	763	21.1%	294	15.3%	469	27.5%
2012	18,446	3150	1825	57.9%	1325	42.1%	689	21.9%	300	16.4%	389	29.4%
2013	13,924	2698	1617	59.9%	1081	40.1%	514	19.1%	207	12.8%	307	28.4%
2014	11,450	2272	1461	64.3%	811	35.7%	422	18.6%	180	12.3%	242	29.8%
2015	10,370	2201	1431	65.0%	770	35.0%	405	18.4%	184	12.9%	221	28.7%
2016	8724	1857	1222	65.8%	635	34.2%	363	19.5%	154	12.6%	209	32.9%

	Enrolled by Academic Background at Undergraduate Level								
Year	Total	Law		Social Science		Natural Science		Other	
2004	5767	3779	65.5%	1269	22.0%	486	8.4%	233	4.0%
2005	5544	3884	70.1%	1050	18.9%	432	7.8%	178	3.2%
2006	5784	4150	71.7%	1138	19.7%	326	5.6%	170	2.9%
2007	5713	4223	73.9%	1061	18.6%	273	4.8%	156	2.7%
2008	5397	3987	73.9%	972	18.0%	282	5.2%	156	2.9%
2009	4844	3620	74.7%	801	16.5%	247	5.1%	176	3.6%
2010	4122	3254	78.9%	572	13.9%	131	3.2%	165	4.0%
2011	3620	2872	79.3%	517	14.3%	134	3.7%	97	2.7%
2012	3150	2559	81.2%	406	12.9%	94	3.0%	91	2.9%
2013	2698	2196	81.4%	348	12.9%	84	3.1%	70	2.6%
2014	2272	1926	84.8%	252	11.1%	58	2.6%	36	1.6%
2015	2201	1850	84.1%	249	11.3%	56	2.5%	46	2.1%
2016	1857	1589	85.6%	191	10.3%	43	2.3%	34	1.8%

The difference of the program duration is based on whether the applicant has learned the law and get admitted to enter the 2 year-program instead of 3 year-program. Working experience was originally defined ambiguously by a MEXT notice as any experience such as professional one and so on. In 2013, in relation to the condition of subsidy, MEXT redefined applicants with working experience as those who with working experience for more than 1 year after college graduation. This still ambiguous definition of the category led different applications by each law school in terms of the duration of working experience and the definition of working experience. Some law schools regard any activities as working experience. As for the academic backgrounds, social science includes economics, sociology, commerce, natural science includes engineering, medicine, science, and other includes education, family matter, art and so on.

The two charts reveal that both the number of applicants and the enrollment has been decreasing, at much higher rate than that of shrinking population. As for demographic makeup of the

enrolled students, the representation of students with working experience has dropped down from over 51.3% to 32.9%. While the representation of students with non-law academic backgrounds reduced by half, the representation of students with undergraduate law degree and without any working experience has increased significantly from 65.5% to 85.6%.[94]

This illustrates that the law students, as a resource for the legal profession, have become less and less diverse, which has potential to lead a less diverse judiciary in the future. The seriousness of the current situation cannot be overlooked and supports the urgent needs for any efforts to deal with this.

c. Comparison with Other Professional Jobs

In the U.S, the reality that big law firms among the legal profession are less diverse has been often emphasized by citing demographics on other professional jobs.[95] The proponents of diversity program use this data to push them to diversify their organizations.

I explored if I could make a similar argument by looking for some demographics but it turned out that there are only data on male-female ration and that, in Japan, which is still male-dominant society, it cannot be said that the legal profession is less diverse than other professional jobs. I show some data as a reference below.

(a) Medical Field

As a general trend, medical field is more gender diverse than the legal profession.

---

[94] There are a lot of arguments on why these situations happened but it is not my purpose to explore these. I just share the summary of the circumstances. It is said that the needs for lawyers has not expanded as expected in the time of legal reform, that as the government increased the number of successful candidates of the bar exam, the more lawyer faced difficulty to find a job and some people found it difficult to maintain the quality of the legal profession, and that, based on the concerns, the government made a downward revision on the number of successful candidate from the original plan which was 3,000 in 2010. Under these circumstances, it is said that great risk of failing to pass the bar exam and expected huge financial burden partly coming from the abolition of stipend provision to legal apprentices (now reinstated) discourage young people from hoping to be a member of the legal profession and from going to law school.

[95] See Chambliss, supra note 11, at 13, 14,19. Aggregate minority representation among lawyers is significantly lower than minority representation in most other management and professional jobs. Minority representation among lawyers was 14.4%, compared to 27.8% among accountants and auditors, 38.2% among software developers, 24.3% among architects and engineers 31,8% among physicians and surgeons, and 25.8 % within the professional labor force as a whole. Women's representation among lawyers (33.1% in 2013) is higher than women's representation in some other professions, including software developers (19.7%), architects and engineers (14.1%), and clergy (15.5%). However, women's representation among lawyers is significantly lower than their representation among accountants and auditors (62.1%), physical and social scientists (46.1%), and post-secondary teachers (50.2%); and significantly lower than their representation within the professional workforce as a whole (57.1%).

As for medical doctors, women representation is 20.4%(63,504) in 2014.[96] As for the successful medical school graduates who passed the national medical test, women representation is 34.5% (2,904) in 2017 and the male-female ratio has been approximately 7:3 recently.[97]

As for dentists, women representation is 22.5%(23,428) in 2014.[98] As for the successful dental school graduates who passed the national dentist test, women representation is 39.3% (779) in 2017 and the passing rate of women is 71% higher than 61.7% for men.[99]

As for pharmacists, women representation is 61.0%(175,657) in 2014.[100] As for the successful pharmacy students who passed the national pharmacy test, women representation is 61.07%(5789).[101]

(b) Certified Public Accountant (CPA) and Real Estate Appraiser (REA)

In Japan, the bar exam, the exam for CPA, and the exam for REA are said to be the three most difficult examinations. Women representation among CPAs and REAs are less than that of the legal profession.

As for CPAs, women representation is 14.4% among the all CPAs, and among the successful applicants who passed the exam, women representation is about 20%(236 of 1098) in 2016.[102] As for REAs, there are only 575 female (6.9%) REAs among 8268 in 2017.[103] Among the successful applicants who passed the exam, women representation is 10.4%(14 of 103) in 2016.[104]

(c) Others

---

[96] Kōsei rōdō shō [the Ministry of Health, Labor and Welfare] [MHLW], Report: Isi shikaisi yakuzaishi Tyōsa no gaaikyō [Summary of Survey on Medical Doctor, Dentists, and Pharmasists], 4 (2014).
[97] Ōbunsha kyōiku Jōhō Sentā [Obunsha Educational Information Center],Report, Apr. 21, 2017.
[98] See supra note 96, at 16.
[99] http://www.ikeipress.jp/archives/9362、http://www.hyoron.co.jp/news/n18486.html
[100] See supra note 96, at 22.
[101] MHLW, Report:Dai 102 kai yakuzaishi kokka shiken no Kekka ni tuite [Results on the 102th National Pharmacy Test] (2017).
[102] Kōnin kaikeishi kansa sinsa kai [Certified Public Accountant and Auditor Association], http://www.fsa.go.jp/cpaaob/kouninkaikeishi-shiken/ronbungoukaku_28.html
[103] Kokudo kōtū shō kensetu sangyō kyoku tika tyōsa ka [The Ministry of Land, Intrastructure, Transport and Tourism, Land Price Research Division][MLIT], Hudōsan no kantei hyōka ni kakaru tōroku jōkyō [Registration on Immovable Property Appraisal] (2017).
[104] MLIT, Heisei 28 nen hudōsan kanteisi shiken no happyō [The result on REA Test in 2016] (2016).

In education or academic field, women representation in academia has increased slightly (14.7% in 2012) but still been lower than most of the developed countries.[105] Women representation among professors is 15.0% in 2015.[106] Looking at the executive and legislative branches, women representation among the member of Diet is 9.5% in the House of Representatives and 15.7% in the House of the Councilors in 2015.[107] As for public officers who passed the national public service designed for candidates of management level in the government agencies, women representation is 33.5% in 2016.[108]

(5) Observation

I have explained the value of diversity on the bench and the unique situations in Japan, which make it urgent to secure and promote judicial diversity. Improving the quality of decision-making, bolstering the legitimacy, and securing the impartiality are all indispensable value for the judiciary. Along with the declining birthrate and the sharp decrease in applicants for the law schools, the necessity to secure diversity in the law schools and the legal profession has been higher than ever before. Even if there are professional jobs less diverse than the legal profession, given the fact that the legal profession occupies one of the three government branches and the responsibility is crucial and that the judiciary should actively make efforts to obtain the public trust because of its weak democratic foundation, promoting judicial diversity by bringing diverse talents together from possible widest range of backgrounds across the nation should be given higher priority.

Diversity on the bench is so important that the courts and judges should participate actively and voluntarily in any activities to promote judicial diversity. This means that it is not acceptable to hesitate to engage in the activities because of abstract concerns. Ostensible concerns might be smokescreen for bias against diverse groups. It is necessary to make efforts to obtain a real understanding of the value of diversity from those who have such implicit or explicit discomfort or antipathy, keeping in mind that those biases should be treated carefully.

4. Conditions for Being Qualified As a Diverse Group

(1) Issue

The former part mainly discussed the value of diversity on the bench. Again, the concept of

[105] Naikakuhu danjo kyōdō sankaku kyoku [The Cabinet Office Gender Equality Bureau], Danjo kyōdō sankaku hakusho gaiyō Ban [Summary of the White Paper on Gender Equality], 25 (2016)
[106] Id. at 10..
[107] Id.
[108] Id.

diversity encompasses not only differences in gender or race/ethnicity, but also every difference in individuals such as sexual orientation/gender identity, age/generations, disabilities, socio-economic statuses, and any other backgrounds. It is obvious that LGBT people are a diverse group contributing to the value of diversity on the bench. When we affirm the value of diversity on the bench and adopt the standing that we should promote judicial diversity, we should start to make efforts to realize judicial diversity beyond gender diversity.

However, the reality is not the case. The word, "Daibāsithi," a Japanese pronunciation of "diversity" has been used mainly in the context of women's empowerment. The discussion happens not in the legal profession but in private sectors which has been facing a serious shortage of human resources and urged to deal with it. Some companies have started a LGBT specific diversity program in response to the New Olympic Charter for Tokyo Olympics games in 2020, which includes the prohibition of discrimination based on sexual orientation (not included gender identity.).[109] As opposed to these efforts in private sectors, the legal profession has been going behind and not started substantial discussion on diversity issues.

Looking at the U.S., there have been a lot of discussions accumulated. However, their diversity programs have not been necessarily inclusive. For example, diversity program by ABA limited to 4 groups; racial and ethnic minorities, women, persons with disabilities, and the LGBT (lesbian, gay, bisexual, and transgender) community.[110]

There are differences in the period when each group started to get focused. At first, program focused on women, African American and Hispanic and then, extended to Asian American.[111] It is not so old that people with disabilities and religious group started to get attention and the programs for LGBT people came recently.

It seems that people have different ideas about judicial diversity. The data on appointment to the federal bench supported this. It was President Jimmy Carter who first started to promote a diversity on the federal bench by appointing female judges and racial minority judges based on the executive order in 1977.[112] The efforts have continued since then for decades. However,

---

[109] Japan Olympic Committee, Olympic Charter, art. 6 of Fundamental Principles of Olympism. "The enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status."

[110] See, e.g., ABA Presidential Initiative Commission on Diversity ,Report and Recommendations, Race and Ethnicity, Gender, Sexual Orientation, Disabilities, 9 (April 2010); Diversity &Inclusion 360 Commission Executive Summary, 5 (Aug.2016).

[111] There exists hierarchy and disparity among Asian American community in terms of representation in the legal profession and for example, Vietnamese or Cambodian American has not achieve fair representation as opposed to Japanese, Korean, and Chinese American. Interview with Sandra S. Yamate, Chief Executive Officer of the Institute of Inclusion in the Legal Profession (Dec 14, 2016).

[112] Alison Lehrer, Diversity on the Bench: The Appointment of Women to the Federal Courts, 4-5 (2011),

Rorie L. Solberg and Kathleen A. Bratton, who researched the record on the appointment to the federal bench by 2004, excluded Asian American judges and Native American Judges because they were too few.[113] It was President Barak Obama who started to actively appoint Asian American judges and LGBT judges.[114] It is said that professional diversity has been emphasized since 2013 and increase judges with experience as a defense lawyer or of public interest work.[115] This reflects the reality that there have been much more judges with experience as a prosecutor because the experience in the courtroom as a prosecutor is appreciated as a credential for becoming a judge. These circumstances indicate that the image of diversity on the bench differs time to time and person to person.

I think Japanese legal profession should start substantial discussion on diversity beyond gender diversity. In preparation for that, it would be meaningful to consider the conditions or requirement that a group should meet to be regarded as a diverse group qualified for getting focused in the discussion or the diversity program.

(2) Qualifications As a Diverse Talent

The 4 groups identified by the ABA - racial and ethnic minorities, women, persons with disabilities, and the LGBT community - is a good start to explore this issue. The 4 groups share the same constitutional issue; these 4 groups have been a subject of discussion on whether they are classified as a suspect class which can receive heightened scrutiny on discriminatory government actions based on such a characteristic. Therefore, I think Foot Note 4 in *United States v. Carolene Products*[116] would be instructive because it refers conditions for a suspect class.

FN4 indicates that government actions based on prejudice against "discrete and insular minorities" are subject to the strict scrutiny. FN4 did not elaborate what is "discrete and insular minorities" but Professor David Baum interprets it as follows. "[T]hese are groups that are not

---

https://www.uvm.edu/~polisci/Lehrer%20Thesis%202011.pdf

[113] Rorie L. Spill Solberg and Kathleen A. Bratton, Diversifying the Federal Bench; Presidential Patterns, 26 Just. Sys. J., 119, 120 (2005); Interview with Hon. Denny Chin, Judge. of 2nd Cir. (Aug. 15, 2017). When he was appointed a federal district court in 1994, there were only 5 federal judges. When he was elevated to the 2nd Circuit in 2010, he was only active circuit judge (Judge A. Wallace Tashima, the first Asian American federal circuit court judge, had assumed a senior status then.).

[114] The American Judicature Society, Diversity of the Bench, 97 Judicature 31, 1 (2013); Interview with Hon. Denny Chin, supra note 13. Under the Obama Administration, the number of Asian American federal judges increased up to 28 (4 are circuit judges.).

[115] Alliance for Justice, Broadening the Bench, Professional Diversity and Judicial Nomination, 12(Mar.18, 2016).

[116] "[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry," 304 U.S. 144 (1938).

able to play their proper role in democratic politics. They are 'discrete' in the sense that they are separate in some way, identifiable as distinct from the rest of society. They are 'insular' in the sense that other groups will not form coalitions with them - and, critically, not because of a lack of common interests but because of 'prejudice.'"[117] It can be said that being identifiable requires being visible to some extent.

Whether the U.S. Supreme Court recognized as a suspect class or not, the explanation by Prof. Baum precisely summarizes the common characteristics of the 4 groups which have been paid attention to as a diverse group. As opposed to wholesome straight white men, these 4 group respectively have been separated (discrete) as an out-group, and they respectively have been isolated (insular) and discriminated against because of prejudice based on its own characteristic. The 4 groups have the same history that their right to a full and equal participation in the society as a citizen were seriously restricted. It is a natural consequence that diversity programs have focused on these 4 groups based on the ideal of democracy and equality that these minority groups should be able to make the most of their abilities and to live a successful life in every level of society, including the politics and the judiciary, as the majority counterparts have been able to.

How to explain the difference in the period when each group started to get focused? I can answer that it depends on when the group became powerful enough to raise a voice for against suppression, and became visible enough to be recognized by the society as a group and to make the public understand that there are serious issues to be addressed. Whether being visible or invisible maters. Each of the 4 groups had power and motivation enough to make their existence and needs visible to the society in the process of standing up against injustice and of forming a group based on its own peculiar experience relevant to its own identity.

The key to forming a group is that members of the group share the same experience of being suppressed by the majority because of its own identity.[118] Women form one group in terms of having the same history and experience of having been suffering sexism, while it is unrealistic to think that they have the common interests in every issue, especially given the scale of the group, the half of the population. Asian American community is not monolithic, either. Depending on its origin, each sub group such as Japanese American, Korean American, Chinese American, Vietnamese American, Cambodian American, Lao American, has a conflict in views and values each other reflecting their different historical and cultural experiences. It is said that they started to have a sharp conflict on the issues regarding affirmative action in higher

[117] David C. Baum, Memorial Lecture: Is Carolene Products Obsolete? U. Ill. L. Rev. Online 1251,1257 (2010).
[118] Interview with Kenji Yoshino, Professor at NYU Sch. of L. (June 20, 2017).

education institutions.[119] Even with such differences and conflicts, Asian American community as a group has been suffering suppression by the majority White American, which is the experience all the members of Asian American community have shared. As for the LGBT people, it is often said that transgender community has somewhat different interests from LGB community. However as opposed to the prevailing rigid views on gender roles and on biological sexes, LGBT community has been vilified and discriminated, which makes a great sense to form one group.

One thing to caution here is that it is not appropriate to put one group above the other in value, depending on whether the group is regarded as a diverse group which is a part of diversity program. We should bear in mind that there are still "discrete and insular minorities" which are not powerful nor visible enough to be paid attention to or to be treated as a diverse group even if they are suffering from prejudice against. As a practical matter, programs might triage groups according to the number or the extent of the estimated impact of the program. However, it does not mean that there are differences in value among groups and that there is no group which has potential to be shed light on as a diverse group.

(3) Pluralism Anxiety

Professor Yoshino Kenji points out that America has had "pluralism anxiety -- as the nation confronts 'new' kinds of people (introduced to the country through immigration) or newly visible people (introduced to the country by social movements)."[120] He attributes pluralism anxiety to the tendency of the Supreme Court that "the Court has systematically denied constitutional protection to new groups, curtailed it for already covered groups"[121] and that "the Court has moved away from group-based equality claims under the guarantees of the Fifth and Fourteenth Amendments to individual liberty claims under the due process guarantees of the Fifth and Fourteenth Amendments."[122] His observation is instructive to the discussion on diversity in Japan. While some people might feel his observation only applicable to a country with long-standing discussion on diversity, I wonder if Japan is a country that has had a strong pluralism anxiety traditionally. If this is correct, Professor Yoshino offers a useful observation for us to consider how to craft a strategy to accomplish what the diversity programs seek for in Japan, without causing rejection that some people show when facing with a foreign concept with foreign language and without increasing hostility or antipathy against minority groups that

[119] Hon. Judge Pamela K. Chen, Judge of D. for E.D.N.Y., Address at the 2016 Korematsu Lecture at N.Y.U.; "Race Consciousness in School Admissions" (Mar. 29, 2016).
https://www.youtube.com/watch?v=InLMSYLyYWk
[120] Kenji Yoshino, The New Equal Protection, 124 Harv. L. Rev. 747(2011).
[121] Id. at 748.
[122] Id.

seek for a more diverse society.

Whether or not we use the word of "diversity," the value of the diversity on the bench is established, not controversial. The important thing is to recognize that judges have different views and perspectives based on different experiences and that because of the unique experience, minority judges have also different views and perspectives and can contribute to the value of diversity on the bench.

III. LGBT Judges As a Diverse Judge

In part II, I explained the reasons why the courts should be composed of judges with diverse backgrounds and what the value of a diverse judiciary is. In part III, I explain how LGBT judges as a diverse judge contribute to the value of a diverse judiciary and refute the counterarguments against LGBT judges.

I make clear that the purpose of this part is not to claim that LGBT judges are better than other judges. However, I believe there is a special reason to discuss that LGBT Judges are as valuable as other judges. It is because LGBT people tend to experience social isolation, perpetuate a sense of inferiority and hate themselves, Information demeaning and pillorying LGBT people are all over out there. Overwhelming majority of Japanese people feel there are no LGBT people around them, come to have stereotypes on LGBT people through the image depicted by the media and then consciously or unconsciously share and perpetuate the negative images of LGBT people. Under such circumstances, LGBT people live in fear. A lot of LGBT people hide who they are, feel stressed out worrying about not only any possibility that might end up in being disclosed but also about being subject to physical threat. LGBT people are privately and publicly isolated and discriminated because they are not conforming to a stereotype on what a man/woman is like. The experience of being forced to deny who they are leaves a deep scar in their minds and whittle away their confidence and self-esteem.

Regrettably, the legal profession, whose responsibility is to achieve the value of the Constitution, has not raised their awareness of issues on LGBT people to the ideal level. Lawyers that I believe one of the most powerful citizens as an agent for social change have the serious difficulty in coming out. LGBT legal professionals might have concerns that being LGBT and being who they are is a risk in building a successful professional career. These concerns dissuade young people from hoping to become a legal professional and ultimately to come to the bench, which have negative impact on achieving judicial diversity. Therefore, it is crucial to understand the values and roles of LGBT judges, to thoroughly refute the counterarguments against LGBT judges, and to recognize that LGBT people deserve dignity the same as the other

people and that being LGBT is not an issue at all as a qualification for a judge.

1. The Role and Significance of LGBT Judges

(1) Better Decision Making

a. New Perspective

LGBT judges offer new perspectives that other judges might not have. They have a courage to come out and built successful career, by fighting against and overcoming the shame and humiliation of being called sexual deviant, and the fear of being ostracized from the family, community and the whole society. They know how painful it is to hide and deny who they are in order to navigate life under a hostile environment. Such courageous experience is the pride LGBT people celebrate.[123]

Such experience provides LGBT judges with unique perspectives and views. LGBT judges might have some areas where they are more sensitive and knowledgeable than other judges. Judge Pamela K. Chen, the first Asian American lesbian federal judge, shared her thought that when she used to prosecute human trafficking cases as a prosecutor, her being lesbian made a difference in that she could be more sensitive to the prevailing issue that there are a lot of LGBT victims and could decide appropriate treatments for them based on that awareness.[124] I think how to view a domestic violence between a same-sex couple can be another example. There would be a risk to dismiss the seriousness of the dispute, mischaracterizing as just a simple quarrel or a brawl between roommates, if the decision is distorted by a stereotype that same-sex couples do not have a serious long-term relationship.[125] Although the comprehensive training program is required to deal with these cases properly, the perspectives of LGBT judges would be beneficial in these situations.

For most of the people, coming to the court is a once in a life time experience. It is important that they can feel their voices properly heard by the judge. Such perception is the core to building the trust in the judiciary. There might be not so many cases involving LGBT individuals, however, it is important to secure the trust from LGBT people who come to the court. Professor Brower pointed that the mismatch between the judge's schema of gay identity

[123] Interview with Tobias Barrington Wolff, Professor at U. of Pa. L. Sch. (Apr. 1, 2017); Interview with Kenji Yoshino, supra note 118.
[124] Hon. Pamela K. Chen, Remarks at supra note 27.
[125] Professor Todd Brower points out “one aspect of the lesbian and gay male schema is the predatory, lustful, or purely sexual nature of homosexual liaisons that do not reflect loving, long-term relationships.” Todd Brower, Article: Social Cognition “At Work”: Schema Theory and Lesbian and Gay Identity in Title VII (2009), 18 Law & Sex. 1, 14 (2009).

may have led judges to misanalyze the appropriate factual and legal context of the claims.[126] LGBT judges can play an important role in bridging the gap of between traditional judges and LGBT people by adding LGBT perspective in the judiciary, which would make their opinion impressive for the people before the courts.

b. Reducing Bias and Stereotype

As for the influence on other judges, LGBT judges might have help reduce negative biases and stereotypes against LGBT people and thereby bias-free decision is more likely to come to fruition. Such impact might result in creating a better working environment.

In addition to the general part above, this positive effect is supported by research. A research shows that "sexual prejudice is strongly related to whether or not a heterosexual knows gay people personally."[127] There are still a lot of people who have only limited image about LGBT people through information conveyed by the media which does not necessarily represent the reality of LGBT people. Interacting with real LGBT individuals who are a judge provides other judges the real image of them and an opportunity to have a second thought on stereotypes and biases against LGBT people and to get more interested in who they are and how they live. It might also happen that a judge hearing a case involving LGBT rights get more conscious about the impact of his/her decision on lives of LGBT people after the faces of LGBT colleagues cross the judge's mind. Having LGBT judges as a colleague can contribute to bias-free decision.

This positive impact is more significant in Japan where overwhelming majority of people report that they have not met LGBT people. A survey[128]- the respondents of which are employees of private sectors, not the legal profession - shows that only 3.5% of the respondents have LGBT people close to them[129] and that only 6.6% of the respondents have heard that there is(are) LGBT employee(s) in the workplace.[130] 81% reported that they have never heard that their friends and family members are LGBT.[131] Japanese people have less opportunity to doubt their stereotypes against LGBT people, and judges are not an exception. LGBT judges in Japan are expected to play an important role in reducing bias and stereotype.

---

[126] Id. at 61.
[127] Gregory M. Herek, The Psychology of Sexual Prejudice, Current Directions in Psychological Science, volume 9, Number 1, 19, 20 (February 2000). "[T]he lowest levels of prejudice are manifested by heterosexuals with gay friends or family members who describe their relationships with those individuals as close and report having directly discussed the gay or lesbian person's sexual orientation with him or her." Id.
[128] Nihon rōdō kumiai sō rengō kai [Japan Trade Union Confederation], LGBT ni kansuru isiki tyōsa [Consciousness survey on LGBT in workplace] (July 2017). The respondents are 1000 employed from 20 years old to 59 years old (500 men and 500 women based on gender at birth).
[129] Id. at 4p.
[130] Id. at 5p
[131] Id. at 5p

I stress on that there should be a critical mass of LGBT judges. In *Grutter*[132], the U.S. Supreme Court said that "[d]iminishing the force of such stereotypes" cannot be accomplished "with only token numbers of minority."[133] It is wrong to assume all of them have the same idea. There are gay individuals representing typical image of gay people and vice versa. Each member of LGBT community has different experience and perspective. The value of diversity on the bench is to appreciate such difference. If a LGBT judge focus too much on reducing stereotypes and have pressure to downplay his/her authenticity, that is counterproductive. Knowing one LGBT individual does not understand who they are. It is only when there are a critical mass of LGBT judges and they can make the most of who they are without reserve that the real judicial diversity come to fruition.

c. Education Effect

As stated above, judges educate each other by way of discussion among the panel members and by opinion writing and so on. When the educational materials on LGBT issues are limited, LGBT judges can be useful information resources for other judges. Judge Chen shared one episode that she shared her thoughts when her colleague asked her a comment on the case pending in the 2rd Circuit involving a controversial legal issue regarding LGBT rights.[134] This is a good example of having LGBT judges as a colleague. The synergy relationship was created that straight judges might feel like being more sensitive to the decision's impact and feel comfortable to ask a LGBT judge and the LGBT judge provides its own thought or useful information for a better decision making. There might be a special responsibility for LGBT judges to contribute to cases involving LGBT issues which are heard by other judges.

(2) Legitimacy

Knowing that the judiciary has LGBT judges would make people realize that LGBT perspective are reflected in the process of decision making and would increase people's trust in the judiciary. This is important because LGBT people are worried if they are treated badly by the court system. According to the research Professor Brower conducted on the perception of court users in California, "when sexual orientation became an issue in the court contact, 30% believed those who knew their sexual orientation did not treat them with respect, and 35 % believed their sexual orientation was used to devalue their credibility."[135] Furthermore, the bias survey

[132] Supra note 21.
[133] *Grutter*, supra note 21, at 333.
[134] Hon. Pamela K. Chen, Remarks at supra note 27.
[135] Todd Brower, Multistable Figure: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts, 27 Pace l. Rev. 141, 168 (2007).

conducted by the New Jersey state court showed that 61% of the lesbian or gay respondents, but only 10% of all New Jersey respondents with litigation experience, believed that sexual orientation bias affected the outcome of a case.[136]

These types of survey have not been conducted in Japan. However, there are constant voices from LGBT people that the judges might treat LGBT people unfairly or that the judges might not take argument from LGBT people seriously. In order to create conditions which never give LGBT people such concerns and fears, there should be a critical mass of LGBT judges.

(3) Role Model

Same as the other minority judges, LGBT judges can be a role model for young people, especially for those who hope to be a member of the legal profession. In the U.S., LGBT judges are a "the first" in many ways. The first lesbian judge, the first gay judge, the first Asian American lesbian judge, the first gay court of appeals judge, the first African American gay judge and so on. President Obama, who appointed a lot of "the first judges", explained the significance of "the first judges" as follows: "these 'firsts' are important, not because these judges will consider cases differently, but because a judiciary that better resembles our nation instills even greater confidence in our justice system, and because these judges will serve as role models for generations of lawyers to come."[137] It is natural that the fewer LGBT judges there are, the more emphasis on their role as a role model people put.

For LGBT youth, knowing and interacting with LGBT judges is comforting and liberating experience.[138] Seeing them coming out unapologetically would give courage and hope to LGBT youth who might have a hard time in their life hiding who they are. Judge Paul Oetken, the first gay federal judge, is one of such an influential role model. Senator Charles Schumer who recommended Judge Oetken to the federal bench made an impressive floor speech;

> *As the first openly gay man to be confirmed as a federal judge and to serve on the federal bench, he will be a symbol of how much we have achieved as a country in just the last few decades. And importantly, he will give hope to many talented young lawyers who, until now, thought their paths might be limited because of their sexual orientation. When Paul becomes Judge*

[136] See, e.g., id. at. 173-174; Final Report Task Force on Sexual Orientation Issues, New Jersey Supreme Court, 42 (2001).
[137] The White House Blog, https://obamawhitehouse.archives.gov/blog/2013/05/17/president-obama-nominates-four-distinguished-women-serve-federal-judges (May 17, 2013).
[138] For example, Carmelyn Malalis described her memory of meeting Judge Deborah Batts, the first lesbian federal judge, as "incredibly comforting experience," Camelyn Malalis, Out and About: The LGBT Experience in The Legal Profession, 100-101, at 100 (2015).

Oetken, he will be living proof to all those young lawyers that it really does get better.[139]

Judge Darrin Gayles, the first African American gay federal judge, expressed the value of a role model, touching on how meaningful to African American LGBT community it was that he was appointed to the federal bench, as "a tangible confirmation that they could live their own truth and still reach their full potential."[140]

Judges themselves recognizes they are a role model. Judge Vicky S. Kolakowski, the first elected transgender judge, described the feeling when she decided to run for the judgeship, "I liked the idea of being a role model as a transgender judge, someone who was respected for the same judgement that many people considered to be pathologically impaired."[141] Judge Oetken highlighted the importance of being a role model by putting it in the first of the list of responsibilities that LGBT judges assume.[142]

The role as a role model is more emphasized in Japan because it is difficult for people to have different, positive and successful image of LGBT individuals from image created by the media.

2. LGBT Protected by the Japanese Courts

As the established interpretation of Japanese law, it is illegal to treat LGBT disparately because of their LGBT statuses. This also means that it is not legally acceptable that LGBT judges are treated unfairly because of their LGBT statuses.

The Japanese courts have consistently protected LGBT individuals, even if, like in the U.S., there is no statute applicable nationwide explicitly prohibiting discrimination based on sexual orientation or gender identity. This means that LGBT people including LGBT judges in Japan are protected against discrimination based on their LGBT statuses. As a general matter, like in the U.S., the equal protection clause of article 14 of the Constitution[143] does not apply directly to mutual relations between private parties,[144] however, in the relation to private party, the right

[139] Senator Charles Schumer, Speech (Jul. 18, 2011)
[140] Hon. Darrin Gayles, Judge of D. for S.D. Fla., Remarks at the "History Makers" Award; Better Brother's Los Angeles and Sheryl Lee Ralph's Diva Foundation presents the 2nd Annual Truth Awards Gala (March 5. 2016)
[141] Hon. Victoria S. Kolakowski, supra note 138, 114-116, at 115. She was denied once her application to the bar exam because the Louisiana State Bar Association thought that she was not of sound mind. She petitioned the Louisiana Supreme court pro se for permission to take the bar exam and got the request granted successfully.
[142] Hon. J. Paul Oetken, Remarks at supra note 27.
[143] It says "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."
[144] See, e.g., *Slaughter-House Cases*, 83 U.S. 36(Apr. 14, 1873); Mitsubishi Jushi Corporation case, Saikō Sibansho [Sub. Ct.] Dec. 12, 1973, Shō 43 (o) no. 932, 27 Saikō Sibansho Minji Hanreishū [Minshū] 1536 (Japan)

of not being subject to discrimination or the right to equal treatment originated in the equal protection clause is recognized as "legally protected interest" in article 709 of the Civil Code,[145] infringement of which establishes tort liability. This way, the courts incorporate the value of the Constitution into an interpretation of "legally protected interest." Therefore, without any statute enacted by the legislative body, LGBT individual can get remedy against discrimination by the private actors because the discrimination is unlawful in violation of "legally protected interest." And in relation to the government, individuals can seek for the remedy through state compensation suit based on the State Redress Act whose liability is similar to tort liability,[146] where the court decides that discrimination is unconstitutional in violation of the article 14 of the Constitution or unlawful in violation of any statutory provisions which limit the discretion that the governmental agency can exercise.

For elaborating this argument, I introduce several cases involving LGBT rights and make comments on a relevant statute, Equal Employment Opportunity Act (EEOA).

(1) Cases

a. Tokyo Youth Hostel Case[147]

In this case, an association whose members were young gay men was excluded from a municipally owned youth hostel. The municipal board of education argued that allowing members of the same sex who were attracted to each other to stay in the same room would contravene the purpose of the facility and the principle that required boys and girls to stay separate room. It also argued that allowing the group members to stay in the hostel would disturb order by causing confusion among other young users who lacked ability to understand homosexuality properly. Tokyo District Court ruled that this was illegal discrimination. On appeal, Tokyo High Court affirmed, holding that the exclusion was unlawful[148] by reasoning

[145] Article 709 Damages in Tort
A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence.

[146] See Art. 1 (1): When a public officer who exercises the public authority of the State or of a public entity has, in the course of his/her duties, unlawfully inflicted damage on another person intentionally or negligently, the State or public entity shall assume the responsibility to compensate therefor.

[147] *Japan Ass'n for the Lesbian and Gay Movement v. Tokyo Metropolitan Gov't*, Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Mar. 30, 1994, Hei 3 (wa) no. 1557, 859 Hanrei Taimuzu [Hanta] 163 (Japan), aff'd, Tōkyō Kōtō Saibansho [Tokyo High Ct.] Sep. 9, 1997, Hei 6 (ne) no. 1580, 986 Hanta 64 (Japan).

[148] Because it was not characterized as equal protection case, the court did not hold the government action unconstitutional and therefore did not identify which category of the list in the article 14 of the Constitution gay people fall into. Plaintiff claimed that the government action violated the freedom of assembly but the court gave the plaintiff remedy based on that the municipal education board exceeded the limit of their discretion provided by the Local Government Law and their action was unlawful. The court did not determine whether the government action was unconstitutional or not because the court did not need to do so. The similar attitudes can be observed in the decisions of the Supreme Court of Japan. Some criticize those attitudes by saying that the

that "it is not difficult for young users to understand the concept of homosexuality when provided with a certain degree of explanation" and that "while it made too much emphasis on abstract concern that the group members would engage in sexual conduct, there is no sign of consideration on how to balance between the group's right to access the facility."[149] Tokyo Hight Court conclusively said that "when a governmental agency performs its duties, it is obligated to pay careful attention to the situation of homosexuals as a minority and to guarantee that their rights and interests be protected,"[150] adding that "indifference and ignorance regarding homosexuality are inexcusable on the part of persons in the position of wielding governmental authority."[151] The last part regarding the obligation as the agency who exercises the public authority is obviously applicable to the judiciary. This case illustrates that the judiciary is prohibited to treat LGBT judges in a discriminatory manner and furthermore, that the judiciary has an affirmative duty to voluntarily engage in activities for raising awareness of LGBT issues among the judiciary.

b. Transgender Discrimination Cases

There are two cases regarding transgender discrimination.

First is a case where a trans woman was rejected to join a private golf club because of her gender identity.[152] Shizuoka District Court Hamamatsu Branch awarded damages for emotional distress, holding that the club ignored a part of fundamental elements of her personality and inflicted her serious emotional distress. This case recognized that the interest of the gender identity being respected from others is legally protected interest.

Another is a case of Kyoto District Court where a trans man was rejected to join a private sports club because of his gender identity.[153] The court made clear in its written settlement

---

Court should grapple with the constitutional issues not avoiding the statutory issues like whether the government actions exceeded the limit of discretion or not. See. Kazuyuki Takahashi, Book, Kenpo Sosho [Constitutional Litigation], Iwanami Shoten, 328 (2017). Based on the basic rule of civil procedure in Japan, the court does not determine things not relevant to the remedy. If the plaintiff seek only for revocation of government actions, the plaintiff can achieve the purpose only by proving that the action was unlawful, without saying unconstitutional. However, if the claim is valid that damages can vary according to the determination on whether the action was illegal or unconstitutional, the court have to step in to decide whether the action was unconstitutional because only declaring unlawful is not sufficient for granting remedy the plaintiff seek for. If this is the case, the critic above is valid.

[149] Tokyo High Ct., supra note 147.

[150] *Id.*

[151] *Id.*

[152] Sizuoka Chihō Saibansho Hamamatsu Shibu [Shizuoka Dist. Ct. Hamamtsu Branch] Sep. 8, 2014, Hei 24 (wa) no. 627, 2243 Hanrei Jihō [Hanji] 67 (Japan), aff'd, Tokyo High Ct., July 1, 2015, Hei 26 (wa) no. 5258.

[153] As the same in the U.S., most of the civil lawsuits were concluded by settlement between the parties. The judge usually engages in the negotiation process for settlement and based on the likely outcome, the judge sometimes shows its own tentative opinion in written form to the party as an effort to help the party to reach the agreement.

recommendation that "gender identity being accepted from others is the fundamental interest in living with dignity (人格的生存に不可欠の利益)," [154] and that "in the context of receiving service in a contractual relationship, it should not be permitted that transgender individuals are treated badly or excluded only because of their gender identities." [155] The court shows their view that discriminatory treatment against transgender individuals is illegal based on gender identity.

The phrase of "the fundamental interest in living with dignity" has been long considered the key words among the legal profession to recognizing the new constitutional liberty based on the article 13, equivalent to the substantive Due Process in the U.S., even if the phrase has not appeared in any Supreme Court decisions. It can be said that, even if the two were disputed between private parties, both two cases considered the very right of gender identity being respected and accepted by others in light of the constitutional value, by using phrases such as "a part of fundamental elements of her personality" or "the fundamental interest in living with dignity." This also means that in relation to the government which is subject to the constitutional mandate, more protection is warranted.

c. Employment Discrimination Case

There is a case [156] where the plaintiff, a transgender woman who had undergone sex-reassignment surgery, was fired because she didn't follow the order from the supervisor which she shouldn't dress like a woman. Tokyo District Court held that the dismissal was invalid and granted injunctive relief ordering the company to reinstate her. [157] Considering the courts' traditional strict attitude against firing practice, the outcome itself is not noteworthy. [158] However, it should be noted that the court imposed an affirmative duty on the defendant company, by saying that "the plaintiff was in the situation where she suffered serious emotional

[154] Watanabe Kazuyuki, Ikite ite yoinda to omoeta, sei douitu sei shōgai zim riyōsha Konami to wakai [Transgender gym user reached a settlement with Konami Sports Club, "I could feel it is OK to live."], BuzzFeed News (June 19, 2017, 16:09), https://www.buzzfeed.com/jp/kazukiwatanabe/20170619?utm_term=.dcMxdNx6J#.ppp5n85aA

[155] Id.

[156] Tokyo Dist. Ct. June 20, 2002, Hei 14 (yo) no. 21038, 830 Rōdō Hanrei [Rōhan] 13. (I think this opinion evaluated correctly how much severe damages the order was likely to impose on the transgender employee. "At the time the plaintiff asked her employer for a permission that she could work wearing like a woman, if she was demanded to wear like a man, she was likely to be suffering from severe emotional damages.")

[157] *Id.* Critic might point out that this ruling lacked sensitivity in that the court found that the action by transgender plaintiff formally violated the internal rules prohibiting any actions disturbing order in the company.

[158] In the contrast to the loose regulation on hiring process where an employer has wide discretion or freedom of employment, they are subject to strict limitation to their firing practice. The Article 16 of Labor Contract Acts says "A dismissal shall, if it lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as an abuse of right and be invalid." The text of this provision comes from the Supreme Court decision made long time before the act was enacted, and, under this decision, the Japanese courts have long protected workers, by interpreting strictly and narrowly the requirement of "objectively reasonable grounds" and "appropriateness in general societal terms." Considering not only the long-standing interpretation but also the courts' attitude against discrimination against sexual minorities, I cannot imagine any court would find that the firing based on sexual orientation or gender identity is valid.

distress if demanded to ack like a man or constrained from acting like a woman"[159] and that "the discomfort and antipathy against the plaintiff among the other employees could be mitigated by making efforts and taking time to recognize and understand her circumstances."[160]

d. Case on The Freedom of Dating

There is a Tokyo District Court case talking about the freedom of dating.[161] This case did not involve LGBT individuals but, like *Lawrence v. Texas*[162], it can be understood as a safeguard for LGBT people from discrimination because this case gives protection a sexual conduct between consenting adults.

This case involved a female idol who had a sexual relationship with her male fan in violation of the management contract which made it a breach of contract for her to have a sexual relationship with any of her fans.[163] The management company filed a lawsuit seeking for damages based on the breach of contract but the court rejected. The court said "feelings to others are an essential part of the nature of human beings and romantic feelings to others are one of the important ones. Dating with someone of the opposite sex and having a sexual relationship with the person is central to the right of self-determination which is important to live true to oneself and to the fullest. The freedom of dating with a person of the opposite sex with consent (including the freedom of having a sexual relationship with the person) is considered a part of the right to pursue happiness."[164] The court added that "whether or not having a sexual relationship with others falls within secret in private life which is not expected to be known to others"[165] and made clear that people should not suffer any detriment when such secret in private life is disclosed without consent.

This opinion ostensibly talked only about the right of dating to the opposite-sex couples. But given that this case was about a female idol who entered an intimate relationship with her male fan and that the part talking about feelings to others is universal regardless of gender, the correct understanding is that the court recognizes the freedom of dating with others in general. Furthermore, again, although this case was between private parties, the court consciously incorporated the constitutional value by using the phrase "the right to pursue happiness" which is guaranteed by the article 13 of the Constitution.

---

159 Supra note 156.
160 *Id.*
161 Tokyo Dist. Ct. Jan. 1, 2016, Hei 27 (wa) no. 1759, 2316 Hanji 63.
162 539 U.S. 558. The Court held that the Texas state law criminalizing sexual conduct between consenting same-sex adults in the private space was unconstitutional in violation of Due Process Clause of the Fourteenth Amendment of the Constitution.
163 The provision of the contract did not limit the fans to male fan on its words.
164 Supra note 161.
165 *Id.*

This opinion means two things: first, the freedom of dating enjoys more protection against the government; secondly, by protecting the freedom about conduct, the opinion rejected the idea that while it is not ok to discriminate LGBT people based on their LGBT statues, it is ok to discriminate them based on their conduct like same-sex intimacy inextricable from their statuses.[166]

(2) The Interpretation of the Equal Employment Opportunity Act (EEOA)

It is possible to interpret that EEOA prohibiting sex discrimination also prohibits discrimination based on sexual orientation and gender identity as a form of sex discrimination. The usefulness of this argument in Japan might be not so strong as in the U.S. where such interpretation is necessary for LGBT employees to seek for remedy under Title VII unless there is any local law prohibiting explicitly discrimination based on sexual orientation and gender identity. As stated above, as a legal interpretation, LGBT people are legally protected from discrimination based on their statuses and get remedies claiming tort liability.[167] Even so, the interpretation that sex discrimination prohibited by the EEOA includes discrimination based on sexual orientation and gender identity might be useful in that the interpretation can elevate the protection for LGBT people and can send a strong message to the public that the discrimination against LGBT people is evil.[168]

In any case, whether such interpretation is possible depends on whether the EEOA recognizes sex discrimination as embracing discrimination based on gender stereotypes such as how a man/woman should behave.[169]

---

[166] In the U.S., this idea was considered to be rejected in *Lawrence.* See also *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62(2013); "if a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation"; It is said that this idea is still gaining support from anti-LGBT groups. Shannon Minter, remarks at ABA Section of Litigation Inaugural LGBT Forum: Religion as Sword or Shield? Tensions over LGBT Rights and Religious Exemption Claims (May 2, 2017).

[167] Of course, this does not mean that there does not exist actual discrimination nor that all the LGBT individuals receive adequate remedies. Not limited to LGBT people, it is said that Japanese people are reluctant to take a legal recourse and they often choose reluctantly to let the matter drop.

[168] I disagree with the idea that a legislation for protecting a right is not necessary when the court precedent guarantee the right. I believe that there can be a significant difference between the protection by the courts and that by the legislation. The protection by the courts is an individual remedy and, public awareness of that matter is not as promoted as the legislation because the court opinions is far from public understandings. Even if the legislation protects the exact same right the court precedent protects, the legislation would not only provide the protection to the right but also operate mechanism substantially protecting the right through imposing the affirmative duties on the executive branch for enforcing the legislation including raising public awareness and promoting their understandings. These are significant effects by the legislation that the court precedent can not make.

[169] See *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). The Court held that "the very purpose of Title VII is to promote hiring on the basis of job qualifications," *id.* at 243, that congress' intent "to forbid employers to take gender into account in making employment decisions appears on the face of the statute," *id.* at 239, that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be

a. The Purpose of EEOA

According to the article 1 of EEOA, the purposes of the act are, to promote securing equal opportunity and treatment between men and women in employment in accordance with the principle in the Constitution of Japan of ensuring equality under the law,[170] and to promote measures, among others, to ensure the health of female workers with regard to employment during pregnancy and after childbirth. In line with the first part of the purposes, the article 5 prohibits discrimination based on sex. The rationale of this prohibition is to secure that an employee can get equal opportunity and receive equal treatment in the employment according to his/her motivation and ability, regardless of his/her sex, and to prohibit any disparate treatment because of the assumption on how a man/woman should be or on how an average or ordinal man/woman should be.[171] Furthermore, the Ministry of Health, Labor and Welfare, a ministry in charge of enforcing the act, shows some examples of violating the article 5, one of which is that an employer cannot recruit new employees for a job by limiting to applicants of a certain sex (such as "Help Wanted-Male" or "Help Wanted-Female.") . The Ministry explain that such recruiting is based on the stereotype that the job should be engaged by or suitable for a woman/man, and is likely to perpetuate job segregation.[172]

b. Sex Discrimination Case

One supreme court case regarding sex discrimination might be instructive even if the case was before the enactment of EEOA. In *Nissan Car Corporation case*,[173] the Court held that the company rule setting different compulsory retirement age, 55 years old for female employees and 60 years old for male employees, was invalid, saying that it was unreasonable for the company to take it for granted that female employees across the board became incompetent earlier than male employees, without actual evaluation of each female employee's ability. This

---

aggressive, or that she must not be, has acted on the basis of gender," *id*. at 250, and that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *id.* at 251. After *Price Waterhouse*, the gender stereotyping theory has been utilized as a theory for protecting LGBT workers, by framing discrimination against them into sex discrimination. See, e.g., Brian Soucek, Perceived Homosexuals: Looking Gay Enough For Title VII, 63 Am. U.L. Rev. 715, 724(2013); *Baldwin v. Foxx*, Apppeal No.0120133080 2015 WL 439764(E.E.O.C. July 15, 2015); *Videckis v. Pepperdine Univ*., No. CV 15-00298 DDP (JCx), 2015 U.S. Dist. LEXIS 167672 (C.D. Cal. Dec. 15, 2015); *Hively v. Ivy Tech Cmty. Coll.of Ind*., 853 F. 3d 339 (7th Cir. Apr. 4, 2017). But see, e.g., *Dawson v. Bumble & Bunble,* 398 F. 3d 311 (2nd Cir. Feb. 17, 2005); *Evans v. Gergia Reg'l Hosp.,* 850 F. 3d 1248 (11th Cir. Mar. 10, 2017).

[170] See supra note 143.

[171] MHLW, Danjo koyo kikai kinto ho no aramashi [Outlie of Equal Employment Opportunity Act], 9 (2014)

[172] Id. at 10.

[173] Sup. Ct. Mar. 24, 1981, Shō 54 (o) no. 750, 35 Minshū 1536 (Japan). This case is not a EEOA case because it is older than the enactment.

opinion can be read that "any rule based on typical stereotype about women should be prohibited."[174]

c. Consideration

As can be understood through the Court's opinion in *Nissan* and the purposes of EEOA, individual employee's ability to perform job should be emphasized when an employer makes any employment decision, and the employer should be prohibited to take into account gender stereotypes irrelevant to the ability. The evil designed to prevent by the EEOA is the reinforcement or promotion of wrong gender stereotypes or job segregation based on that. Although I cannot assert that this interpretation is flawless, I can say that it is possible for the court to take this interpretation.

I demonstrated that, as a legal matter, discrimination against LGBT people is unacceptable and therefore, LGBT judges should not be treated unfairly because of being LGBT.

3. Counterarguments

In this section, I analyze and refute potential counterarguments against LGBT judges. I reveal that there are conscious or subconscious discomfort and antipathy against LGBT people. These arguments are likely to get bigger as pushback as LGBT judges get more visible and LGBT people get more understanding and acceptance from the society. Although the blatant claim that being LGBT is wrong is not realistic, it is realistic to expect that there would be arguments ostensibly legally well-crafted for attacking the LGBT judges' temperament or qualification as a judge. These arguments impair the dignity of LGBT judges and discourage LGBT people from having a hope to be a legal professional and considering to become a judge. It is necessary to increase the number of LGBT judges to realize a diverse judiciary and, in order to that, it is important to prepare for refuting those counterarguments against LGBT judges. Some might view my attempts as overreacted, supersensitive or farfetched. However, this is a piece of evidence that LGBT people are constantly feeling and suffering from hostility and antipathy in their daily lives enough to have to be sensitive to these oppositions. The pervasive negative and hostile environment inevitably gives LGBT people such pressure.

(1) LGBT Judges Do Not Deserve Attention

[174] Hidenori Tomatsu, Seisabetu sōshō to sihō sinsa no yakuwari [Sex Discrimination Lawsuit and the Role of Judicial Review], 17 Seijo Hogaku 23, 24(1984).

a. Not Exist or Too Few

The argument based on that LGBT people do not exist is out of question. However, I need to refute an argument that diversity program for LGBT judges is not necessary because there are only 5% of LGBT at best. This argument has two flaws. One is that a seemingly low percentage is sometime misleading and distorts the perception of reality. Even 1% of population of Japan is over 1 million. It is not the number that can be ignored. 5 % of the population means that a LGBT exists every class of 20 students. Nobody claims that it is permissible to ignore the student. Second, the number does not matter when it comes to the value or dignity as a human being.

b. Irrelevant Characteristic to the Responsibility As a Judge

Next counterargument is that being LGBT does not matter and should not be disclosed because such a private matter is irrelevant to the responsibility or role as a judge.

I suspect that this argument comes from a misconception that the proponents of this argument might have when hearing someone come out as a LGBT. They might get an instant image of sexual conduct and perceive coming out as publicizing private sexual life. This often happens to people who perceive LGBT people as out-group. Namely, as human cognitive processing, people tend to see out-group members as homogeneous, while seeign our own group as individuals and as more diverse in our characteristics and motivations.[175] People tend to focus much on the difference, to exclude them, and to reinforce the antipathy against them. For example, in the context of LGBT, people tend to focus on whom to sleep with, which easily associates LGBT people with sexual conduct and causes discomfort and antipathy against LGBT people. Those who have no problem at all hearing their straight colleagues talking about their spouses or family members somehow feel discomfort and antipathy when hearing gay colleagues talking about his/her same-sex partner.

The argument that LGBT people need not say their sexuality and should keep their sexuality private cannot be sustained, considering the abovementioned benefits of LGBT judges. In addition to this, the proponents would drop this argument when they understand who and what LGBT people are. This argument gives short shrift to the value of LGBT people getting visible and the harm caused by keeping them in the closet and invisible. This argument is based on lack of understanding and on misunderstanding. It is important to know the reality that LGBT people have been suffering from stigma and shame because of who they are and to realize how important for LGBT people and LGBT community in such a society it is to come out as a LGBT.

[175] Brower, supra note 125, at 26.

Unfortunately, in Japan, many people do not have such correct recognition about LGBT people and coming-out, which a recent survey vividly revealed.[176]

(a) Low Recognition on Experience of LGBT

Many people have little understanding that LGBT have been suffering from discrimination, negative prejudice and acts based on hate against them. Many people does not recognize this very experience that is the core experience that the members of LGBT community have shared and the very reason why they deserve attention as a diverse talent.

The survey shows that 47.1% reported that LGBT people are as same as the other people, 41.8% reported that LGBT people have been having a hard time facing discrimination and negative prejudice, and 8.8% reported that LGBT people have been vilified and subject to antipathy or hostility. About 60% showed their understanding that LGBT people do not have any difficulty in life and the overwhelming majority felt that there has not been any hate acts or assaults against LGBT people. The result tells that many people do not realize what LGBT people are going through while not being able to come out, feeling and fearing pervasive negative prejudice.

There are two possible explanations, not mutually exclusive, rather related to each other. One is that many people have not had any LGBT people close to them and not had any opportunity to understand their experience through interaction with them, therefore, do not realize that LGBT people who actually exist around are having a hard time not being able to come out for fear of negative prejudice and discrimination. The survey supports this explanation by showing that only 3.5% reported that they have any LGBT people close to them[177]and that there is significant difference of recognition on harassment or discriminatory treatment of LGBT people between those who have LGBT close to them and those who do not (as for harassment, 58.4% as opposed to 14.6%[178], as for discriminatory treatment, 35.2% as opposed to 5.3%[179]).

---

[176] Japan Trade Union Confederation, supra note 128.

[177] This reveals that most of the LGBT people stay in the closet or come out to only limited community. Given the result of this survey that LGBT people are about 5% of population (1 of 20) and that the limit to the number of people with whom one can maintain a stable social relationship is from 50 to 150 (Dunbar's number) , everyone is supposed to have 2- 7 LGBT friends. In spite of this, only 3.5% of the respondents have LGBT people close to them and only 6.6% have heard that there is(are) LGBT employee(s)in the workplace. 81% reported that they have never heard that their friends and family members are LGBT. This is the evidence that LGBT people have difficulty to be out openly in Japan. It is not rare to hear that "you are the first gay I have ever met" from Japanese people in Japan and this survey result nicely explains this common reaction by Japanese people.

[178] Japan Trade Union Confederation, supra note 128, at 8.

[179] Id. at 9.

Another explanation is that such low recognition reflects the negative feeling against LGBT people. The negative feeling can be at conscious level or unconscious level. As a cognitive human processing, people tend to deny things causing psychological distress and to believe things that has an emotional effect causing comfortable feelings. It is the cognitive process that makes people reluctant to see things that is annoying or burdensome and decide to believe that they did not see those things. Some of the results of the survey vividly illustrates that this cognitive process operated.

The answers from respondents in managerial position give the vivid account of this. There are three conspicuous characteristics about their answers. First is that they feel more discomfort or antipathy when they have a transgender college than any other groups (35.1% as opposed to 26.3 in average. As for LGB, 35.1% as opposed to 35.0%).[180] Secondly, they showed the lowest recognition on discrimination or prejudice against LGBT people (31.6% as opposed to 41.8% in average).[181] Thirdly, they showed the highest percentage of rejection of any accommodation for transgender employees (As for dress or hairstyle, 43.9% as opposed to 29.0 in average. As for bathroom or other facilities, 47.4% as opposed to 27.0% in average.).[182] Because people in managerial position are in charge of solving problems in their organizations, it would be more helpful for them if there are no problems to deal with than if there are. They tend to see LGBT people as people without any difficulty in life. This attributes to the second point. As for transgender against whom they have higher discomfort and antipathy, they are more inclined to avoid them and to dismiss their real needs which people in managerial position are supposed to have to deal with. This attribute to the third point.

This way, the low recognition on discrimination, prejudice, or hate acts against LGBT can be also explained by the negative emotional bias against LGBT people by the respondents.[183]

(b) Significance of Coming Out

The argument that LGBT people need not say their sexuality and should keep it in private means that LGBT people need not come out or should not. This argument is tantamount to the denial of the significance of coming out for LGBT people. Whether or not to come out is the most private and important decision for LGBT individuals because coming out is a life-changing

[180] Id. at 11.
[181] Id. at 10.
[182] Id. at 13.
[183] See also Kazuya Kawaguti et al., Seiteki mainorithi ni tuite no isiki 2015 nen zennkoku tyōsa [Nationwide Consciousness Survey on Sexual Minorities in 2015], Structuring Queer Studies in Japan, Study Group, 138, 141; this survey shows the similar result influenced this cognitive process. Namely, the older male, who had the highest discomfort and antipathy against LGBT people than any other group, is the group that show a response to other's coming out, "I pretend that I did not hear," more than any other groups.

experience. Given the significant impact on the LGBT individual, coming out should be legally protected and restricting LGBT people from coming out should be found to adversely affect the dignity of LGBT individuals. No U.S. Supreme Court majority has ever decided whether coming-out speech is protected under the First Amendment.[184] However, the Court in *Obergefell v. Hodges*[185] states "[t]he Constitution promises liberty, a liberty that included certain specific rights to define and express their identity."[186] This indicates that coming out is a part of the right to pursue happiness.

Coming out is in a sense a political statement.[187] It includes the message that "homosexuals exist, that they feel repressed by existing laws and attitudes, that they wish to emerge from their isolation, and that public understanding of their attitudes and problems is desirable for society."[188] It would also include an implicit "statement for equal rights and human rights."[189] In addition, when the speech is made by a judge, it would send the message that there are gay judges in the judiciary, which would inform the public about an aspect the judiciary's "functioning or operation."[190]

The argument demanding LGBT people staying in the closet is dismissive of the harm caused by keeping them in the closet and invisible. It is said that, for gay people, having their sexuality hidden can lead to higher absenteeism or job turnover, and the energies involved may reduce productivity or increase stress.[191] Besides, silence about one's self-identity reinforces LGBT marginalization because it requires LGBT individuals to deny an essential difference between themselves and others.[192] Silencing minority characteristics increases bias.[193] People have less opportunity to understand who LGBT people are if LGBT people are forced to remain invisible. People tend to aggravate their complaints or abusive expressions against someone when the person is not in front of them. As long as LGBT people remain invisible, the negative biases and stereotypes against LGBT people are likely to be reinforced and perpetuated, which would marginalize LGBT people and push back them to the deep closet. Reducing the negative biases and stereotypes and promoting mutual understanding is unlikely to be accomplished.

---

184 Kenji Yoshino, Covering 111 Yale L.J. 769, 831(2002).
185 135 S. Ct. 2584 (2015).
186 *Id.*, at 2593.
187 Yoshino, supra note 184, at 819; Hon. Pamela K. Chen, Remarks at supra note 20.
188 *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).
189 *Fricke v. Lynch*, 491 F. Supp. 381, 385 (D.R.I. 1980).
190 See. *City of San Diego v. Roe*, 543 U.S. 77 (2004). In this case, a former police officer, sued petitioner city, alleging that the city violated the officer's right to freedom of speech by terminating the officer for making and selling videotapes showing the officer engaged in sexually explicit acts. Denying the First Amendment claim, the Court noted that his "activities did nothing to inform the public about any aspect of the [department]'s functioning or operation. " *Id.* at 84.
191 Brower, supra note 135, at 194.
192 Id. at 145-146.
193 Id. at 184.

The argument demanding LGBT people to stay in the closet is to force LGBT people to lie about themselves. For example, it demands a gay man to pretend to be a straight man (I doubt if such an argument and its consequences is permissible in light of the precedent of the Japanese Supreme Court.[194]). This argument demands a gay man who have decided to live who he is to pretend to be not a gay, or like women, by forcing him to keep silent. As Professor Tobias Barrington Wolff points out, "in all but the most unusual of circumstances, people will assume that any given individual is straight unless they have reason to believe otherwise. That assumption informs every conversation and interaction."[195] Under the prevailing assumption that men with a male body like women with a female body and that women with a female body like men with a male body, people assume that LGBT people do not exist. Not saying his/her sexuality is to lie about who they are. Compelling false affirmation is "what the Supreme Court pronounced in *West Virginia State Board of Education v. Barnette*[196] to be among the most serious of burdens on an individual's First Amendment rights."[197] This way, it is clear that the argument demanding LGBT people to stay in the closet is seriously problematic.

Proponents of this argument often defensively put a phrase "I do not intend to discriminate LGBT people but…." or "I believe that LGBT people should not be discriminated against but…" However, they unconsciously say things which substantially discriminate LGBT people in way of demanding LGBT people to suppress the core part of their existence. This attitude is likely to originate from unconscious feelings against LGBT people like, "I do not want them to be close to me" or "I do not want them to come into my view."

c. Too Early to Focus on LGBT Judges

There might be an argument that, for the time being, it should not be recommended to appoint LGBT judges even if they are well-qualified as a judge, given that Japanese judges have a nationwide job rotation and some regions have strong negative prejudice against LGBT people.[198] This argument might bring up two justifications: to protect LGBT judges and to

---

[194] See e.g., Sup. Ct. July 4, 1956, Shō 28 (o) no. 1241, 10 Minshū 785 (Japan); Sup. Ct. Feb. 27, 2007, Hei 16 (gyō so) no 328, 61 Minshū 291 (Japan) (Refusing Piano Accompaniment to the National Anthem Case); the Court held that forcing the music teacher to provide piano accompaniment to the national anthem did not violate his freedom of thought and conscience because it is difficult to see the piano accompaniment as the expression of his thought, negative historical view against the national anthem. This means that the piano accompaniment is not a compelled speech because no one perceive the piano accompaniment as the teacher's own speech that he has a positive historical view about the national anthem.

[195] Tobias Barrington Wolff, Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy, 63 BROOK. L. REV. 1141, 1144 (1997).

[196] 319 U.S. 624 (1943).

[197] Wolff, supra note 195, at 1144.

[198] A similar argument appeared in the process of amending the government educational course guideline. MEXT did not put reference to LGBT in the course guideline because they have concern about "the current

maintain the judicial authority and people's confidence in the judiciary. It is true that unlike Japanese judges, American Judges are elected or appointed to a specific court, and that all the openly gay federal judges have been appointed to the courts in liberal areas. In the U.S. federal bench, there is no transgender judge. And it is also true that there are differences in protection or accommodation provided to LGBT people by municipality region to region in Japan. Some municipalities allow same-sex couples to be foster parents while some not. Some recognize same-sex partnerships, even if it is not equivalent legal recognition and does not give any specific legal rights.

Name	Court	Nomination	Confirmation	Commission	President	Location
Judge Deborah A. Batts	the United States District Court for the Southern District of New York.	27-Jan-94	6-May-94	9-May-94	Clinton	Manhttan
Judge J. Paul Oetken	the United States District Court for the Southern District of New York	26-Jan-11	18-Jul-11	20-Jul-11	Obama	Manhttan
Judge Alison J. Nathan	the United States District Court for the Southern District of New York.	31-Mar-11	13-Oct-11	17-Oct-11	Obama	Manhttan
Judge Michael W. Fitzgerald	the United States District Court for the Central District of California	20-Jul-11	15-Mar-12	15-Mar-12	Obama	Los Angeles
Judge Pamela K. Chen	the United States District Court for the Eastern District of New York	2-Aug-12	4-Mar-13	5-Mar-13	Obama	Brooklyn
Judge Michael J. McShane	the United States District Court for the District of Oregon	19-Sep-12	20-May-13	30-May-13	Obama	Portland
Judge Nitza I. Quiñones Alejandro	the United States District Court for the Eastern District of Pennsylvania	27-Nov-12	13-Jun-13	19-Jun-13	Obama	Philadelphia
Judge Todd M. Hughes	the United States Court of Appeals for the Federal Circuit.	7-Feb-13	18-Jul-13	30-Sep-13	Obama	Washington D.C.
Judge Judith E. Levy	the United States District Court for the Eastern District of Michigan	25-Jul-13	12-Mar-14	14-Mar-14	Obama	An Arbor
Judge Staci M. Yandle	the U.S. District Court for the Southern District of Illinois	16-Jan-14	17-Jun-14	19-Jun-14	Obama	Chicago
Judge Darrin P. Gayles	the United States District Court for the Southern District of Florida	6-Feb-14	17-Jun-14	19-Jun-14	Obama	Miami

However, accepting this argument and reflecting concerns about negative reaction against LGBT judges in the process of appointing judges, contradict with the messages that the courts have been sending through their decisions. Accepting this argument and halting the efforts to a diverse judiciary by not appointing LGBT judges is to protect the negative prejudices against LGBT people, not to protect LGBT people from the negative biases. The courts have been sending messages that LGBT should be protected from discrimination and prejudice. The courts have imposed affirmative duties on private companies or government agencies to raise the awareness of LGBT issues. The courts should discharge the same duties to protect LGBT people from prejudice and biases. Doing nothing because of the pervasive prejudice against LGBT people in some local areas can never be justified. Such ostensible solicitudes for LGBT judges is actually no less invidious than the idea of refraining from appointing female judges because of stronger sexism in some regions, judges from a buraku (the outcast communities dating back

situation of understanding of parents and the general public." See MEXT, The Result of Public Comments on the Draft of The New Educational Course Guideline, 10 (Mach 31, 2017).

several centuries ago.) because of deep-rooted discrimination against them, judges who naturalized as a Japanese citizen because of persistent hostility against Koreans is. I would never imagine that the courts, a very institution whose responsibility is to embody the ideal of the Constitution, would accept this premise. As the U.S. Supreme Court said in *Palmore v. Sidoti*[199] "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[200]

d. Going Against the Declining Birth Rate

Some might make an argument that one of my justifications for judicial diversity, the declining birth rate, is inconsistent with the idea of increasing LGBT judges because that policy would send to the public a message likely to lead more declining birth rate. This argument has an common fallacy that as LGBT people get more accepted and respected in the society, the number of LGBT people increases, and then numbers of heterosexuals decreases, which lead less marriage couples and those having and raising kids.

This assumption is not supported by the scientific data. More serious problem lies in the reason why they think LGBT people increases. They might think that gay people entice straight people into gay lifestyle and that homosexuality is a choice.

When blaming and criticizing someone for something, what matters is whether the thing came from the person's free will or not. In a legal arena, voluntary act based on free will justifies to impose criminal or civil liability. When considering to impose legal liability, we need find a circumstance that he/she did it (or did not do it) despite that he/she could choose not to (or choose to). Choice based on a free will is easy to use when people want to blame or criticize someone for something.

The argument that LGBT people deteriorate the declining birth rate is a simple wrong in that the argument assumes that being LGBT is a choice for criticizing and denying the existence of LGBT people.

(2) Challenging the Fitness

Some might argue that LGBT individuals are not qualified for a judge and it is not necessary to discuss on a LGBT diverse judiciary. Such policies existed in the past in some counties.

---

[199] 466 U.S. 429 (1984).
[200] *Id.* at 433.

In England, even 20 years after the sodomy law was abolished, during the period of Lord Chancellor Lord Haisham (1970 to 1974 and 1979 to 1987), there was a policy of not appointing a gay judge for the purpose of avoiding so called homosexual controversy.[201] A English judge share his episode that, when asked in the process of the appointment whether he was gay or not, he was told that homosexuals could not be a judge because of the dangers of blackmail.[202] There was a time in England when the guilty party in divorce actions could never be appointed.[203] This illustrates that the qualification for a judges might associated with the social norm on what is good and bad.

In the U.S., the persecution of gay men and lesbians dramatically increased since Senetor Joseph McCarthy's denunciation of the employment of gay people in the State Department.[204] Gays and lesbians were considered not only as those who engage in overt acts of perversion lack the emotional stability of normal persons and constitute security risks and but also as predators who would frequently attempt to entice normal individuals to engage in perverted practices.[205] The government at every level rejected the employment of gays and lesbians and fired a lot of them. In 1953, President Eisenhower issued an executive order banning gay men and lesbians from civilian and military employment,[206] the order remined in effect until 1975.[207] First openly gay or lesbian judge in state court is Judge Stephen M. Lachs in 1979 and in federal court, Judge Deborah A. Batts in 1994.

Japan has not had such explicit ban. However, some might craft arguments based on provisions of Judge Impeachment Act or Court Act, claiming that LGBT people are not qualified for a judge because they lack integrity, or impair the institutional impartiality or neutrality.

a. Questioning Integrity Based on Judge Impeachment Act

(a) General Matter

Article 2 of Judge Impeachment Act lists the grounds of dismissal of a judge by impeachment: 1) a judge has violated extremely his/her official duties or neglected egregiously his/her jobs,

---

[201] Leslie J Moran, Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings, 28 Sydney L. Rev. 565, 580 (2008).
[202] Id. at 581.
[203] Id.
[204] Organization of American Historians as Amicus Curiae 5-28, 22,23, Obergefell v. Hodges, 135 S. Ct. 2584 (2015)
[205] Id. at 23.
[206] Id.
[207] Id. at 36. It was not until 1998 that President Clinton issued an executive order forbidding such discrimination. See also Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998)

2) a judge has degraded himself/herself extremely, regardless within or outside of the jobs. So far, some judges have been dismissed for committing criminal conducts like stalking, camera voyeurism, and child prostitution and so on. Article 49 of Court Act provides the grounds of disciplinary actions, that is, if a judge has violated his/her official duties, neglected his/her jobs or degraded himself/herself, that judge shall be subjected to disciplinary action by judicial decisions as provided for by applicable law. In Japan, an incident was wildly reported that Chief Judge of Tokyo Hight Court reprimanded as degrading behaviors a high court judge who uploaded a picture of his being tied up as a SM play on Twitter and tweeted comments such as, "I will try to continue erotic tweet."

The duty to maintain integrity and not to degrade is considered "official duties"[208] and the degrading behaviors can be a reason of dismissal depending on the degree of seriousness. Because integrity is the concept susceptible to the perception of the public or cultural value and, in spite of that, can result in serious consequence on the status as a judge, it is worthwhile examining how to evaluate a judge's behavior with relation to the duty to maintain integrity.

Why do the judges have the duty to maintain integrity from the first place? It is said that the foundation of the legitimacy or authority of the judicial work is deeply associated with the confidence in the judge's humanity and with the respect for the judge, which is the reason why the judges have the duty to maintain integrity.[209] Therefore, as a legal interpretation, degrading behaviors include disgraceful behaviors which would lose the confidence of the public in the judge and behaviors which would impair the judicial impartiality,[210] and whether a behavior is a degrading one or not depends on whether the behavior is likely to lose the public confidence not only in the judge him/herself but also in the judicial system as a whole.[211]

(b) Observation

Being LGBT can never be denied their qualification for a judge because of their being LGBT.

First, it is not permissible to take it into consideration as an issue of integrity that there are pervasive and persistent negative feeling against LGBT people. There are some people who would not accept LGBT people as a religious belief[212] or who just have strong antipathy and

[208] Takahashi, supra 76, at 51.
[209] Sigemitsu Dandō, Hōsō rinri ni kannsuru hōkōku sho [Reports on Legal Ethics], Hōsō rinri kenkyu iinkai [Legal ethics Research Committee], 32 Hō no sihai [Rule of Law] 50 (1977).
[210] Hajime Kaneko & Morio Takeshita, Saiban Hō [Law on Judiciary], 259 (4th ed. 1999)
[211] Saiko Saibansho Jim so kyoku [General Secretariat of Sup. Ct.], 2 Saibansho hō tikujō kaisetu [Annotations to Court Act] 148 (1967).
[212] For example, as for the nomination to the federal bench of Judge Michael Macshane, there was a person who in his video uploaded in YouTube publicly pointed out his sexuality as one of the reasons why Judge Macshane was not appropriate for a judge. https://www.youtube.com/watch?v=NOjL_d60EwQ

discomfort. Those people might find LGBT people lack integrity indispensable with being a judge, by associating their identities with the negative images.

However, as the courts has made clear as a matter of law, LGBT people should be treated equally and fairly the same as others in Japanese society. Negative belief and emotion against LGBT people can be protected as a matter of the freedom of thought and conscience as long as such belief and emotion stay in their mind no matter how dehumanizing and egregious. However, the government including the courts, which have the obligation to respect and uphold this Constitution,[213] should never adopt the interpretation allowing such negative idea to function as a justification for imposing disadvantage on others. It is clearly contradictory to the value of the Constitution.

In response to this, those who have negative feeling against LGBT people might argue that it is not discrimination based on their statuses or identities but because on their conducts in private life, especially sexual behaviors. However, this argument is not acceptable. Private sexual conduct should not be taken into consideration on deciding on the issue of integrity unless the person voluntarily disclose it to the public. Sexual intimacy is one of the most private mattes and should not be intervened by others even if some people perceive it as "deviant" or "sinful," as long as the sexual conduct happens between consenting adults in the private area (which means that it does not constitute public indecency.) and the conduct does not violate other's interest or right (which means that it does not constitute sexual assault nor child prostitution and so on.). In Japan, the Supreme Court declared that the principle of "the nonpublic nature of sexual acts" cannot be overstepped and is still being honored by the public.[214] Based on this principle, if a judge discloses his/her sexual behaviors to the public, for example, by uploading a picture of the sexual act, it would have potential to be seen as an degrading act, even if the picture is not sexually explicit enough to be obscene. When there is not such a circumstance, private sexual behaviors should not be a factor for deciding an issue of integrity.

b. Questioning the Judicial Impartiality or Neutrality as an Institution

There might be an argument that because how to protect LGBT people is still controversial issues on which the people have not reach consensus, the courts should be colorless in this issue by avoiding having LGBT judges, which otherwise would be perceived as a political message on how much LGBT people should be protected.

[213] See art. 99 of the Constitution: "The Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution."
[214] Translation and publication of LADY CHATTERLEY'S LOVER, Sup. Ct. Mar. 13, 1957, Shō 28 (a) no. 1713, 11 Saikō Sibansho Keiji Hanreishū [Keishū] 997 (Japan).

It is true that the courts are strictly required to be political neutral. However, again, the courts have been sending the clear message that LGBT people should deserve dignity as the others and should not be discriminated because of who they are through discharging the responsibilities as the judicial branch. Therefore, this is not controversial. Furthermore, it is never legally or constitutionally questionable at all to send a message that judicial diversity is important by way of having more LGBT judges. Essentially, the courts are not mandated to be colorless in any issues because the courts represent the value of the Constitution.

Others might claim that by appointing more LGBT judges, the courts will come to seem to have a certain direction on some politically controversial issues to the point where the courts will appear not to be impartial or neutral, such as an issue whether same-sex marriage should be legalized in Japan or not. This argument identifies the fact that LGBT judges are working in the judiciary as the court system sending a specific political message enough to lose its impartiality.

This argument is clearly wrong. First, it is unrealistic to think that one private personal view held by one judge represents the court system as a whole. This argument forgets that the overwhelming majority of judges are not LGBT judges and that they have different views. It is unreasonable to assume that viewpoints of only a handful of LGBT judges are messages shared by the whole court system.

Second, it is impossible to think that the LGBT judges are making a political speech enough to be questioned the impartiality, only from a single fact that the judge is a member of LGBT community. As I said before, it is true that coming out is a political statement in a sense and some information on the judge's private life would make it possible to guess the judge's views on specific issues. But such a guess is not sufficient reason to conclude that the judge is sending a specific political message on a specific issue, much less to conclude that the judge is making a speech in the purpose of trying to enact or repeal a specific law, which is prohibited as active engagement in political campaign.[215]

(3) Exclusion from Specific Cases

Here, I examine arguments trying to exclude LGBT judges from specific cases. These arguments would appear as motion for disqualification of LGBT judges in the court proceedings. The arguments and the motions for disqualification attacking a judge's sexuality itself, even if not granted, give undue pressure on LGBT judges and negatively affect the goal of a diverse judiciary by discouraging LGBT youth from entering the judiciary.

[215] See Sup. Ct. Dec. 1, 1998, Hei 10 (bun ku) no. 1, 52 Minshū 1761 (Japan).

a. Fear of Prejudice Decision

A judge shall not involve a case if there is the fear that he/she may make a prejudice decision.[216] This is because judges are obligated to discharge their responsibility independently and impartially from neutral perspective. It is interpreted that there is such a fear if there is any circumstance outside of the court proceedings making it difficult to expect that the judge would make an impartial decision; for example, if the judge has a special relationship with the litigants such as being best friends or having a lending-borrowing relationship, or the judge have already formed a certain judgement outside of the court proceedings.[217] The motions of disqualification most often happen when the litigants get displeased at the judge's attitude or behavior within the proceeding but such motion never warrant a grant.[218] Only the fact that the judge published a certain view on some legal issues cannot constitute such a fear.[219]

Based on the established jurisprudence of disqualification, there is no occasion when a judge's sexuality should be a reason to question the judge's impartiality. More specifically, judges' sexuality can never be a cause for the motion of disqualification and LGBT judges need not hesitate and involuntarily recuse him/herself.

Although it is obvious that the motion for disqualification based on the judge being a member of a minority group never warrant a grant, the theory itself cannot stop people from filing such a motion. I have not heard that there has been any motion for disqualification because of minority statues. But it seems that some motions have been filed based on stereotyping about female judges, especially in family or civil cases. Even where there is no such motion, female judges have been exposed to criticism simply because they made a decision in favor of women's rights. Such criticism dismisses the validity of the logic and evaluation of evidence. Recently, a president of a famous company publicly attacked the impartiality of judges in cases involving Korean Japanese or Koreans living in Japan (collectively called "zai-niti"), by uploading his message on the company website that "if the judge is a zai-niti and so is the defendant, we plaintiff will lose the case 100%." [220] This illustrates that even in Japan, more or less, there has existed people who cast doubt on the judges' impartiality solely because they are or perceived to be a member of a minority group.

---

[216] As for the criminal procedure: Keiji Soshōhō [Keisohō][C. Crim. Pro.] art. 21 (Japan), Keiji Soshō Kisoku [Keisokisoku] [Rule Crim. Pro.] art. 13 (Japan). As for the civil procedure: Minji Soshōhō [Minsohō] [C. Civ. Pro.] art. 24 (Japan), Minji Soshō Kisoku [Minso Kisoku] [Rule Civ. Pro.] art. 12 (Japan).

[217] Takahashi, supra 76, at 38.

[218] See, e.g., Sup. Ct. Nov. 16, 1972, Shō 47 (shi) no. 51, 26 Keishū 515 (Japan); Sup. Ct. Oct. 8, 1973, Shō 48 (shi) no. 66, 27 Keishū 1415 (Japan).

[219] Sup. Ct. July 1, 1959, Shō 34 (su) no. 189, 13 Keishū 1001 (Japan); Sup. Ct. Sep. 20, 1973, Shō 48 (su) no. 24, 27 Keishū 1395 (Japan).

[220] https://top.dhc.co.jp/company/image/cp/message1.pdf

American disqualification regime for judges shares the same rationales. However, this mechanism has been "a vehicle upon which litigants can ruthlessly and capriciously attack a judge's partiality by claiming that the judge's race, sex, ethnicity, religion, or sexual orientation creates an appearance of partiality."[221] Litigants have also attacked a judge based on the judge's family member's attribution, such as identical twins, spouse and so on. Even if most of the motion for disqualification is denied, such motions place a special pressure on minority judges. I believe those motions for disqualification not only impair the public's faith in judicial integrity, but also seriously damage the dignity of minority judges, which discourages them from hearing cases involving minority rights.

Such motions for disqualification is a direct personal attack against the judge and a clear denial of the value of the judge. Such motions impede realizing diversity on the bench by discouraging young people from entering the judiciary. In this sense, we should focus on the negative impact such motions have. I will cite words that an old judge told about the motion for disqualification. I respect his spirit and make clear the evil of the motions for disqualification by introducing specific cases.

> *When there is a motion for disqualification against you from a lawyer, you should not take it as a simple procedural incident, rather you should resolutely face it as an attack against your whole personalities. Taking a determined attitude requires you to get ready anytime for the motions by researching and grasping the disqualification law in a daily life. Moreover, you should keep in mind that it is necessary to consider seriously and soberly how to purify such unjustified insults against your whole personalities, which is ultimately disrespect to the national authority. Some say that it is better to treat it in a business manner because it is a business matter. I disagree. We are a judge precisely because we are making efforts to get ourselves just. We put our hearts into being right. When our rightness being unjustifiably tramped, how can I handle it in a business manner? I feel I cannot as such a human being. Judges should be permitted to ask the lawyer to take responsibilities in case of not successfully getting the motion granted. – Shotaro Miyake*[222]

b. Exclusion from Cases Involving LGBT Rights

[221] Ray McKoski, Disqualifying Judges When Impartiality Might Reasonably Be Questioned: Moving Beyond A Failed Standard, 56 Ariz. L. Rev. 411 (2014).
[222] Miyake, supra note 79, at 205.

As stated above, it is natural to assume that the established precedent on disqualification of judges would never grant the motion for disqualification based on judge's sexuality. Here, I would like to introduce a case in the U.S. to consider the substantial reasons for that. The case is *Perry v. Schwarzenegger*.[223]

(a) Perry v. Schwarzenegger

The court considered the issue on whether a gay judge who has a long-term same-sex partner can preside a case involving the constitutionality of a state ban on same-sex marriage and the court answered yes. The court made clear 4 points; 1) general benefits as a citizen is not a basis for disqualification, 2) The benefits from constitutional adjudication belong to the whole society, not only to a part of it, 3) appearance of impartiality should be valued from the perspective of "a reasonable person," 4) as a general matter, minority judges would not be denied competency or impartiality for hearing cases involving minority rights.

In this case, U.S. District Judge, Vaughn Walker, presided over a case where Plaintiffs were same-sex couples who claimed that the amendment to the California Constitution that redefined marriage in California solely to encompass a union between one man and one woman violated their rights under the U.S. Constitution. On August 4, 2010, Judge Walker entered judgement for Plaintiffs, holding that the amendment, known as "Proposition 8," violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. On April 6, 2011, in an interview after his retirement, Judge Walker reported that he was gay and in a 10-year relationship with a same-sex partner (8 year as the beginning of the proceeding). Based on that information, Defendant-Intervenors filed a motion to vacate the judgment on the ground that Judge Walker was disqualified from presiding over the case because his same-sex relationship was, or reasonably appeared to be, a non-pecuniary interest that could be substantially affected by the outcome of the case.

In denying the motion, the court first addressed and held no to the question on whether Judge Walker had an actual interest in the case. The court reasoned "[i]n light of the attenuated nature of non-pecuniary interests held by a judge as a general member of the public or a large community, --- no personal bias or reasonable doubt about the judge's impartiality exists in these circumstances." Furthermore, the court said;

> [i]n a case that could affect the general public based on the circumstances or characteristics of various members of that public, the fact that a federal judge happens to share the same circumstances or characteristic and will only be

[223] 790 F. Supp. 2d 1119 (N.D. Cal. 2011).

> affected in a similar manner because the judge is a member of the public, is not a basis for disqualifying the judge.[224]

The court's reference to the nature of constitutional decision is instructive. The court made clear that protecting the constitutional value is a benefit for the whole society, not one only attributing to a part of the society. Namely, "it is inconsistent with the general principles of constitutional adjudication to presume that a member of a minority group reaps a greater benefit from application of the substantive protections of our Constitution than would a member of the majority."[225] The court added;

> In our society, a variety of citizens of different backgrounds coexist because we have constitutionally bound ourselves to protect the fundamental rights of one another from being violated by unlawful treatment. Thus, we all have an equal stake in a case that challenges the constitutionality of a restriction on a fundamental right.[226]

Then, the court concluded that a fact that the judge had been engaged in an eight year same-sex relationship would not lead a reasonable person to question the judge's impartiality. The court reasoned that the test should be objective one, "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned."[227] The court detailed what a reasonable person is: "the 'reasonable person' is not someone who is 'hypersensitive or unduly suspicious,' but rather a 'well-informed, thoughtful observer' who 'understand[s] all the relevant facts' and 'has examined the record and law.'"[228]and "[m]ere speculation of that nature does not trigger the recusal requirements."[229]

The court also showed reasons why minority judges cannot be denied their competence and impartiality in cases involving minority rights. First is the unreasonableness. The court said that "courts have cautioned against mandating recusal "merely because of the way in which the attorneys in the case decided to frame the class, noting ripe grounds for manipulation"[230] because it would otherwise "come dangerously close to holding that minority judges must disqualify themselves from all major civil rights actions"[231]and "Congress could not have intended such an unworkable recusal statute."[232] Second is the unfairness against minority

---

[224] *Id.* at 1125.
[225] *Id.*
[226] *Id.* at 1126
[227] *Id.* at 1129.
[228] *Id.*
[229] *Id.* at 1131.
[230] *Id.* at 1125.
[231] *Id.*
[232] *Id.*

judges. The court said that regarding a minority status as a circumstance bringing a judge's impartiality into question "would institute a 'double standard for minority judges' whereby the fact that a judge is gay, or black, or female would 'raise doubts about [that judge's] impartiality.'"[233] The court added;

> The presumption that Judge Walker, by virtue of being in a same-sex relationship, had a desire to be married that rendered him incapable of making an impartial decision, is as warrantless as the presumption that a female judge is incapable of being impartial in a case in which women seek legal relief. On the contrary: it is reasonable to presume that a female judge or a judge in a same-sex relationship is capable of rising above any personal predisposition and deciding such a case on the merits.[234]

The reasons provided in *Perry* are reasonable and valid. Even under the Japanese disqualification scheme, these reasons are applicable. *Perry* provides substantial reasons why there is no fear that LGBT judges may make a prejudice decision.

c. Exclusion from Family Cases

There might be an argument that being LGBT is so inimical to the traditional family value[235] that they are not qualified for presiding family cases, while not denying general qualification as a judge. There might be a similar argument claiming that even if being LGBT should not be a ground for discrimination, their behaviors in private lives are so inimical to the traditional family value that they are not qualified for presiding family cases. These arguments substantially require an additional qualification for judges to preside family cases, despite that the current law does not have such a requirement, that is, not being LGBT. However, it is not plausible to create an unwritten requirement based on the traditional family value for excluding LGBT judges from family cases. In the following part, I explain this by looking to the meaning of the historical absence of sodomy law in Japan and by analyzing several cases useful to consider how Supreme Court of Japan has positioned the traditional family value in the constitutional interpretation.

---

[233] *Id.* at 1130.
[234] *Id.* at 1133.
[235] While some people insist that the traditional family value is important, how to define the traditional family value is difficult because the concept is so abstract. For this paper purpose, I define it as the idea that a biological man should get married with a biological woman and the couple should have some children without assisted reproductive technique. It seems that the concept embrace the idea that men and husbands should work outside and women and wives should take care of household and child rearing.

(a) Historical Absence of Sodomy Law

Japan traditionally has not criminalized same-sex intimate conducts, which could have been criminalized if the traditional family value had been strongly protected. Differently put, this can mean that it is not justified that same-sex intimacy can be prohibited based on the traditional family value. Furthermore, this long tradition of non-criminalization, in addition to the guarantee of the freedom of dating regardless of sexual orientation or gender identity I explained in the earlier part, can lead an interpretation that it is established that the right of entering an intimate relationship with others should enjoy the high level of protection, regardless of sexual orientation or gender identity. Of course, the right is not unlimited. Bigamy is a crime because it violates the legal marriage system which allows people to have only one spouse.[236] Committing adultery with a married person establishes tort liability because it violates the right of the spouse's maintaining a good family relationship.[237] However, the freedom of dating cannot be restricted based on the traditional family value unless there is a violation of specific legal principle or legally protected private interest. This means that the traditional family value has not been regarded as an absolute value and that it has not been so strong as to impose any legal penalities on people who are not conforming with it.

(b) Case on Discrimination Based on Legitimacy[238]

In this case, the Court held that a provision of Civil Code in 1947, which limited the share in inheritance of a child born out of wedlock to a half of that of a child born in wedlock, was unconstitutional in violation of the equal protection clause of the article 14 of the Constitution and reasoned that the protection of legal marriage, one of the traditional family values, did not justified such a discrimination. The Court said that "[i]t is left to the reasonable discretion of the legislature to define the inheritance system,"[239] however, that "the reasonableness of such rules should be subject to constant examination and scrutiny in light of the Constitution, which provides for individual dignity and equality under the law."[240] The Court made clear that "the provision is apparently a discriminatory rule set by law, and the very existence of the provision has the risk of provoking a sense of discrimination against children born out of wedlock upon their birth."[241] Admitting that "the legal marriage system itself is entrenched in Japan"[242], the Court concluded that the reasonableness of the provision was lost as of 2001, saying that;

---

[236] Keiho [Penal Code] art. 184 (Japan).
[237] Sup. Ct. Mar. 30, 1979, Shō 53 (o) no. 1267, 126 Saikō Sibansho Hanreishū Minji [Saishū Minji] 423 (Japan).
[238] Sup. Ct. Sep. 4, 2013, Hei 24 (ku) no. 984, 67 Minshū 1320 (Japan)
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.*

> [I]t is now impermissible…..to cause prejudice to children by reason of the fact that their mother and father were not in a legal marriage when they were born -a matter that the children themselves had no choice or chance to correct. Rather, it can be said that a notion that all children must be given respect as individuals and that their rights must be protected has been established.[243]

This is a case where there is a specific legal provision enacted by the legislature protecting one of the aspects of the traditional family value. The Court denied the reasonableness of this provision because it is not permissible to cause prejudice to children based on the circumstances that they cannot choose nor correct and because the society has established a notion that all children should be given equally respect with dignity.

This decision has significant precedential value in that it shows a circumstance where a statutory provision protecting the traditional family value can be unconstitutional, losing its reasonableness. It might also indicate that when there is no such a statutory provision, the traditional family value is pushed back by the force of the value of individual dignity and equality under the law.

(c) Two Cases on Parent-Child Relationship

First case has to do with surrogacy.[244] The issue is who can establish a mother-child relationship, a surrogate mother or an egg donated mother. The Court held that only the surrogate mother can do based on the precedent in 1962 that a mother-child relationship between a woman and her child born out of wedlock shall be established immediately by the objective fact of delivery of the child.[245] The Court explained that;

> [A] natural parent-child relationship is deeply involved in the public interest as well as child welfare, and therefore it should be uniformly determined according to definite and clear criteria, there is no choice but to construe the existing Civil Code to require that a woman who has conceived and delivered a child shall be the mother of the child, and that a mother-child relationship cannot be deemed to be established between the child and the woman who has not conceived or delivered the child, even where the child is born using

---

[243] *Id.*

[244] Sup. Ct. Mar. 2, 2007, Hei 18 (kyo) no. 47, 61 Minshū 619 (Japan) (A Japanese married couple (X and Y) submitted birth notifications of the twins conceived and delivered by a woman, who is a American citizen, by way of assisted reproduction technology using X's sperm and Y's eggs.).

[245] Sup. Ct. Apr. 27, 1962, Shō 35 (o) no. 1189, 16 Minshū 1247 (Japan).

the egg donated by that woman.[246]

This is a case where while there is no statutory provision protecting the traditional family value, there is an established precedent reflecting the traditional family value, that is, only woman who gave birth to a baby can establish a mother-child relationship. The Court showed some empathy to plaintiffs' "strong desire to have children genetically related to them by using their eggs,"[247] however, the Court did not think that the desire fell short of overruling the precedent. It is worth noting that the Court encouraged the public to "start discussion about how to treat surrogate birth under the existing legal system"[248] and said that "there is strong demand that legislative measures should be taken promptly."[249] This indicates that how much protection are given to the traditional family value depends largely on the legislature, which was also clearly stated in the case on discrimination based on legitimacy.

Next is a case whose issue was whether a child conceived by a wife during marriage with a transgender man who has received a family court ruling of change in gender from female to male under the Act on Special Cases in Handling Gender for People with the Gender Identity Disorder.[250] The Court applied marital presumption of paternity to the transgender man. This couple is non-traditional in terms that they are not biologically opposite sex couple and that they cannot have biologically connected children. The premise of this decision is simple; since such a non-traditional couple is recognized as a marital couple under the Act, there is no reason to exclude them from the application of marital presumption. Given the fact that the Act does not explicitly exclude the application of marital presumption of paternity, this case also indicates that when there is no provision protecting the traditional family value, the value does not operate as a strong justification to limit interests of non-traditional family.

The supplemental opinion on marital presumption by Chief Justice Terada is worth noting. He recognizes marital presumption as a core to maintain the marriage system.

> Under the existing Civil Code, marriage, by which a man and a woman become a husband and wife, does not only serve as official recognition of a man-and-woman couple but it is also strongly linked with the mechanism of recognizing a child born to a husband and wife as a child born in wedlock. This can be understood as a system centered on the concept of building a family which will be handed down to the next generation through the

[246] Supra note 244.
[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] Sup. Ct. Dec. 10, 2013, Hei 25 (kyo) no. 5, 67 Minshū 1847 (Japan).

> existence of the child. The core of the marriage system is the mechanism of legitimacy, and more specifically, the mechanism of presumption of legitimacy including the husband's right to rebut the presumption of legitimacy, and thus substantial consideration seems to be given to the formation and succession of a family on the basis of the relationship between the husband and wife.[251]

This opinion implies the court's tendency to take an interpretation on marital presumption better protecting legally recognized marital family, regardless traditional or non-traditional, but also shows the court's attitude in favor of maintaining the unity of the family. This attitude can be seen in other family cases. First is a case regarding the constitutionality of the provision prohibiting only women from remarrying within 6 months after divorce.[252] The Court held that the provision is unconstitutional to the extent the period exceeds 100 days. The Court emphasized the best interest of the child getting from marital presumption. Another is a case where the court held the provision in Civil Code requires marital couples to choose one surname, not allowing to have a separate surname, is constitutional.[253] Affirming the reasonableness of the provision, Chief Justice Terada again mentioned the value of marital presumption as a factor to supporting the marital unity justification for the provision.

(d) Summary

I can make 4 points from the three cases above. First, the degree of protection given to the traditional family value depends largely on the legislature and the legislature has a broad discretion on family matters. Second, when there is a specific statutory provision or established case law, the traditional family value enjoys strong protection. Third, even such a case, the value of individual dignity and equality under the law can precede the traditional family value codified in the statutory provision, ultimately making the provision unconstitutional.[254] Fourthly, in the legal framework regulating the family mattes, marital presumption is a core principle, and as long as the natural child birth exists between the marital couple, the principle applies in a rigidly value-neutral manner.

As I noted before, the historical absence of sodomy law means that the traditional family value

---

[251] See also Note 3 of the Supplemental Opinion by Chief Justice Terada. He would deny to apply marital presumption of maternity to a transgender woman because of lack of her natural child birth. Otherwise, he would think, it would be a "special preferential treatment beyond the level of treatment enjoyable by an ordinary man and woman." Keep in mind that his comment takes it for granted that the Act, legally recognizing couple which cannot enjoy marital presumption because of lack of the ability of natural child birth, is valid, even with his emphasis on the nature of marital presumption as a core of legal marriage in Japan.

[252] Sup. Ct. Dec. 16, 2015, Hei 25 (o) no. 1079, 69 Minshū 2427 (Japan).

[253] Sup. Ct. Dec. 16, 2015, Hei 26 (o) no. 1023, 69 Minshū 2586 (Japan).

[254] See Id. This case is an unsuccessful case.

is not ranked in the highest in the whole legal system in Japan and is not so strong as to impose legal disadvantages on people who do not conform it.

Based on these considerations, it is clear that the traditional family value can never create an unwritten requirement for judges to preside family cases and that LGBT judges, who should enjoy same dignity and respect, would never be excluded from family cases based on the unwritten requirement.

d. Problems of Attacking Judges' Sexuality

The motion for disqualification attacking a judge's sexuality itself, even if not granted, negatively affects the LGBT judges and the goal of judicial diversity. As a factual matter, it is obvious that attacking the judge's sexuality as the ground of disqualification discourages the judge and other LGBT judges from coming out, even if such a motion is not granted. It imposes an undue burden on fundamental rights that judges enjoy as a citizen, discourages LGBT people from becoming judges, and deters LGBT judges from living as who they are. Bringing matters about the judge's private life which is inextricably tied to his/her sexuality to the court procedure and making them a subject of controversy in the court proceedings is disrespectful, dismissing the judge's privacy. Such an attack also might create an environment where people around LGBT judges feel like recommending that LGBT judges keep their sexuality secret.

Challenging any connection that a LGBT judge personally has with the group or community of the same minority members imposes on them disproportionately negative impact. This negative impact discourages LGBT judges' community building, which is crucial for the existence of LGBT judges. In general, for minorities, community building with other minority members is important. Minorities need to connect with members of the same minority group to seek relief, overcome their weakness, make them visible, bring diversity to society, and fight against the injustice they face. Solidarity is a core value for minority groups. The same thing is true for sexual minorities. Attacking the connection with the minority group is to ignore the value of community building for minorities and to potentially attempt to destroy the important foundation for minority judges. Members of the community would be discouraged from entering the judiciary for fear of attack. Attacking minority judges' connection to other minority members risks depriving the judiciary of benefits from diversity on the bench.

Compared to the significance of the benefits of having LGBT judges in the judiciary, the evil of challenging their impartiality because of the judge's sexuality or of their connection to the LGBT community, even if they are not ultimately excluded from the case, is obvious.

(4) Sources of the Counterarguments - Implicit or Unconscious Bias

I refuted potential counterarguments against LGBT judges. As I demonstrated, these arguments can be refuted theoretically. What I am concerned about is that there might be more similar arguments coming up because counterarguments come not only from negative explicit bias against LGBT people but also from implicit bias. Counterarguments based on negative implicit bias against LGBT people can be crafted in a variety of forms but in ostensibly non-discriminatory ways. Such implicit bias has potential force to deny the value of LGBT judges.

One psychological research indicates this.[255] The research concluded that homonegativity has undergone a transformation from old-fashioned to modern. People's prejudice against gay men and lesbians used to include: being gay means that he has a mental disorder; gay men are immoral; gay men does not deserve the same rights as straight people.[256] Such prejudice has moved away to more abstract concerns including: gay men and lesbian and lesbians are making illegitimate (or unnecessary) demands for changes in the status quo (e.g., spousal benefits); discrimination against homosexual men and women is a thing of the past; gay men and lesbians exaggerate the importance of their sexual preference and, in so doing, prevent themselves from assimilating into mainstream culture.[257] The experiment in this research shows that people with such modern homonegativity are more likely to act in a prejudicial manner if a means of non-discriminatory justification is available.[258]

This research shows that hidden or implicit antipathy might be a source of the claims: "I do not intend to discriminate gay people based on their sexual orientation, but I am talking about their behaviors", "you should not come out", "discrimination does not exist", and "the court should be colorless in LGBT issues." In other words, while these arguments can be refuted logically and theoretically, it is not a fundamental solution. When suppressed long time, such hidden antipathy can erupt into serious backlash against LGBT people.

The important thing is to dismantle and reduce such hidden antipathy and bias. The above-mentioned research also shows that modern homonegativity correlates positively with political conservatism and sexism.[259] As expounded in the next chapter, it is crucial to deal with implicit bias to realize a diverse judiciary. For creating an inclusive and attractive working environment where everyone including women, LGBT people, people with disabilities and so on, can feel

---

[255] Melanie A. Morrison & Todd G. Morrison, Development and Validation of a Scale Measuring Modern Prejudice Toward Gay Men and Lesbian Women, 43 J. Homosexuality 15 (2002).
[256] Todd Morrison et al., The Psychometric Properties of the Homonegativity Scale, 37 J. Homosexuality 4 111 (1999).
[257] Morrison & Morrison, supra note 255, at 18.
[258] Id. at 33, 34.
[259] Id. at 18.

comfortable and make the most of their abilities, it is important for judges and court officers to dismantle their hidden antipathy against people recognized “different from us.”

In the next section, including the problems of implicit bias, I discuss the means for a diverse judiciary.

IV. Measures for a Diverse Judiciary

In this section, I discuss what the judiciary and the judges in Japan can do to realize a diverse judiciary and I add LGBT perspective to the observations. As highlighted before, the judiciary should explicitly demonstrate to the public the appreciation of diversity value by actively and voluntarily engaging in any efforts to realize judicial diversity. The judiciary should start such efforts before the bar association or other civil societies start to raise their concerns on judicial diversity or criticize for the delay of the necessary measures. It is important for the judiciary to be sensitive to what the society expects from the judiciary and to realize that achieving judicial diversity is necessary to meet the people’s expectation.

Some people might think reforming legal education should be prioritized and discussed here. There are a lot of voices claiming that the government should increase the number who can pass the bar exam, that the number of law schools and the enrollment should be cut down, that the law school system should be abolished to make the old bar exam reinstated, and that the legal practical training should be abolished. I would not intend to discuss these policy issues, which is not my purpose.

What I discuss here is that, other than structural reform, what the judiciary and the judges in Japan can do in order to realize judicial diversity when we have been facing the sharp decline of the law school applicants and the declining population due to low birth rate. It is important to consider how to attract and bring young people to the legal profession and ultimately to the judiciary. I believe two things are crucial: developing a comfortable working environment for everyone; and judges should be more visible to the public so that people can get a better understanding on who the judges really are and what the judiciary is. The latter might make people to have a better impression about the court system by realizing the satisfaction, benefits or advantage that can be gotten by working in the judiciary. Additionally, from LGBT perspective, the court should be more LGBT friendly workplace and create a condition where LGBT judges can be more visible.

1. Inclusive and Comfortable Working Environment for Everyone

For realizing a diverse judiciary, it is important for the courts to be an inclusive and comfortable working environment for everyone as an institution. Being able to feel accepted and respected as an individual within the institution is important. When the courts can be a such a place where everyone can feel "I belong," the courts can increase the strengths as an institution and can draw and retain more diverse and talented people.

As briefly explained before, in Japan, you can choose one of three legal professionals - lawyer, prosecutor or judge - after you passed the bar exam and complete the 1 year of legal practical training. Most of the people who choose a judge are those who came to feel like working in the judiciary for life through the interaction with judges at law school, at the legal research and training institute, or in the court they belonged to as a legal apprentice and through the experience of putting themselves in the atmosphere in the judiciary. Spending their training period with judges close to them, legal apprentices can sensitively comprehend who judges are and how the judiciary is. In Japanese society, there are a lot of people who are a member of a minority group historically subject to any form of prejudice from the society, such as women, immigrants, LGBT people, people with disabilities, public welfare-payment recipients, religious groups, political groups and so on. If a legal apprentice hears a judge making insensitive and inappropriate comments on those people based on prejudice, he/she would get disillusioned not only with the judge and but also with the judiciary as a whole and would lose his/her confidence in the judiciary. For the legal apprentice, the court is no longer a place where he/she feel safe and comfortable. If the legal apprentice is a member of the minority group against whom the judge made such a prejudicial comment, he/she would feel despairing, worrying if he/she might be subject to be teased or marginalized because of the unalterable identity and has to lie him/herself even in the legal profession and the courts that have the responsibility to protect minority rights as the bulwark of the Constitution. Such an experience is critically damaging, completely discouraging the legal apprentice from entering the judiciary, which is why we should create a judiciary which can make a lot of legal apprentice want to choose a judge as a career.

What should we do? It is important to understand our colleagues with a lot of difference in personality, experience and background. because "until we have been confronted with the realities of the experiences of people different from ourselves, we have no way of knowing whether and how our experiences, compare to theirs."[260] It is necessary to have an opportunity to know the realities that colleagues have faced. It is also important to understand the differences among the generations (generational diversity) because the sense of unity across the

[260] Jim Sandman, The Role of White Males in Improving Diversity, Multicultural Advantage, http://www.multiculturaladvantage.com/recruit/diversity/white-men-diversity/white-male-role-diversity.asp

generations[261] is also a key to creating an inclusive atmosphere.

Among the things to be done, I feature the problems of implicit or unconscious bias which I briefly touched on in the former parts as a potential source of counterargument against LGBT judges. In the U.S., implicit bias has been paid much attention to recently and a lot of researchers have worked on this issue, and a lot of training programs for judges have been carried out. I like to discuss implicit bias because it might be not familiar in Japan, however, it is important to know it. I also state several points that we should keep in mind in carrying out effective implicit bias training programs.

(1) Implicit bias

> *Human perception is not as accurate as people think. It is a principle that a person's perception is not to capture the subjective nature of a thing as it is because the perception is influenced by his/her subjective factors such as ability, personality, knowledge, experience, interest, status, health conditions and so on. Both because judgements is a perception of a judge about a case and because judges are a human being, it is also a principle that our judgements are distorted by the subjectivities, losing objectivities in some aspects. - Saburo Iwamatsu*[262]

a. What is Implicit Bias

Implicit or unconscious bias is a feeling and emotion about something hidden in subconscious level. People have implicit bias but they do not notice nor control them. Some people might found it fishy because it is about things in subconscious level, however, the existence of implicit bias has been scientifically supported. Stereotype is a fixed image or idea about the characteristics or qualities of a certain group or thing.[263] Bias, such as likes or dislikes, is created and registered based on the stereotype. For example, an image that Japanese are gentle and diligent, or that Japanese show smiles a lot but it is difficult to know what they are thinking about, is a stereotype. The positive image like the former might create a bias in favor of Japanese as a group but the negative image like the latter might create a bias against Japanese as a group.

---

[261] It is said that there are 4 generational Groupings according to the birth year: traditionalist (1922-1943), Boomers (1944-1964), Generation X (1965-1981), and Millennials (1982-2002). As a general tendency, each group share similar values because of the events that each group experienced. In Japan, I sometimes notice the generational differences. It would be useful to analyze such differences and based on that, to promote the mutual understandings among the generations.

[262] Minji ziken no gōgi [Deliberation in Civil Cases], No. 13, Sihō Kenshū Jo Siryō [Material of the Legal Training and Research Institute] (March, 1965).

[263] Tina Gianoulis, Stereotypes, glbtq (2004), http://www.glbtqarchive.com/ssh/stereotypes_S.pdf

Depending on whether you can recognize such a bias, the bias is explicit bias or implicit bias. I show some examples. A person who knows that he dislikes Japanese would act in a discriminatory way against Japanese. There might be people who does not admit that they dislike Japanese but act to avoid Japanese unconsciously. In their mind, implicit bias against Japanese might activate. When people have an idea that men should work and women should stay home, they might have an explicit bias against working women. Some people who does not have such an idea but somehow fail to provide equal employment opportunity to women might have implicit bias against working women. In their minds, they are trying their best on the recognition that, regardless of gender, people should be treated equally. But unconsciously they act in a different way from their publicly expressed idea. If a person believes that gay people are inferior to others and it is OK to discriminate them, he/she has an explicit bias against gay people. If another person believes that gay people should deserve same rights as straight people but feel discomfort only when seeing gay couples holding hand on the street, not when straight couple doing so, he/she might have an implicit bias against gay people.

Human brain automatically stereotypes objects. People constantly have sensory input that they must quickly organize into manageable categories and stereotyping is a useful cognitive representation because it enables people to categorize groups of people or things quickly.[264] It is also noted that we can anchor feelings and emotions to the stereotype.[265] When people can remove the bias or stereotype from their conscious level, such bias and stereotype remain in their subconscious level. When people see an object, unconsciously they react based on the hidden feeling or emotion associated with the image of the object. This is the problem of implicit bias.

The Implicit Association Test(IAT)[266] is a good way to measure your implicit bias. The mechanism of this test is as follows;

> The IAT is a computerized reaction time measure that assess the comparative strength of associations between two pairs of concepts (for example, gay and good/bad, straight and good/bad). Participants use two keys on a keyboard to categorize target stimuli appearing one at a time on the screen as belonging to one of two categories (“Gay people” or “Straight people”) or one of two attributes (“Good” or Bad”). If people are faster at accurately categorizing stimuli when “Gay people” and “Bad” are paired on the same side of the screen (compared to when “Straight people” and “Bad” are paired on the same

[264] Id.
[265] Brower, supra note 125, at 63.
[266] https://implicit.harvard.edu/implicit/selectatest.html (English), https://implicit.harvard.edu/implicit/japan/ (Japanese).

> side of the screen), it suggests that people have stronger negative associations with gay people than with straight people. The IAT thus can provide a measure of implicit evaluations of lesbian and gay people. [267]

Activation of implicit bias can be observed visually. Because implicit bias activates automatically, people cannot recognize it. However, FMRI (functional magnetic resonant images) allows scientists to see the variations in the flow of blood, or activation in specific area of brain.[268] For example, there is distinct difference in the blood flow in a part of brain, "insula" between people who have stronger negative associations with gay people and people who are not.[269]

b. Effect of Implicit Bias

Implicit bias influences ways in which people interact with others, working environments, and decision-making processes at every level. In order for the judiciary to build a comfortable and inclusive working environment where people feel accepted and respected, and to make a better decision-making, it is necessary to start to make efforts to get rid of the negative influence of implicit bias. Here I explain some major effects of implicit bias.

(a) In-Group Bias

Implicit bias can compel people to favor those who are most similar to themselves.[270] This in-group bias, or homophily, is the tendency that most people form bonds of mutual affinity with each other more easily when they share common tastes, life experiences, preferences, and values.[271] This can influence workplace decisions because individuals are more likely to give favorable evaluations, mentoring, loyalty, cooperation rewards and opportunities to other individuals who are similar to them in important respects, like gender, race and ethnicity.[272]

Implicit bias causes a person to make different judgments of identical actions or objective states depending on one's group membership. [273] A research shows that male-sounding-name

---

[267] Erin C. Westgate, et al., Implicit Preferences for Straight People over Lesbian Women and Gay Men Weakened from 2006 to 2013, Collabra, 1(1), 1, pp. 1-10, at 2, DOI,: http;//dx.doi.org/10.1525/Collabra.18 (2015).
[268] Video, The Neuroscience and Psychology of Decisionmaking, Part 1: A New Way of Learning (2009), http://www2.courtinfo.ca.gov/cjer/857.htm
[269] Id.
[270] Negowetti, supra note 34, at 944.
[271] Anna Jaffe et al, Retaining and Advancing Women in National Law Firms, Stanford Law School Women in Law Policy Lab Practicum, at 11 (2016).
[272] Id. at 12.
[273] Negowetti, supra note 34, at 945.

applicants are more likely to receive higher evaluation than female-sounding-name applicants by participants who were all male and asked to evaluate a job applicant by paper-based review.[274] This means that the same behavior or action can be differently evaluated even by the same objective standard. This also applies to the evaluation of future success of the applicants.[275] Stereotypes create expectations of what constitutes potential.[276] Those are often built up out of common traits associated with those who performed the job well in the past.[277] Evaluation of future success of someone is susceptible to implicit bias.

(b) Influence on Memory and Data-Collecting

Implicit bias influences ways in which we memorize and collect information. Implicit bias has the tendency to notice and recall information that confirms stereotype rather than information contrary to the stereotype,[278] which can be easily regarded as an exception or forgotten. This is one of the reasons why it is difficult to overcome the image people already have. In the context of the data-collection, implicit bias makes people to unconsciously find information along with the stereotype. A research reveals that the exact same legal memo received different evaluation depending on whether the name of the student sounds like Caucasian or African American because the participants were more likely to find more errs, such as grammatical errs or technical writing errs, in the memo written by a student with African-American sounding name and to rate lower.[279] This research shows that even if participants tried to be fair and objective in evaluating the memo, they had implicit racial bias of writing skills. Another experiment illustrates shooting bias. In this experiment, participants were asked to push the button when a person with a firearm appears on the screen (so on the screen, the participant shoot the person to kill.) and not to do anything when a person does not have anything.[280] The result is that participants were more likely to push the button when black people appeared on the screen, regardless of with or without a firearm and that giving an abstract purpose by asking participants to be fair and objective did not make a difference.[281] This clearly indicates that thinking that we are fair and square does not guarantee that we actually behave fair and square.

---

[274] Eric Luis Uhlmann & Geoffrey L. Cohen, "I Think It, Therefore It's True": Effects of Self-Perceived Objectivity on Hiring Discrimination, 104 Organizational Behav. & Hum. Decision Processes 207, 210-11 (2007).
[275] Negowetti, supra note 34, at 943-944.
[276] Id. at 943.
[277] Anna Jaffe et al, supra note 271, at 11.
[278] It is called "Role-incument schemas." See, Negowetti, supra note 34, at 948.
[279] Arin N. Reeves, NEXTIONS Yellow Paper Series, Written In Black & White: Exploring Confirmation Bias In Racialized Perceptions Of Writing Skills (2014).
[280] Video, The Neuroscience and Psychology of Decisionmaking, Part 3: Dismantling and Overriding Bias (2010), http://www2.courtinfo.ca.gov/cjer/864.htm
[281] Id.

(c) Response Amplification

Response amplification is one of the effects of implicit bias. According to Kristin J. Anderson and Melinda Kanner said;

> Response amplification occurs when a majority group member wants to appear nonprejudiced and thus gives overly positive evaluations to minority group members in certain situations. In different situations, however, when there is a nonprejudicial justification available, the respondent will evaluate the minority group member negatively. A cognitive explanation for response amplification suggests that a lack of information about out-groups results in reduced cognitive complexity surrounding representations of out-groups, thus leading to more extreme reactions to out-group members.[282]

Such response amplification can be seen in several occasions in Japan. For example, there was news coverage that a man who cannot walk without assistance of others was denied to board on an airplane and he crawled up stairs to enter the plane.[283] This news followed criticism by many people that the passenger should be blamed for the denial because he did not give the airline an advance notice.[284] I assume that people who criticized the disabled passenger would admit that people with disabilities should be treated equally and allowed to board the airplane without any restriction. However, they somehow perceived the way in which the passenger protested as requesting an unreasonable demand. With real understandings on what is the ideal conditions for people with disabilities and how much difficult it is to achieve it and to raise a voice as an individual for the change, such criticism would not have happened. Implicit bias prevents them from getting such understandings. It is a typical reaction that can be observed when minority groups raise their voices for the change.[285]

(d) Observation

Attitudes and behaviors based on implicit bias are not so obvious that some often say to those

---

[282] Kristin J. Anderson & Melinda Kanner, Inventing a Gay Agenda: Students' Perceptions of Lesbian and Gay Professors, J. of Applied Sci. Psychol., 1538, 1540-1541 (2011)

[283] Justin McCurry, Disabled passenger forced by Japanese airline to crawl up stairs to board plane, The Guardian (28 Jun. 2017), https://www.theguardian.com/world/2017/jun/29/disabled-passenger-forced-japanese-airline-vanilla-crawl-up-stairs-board-plane

[284] Hirotada Ototake, Banira eā ga moeteiru, sikasi, Kizima san mo moete iru [Vania Air in flames, but so Mr. Kizima], Huffington Post (June 28, 2017, 10:23 PM), http://www.huffingtonpost.jp/hirotada-ototake/post_15315_b_17326010.html

[285] While embracing the virtue of ladies first, some people try to find faults with female victims of sex crimes when they raise their voices. It is often the case that when It can be said that this reaction reflects implicit sexism demanding women to have higher sexual moral than men.

who regard them as a problem, "you are overreacted" or "you worry too much." In some cases, blame-shifting would occur when people think that those who take such attitudes as a discrimination is wrong. However, no matter how subtle attitude and behaviors based on implicit bias are, such a workplace can never be a comfortable and inclusive environment. People subject to negative implicit bias would feel that they might not be evaluated by merit and feel isolated in the institution. Such an institution is not a place where diverse talents can make the most of their abilities. We should start to recognize that all of us have implicit bias and are subject to the influence of implicit bias without knowing it, and to deal with this issue.

c. Judges Should Recognize Implicit Bias

Judges should deal with implicit bias. As long as judges are human beings, they have implicit bias. Judges cannot be immune from implicit bias. However, judges have so strong confidence in their objectivity and impartiality that they are less likely to recognize that they are subject to implicit bias and to continue to act influenced by implicit bias. We still need to realize that we cannot consciously access and often cannot control implicit biases and how biases and stereotypes operate in our cognition and behaviors.[286]

Judges work hard to eliminate explicit bias in their own decisions and behaviors and they believe they do not prejudice to color their judgement.[287] Most of the judges believe that they are fair and objective and base their decisions only on the facts of a case.[288] For example, a survey found that that 97 percent of judges (thirty-five out of thirty-six) believed that they were in the top quartile in "avoiding racial prejudice in decision making" relative to other judges attending the same conference.[289] Most of the judges have strong belief that "I am above average" or "I am better than him/her."

This overconfidence involves risk in terms of implicit bias. Judges may be less motivated to attend and fully participate in educational programs discussing issue relating to make bias free decision or to improve the working environment, unless they view themselves as explicitly biased.[290] Unfortunately, there is evidence that believing ourselves to be objective puts us at particular risk for behaving in ways that belie our self-conception.[291] American judges are found to have implicit racial bias by the recent research which revealed that the darker skin and

[286] Negowetti, supra note 34, at 935.
[287] Pamela M. Casey, et al., Helping Courts Address Implicit Bias, National Center for State Courts, Resources for Education, 2 (2012).
[288] Id.
[289] Jerry Kang et al., supra note 31, at 1172; Jeffrey J. Rachlinski et al., Does Unconscious Racial Bias Affect Trial Judges? 84 Notre Dame L. Rev. 1195, 1225 (2009).
[290] Casey, et al., supra note 287, at 2.
[291] Jerry Kang et al., supra note 31, at 1173.

the more Afrocentric feathers the defendant had, the harsher sentencing the defendant got.[292] Taking the IAT is a very good start to recognize our own implicit bias.

The silver lining is that educational programs on implicit bias for judges have received good reviews from participant judges.[293] This means the conducting such training program is effective. Participants can learn the nature and mechanism of implicit bias based on the scientifically proven information. Judges are people who have been trying to improve not only the quality of their decision making but also their behavior. Educational programs can provide information useful and applicable to their daily adjudicational work. In that the judges are motivated to make the most of the educational programs for their daily jobs, such programs are meaningful and have a positive impact.[294]

(2) Points to Considered

a. Importance of Leadership

It is crucial that, with the recognition that judicial diversity is important, the leadership of the institution show the motivation and commitment to the efforts for judicial diversity. The leadership has a power to change the institutional culture and atmosphere. This is also true to the Japanese judiciary. In order to share and understand the value of judicial diversity and to take steps for it, the leadership of the top is important. It is also necessary that achieving judicial diversity and addressing necessary measures should be a shared goal within the judiciary.[295] By so doing, not limited to implicit bias training program, all other necessary measures can be robust and comprehensive with strong support from the whole institution.

b. Not Blaming "Majority"

Getting cooperation with people who create the culture and atmosphere in the organization is necessary because efforts and measures for judicial diversity is to change those things. We should devise ways to motivate such people to actively and voluntarily participate in these efforts and measures. We should keep in mind that these efforts and measures sometimes can cause individuals to feel that they have been unfairly blamed for inequalities, which serves only

[292] Ryan D. King & Brian D. Johnson, A Punishing Look: Skin Tone and Afrocentric Features in the Halls of Justice, 122 Am. J. Soc. 90 (2016).
[293] Casey, et al., supra note 287, at 10, 14, 18, 21.
[294] There is no established research about the long-term effects of education on implicit bias. Hon. Theodore Mckee, Judge of 3rd Cir., Remarks at The Annual Goerge Boyer Vashon Lecture: Diversity and Inclusion in the Judiciary – A View From the Bench (May 5, 2017).
[295] See, The Journey toward Diversity, Fairness, and Access through Education, National Association of State Judicial Educators, 29 (2014).

to increase divisiveness and animosity.[296] We should refrain from putting others in a box named "majority" by saying "they have a problem to fix," and "they are biased and prejudiced." We should remember that even in the minority communities, negative stereotypes against each other have prevented cooperation and unity.[297] It is necessary to send a clear message that respecting diversity is to respect each difference that each individual has and the beneficiary is everyone, not limited to minority groups.

It is also necessary to have a perspective that everyone has something making him/her a minority, not seeing others as a majority in an abstract way.[298] It is worth looking at how multiple identities compound and offset others so that we can examine how you experience advantages and disadvantages and be open to learning the experience of others.[299] Such identities include, socio-economic statuses (e.g., grown up in poor family), family situations (e.g., grown up in a single parent family, divorced, with a family member in needs of nursing care, illegitimate child), educational backgrounds (e.g., a graduate from school typically producing few legal professionals), physical traits (e.g., having some disease, having inferior complex in appearances), and so on. We should know that everyone might have gone through something because of their disadvantageous identities or characteristics. It is important to be open minded to learn their experience and to respect such difference.

c. Judges as Learners

To make any training program for judges, it is important to understand characteristics of judges as learners. Adult learning theory tells us that, while it shares commonalities with childhood learning, there are substantial differences, especially because adults are self-directed learners.[300] Judges, professional and adult, have distinguished characteristics as follows: exceptionally

---

[296] C.W. Von Bergen et al., Unintended Negative Effects of Diversity Management, 31 Pub. Personnel Mgmt., Summer 2002, at 241 (2002).

[297] For example, gay men look lesbians as humorless, aggressive, and undersexed. Gay men and lesbians may mistrust bisexuals because they believe the stereotype of the bisexual who abandons his or her same-sex lover in favor of a safer hetero sexual relationship. See Gianoulis, supra note 263. http://www.glbtqarchive.com/ssh/stereotypes_S.pdf ; More serious problems is that bisexuals are sometimes considered not to exist not only by straight people but also by gay men and lesbians. See, Kenji Yoshino, The Epistemic Contract of Bisexual Erasure, 52 Stan. L. rev. 351(2000), Nancy C. Marcus, Bridging Bisexual Erasure In LGBT-Rights Discourse And Litigation, 22 Mich. J. Gender & L. 291(2015); Racism can not be overlooked in LGBT community; https://www.gaystarnews.com/article/racism-big-problem-gay-community-survey-finds/

[298] See also, Hon. Ronald M. Gould, Judge of 9th Cir., Pathways to the Bench Video Series (Nov. 26, 2013); "Having significant disability reminds you that everybody has problems and everybody has to adapt them. In my case it's just a more visible problem, lots of people have problems that you can't see."

[299] Verna A. Myers, Moving Diversity Forward: How To Go From Well-Meaning To Well-Doing 10, 109-120, at 118 (2011).

[300] Livingston Armytage, Judges As Learners; Reflections on Principle and Practice, 2nd Int'l Conf. on the Training of the Jud., at 5(2004).

motivated to pursue competence for its own sake;[301] rigorously autonomous;[302] entirely self-directed;[303] having an intensely short-term problem-orientation;[304] sensitive to any possible indoctrination;[305] sensitive to any possibility to erode the authority of their role.[306]

Based on this adult learning theory, it would be effective to devise the training program which emphasizes that judges can learn useful knowledge and theories applicable to their daily jobs and contributable to a better decision-making. It would be also desirable to send a clear image or explanation on when and how implicit bias influences their decision-making, by using specific examples, e.g., evaluation of evidence, sentencing, determining the amount of consolation money for non-monetary damages.

It is important to secure an environment under which participant judges can learn comfortable without feeling embarrassed. Judges themselves believe in their subjectivity and impartiality. They would feel mortified if they were labelled as sexist or homophobia or so on. Instead, providing scientific proven knowledge based on neuroscience in a subjective manner would be an effective way to create less threatening atmosphere and to help judges understand how brain works in sorting out and uses perceived information in everyday life.

There are a lot of materials regarding implicit bias and training programs developed. Japanese judiciary should start to deal with implicit bias.

(3) Specific Issues on LGBT

Here, I talk about some LGBT specific issues in terms of creating a comfortable and inclusive environment by reducing negative explicit or implicit antipathy against LGBT people.

a. The Importance

It is important for the judiciary as an institution to promote understanding of LGBT people and to create a comfortable and inclusive workplace. This helps not only judges and court officers in the judiciary but also young people who have potential to play an important role in the future judiciary. LGBT citizens have concerns such as how judges perceive LGBT people, whether or not they have prejudice against LGBT people. They might perceive a sense of homophobia

[301] Id. at 7-9.
[302] Id. at 9.
[303] Id.
[304] Id.
[305] Id.
[306] Id.

through interaction with a judge. Such discriminatory experience make it difficult to bring talented LGBT individual into the judiciary. Unfortunately, these potential negative consequences have not been paid much attention to. In Japan, there is little awareness on that gay-joke should be prohibited. We have a lot to be done. We should start to dismantle negative stereotypes against LGBT and to have opportunities to understand who LGBT people are.

b. Points to be Considered

(a) Relevance to the Daily Judicial Work

Some people who have engaged in training programs on LGBT issues for judges told that programs mainly focusing on LGBT issues still cause some discomfort among participant judges.[307] Therefore, it would be useful to devise programs emphasizing the relevance to the daily judicial work, based on the adult learning theory described above. For example, when the Supreme Court issues a decision involving an important LGBT issue, a training program would be more appropriate to discuss specifically how the case influences the daily judicial work, using hypothetical cases that participant judges can apply the case for practice. This is the same when an important statute involving LGBT people is enacted. This way, discomfort can be reduced and if any, benefits from the program would overweight the discomfort.

Along with taking the form of emphasizing the relevance to the daily judicial work, reducing and dismantling negative stereotype and bias is also one of the primary purposes. As useful materials for better presiding and deciding cases, it would be desirable to provide objective information regarding the realities of LGBT people based on reliable statistics and experiments, which help judges to get better understandings of the backgrounds or contexts of the case, which, in Japan, repeatedly has been emphasized as an important factor for a better decision making.

(b) Knowing "I Was Wrong" with Surprise

Professor Brower points out that element of surprise or disconfirming stereotypes is key to dismantling to negative stereotypes.[308] Such surprise makes people curious about the reasons why such misunderstanding happened and what the reality is, and then, also more willing to learn about how stereotype and bias works in human brain. It would be not easy to get people have such an experience but it is important to craft a program to make such surprise happen by devising the order of topics or including several quizzes and so on.

---

[307] Interview with Hon. Rosalyn Richter, Justice of N.Y. App. Div. (28, Oct., 2016); Telephone Interview with Todd Brower, Judicial Education Director of the Williams Institute UCLA Sch. of L., Professor at Western State U. Coll. of L. (2, February, 2017).

[308] Telephone Interview with Todd Brower, supra note 305 (30, March, 2017)

Professor Brower taught me an effective question for American Judges. The question is asking which states rank among the top ten in the proportion of same-sex couples who are raising children. Choices include California and three other Southern States known for conservative and less LGBT friendly states. Contrary to the commonly shared image, California is only state not ranked in the top ten, actually in 33rd. Participants are surprised at this data. Such surprise makes people humble and be open to learn new things.

(c) Shift from Out-Group to In-Group

As a process to understand LGBT people, it is important to perceive LGBT people as a member of in-group, not out-group. As noted before, once people perceive someone as out-group, people tend to see the distinguished characteristic different from in-group, miss the complicated context, and fail to evaluate situations correctly. With such perception, it is difficult to understand others.

What information would help people perceive that LGBT people are in-group? Providing information that people can get empathy with LGBT people would be useful. Training programs by The Judicial Training Program of the Williams Institute of UCLA Law School provide information including: same-sex couples exist in almost all counties in the U.S. and they are actually neighbors to everyone; there are a lot of same-sex couples raising children and they tend to live in a place suitable for raising kids, same as the heterosexual couples think. Such information based on reliable data would prompt natural shift from out-group to in-group as for LGBT people.

Such shift is important because otherwise it would be likely to perpetuate negative images against LGBT people depending on the topic dealt with in training program. For example, domestic violence among LGBT couples[309] are as prevailing as among the straight couples and, in some case, because of peculiar circumstances, situations can be more serious. LGBT people have weakness. Abusers take advantage of the weakness by manipulating malicious tactics. In order to understand the context of LGBT domestic violence case, judges should need to know such tactics in detail but if judges still see LGBT people as out-group, judges might perceive them as a cruel people as a community. When providing information on domestic violence, it is crucial to first provide information helping participants shift their perception about LGBT people from out-group to in-group. This way, participants can get an accurate knowledge and

[309] Here I do not limit to same-sex couples because bisexuals are more likely to be victim of domestic violence and it is not always the case that the couples are same-sex couples.

understanding, avoiding inappropriate generalization.[310]

(d) Choice of Lecturers

Choice of lecturers should be made carefully. Judges are sensitive to any possible indoctrination. Professor Brower emphasized that the lecturers of the judicial training program are not advocates and do not advocate in a specific position on an issue and that they are very careful not to be perceived in that way.[311] As a neutral expert, he provides judges with information or leads discussion useful for judges' daily work, and let the judges do with that information what they think is best.[312]

He also noted that when he chooses a lecturer partner, as a principle, he chooses judges, not lawyers who sound and look advocate. Judges know judges the best. If participant judges find that a lecturer does not know about what judges are about, such a lecture instantly lose its value.

It is worth making a comment on sexuality of the lecturer. A research shows that students who have prejudice against gay people are more likely to view a gay professor who teaches human sexuality as coming to the course with a political agenda, with personal biases, and with the aim of forcing their views of sexuality on students.[313] This research indicates that sexuality of the lecturer might influence the perception on participant judges. However, this research is about the perception after reading a syllabus, not after taking the course. Even if participant judges have such negative perception, that can be a good opportunity to know the very fact that they have implicit bias. Therefore, the important thing is to look for an appropriate lecturer regardless of sexuality.

2. From Invisible to Visible

Under the current situation, the sharp decline of law school applicants and the declining population of younger generation, we need to create conditions which can bring more diverse young talents into the legal profession and ultimately into the judiciary. I believe, as one of the approaches, judges need to be more visible and actively engaged in communication with the public outside of the judiciary so that people can understand what the legal profession and the judiciary are and who judges are. With more information about the legal profession and the

[310] A similar example is where there is a news coverage that a male teacher committed a sexual act on a boy student. One of the typical reaction is that gay should not be allowed to be a school teacher. Such generalization is because of their perception of gay people as out-group. Despite the fact that there have been a lot of male teachers who did on girl students, they perceive quite differently.
[311] Brower, supra note 308.
[312] Id.
[313] Anderson & Kanner, supra note 282, at 1538.

judiciary, people get more interested in becoming a legal professional. Japanese judges have been seen as "nameless and faceless."[314] Japanese judges rarely talk in public. It is the time to step forward for judicial diversity.

Japanese legal professionals, above all, judges, are not a familiar existence for Japanese people. Compared to the medical profession, people have much less interaction with the legal profession, which make it difficult to understand who they are and what they are doing. A lot of people regard the judiciary as an unapproachable place and they might have an image that judges live in a different world. The less opportunity to know about the judges people have, the more dependent on the simplified image described by the media people's perception will be. Besides, the media reports and emphasizes the difficulty and risk for becoming a legal professional. It is natural that young people are discouraged from hoping to be a legal professional.

Judges are the right persons who can send positive and powerful messages that effectively motivate young people to choose a legal professional as a career and to enter the judiciary. When young people have an opportunity to know the important role the legal profession plays in the society, to feel familiar with legal professionals and know they also live in the same world, to get rid of misconception that only handful exceptionally smart people can be a legal professional, and to realize that the pathway to the legal profession and the judiciary is open to everyone. As a member of the legal profession, judges should make efforts to get them close to the public by actively outreaching to the public. This is all the more important, considering the needs for creating accessible and open judiciary, which has been a widely discussed topic in Japan.

In the next section, I introduce discussion and practices on extrajudicial activities by judges in the U.S. as a reference to following discussion on those in Japan.

(1) Discussion and Practices in the U.S.

a. Encouraged Extrajudicial Activities

Rule 3.1 of ABA Model Code of Judicial Conduct in 2007 encourages judges to engage in extrajudicial activities that concern the legal system and the administration of justice, such as by speaking, writing, teaching or participating in scholarly research projects because judges are uniquely qualified to engage in those activities.[315] Judges can participate in activities sponsored

[314] Foote, supra note 2.
[315] Comment 1 on Rule 3.1.

by organizations or entities, regardless of private or governmental.[316] The rationale is that "participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system."[317]

The idea that there are activities that judges are uniquely qualified for reminds me of a case recognizing the unique value of speech by teachers in public school. The U.S. Supreme Court in *Pickering v. Board of Education*[318] held that, as for the freedom of speech of public officers, the speech can be protected if the officer spoke as a citizen on a matter of public concern and the speech does not impair the efficiency of the public services it performs. The Court mentioned the unique value of the teachers' speech: as the question whether a school system requires additional funds is "a matter of legitimate public concern, "[o]n such a question free and open debate is vital to informed decision-making by the electorate;"[319]and "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent,"[320]therefore, "it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."[321] The same as certain speech of teacher have special value, certain speech or activities of judges have special value. Those speech or activities are listed in the Rule 3.1 and the Model Code encourages judges into that.

Contrary to Japan, there are a lot of occasions to meet judges and to hear their talks in the U.S. At law school, judges participate in events as a guest speaker, panelist, moderator, or judge of a mock trial.[322] Some judges have a class at law school. Judges participate in events sponsored by law firm as a speaker.[323] Those activities are private and independent of the daily judicial

---

316 Rule3.7(A)(1).
317 Comment 2 on Rule 3.2.
318 391 U.S. 563 (June 3, 1968).
319 *Id.* at 571-572.
320 *Id.* at 572.
321 *Id.*
322 At Penn Law where I studied and researched, there were a lot of events organized by student groups or Law School. Three federal circuits judges joined as a panel at the annual mock trial. There were all-judges panel discussions. In such occasions and following receptions, I could learn their personalities and ideas first-hand. Looking at Japanese law schools, due to the daunting pressure from the bar exam, I am afraid Japanese law students cannot afford actively engaged in those activities, which make it more important that members of Japanese legal profession including judges, should actively outreach to law students.
323 I could participate in two events. One is Vashon Lecture, the panel discussion on diversity on the bench sponsored by a Philadelphia based law firm, Duane Morris LLP. This lecture series are a part of annual Diversity and Inclusion Retreat. The 4 panelists are all federal judges (African American male judge and Hispanic male judge from The 3rd Circuit, African American male judge from a district court of Ohio, and female judge from a district court of Louisiana.). The other is the Sixth Annual Judicial Reception co-sponsored by Skadden, Arps, Slate, Meagher & Flom LLP and LGBT Bar Association of Greater New York. There was a panel discussion by 4 openly gay judges in New York (One gay federal district judge, one lesbian federal district judge, one lesbian state appellate court judge, and one gay state trial court judge.). Other than these panelist, about 30 openly gay and lesbian judges participate in this event.

work.[324] Event organizers get in touch with judges by email or phone for invitation, then, if participation does not impede the daily judicial responsibilities, judges join the event.[325] Exceptions are writing and teaching. Because those are paid jobs, unlike simply speaking at law school or in public, judges need permission from the chief judge, in addition to that the job does not impede the daily judicial responsibilities.[326]

b. Discussion Resulting in the Current Provision

The current provision encouraging extrajudicial activities is a product of the social change and the change in judges' mindsets. Traditionally, it was thought that American judges should remain silence (extrajudicial silence). However, the growing criticism or attack against the judiciary in the media, accompanying the change in media structure, made a shift in how to response to those criticism; to build public trust and confidence in the courts, judges should engage in the ongoing public discussion about the courts. I introduce the discussion regarding this shift because I believe it would be useful when we Japanese discuss judges' extrajudicial activities.

(a) Extrajudicial Silence

It is said that extrajudicial silence used to be a norm in the U.S. because "extrajudicial silence was the best way to convey to the public a judge's commitment to the rule of law."[327] There were other justifications; judges should maintain the aura of tradition and mystery surrounding judicial decision making and should avoid anything that associates it with the "political."[328]

The extent of extrajudicial silence has changed. At first, silence was limited to the proposition that a judge should never speak to a journalist about a case that was pending.[329] Later, the silence expanded to restrict for all judges on all pending matters, regardless of whether a judge was involved in the matter, and then come to mandate judges to refrain from speaking to a

[324] Interview With Hon. Luis Felipe Restrepo, Judge of 3rd Cir. (Feb. 6, 2017).
[325] Id.
[326] Id.
[327] Hon. Brian Mackenzie, Extrajudicial Speech: Judicial Ethics in the New Media Age, Reynolds Cts. & Media L. J., 185, 192 (Spring, 2012)
[328] See, Hon. Stephen Reinhardt, Symposium: The Sound of the Gavel: Perspectives on Judicial Speech: Judicial Speech and the Open Judiciary, 28 Loy. L.A. L. Rev. 805, 807-808 (1995). Hon. Reinhard, judge of U.S. Court of Appels for the Ninth Circuit, himself criticizes this justification as "a strange combination of arrogance and fear" based on the idea that it would be judges' duty to share their respective visions of the law with the public and judicial openness will provide a stronger foundation for the legitimacy. He opposes to extrajudicial silence because it prefer to hold judges above censure, by providing people with no basis for criticizing. He lists permissible topics of extrajudicial speech including controversial issues such as decriminalization of drugs, deal penalty, judicial appointment by the President because those topics are ones that judges are uniquely qualified for discussing on.
[329] Hon. Mackenzie, supra note 327, at 192.

reporter simply avoid being misquoted.[330] Some advocates started to claim "that a judge should be admonished not to engage in any form of public speech, stopping just short of restricting a judge's ability to teach in a classroom."[331]

(b) Change in the Media

Shift from extrajudicial silence to encouraging extrajudicial activities was prompted by the change in the media and the growing criticism against the judiciary.

The most common way for the general public to become informed about judges and courts is through the news and entertainment media.[332] However the media lost their ability to convey the accurate information about how the judiciary and the judicial process work, and the media coverage has simplified and sensationalized legal proceedings and undermined the public's faith in the judiciary.[333] This was the result of economic pressure and the 24-hour news cycle, which caused a sharp decline in advertising revenues, staff reductions, and deterioration of the quality of news coverage.[334] For example, local news coverage on crime and criminal justice does not report meaningful in-depth feature stories, not being able to do more than skim the surface of the stories.[335] Besides, candidates for elective office routinely attack judges and call for radical changes in the judicial system as part of their campaign rhetoric.[336]

Such circumstances prompted the courts and judges to adopt the idea that the judges should actively engage in broad range of extrajudicial activities, above all, extrajudicial speech. The courts have no choice but to response to the growing criticism themselves because it became hard to expect that the media can perform an appropriate function by correctly conveying to the public how the judicial system works. The justification of the public trust and confidence in the justice system, which once supported extrajudicial silence, now came to support active extrajudicial activities. This way, the amendment of encouraging extrajudicial activates to the Model Code of Judicial Conduct was enacted for the purpose to promote public understanding of and confidence in the judicial system.[337]

c. Examples of Extrajudicial Speech

---

[330] Id. at 193.
[331] Id.
[332] Id. at 185.
[333] Id.
[334] Id. at 188.
[335] Id.
[336] Id. at 191.
[337] Rule 2.1, Comment (2).

Extrajudicial speech contributes to getting the public well-informed about judges and courts. It has been sometimes observed that Justices of the U.S. Supreme Court talk about misunderstanding about the Court, trying to correct them. For example, Chief Justice John Roberts talked about his concern about people's perception on the Court, by saying;

> It is very difficult, I think, for the member of the public to look at one goes on confirmation hearing these days which is a very sharp conflict in political term, democrats and Republicans, not to think that person comes out of the process must similarly share the same sort of partisan view on public issues or public life. That's very unfortunate because we, in the judiciary, are not doing our business in partisan or ideological manner. The new justice is not a Republican, not a Democrats, he is a member of the Supreme Court.[338]

Incumbent Justices often mention how they are getting along with each other possibly because there have been cases representing sharp ideological conflicts where each Justices are critical each other in opinion writing.[339]

In addition to these defensive remarks, there are a lot of speeches valuable in terms of realizing judicial diversity. One great example is Pathways to the Bench Video Series.[340] In each episode of several minutes, diverse federal judges - women, immigrants, with disabilities, or racial minorities – send powerful and inspiring messages to young people through talking about their life experience and difficulties they have overcome before coming to the bench: you get better because of the challenges; you have to have faith in yourself that you can make a life that you want; don't let outside forces define you or determine your future; if somebody is enthusiastic about what they want to accomplish -- if they have a passion for it -- they have a chance of achieving it; you never can dream big enough. Overlapping with judges' experiences or circumstances, people would hear their stories and see them as a role model. I believe that the very reason why their words have such a powerful influence on people is because the speakers are judges who are in a prestigious position with special responsibilities in the society. I want to highlight the value lying in judges' speeches talking about their personal stories which can help people become well-informed about judges and courts.

(2) Applicability in Japan

---

[338] Talk with Renssela President Shirley Ann Jackson (Apr. 11, 2017).
[339] The late Justice Antonin Scalia, who was famous as a caustic stylist, said "I attack ideas, I don't attack people - and some very good people have some very bad ideas." See Antonin Scalia: In his own unforgettable words, L. A. Times (Feb. 13, 2016, 6:56 PM), http://www.latimes.com/nation/la-na-scalia-quotes-20160213-story.html
[340] http://www.uscourts.gov/judges-judgeships/pathways-bench-video-series

a. Observation

The idea of extrajudicial silence has been familiar with Japanese judges. The possible justifications for Japanese judges' reluctance to engage in extrajudicial activities are as follows. First, extrajudicial activities are outside of the realm of the judicial responsibilities so that judges do not have to. Second, as the maxim says that judges should not excuse, judges explain everything to say in their opinions so that judges do not need speak outside of the written opinions. Based on this idea, if the public confidence in the judiciary is negatively affected, the best way to restore the confidence would be to improve the quality of decision-making. Third, judges should keep an appropriate distance from the public in order to avoid creating conflicts of interests and any potential of impartiality concerns and to maintain political neutrality. The motivation to avoid slip of the tongue or misinterpretation of their words as much as possible might hide in those justifications.

Recently, judges started to talk outside of the courts, however, the speech is about court proceedings - especially newly established saiban-in trial -, not personal life stories of judges. The reality is that most of the judges adopt the maxim that judges should not excuse. Another factor is that Japanese judges are busy. This might make it difficult to get themselves motivated to extrajudicial activities other than daily judicial work.

Whether the media structure has changed in Japan or the growing criticism has occurred or not is not covered in my research. However, now that we admit the value of judicial diversity, the validity of extrajudicial silence in Japan should be worth re-examining. Only judges can talk about the reality of judges and courts. Most of the people decide their career path, ruling out the legal profession as a career without having any experience of interacting with any legal professionals including judges. Based on fragmental and simplified information on judges, people are not well-informed about judges and courts, ending up in creating their image of judges, which would not inspire people to be a legal professional. As a visible being, through communication with the public, judges should try to capture people by getting them understand how significant and rewarding work judges have and the fact that the Japanese judiciary seriously appreciate diverse talents across the nation coming into the courts. Interacting with real judges would be a great opportunity for young people to reduce negative images of judges and to get inspired like, "I would like to be like this judge," "as long as I continue to improve myself, I have a chance to be a judge." Such extrajudicial interaction can promote the people's understanding of and the confidence in the judiciary.

Of course, it is not an easy job to draw the clear line between what judges can do and what they cannot. However, it can never be a reason to do nothing when there are extrajudicial activities

clearly permissible. It is important to start with those activities.

b. Grand Bench Case on Judge Teranishi[341]

Extrajudicial activities should be considered in relation to the extent of the permissible restriction on the freedom speech of judges. Grand bench case on Judge Teranishi would be instructive. This case interprets the definition of "to actively engage in a political campaign" which judge are prohibited to pursuant to the article 52 of Court Act.[342]

(a) Relevant Part of the Opinion

The Court said that a judge is not prohibited from at least holding an opinion against the enactment of the law as an ordinary citizen and expressing such an opinion in a situation where his/her independence as well as neutrality and fairness will not be suspected. However, when beyond the bounds of mere expression of an individual's opinion, the speech actively assists and promotes the achievement of the aim that a particular bill should be scrapped, the speech falls within the scope the Act prohibited. On the other hand, the Court listed permissible speech activities: where a judge takes part in the legislative process as a member of a council and expresses his/her opinion for or against a particular bill; where a judge, while identifying his/her occupation, presents in a thesis or lecture that he/she is against a particular legislative measure, to the extent that, in light of the place and manner of presentation, this act is not regarded as assistance for a particular political campaign but regarded as a mere declaration of his/her personal opinion as a legal professional or person with relevant knowledge and experience; judges may state their opinions to a certain degree about the establishment, revision or abolition of laws and regulations relating to the judicial system. The dissenting opinion pointed out that "it has been construed that acts such as joining a political party to become its member, criticizing the policies of the government or political party as an ordinary citizen, and criticizing a specific political party as a lecturer at university, do not fall within the scope of "to actively engage in a political campaign."[343]

(b) Consideration

What the Grand Bench instructed was that context (situation, place or manner) matters. In this

[341] Supra note 215.
[342] Art 52, item 1 of Court Act
A judge shall not conduct any of the following acts while in office.
(i) To become a member of the national diet or the assembly of a local public entity or actively engage in a political campaign.
[343] Supra note 215 (Motohara J., dissenting).

case, the speech occurred at the rally which was not "a simple debate meeting" but "part of the campaign aimed to scrap the Bills based on the belief that they were evil laws." Participation in such a rally can be a critical factor for the Court to recognize the speech as impermissible.

Although the Grand Bench did not clearly mention, the emphasis on "the place and manner of presentation" would be relevant to the core value of free speech or freedom of association. The rationale of strong protection to freedom association as a form of freedom of speech is that the group or the meeting has the very purpose to engage in expressive activities protected as the exercise of the freedom of speech.[344] Participants of the meeting or members of the group are considered to express the same idea as the group and the meeting have. The reason why denying membership based on discriminatory reason can be justified[345] is because the freedom of speech guarantees that people be not compelled to speak against his/her will.[346] That is the reflection of the strong protection to the freedom of association.

Therefore, when trying to engage in any extrajudicial activities, it is important for a judge to grasp the circumstances objectively such the nature of the place, securing that the judge's behaviors would not be interpreted in an unexpected way by others. This might not be so difficult. The standard would be whether the event has the purpose to express so specific and political message that the impartiality of judges can be undermined. I assume that not so many occasions fail to meet this standard.

c. Needs for Written Code of Judicial Ethics

I would like to stress on the needs for a written code of judicial ethics. Without clear standards, even permissible behaviors are inhibited.[347] It is so burdensome to consider carefully whether or not the behavior is permissible that overworked Japanese judges would be reluctant to take the trouble to do so. This is typical symptom of "decision fatigue."[348]

Clear rules about extrajudicial activities play an important role in drawing diverse talents into

---

[344] *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).
[345] *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).
[346] *Barnette*, supra note 196.
[347] See supra note 215 (Kawai, J., dissenting). Justice Kawai said that "the terms included in the provision on the ground for disciplinary action, such as 'actively' and 'political campaign,' may have a significantly broad scope of meanings that can be interpreted in many ways. Seeing disciplinary authority actually exercised with respect to such a broad provision, I fear that some judges might regulate their own behavior more than necessary."
[348] See, John Tierney, Do you Suffer From Decision Fatigue?, N. Y. Times Mag. (Aug. 17, 2011), http://www.nytimes.com/2011/08/21/magazine/do-you-suffer-from-decision-fatigue.html (The more decisions you have to make, the weaker your will power will become. The research shows that this situation causes people to get frustrated easier and not to do what to do, make a careless decision that lacks of long-term perspective or just keeps status quo. To make a better judicial decision-making, judges should learn the idea of decision fatigue.).

the judiciary. Some people might feel anxious about the restrictions on private life because of being judge and end up not choosing to be a judge. It would be an easy choice to appoint as a judge from people who are fit in the atmosphere controlled by unwritten rules because it saves time and energy to make new clear standards. However, judges who feel frustrated with the restrictions on private life and free speech are valuable. After introducing saiban-in trials, Japanese judges must have realized how stressful and disturbing it is for jurors not to be able to say what they want to because of the obligation of confidentiality. This experience must have made judges to be more sensitive to frustration caused by the obligation of confidentiality. Not only that, this experience must have led a better understanding on how important the freedom of speech and on that the restriction on freedom of speech should be minimized. As a bulwark of the Constitution, the courts should have judges who have real empathy with those whose freedom of speech are restricted. Clear rules on extrajudicial activities have potential to produce such judges more.

Having clear rules has a variety of benefits. Clear rules create an atmosphere respecting judges' private lives. Judges would feel less stressed, and broader recognition that judges can do more than expected would make people less worried about being a judge. Not sticking to official codified rule, organizing workshop and sharing the idea and result of it among judges would be an alternative for alleviating any potential opposition to creating clear rules. As a measure for securing judicial diversity, clear rules on extrajudicial activities are a must.

3. Making LGBT Judges Visible

(1) General Discussion

Making LGBT judges visible has special significance. LGBT judges are a role model for LGBT youth. The more LGBT judges we have, the more comfortable and confident LGBT youth get when choosing to be a judge. In Japan, there must be LGBT judges in the closet. Along with creating an atmosphere where they can come out with ease, as a measure of making LGBT judges visible, forming an affinity group would be effective. LGBT judges should be visible in order to perform their special responsibilities to reduce stereotype and bias, and educate colleagues on LGBT issues and to bolster the legitimacy in the eye of the public.

In this section, I mainly discuss affinity groups for LGBT judges and touch on active participation in extrajudicial activities. In the U.S., there are several affinity groups for LGBT judges. There are also occasions where LGBT judges talk in public. I summarize the affinity groups for LGBT judges I could interact with and their activities, and then, consider the applicability in Japan.

(2) Activities by LGBT Judges

a. Affinity Groups

Simply put, affinity groups are groups whose members share something common. Affinity groups come in all shapes and sizes from unofficial small ones for social function to incorporated big nationwide groups.[349] Affinity groups in big law firms have been often paid attention to as a measure to promote diversity and inclusion. Affinity groups are expected to serve as an effective means of bringing together minority members from different areas within the organization, thereby to represent the needs, interests, and concerns of them to the management.[350] It is emphasized that affinity groups in big law firms serve as the hub for the professional development of the members, beyond a social function.[351] This reflects the reality in big law firms that associates have to compete in "tournament model."[352] In this regard, there is a big difference from affinity groups for judges.

(a) International Association of LGBT Judges (IALGBTJ)[353]

International Association of LGBT Judges was founded in California in 1993 by 25 LGBT judges.[354] Although having "international" in its name, most of the members are American Judges. The objectives include providing opportunity for LGBT judges to meet and exchange views, and increasing the visibility of LGBT judges[355] as role models for other LGBT people.[356] Regularly news related to LGBT judges (mainly appointing a new LGBT judge) is posted on the website and to the mailing list. IALBTJ hold its annual general meeting customarily on August during the period of Lavender Law Conference & Career Fair by The National LGBT Bar Association. At the meeting, participants elect new board members, discuss

[349] For example, National LGBT Bar Association (Lavender Law), National Asian Pacific American Bar Association (NAPABA), Hispanic National Bar Association, (HNBA), South Asian Bar Association of North America, National Association of Minority and Women Owned Law Firms, National Association of Women Lawyers. Judges join an affinity group and, in some case, form a judicial council as a part of the affinity group. See, e.g., the judicial council of NAPABA, http://www.napaba.org/?page=judicial_com; the judicial council of NHBA, https://hnba.com/judicial-council/. There is an affinity group for women judges. See National Axxociation of Woman Judges, https://www.nawj.org/about-nawj.

[350] Sandra S. Yamate, Affinity Groups in Large Law Firms: What to Consider, Litigation News, The ABA Section of Litigation, https://apps.americanbar.org/litigation/litigationnews/practice_areas/minority-affinity-groups-in-large-firms.html

[351] Lloyd Freeman, Affinity Groups Are the Paths to Inclusion; Diversity, L. Intelligencer (June 2, 2015), http://www.evergreeneditions.com/article/Affinity+Groups+Are+The+Path+To+Inclusion/2020879/0/article.html

[352] Anna Jaffe et al, supra note 271, at 8-9.

[353] https://ialgbtj.org/

[354] https://ialgbtj.org/about/

[355] Being said, I personally do not know a bisexual judge member.

[356] https://ialgbtj.org/about/our-objectives/

future management policies, have an award ceremony of the writing competition for law students. At night, the annual dinner is held. Some members participated in some sessions of Lavender Law as a panelist or speaker, such as "Pathways to the judiciary."[357]

(b) Alliance of Illinois Judges (AIJ)[358]

Alliance of Illinois Judges were founded in 2008 by 8 judges. The members are judges in Cook county whose county seat is Chicago. It started to improve fringe benefits system which was not applied to same-sex partners, by making LGBT judges[359] visible and thereby the needs visible.[360] AIJ is also to provide LGBT judges with a comfortable place.[361] AIJ has similar objectives as IALGBTJ, however, AIJ are more actively engaged in outreaching to law students, such as mentoring, summer fellowship funded by the membership dues, based on the idea that LGBT judges are a role model to LGBT law students. AIJ annually gives an award to a young lawyer who contribute LGBT community. In a week of June, "the pride week," AIJ hold an grand party along with installation of officers where all the judges in Cook county are invited and lot of lawyers and law students participate.[362] Members of AIJ march at Pride Parade in Chicago wearing original designed T-shirts.

(c) Monthly Social in Philadelphia

This is monthly gathering of gay and lesbian state court judges in Philadelphia. It started by Judge Daniel Anders, now the president of IALGBTJ, at around 2009. Members meet for 1 hour monthly at a hotel bar near the courthouse and have an annual dinner in December. Members talk about topics ranging from private matters to problems they are dealing with as a judge. Newly elected judges can receive advice from senior judges. The monthly social is good place to talk in a relaxed and comfortable manner.

b. Other Activities

LGBT judges, like other judges, actively engage in extrajudicial activities. As introduced before,

[357] Lavender law has this session every year. Panelist judges discuss both the appointed and elected processes for judges in different jurisdictions as well as ethical guidelines or standards associated with panelists' paths to becoming judges or retaining their positions. See http://lgbtbar.org/annual/concurrent_sessions/pathways-to-the-judiciary-2/

[358] http://www.theaij.com/

[359] I am not sure if there are bisexual or transgender judges in this group.

[360] Interview With Hon. Mary Colleen Roberts, Past President of AIJ, Judge of Cir. C. of Cook Cty. (December 16, 2016).

[361] Id.

[362] Fortunately, I could attend the party on June 21, 2017. The chief judge of Circuit Court of Cook County officiated the installation of officers. Even if AIJ is not an official part of the court, AIJ are highly appreciated by the court and its members.

some LGBT judges talked in open events such as LGBT Forum[363] by litigation section of American Bar Association, and Annual Judicial Reception in New York City sponsored by a law firm. Topics LGBT judges talk vary from LGBT issues to non-LGBT issues. Some of those are recorded and available online.

(3) Applicability in Japan

a. Creating an Affinity Group

In Japan, there are a lot of affinity groups such as female judges group, junior associate judges group, senior associate judges group and so on. They traditionally have existed but basically, they are not official ones. Creating an affinity group for LGBT judges itself must have no problem.

Even if the number of LGBT judges in Japan are small, an affinity group for LGBT judges is necessary. We should focus on the positive effect that the affinity group makes LGBT judges visible and that the group can influence on the culture or atmosphere in the courts. Providing a safe place for LGBT judges who are still in the closet is one of the important functions. The affinity group can be useful resource for other judges.

I think it better that the group should not set stringent goals and not ask members for too much commitments to the group. Otherwise, members would feel intimidated by the activities of the group and start to be unwilling to join the group. It would be desirable to carefully craft a way in which the group can draw non-openly LGBT judges, LGBT legal apprentices and allies.

At an early stage, it is realistic to form a group across the courts, not within one court because of the small number of members. By using a mailing list, the group would function as a forum of opinion exchange which has a potential for making proposals to the judicial assemblies which has authority of judicial administration. When the leadership of the courts come to consider any initiative on LGBT issues, the group is a go-to place. Members of the group can be core members of that.

b. Range of the Activities

It is important for LGBT judges to be visible to the public by actively engaging extrajudicial activities. The consideration on what a judge can do and talk is overlapped with those I did at

[363] In this event, Judge Walker (retired) of *Perry v. Schwarzenegger* participated in a panel discussion talking about the case.

the section of extrajudicial activities. Here, I consider an issue of whether a judge can participate in Pride Parade because while marching at Pride Parade increase visibility of LGBT judges, some people might associate the parade with political demonstration.

My view is that whether it is permissible or not depends on the message the parade organizer wants to express. Participants in the parade are considered expressing messages as the organizer wants to convey. Therefore, if the theme of the parade includes "aiming at enacting LGBT non-discrimination Act," it might trigger impartiality concern. On the other hand, when the theme is simply to convey a message that LGBT people do exist out there, there should be no controversy. No "well-informed, thoughtful observer"[364] see a message, "I am a gay judge," as "I am actively supporting in order to make LGBT non-discrimination Act enacted." Even when other groups express highly political messages, it does not matter. A variety of groups join the parade. Each has each message. They are expressing the message the organizers convey and their own message, not other groups' messages.

V. Conclusion

The purpose of this paper is to make a case that diversity on the bench is important, and that realizing judicial diversity requires the judiciary and each judge to actively make efforts for it, and to add LGBT perspective to the general consideration by exploring LGBT specific issues. In the former part of this paper, I expounded the value of judicial diversity and the value of LGBT judges, along with refuting several counterarguments against LGBT judges. In the latter part of this paper, I considered the measures for a diverse judiciary. I argued the necessity of creating an comfortable and inclusive judiciary as a workplace and that implicit bias is to be tackled. Furthermore, I stressed that judges should be more visible, stepping out of "nameless and faceless" judges for the purpose to draw diverse talents from the widest possible range of backgrounds to the courts. I also considered what judges can do for getting more visible, adding legal analysis on issues regarding extrajudicial activities.

Some readers might feel that my observation on how to realize judicial diversity is weak, even if the value of diversity on the bench is well-understood. To tell the truth, I take such an impression as success in my paper purpose. Because the most important thing is to understand the value of diversity on the bench. It is the very starting point to do something. With such understanding and consensus on the value, the judiciary and judges can start to have a specific discussion and step forward without hesitation due to logistical matters, and can come up with brilliant ideas that I personally cannot. My hope is, as a member of the judiciary, to contribute any efforts for judicial diversity with cooperation with as many judicial colleagues as possible.

[364] *Perry*, supra note 223, at 1129.