

Comment: Japan’s Same-Sex Marriage Cases (2021-2023) & the Fight for Freedom of Marriage in Japan

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I. INTRODUCTION

The fight to legalize same-sex marriage in Japan reveals fundamental tensions between evolving societal views toward the role of the family and a marriage system founded upon “traditional” 19th century views predicated upon heterosexuality.¹ As Japan’s national legislature responds

¹ As is often the case elsewhere, Japanese “traditions” can often be the product of a series of conscious political choices by political elites (i.e., “invented traditions”) beginning in the early twentieth century, predating major legal reforms in the Meiji Restoration Era and post-World War II. In the context of marriage in Japan, an invented tradition is evident in early 20th Century social lore condoning consensual divorce even though Japan’s divorce rate had been among the world’s highest per capita in the late 1900s. This lore then appears to have been operational in driving down rates through the later decades of the century, contrary to English-language scholarship noting low divorce

to domestic and international pressures to enact measures protecting LGBT individuals,² the political majority remains reluctant to legalize same-sex marriage.³ For example, in 2019, The National Assembly introduced a session bill proposing a Civil Code amendment to allow for same-sex

rates in Japan relative to other Western nations. These invented traditions extend to perceptions of homosexual persons in Japan. *See generally*, Frank Upham, *Same-Sex Marriage in Japan: Prospects for Change*, 15 *ASIAN J. COMPARATIVE L.* 195, 197-202 (2020) [hereinafter *Prospects for Change*] (discussing how stigma against LGBT individuals in Japan is an invented tradition); Frank Upham, *Weak Legal Consciousness as Invented Tradition*, in *Mirror of Modernity: Invented Traditions of Modern Japan* 48-66 (Stephne Vlastos, ed., 1998) (providing a historical analysis of the “invented tradition” of low litigation rates in Japan); HARALD FUESS, *DIVORCE IN JAPAN: FAMILY, GENDER, AND THE STATE 1600-2000* (2004) at 1 (exploring “invented tradition” of divorce in Japan underlying conservative interpretations of marriage codified in modern laws. Fuess argues that “Japan traditionally had a high divorce rate until the turn of the twentieth century. The social function and meaning of divorce in the context of Japan’s traditional high-divorce society and its subsequent evolution is at the heart of ... divorce laws, practices, and perceptions).

² This paper refers to sexual minorities as LGBT individuals to align with the Japanese court opinions. However, the authors recognize more inclusive terms, including the SOGIESC (sexual orientation, gender identity, gender expression, and sexual characteristic), the preferred term in international human rights discourse, as an umbrella term for individuals whose sexual and gender identities place them outside culturally mainstream categories. *e.g.*, *Full Glossary of Terms*, U.N. MIGRATION, <https://www.iom.int/sites/g/files/tmzbd1486/files/documents/IOM-SOGIESC-Glossary-of-Terms.pdf>. *See, e.g.*, Mark A. Levin & Makoto Messersmith, *Presence and Voice: The History and Status Quo of Women Law Professors in Japan*, 23 *ASIAN-PACIFIC L. & POL’Y J.* 176, 210 (discussing data collection and sharing among Japan’s law schools and faculties to improve transparency relating to sexual orientation, gender identity and expression, and sexual characteristics).

³ The Liberal Democratic Party (LDP) is Japan’s major political party, which is rooted in conservative views, opposing same-sex marriage and other measures to recognize discrimination against LGBT individuals. *See e.g.*, Brad Glosserman, *Don’t Forget the Conservative Core that Churns In Japan*, *JAPAN TIMES* (May 10, 2023), <https://www.japantimes.co.jp/opinion/2023/05/10/commentary/world-commentary/conservative-japan/>; Josh Ocampo, *In Japan, An Uncertain Future for L.G.B.T.Q. Rights*, *N.Y. TIMES* (Sep. 12, 2023), <https://www.nytimes.com/2023/09/12/insider/japan-lgbtq-rights.html>. *Contra Growing Number of Municipalities Ban Outing of LGBTQ Individuals*, *JAPAN TIMES* (Oct. 23, 2023), <https://www.japantimes.co.jp/news/2023/10/23/japan/society/lgbtq-outing-ban-municipalities/> (Japan’s national legislature enacted a 2023 law calling for the mutual understanding of LGBT individuals without codifying meaningful anti-discrimination measures. Japan’s municipalities are enacting ordinances to extend protections by prohibiting “outing” to protect the human rights of LGBTQ individuals against abuse of power and harassment); *but see* Tomoko Otake, *Calls Grow to Abolish Japan’s Surgery Requirement for Gender Change*, *JAPAN TIMES* (Oct. 22, 2023), <https://www.japantimes.co.jp/news/2023/10/22/japan/society/transgender-surgery/> (summarizing the campaign to abolish a 2003 special law on gender dysphoria requiring transgender individuals to undergo sterilization surgery to change their official gender status).

marriage, but abandoned it without deliberation.⁴ Instead, the National Assembly enacted legislation in June 2023 calling for a “commitment to understanding LGBTQ individuals.”⁵ The legislation did not enact robust anti-discrimination measures or codify the right to marriage for same-sex couples.⁶ The Judicial Branch analyzed the constitutionality of domestic laws prohibiting same-sex marriage in five of its district courts – Sapporo

⁴ See Fukuoka Chihōsaibansho Minji Dai 6-bu [Fukuoka Dist. Ct.], Case No. (Wa) 2827 of 2021, [hereinafter Fukuoka District Court decisions], *translated in* (Laws for LGBT and Allies Network [LLAN]), <http://llan-japan.org/> (the Fukuoka decision consolidated two cases, including a second referred to as Case No. (Wa) 447 of 2021) (“On June 3, 2019, the opposition parties submitted a bill to the Diet to amend part of the Civil Code in order to develop legal systems necessary to allow same-sex marriage and realize equality in marriage; however, the bill was abandoned without deliberation on October 14, 2021 upon the dissolution of the House of Representatives. Though since then, questions concerning same-sex marriage and the legal protection of same-sex couples have been raised in the Diet committees and plenary sessions, the government’s responses in general have not changed ...”).

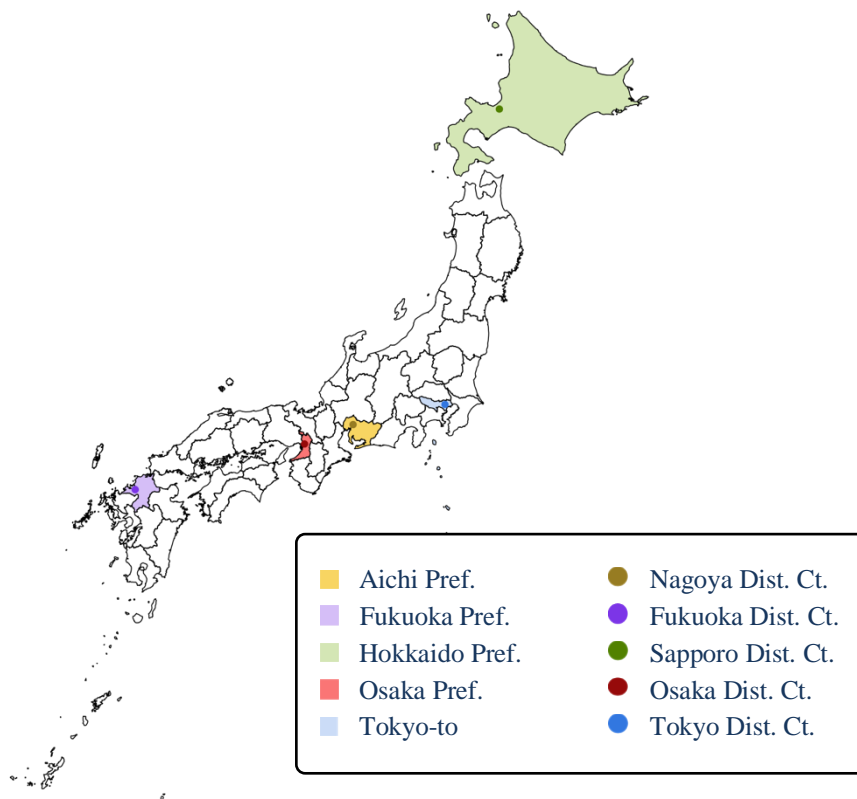
⁵ Seiteki shikō matawa-sei jinin o riyū to suru sabetsu no kaishō-tō no suishin ni kansuru hōritsu-an[性的指向又は性自認を理由とする差別の解消等の推進に関する法律案][Proposed Act on Promotion of Elimination of Discrimination on the Grounds of Sexual Orientation or Gender Identity], Law no. 190 of 2023, Shūgiin seitei hōritsu (SEITEI HŌRITSU)(House of Representatives: Session Laws), https://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/honbun/houan/g19001057.htm (enacting basic policies and measures aimed at eliminating discrimination on the basis of sexual orientation and gender in Articles 6-19, providing support for these efforts in Articles 20-26, and establishing a Sexual Orientation and Gender Identity Council within the Cabinet Office consisting of no more than thirty members selected by the Prime Minister in Articles 27-30); *see also The Path to Legislation, MARRIAGE FOR ALL JAPAN*, <https://www.marriageforall.jp/en/marriage-equality/why/>; Hajime Funada, *LGBT Understanding Bill*, JAPAN FORUM ON INT’L REL. (Aug. 10, 2023), <https://www.jfir.or.jp/en/commentary/4210/>.

⁶ *Japan’s Parliament Passes Watered-down LGBTQ Understanding Bill*, JAPAN TIMES (June 16, 2023), <https://www.japantimes.co.jp/news/2023/06/16/national/crime-legal/lgbtq-bill-passed/> (tracking the development of the Proposed Act on Promotion of Elimination of Discrimination on the Grounds of Sexual Orientation or Gender Identity in the National Diet resulting in the passage of a bill days prior to the G-7 Summit hosted in Hiroshima as a symbolic, but potentially problematic measure to address discrimination faced by LGBT individuals); ⁶ Seiteki shikō matawa-sei jinin o riyū to suru sabetsu no kaishō-tō no suishin ni kansuru hōritsu-an[性的指向又は性自認を理由とする差別の解消等の推進に関する法律案][Proposed Act on Promotion of Elimination of Discrimination on the Grounds of Sexual Orientation or Gender Identity], Law no. 190 of 2023, Shūgiin seitei hōritsu (SEITEI HŌRITSU)(House of Representatives: Session Laws), https://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/honbun/houan/g19001057.htm (establishing guidelines for non-discrimination measures for regulatory agencies, but falling short of codifying sanctions for violations to deter discriminatory practices. The new law does not address existing discrimination against LGBT individuals on the basis of gender identity or sexual orientation, and is based on the idea that all citizens, regardless of their sexual orientation or gender identity, are to be respected as individuals who equally enjoy basic human rights).

(2021), Osaka (2022), Tōkyō (2022), Nagoya (2023), and Fukuoka (2023).⁷ This comment summarizes the five lower court decisions and offers insight

⁷ English translations are used with the permission of the Lawyers Network for LGBT and Allies (LLAN). Fukuoka District Court decisions, *supra* note 4; Nagoya Chihōsaibansho Minji Dai 8-bu [Nagoya Dist. Ct.], Case No. (Wa) 597 of 2019 [hereinafter Nagoya District Court decision], *translated in* (Laws for LGBT and Allies Network [LLAN]), <http://llan-japan.org/llan17/cont/uploads/2023/07/Nagoya-District-Court-Judgment-on-May-30-2023.pdf> (presided by Judge Osamu Nishimura, Judge Kouhei Fujine, and Judge Masanari Hayakawa); Tōkyō Chihōsaibansho Minji Dai 16-bu [Tokyo Dist. Ct.] Nov. 30, 2022, Case No. (Wa) 3465 of 2019 [hereinafter Tokyo District Court decision], *translated in* (Laws for LGBT and Allies Network [LLAN]), <http://llan-japan.org/llan17/cont/uploads/2022/12/Translation-Tokyo-District-Court-20221130.pdf>; Ōsaka Chihōsaibansho Minji Dai 11-bu [Osaka Dist. Ct.] June 20, 2022, Case No. (Wa) 1258 of 2019, [hereinafter Osaka District Court decision], *translated in* (Laws for LGBT and Allies Network [LLAN]), <http://llan-japan.org/llan17/cont/uploads/2022/08/Osaka-Decision-Translation-final29120911.1-revised.pdf>; Sapporo Chihōsaibansho Minji Dai 2-bu [Sapporo Dist. Ct.] Mar. 17, 2021, Case No. (Wa) 267 of 2021 [hereinafter Sapporo District Court decision], *translated in* (Laws for LGBT and Allies Network [LLAN]), http://llan-japan.org/llan17/cont/uploads/2021/04/Sapporo-District-Court-Marriage-Decision_20210331.pdf.

into forthcoming litigation in the appellate High Courts and the Supreme Court of Japan.⁸



Map of Japan indicating affected jurisdictional prefectures and court locations.⁹

II. JAPAN'S MARRIAGE SYSTEM & MARRIAGE REGISTRATION PROCESS

Couples seeking marriage in Japan must do so according to Japan's marriage system,¹⁰ founded in Article 24 of the Constitution of Japan and supported by national legislation and regulations, as well as municipal

⁸ Plaintiffs Appeal Tokyo Court Ruling on Same-Sex Marriage, Japan Times (Dec. 13, 2022), <https://www.japantimes.co.jp/news/2022/12/13/national/crime-legal/tokyo-same-sex-marriage-ruling-appeal/>.

⁹ Author added color and symbols to indicate prefectures and mark district court locations. *See Japan / MapChart* (illustration), in MAPCHART.NET, (2023), <https://mapcharts.net/japan.html>.

¹⁰ *See generally, Marriage in Japan*, U.S. EMBASSY & CONSULATES IN JAPAN, <https://jp.usembassy.gov/services/marriage/marriage-in-japan/>.

ordinances.¹¹ Legal recognition of marriage is sought by submitting a registration form¹² to the appropriate Japanese municipal government office, or to the Japanese embassy or consulate if residing outside of Japan.¹³ The registration form requires signatures from two witnesses over the age of 18 years old, along with basic information about the couple (such as names, birthdates for age eligibility verification, address for domicile purposes, and the couple's desired surname).¹⁴ Marriage registration involving foreigners must also meet the requirements of the foreign individual's home country.¹⁵

The Japanese municipal government office (or mission abroad) decides on the issuance of a Certificate of Acceptance recognizing and extending legal rights to the married couple.¹⁶ If the requirements are not met, a Certificate of Non-Acceptance is issued.¹⁷

¹¹ See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 24 [hereinafter KENPŌ]; MINPŌ [MINPŌ] [CIV. C.] art. 731-736 (provisions in Japan's Civil Code pertaining to marriage); Koseki-hō [Koseki-hō] [Family Register Act], Law No. 224 of 1947 (provisions in the Family Register Act establishing a system of registering familial relations by blood and marriage with the government for the purposes of legal recognition through property inheritance, family law, etc.). See Japan's municipal ordinances establishing registered partnerships, *infra* note 28.

¹² Marriage registration requires a report form (婚姻届, ko-in todoke). See e.g., *Registrations*, CONSULATE-GENERAL OF JAPAN IN LOS ANGELES, https://www.la.us.emb-japan.go.jp/pdf/m02_04_02b.pdf.

¹³ Japan's shikuchōson (市区町村) system defines municipalities as its smallest form of government, akin to cities, towns, villages, and special wards (e.g., Tokyo ward). Japan's prefectures define the status of its municipalities based on population. The smallest municipality units are villages (村, mura) and towns (町, machi) (population less than 50,000), with cities (市, shi) requiring a population size of more than 50,000. See *Local Autonomy System*, MINISTRY OF INTERNAL AFFS. AND COMMUNIS., <https://www.soumu.go.jp/kouiki/kouiki.html>.

¹⁴ See generally, *Marriage in Japan*, U.S. EMBASSY & CONSULATES IN JAPAN, <https://jp.usembassy.gov/services/marriage/marriage-in-japan/>.

¹⁵ *Id.*

¹⁶ See e.g., Reiko Kato & Etsuko Toyoda, *Marital Surname System in Japan – Fufubessei Issues and Disparate Impact of Civil Code Article 750 and Koseki Law*, 1-3 SOC. SCI. RESEARCH NETWORK (Nov. 16, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4266848; Tamie Bryant, *Marital Dissolution in Japan: Legal Obstacles and Their Impact*, 1 L. & SOC. IN CONTEMPORARY JAPAN: AMERICAN PERSPECTIVES 221, 221-42 (1998); David Chapman, *GENDER AND THE KOSEKI* (2019); HARALD FUESS, *DIVORCE IN JAPAN: FAMILY, GENDER, AND THE STATE 1600-2000* (2004).

¹⁷ For example, the plaintiffs in the cases discussed received a Certificate of Non-Acceptance in response to their application to marry as same-sex couples from the respective municipal government offices. See cases cited *supra* note 7.

A. Historic Events & Legal Protections for Married Couples

Japan's national standards regulating marriage are defined through provisions in Articles 731-737 of the Japanese Civil Code and the Family Registry Act.¹⁸ Under Japanese law, married couples enjoy legal rights and protections preserving their family unit.¹⁹ The legal benefits and duties for married couples are listed below:

The Civil Code confers rights and obligations between husband and wife, such as relatives (Article 725), joint parental authorities (Article 818), the right to inheritance including statutory reserved share of a spouse (Article 890, Article 900, Items 1 to 3 and Article 1042), division of property upon divorce (Article 768), the right of spousal residence (Article 1028), the principle to share the same surname (Article 750), the duty to live together, cooperate and provide assistance to each other (Article 752), the right to rescind contracts between husband and wife (Article 754), property relations between husband and wife (Article 755), the requirements for the perfection of prenuptial property agreements (Article 756), sharing of living expenses (Article 760), joint and several liability for debts incurred for household necessities (Article 761), and ownership of property between husband and wife (Article 762). Marriage also provides official recognition of family relations through the family register system (Article 6 of the Family Registration Act), based on which various rights including benefits such as spousal deductions for income and residence taxes (Article 2, Article 83, Article 83-2 of the Income Tax Act, Article 34 of the Local Tax Act), reduction of inheritance tax (Article 19-2 of the Inheritance Tax Act), status of residence as spouses (Article 2(2) of the Immigration Control and Refugee Recognition Act), granting of survivor's pension (National Pension Act,

¹⁸ MINPŌ [MINPŌ] [CIV. C.] art. 731-736 (provisions in Japan's Civil Code pertaining to marriage); Koseki-hō [Koseki-hō] [Family Register Act], Law No. 224 of 1947 (provisions in the Family Register Act establishing a system of registering familial relations by blood and marriage with the government for the purposes of legal recognition through property inheritance, family law, etc.).

¹⁹ See Sapporo District Court decision, *supra* note 7 at 11 (“[m]arriage is a legal act that, simultaneously and subsequently, confers comprehensive legal benefits tied to the status created by a relationship, namely the creation of a family relationship between the parties to the marriage and their family, public certification of the relationship by means of the family register and legal status comprising a variety of legal rights and obligations based on that status.”).

Article 37; Employees' Pension Insurance Act, Article 59), provision of survivor's benefits under 5 the crime victims aid system (Article 5(1)(i) of the Act on Measures Incidental to Criminal Proceedings for Protecting the Rights and Interests of Crime Victims), protection under the Act on the Prevention of Spousal Violence and the Protection of Victims, and the privilege of refusing to testify in court proceedings (Article 196 of the Code of Civil Procedure; Article 147 of the Code of Criminal Procedure).²⁰

The right to marry under Article 24 of the Constitution is rooted in Japanese law and societal views toward marriage at the time of the 1889 Meiji Constitution,²¹ and later evolved when the 1947 Post-War Constitution²² was adopted.²³ Japanese societal views also influenced the aforementioned district courts' analysis of the existing legal marriage framework's constitutionality.²⁴ Codified in Japan's Civil Code during the

²⁰ See Fukuoka District Court decision, *supra* note 7 at 19-20.

²¹ DAI Nihon TEIKOKU KENPŌ [KENPŌ] (1889) [hereinafter MEIJI CONSTITUTION].

²² KENPŌ, *supra* note 11.

²³ Shigenori Matsui, SEX, SEXUALITY, AND THE CONSTITUTION: ENSHRINING THE RIGHT TO SEXUAL AUTONOMY IN JAPAN at 25-34 (2023) (discussing the functionality of Article 24 in creating government regulations of family matters and other fundamental human rights protecting sexual autonomy); Dale M. Hellegers, WE THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION (2001) (analyzing the historical evolution of the drafters' versions of Article 24); Yūichiro Tsuji, *Article 24: Marriage and Gender Equality in Family Life*, in THE ANNOTATED CONSTITUTION OF JAPAN: A HANDBOOK 115-19 (Colin P.A. Jones, ed., 2023).

²⁴ The trial courts considered national surveys of Japanese citizens' views toward same-sex marriage as evidence of national acceptance of LGBT individuals as socially accepted examples of "non-traditional" families in the community. The trial courts also considered historical perceptions of homosexuality from the early post-war period (around 1945) to around 1980 in the fields of medicine, psychology, and education, and how these evolutions were reflected in amendments to the Civil Code. *See e.g.*, Tokyo District Court decision *supra* note 7 at 2-10 (analyzing perceptions of homosexuality from the Meiji Era to present, considering a shift in perception of homosexuality in Japan around 1981 when "the perception that homosexuality should not be considered a psychiatric problem as long as the individual concerned is leading a normal social life." Similarly, foreign countries outside of Japan around 1973, resulting in an endorsement by the American Psychological Association that "homosexuality on its own did not imply the existence of a disability with respect to the person's judgment, stability, reliability, general social ability or occupational performance"); Osaka District Court decision *supra* note 7 at 3-10 (starting the historical analysis from the Middle Ages to the End of the 19th Century as an indication of criminalization of homosexuality influenced by Christianity in Germany, the U.S., and UK); *see also*, Frank Upham, *Same-Sex Marriage in Japan: Prospects for Change*, 15 ASIAN J. COMPARATIVE L. 195, 197-

Meiji Restoration Era of 1879 were traditional views toward the role of the family giving wide deference to the husband as the patriarchal figure.²⁵ The purpose and role of the family was later reformed through constitutional protections on the basis of sex and the right to marry as stated in Articles 13, 14, and 24 of the 1947 Constitution of Japan.²⁶

Although marriage between individuals of the same sex is not explicitly prohibited under provisions of Japan's Civil Code and the Family Register Act, current legal interpretations on the scope of marriage protections are typically limited to unions between "husband and wife" as

202 (2020); Shigenori Matsui, *SEX, SEXUALITY, AND THE CONSTITUTION: ENSHRINING THE RIGHT TO SEXUAL AUTONOMY IN JAPAN* at 25-34 (2023); TESSA MORRIS-SUZUKI, *RE-INVENTING JAPAN: TIME, SPACE, NATION* 111-39 (1998).

²⁵ See e.g., Sapporo District Court decision, *supra* note 7 at 11 ("When the Meiji Civil Code was enacted, homosexuality was regarded as a kind of mental disorder or congenital disease that must be prohibited, and homosexual persons must be cured into heterosexuality (*Findings of Fact* (2)). In the Meiji Civil Code, although there was no provision prohibiting same-sex marriage, marriage was understood to be between individuals of the opposite sex as a matter of course and thus there was no need to explicitly stipulate against same-sex marriage (*Findings of Fact* (3)(i), (ii)). In the early postwar period, homosexuality was still regarded as a perverted sexual desire, and homosexual persons were seen as mentally deranged (*Findings of Fact* (4)(i)). The same was true in foreign countries (*Findings of Fact* (4)(ii)). When the Constitution entered into force on May 3, 1947, it did not mention same-sex marriage; and although there is no evidence that same-sex marriage was discussed during the amendment of the Civil Code in the same year either, it was understood that same-sex marriage was naturally not allowed (*Findings of Fact* (5)(i) to (iii))."); see also TESSA MORRIS-SUZUKI, *RE-INVENTING JAPAN: TIME, SPACE, NATION* 111-39 (1998).

²⁶ KENPŌ, *supra* note 11 at arts. 13, 14, & 24; see also Hellegers, *supra* note 23 at 589 (2001) (attributing the evolution of gendered language in Article 24 to Beate Sirota Gordon, who was the only woman among the drafters of the 1946 Constitution of Japan); Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U. INT'L L. & POL. 419, 422 & 471-73 (2001) (arguing the Nibutani Dam decision exemplifies the first legal contest in history to consider "the relationship of Japan as a nation-state with an indigenous people living in its territory under Article 13." Levin further stated, "Japan's Article 13 is unique in the world. While other nations' constitutions may explicitly address group rights, and various particular aspects of the rights of individuals, Japan's provision establishing a fundamental notion of *respect for people as individuals* finds no counterpart. The statement appears as the opening sentence to Article 13, which then adds a variation on the Jeffersonian theme of life, liberty, and the pursuit of happiness and stands apart from Article 14's important guarantee of equality."); Chelsea S. Schieder, *The Only Woman in the Room: Beate Sirota Gordon, 1923-2012*, DISSENT (Jan. 15, 2013), <https://www.dissentmagazine.org/blog/the-only-woman-in-the-room-beate-sirota-gordon-1923-2012/>.

defined in Article 21(1) of the Constitution, the Civil Code, and Family Register Act.²⁷

B. “Next Best” Alternative to Marriage: Registered Partnerships

Several municipalities in Japan have created registered partnership systems providing partnership certificates for same-sex couples to publicly declare their relationships.²⁸ In April 2015, Shibuya ward of Tokyo established a registered partnership system through a local ordinance enabling same-sex couples to pledge an oath of partnership and receive an officiated certificate acknowledging their oath.²⁹ In November 2022, 242

²⁷ MINPŌ [MINPŌ] [CIV. C.] art. 731-736; Koseki-hō [Koseki-hō] [Family Register Act], Law No. 224 of 1947 (Part IV, Chapter 2, Section 1 of the Civil Code provides the requirements for marriage and process for becoming effective via notification according to Article 739(1) of the Family Register Act. Similarly, Article 74(1) of the Family Register Act provides that, in light of Article 739(1) of the Civil Code, persons who wish to marry shall notify the surname that the *husband and wife* will use).

²⁸ Japan’s registered partnership system (パートナーシップ証明制度, *pātonāshippu shōmei seido*) serves as a means for same-sex (and opposite-sex) couples to publicly declare their relationships. These local ordinances are particularly beneficial for same-sex couples who are unable to formally register their relationship through Japan’s national marriage system. *See e.g.*, Sapporo City Partnership Oath System, SAPPORO CITY, <https://www.city.sapporo.jp/shimin/danjo/lgbt/seido.html> (describing the requirements and procedure for registering a partnership oath effective for up to ten years); 東京パートナーシップ証明制度, TOKYO METRO. GOV’T HUMAN RTS. DIV., <https://www.soumu.metro.tokyo.lg.jp/10jinken/sesaku/sonchou/partnership.html> (defining the Tokyo Registered Partnership System as an oath and notification process providing sexual minorities with a means to receive support services, such as applying to move into metropolitan housing); Tokyo Partnership Oath System, TOKYO METRO. GOV’T, https://www.soumu.metro.tokyo.lg.jp/10jinken/base/upload/item/guide_en.pdf; Fukuoka Prefecture Partnership Oath System Implementation Guidelines, FUKUOKA PREFECTURE, <https://www.pref.fukuoka.lg.jp/contents/fukuokapartnership.html> (explaining prefectural and municipal services available to registered same-sex partners, including public housing, medical coverage and treatment policies at select medical institutions, tax reduction for automobile registration for people caring for partners with disabilities, welfare, condolence payments for partners who die in a natural disaster, nursery school admission and transportation, among other benefits); Osaka Prefecture Partnership Oath Certification System, OSAKA PREFECTURAL GOV’T, https://www.pref.osaka.lg.jp/jinken/sogi_partnership/index.html (defining the registered partnership application process and providing examples of registered partnership certificates issued); Nagoya City Familyship System, Nagoya City, <https://www.city.nagoya.jp/sportsshimin/page/0000157975.html> (providing partnership oath registration and other required forms).

²⁹ *See, e.g.*, *Shibuya City Partnership Certificate*, SHIBUYA CITY, (July 13, 2023), <https://www.city.shibuya.tokyo.jp.e.mu.hp.transer.com/kusei/shisaku/lgbt/partnership.html>; *see also Shibuya City Partnership Certificate*, Lawyers Network for LGBT and

out of 1,741 municipalities³⁰ established similar systems and are currently adopting measures to recognize registered partnerships of other municipalities.³¹ This system affords same-sex couples an opportunity to publicly declare their relationship and may afford the couple municipal benefits and programs.³² However, registered partnerships do not confer legally binding benefits or duties available to heterosexual married couples through the national marriage system.³³

Japan's national legislature³⁴ (i.e., the National Assembly of Japan, Diet) has not formally recognized same-sex marriage.³⁵ The parliament's

Allies Network (Nov. 14, 2020), <http://lanjapan.org/lgbtinfo/1574>; Evan McKirdy, *Tokyo's Shibuya district takes steps to recognize same-sex partnerships*, CNN (Apr. 1, 2015), <https://www.cnn.com/2015/04/01/asia/11tokyo-shibuya-same-sex-relationships-recognized/index.html>; Meg Murphy, *Tokyo's Setagaya Ward to Begin Legally Recognizing Same-Sex Partnerships*, SORA NEWS 24 (July 31, 2015), <https://soranews24.com/2015/07/31/tokyos-setagaya-ward-to-begin-legally-recognizing-same-sex-partnerships/>; *Shibuya Pioneers with Partnership Certificates for Same-Sex Couples*, NIPPON.COM (Apr. 1, 2015), <https://www.nippon.com/en/behind/100095/>.

³⁰ Japan's municipalities are created through the shikuchōson (市区町村) system, establishing population and other requirements for municipality classifications (i.e., city, ward, town, and village). See 全国の市区町村 人口・面積・人口密度ランキング [Ranking of population, area, and population density of cities, wards, towns and villages nationwide], https://uub.jp/rnk/cktv_j.html.

³¹ See Fukuoka District Court decisions, *supra* note 4 at 13; see also *Tokyo Begins Issuing Certificates Recognizing Same-Sex Couples*, PBS (Nov. 1, 2022), <https://www.pbs.org/newshour/world/tokyo-begins-issuing-certificates-recognizing-same-sex-couples>.

³² Some municipalities recognize registered partnerships for the purposes of housing (e.g., joint rental application) and hospital visitation rights. The Tokyo Metropolitan Government recognizes the Certificate of Acceptance for situations where same-sex couples are seeking recognition for benefits related to work, study, and moving. Tokyo Partnership Oath System, TOKYO METROPOLITAN GOVERNMENT, https://www.soumu.metro.tokyo.lg.jp/10jinken/base/upload/item/guide_en.pdf.

³³ See e.g., Fukuoka District Court decisions, *supra* note 4 at 25 (Japan's registered partnership system does not have legal effect and do not replace the functions of marriage).

³⁴ The National Diet (国会, *Kokkai*, literally the "National Assembly"), consisting of the lower House of Representatives (衆議院, *Shūgiin*) and upper House of Councilors (参議院, *Sangiin*) enact national laws, including the Civil Code and Family Register Act, which codify Japan's national marriage system. See KENPŌ, *supra* note 11 (Chapter IV, The Diet, Articles 41-64, creating the national legislature and defining its scope of duties and powers.).

³⁵ But see MINPŌ [MINPŌ] [Civ. C.] art. 731-736; Koseki-hō [Koseki-hō] [Family Register Act], Law No. 224 of 1947; 性的指向又は性自認を理由とする差別の解消等の推進に関する法律案 [Proposed legislation regarding the promotion of elimination of discrimination based on sexual orientation or gender identity], 衆議院 [House of Representatives, Japan],

recent efforts have even fallen short of passing legislation on non-discrimination for sexual minorities and has instead euphemistically called for deeper understanding of sexual orientation and gender identity.³⁶ This symbolic gesture leaves the inequalities inherent to Japan's marriage system unaddressed and opens the government up to possible litigation by same-sex couples who are denied benefits afforded to heterosexual married couples.

The Japanese same-sex marriage cases being discussed considered trends in foreign jurisdictions concerning the protection of same-sex couples through various legal mechanisms existing separately from marriage systems, including registered partnership systems,³⁷ legal cohabitation,³⁸ PACS,³⁹ and civil union with de facto communal living.⁴⁰

C. Marriage Registration for Same-Sex Couples and Alternatives

Marriage equality is sustainable under an interpretation of Article 24 of the Constitution.⁴¹ Even if there are interpretational questions arising as to Article 24 (1) owing to the textual language referring to marriage as

https://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/honbun/houan/g19001057.html.

³⁶ 性的指向又は性自認を理由とする差別の解消等の推進に関する法律案 [Proposed legislation regarding the promotion of elimination of discrimination based on sexual orientation or gender identity], 衆議院 [House of Representatives, Japan], https://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/honbun/houan/g19001057.html.

³⁷ In 1989, Denmark introduced the world's first registered partnership system followed by Norway in 1993, Sweden in 1994, Iceland in 1996, the Netherlands in 1998, Finland and Germany in 2001, Luxembourg, the United Kingdom, Switzerland and New Zealand in 2004, Austria in 2009, Ireland in 2010 and Malta in 2014." See Nagoya District Court decision, *supra* note 7 at 13-14. A registered partnership system is defined as "a framework to legally protect the relationship between same-sex couples. *Id.*

³⁸ Belgium and Sweden introduced legal cohabitation primarily to confer a legal effect under property law, family law (adoption), and inheritance rights. This remedy is available to same-sex couples, as well as heterosexual couples and (unmarried) siblings. *Id.* at 12-13.

³⁹ France introduced the PACS system to allow two people enter into a contract registered with public authorities in order to establish rights and obligations recognized and enforceable by the French government and other parties. *Id.* at 13.

⁴⁰ Italy enacted the 2016 Regulations on Civil Union between the Same Sexes and Regulations on Communal Living in response to a decision by the Constitutional Court in 2014 limiting marriage to the union of individuals of the opposite sex, while also recognizing the unconstitutional nature of not providing an alternative for same-sex couples to marry. *Id.*

⁴¹ KENPŌ, *supra* note 11.

between “husband” and “wife” (i.e., “both sexes”), Articles 13 and 14 are more important to recognizing fundamental human rights in Japan and should inform the reading of Article 24 not to limit the right to marry on the basis of sexual orientation.⁴² The principles of marriage equality are enshrined in Article 24 as a progressive measure aimed at eliminating undue paternalism in the *ie* (家, household) system by importing western norms in the post-World War II constitutional reform recognizing the equality of sexes.⁴³ The Japanese government has not definitively prohibited same sex marriage⁴⁴ based on a strict textual interpretation of Article 24(1) of the Constitution reference to “husband and wife.”⁴⁵ The previously mentioned

⁴² Article 24 of the Constitution was adopted as a progressive measure aimed at eliminating undue paternalism in Japan’s pre-1946 legal system by importing western norms recognizing the equality of the sexes. Telephone interview with Mark A. Levin, Professor of Law, Univ. Haw. Mānoa William S. Richardson Sch. Law (Nov. 10, 2023) (the drafters of the 1947 Constitution of Japan established fundamental human rights for Japanese citizens to empower them as equal members within a newly formed democracy who were no longer viewed as subjects with limited rights afforded only to the extent recognized by the Emperor. Even if same-sex marriage was not contemplated at the time the drafters of Article 24 discussed the scope of the right to marry, the fundamental principles on non-discrimination enshrined in Articles 13 and 14 must inform the reading of other constitutional provisions regarding human rights guaranteed under the Constitution); see Dale M. Hellegers, *WE THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION* at 589 (2001); Tessa Morris-Suzuki, *RE-INVENTING JAPAN: TIME, SPACE, NATION* at 111-39 (1998).

⁴³ Article 24 of the Constitution was adopted as a progressive measure aimed at eliminating undue paternalism in Japan’s pre-1946 legal system by importing western norms recognizing the equality of the sexes. Telephone interview with Mark A. Levin, Professor of Law, University of Hawai‘i at Mānoa William S. Richardson School of Law (Nov. 10, 2023); see KENPŌ, *supra* note 11. Art. 24(1) (“Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of *husband and wife* as a basis. With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential *equality of the sexes*.”) (emphasis added); see also Dale M. Hellegers, *WE THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION* at 589 (2001); Tessa Morris-Suzuki, *RE-INVENTING JAPAN: TIME, SPACE, NATION* at 111-39 (1998).

⁴⁴ Homosexuality was previously criminalized in Japan. See Furukawa Makoto, *The Changing Nature of Sexuality: The Three Codes Framing Homosexuality in Modern Japan*, 7 U.S.-JAPAN WOMEN’S J. (Angus Lockyer, trans.) 98, 98-127 (1994) (chronicling the development of the sodomy ordinance in the Keikan Code punishing homosexual acts from 1873-1881); Frank Upham, *Same-Sex Marriage in Japan: Prospects for Change*, *supra* note 1.

⁴⁵ Telephone interview with Mark A. Levin, Professor of Law, University of Hawai‘i at Mānoa William S. Richardson School of Law (Nov. 10, 2023); see KENPŌ, *supra* note 11. Art. 24(1) (“Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of *husband and wife* as a basis. With regard to choice of spouse, property rights, inheritance,

registered partnership system offers same-sex couples a way to publicly declare their relationship in the absence of national legislation or a Supreme Court of Japan (SCOJ) interpretation of the Constitution to formally recognize same-sex marriage.⁴⁶

Marriage registration forms submitted by same-sex couples are reviewed according to Articles 731-737 of the Japanese Civil Code and the Family Registry Act, which do not explicitly prohibit marriage between same-sex individuals.⁴⁷ Although the provisions do not limit marriage to persons of the opposite sex, the municipal government staff issued the plaintiffs in the same-sex marriage cases a Certificate of Non-Acceptance.⁴⁸ These refusals to approve same-sex marriage registration applications have been challenged as unconstitutional under Articles 13, 14, and 24 of the Constitution.⁴⁹

III. CONSTITUTIONAL REVIEW OF SAME-SEX MARRIAGE PROHIBITIONS: FIVE TRIAL COURT DECISIONS

The constitutionality of marriage between same-sex individuals was considered by Japanese trial courts in five decisions from 2021-2023.⁵⁰

choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential *equality of the sexes*.”) (emphasis added); *see also* Dale M. Hellegers, WE THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION at 589 (2001); Tessa Morris-Suzuki, RE-INVENTING JAPAN: TIME, SPACE, NATION at 111-39 (1998).

⁴⁶ *See e.g.*, *Tōkyō Partnership Oath System User Guide*, TŌKYŌ METROPOLITAN GOVERNMENT BUREAU OF GENERAL AFFAIRS, https://www.soumu.metro.tokyo.lg.jp/10jinken/base/upload/item/guide_en.pdf (detailing Tōkyō’s registered partnership system); *Shibuya City Partnership Certificate*, SHIBUYA CITY, <https://www.city.shibuya.tokyo.jp.e.mu.hp.transer.com/kusei/shisaku/lgbt/partnership.html>; *Naha Starts System to Certify Same-Sex Marriages*, JAPAN TIMES (July 8, 2016), <https://www.japantimes.co.jp/news/2016/07/08/national/naha-ready-certify-sex-marriages>; *see also* Yasuo Takao, *The Politics of LGBT Policy Adoption: Shibuya Ward’s Same-Sex Partnership Certificates in the Japanese Context*, 90 PAC. AFF. 7, 7-27 (2017).

⁴⁷ The Provisions refer to married couples as “husband” and “wife” but do not provide any explicit prohibition on marriage between same-sex individuals. It is inferred that marriage is only between opposite sexes, but not explicitly stated that same-sex couples are excluded. *See* MINPŌ [MINPŌ] [CIV. C.] art. 731-736 (setting restrictions on marriage on the basis of age, prohibition on bigamy, marriage between close relatives, etc.); Koseki-hō [Koseki-hō] [Family Register Act], Law No. 224 of 1947.

⁴⁸ It is conceivable that a Japanese municipal government staff exercises discretion in reviewing marriage certificate applications and could issue a Certificate of Acceptance to a same-sex couple. However, the universal response to date has been to issue a Certificate of Non-Acceptance, as indicated by the five trial court decisions. *See* MINPŌ [MINPŌ] [CIV. C.] art. 731-736; Koseki-hō [Koseki-hō] [Family Register Act], Law No. 224 of 1947; cases cited *supra* note 7.

⁴⁹ Cases cited *supra* note 7.

⁵⁰ Cases cited *supra* note 7.

These five cases were litigated by lawyers associated with the Freedom of Marriage for All, a Japan-based campaign organization,⁵¹ on behalf of plaintiffs⁵² who were issued certificates of non-acceptance in response to their marriage registration applications.⁵³ The trial court decisions yielded mixed results regarding the constitutionality of existing provisions in the Civil Code and Family Registry Act limiting marriage to individuals of the opposite sex.⁵⁴ The provisions' constitutionality was upheld in one case, deemed unconstitutional in two cases, and determined as in a "state of unconstitutionality"⁵⁵ in two cases.⁵⁶

⁵¹ Cases cited *supra* note 7; see *About Us*, MARRIAGE FOR ALL JAPAN, <https://www.marriageforall.jp/en/aboutus/>.

⁵² See Takeharu Kato, *The Impact of the Landmark Sapporo Ruling on Marriage Equality in Japan*, 1 U.S.-ASIA L. INST. PERSPECTIVES 24 1, 1-3 (2021) ("On Valentine's Day 2019, thirteen same-sex couples across Japan filed lawsuits against the government in four district courts ... claim[ing] the provisions of the Civil Code and Family Registration Law that do not allow same-sex marriages are unconstitutional...").

⁵³ MINPŌ [MINPŌ] [CIV. C.] arts. 731-736 (Japan) (provisions in Japan's Civil Code pertaining to marriage); Koseki-hō [Koseki-hō] [Family Register Act], Law No. 224 of 1947 (provisions in the Family Register Act establishing a system of registering familial relations by blood and marriage with the government for the purposes of legal recognition through property inheritance, family law, etc.).

⁵⁴ Cases cited *supra* note 7.

⁵⁵ In Japan, a "state of unconstitutionality" exists where a law conflicts with a constitutional provision or principle but remains valid. The Japanese courts use various shades of constitutionality to measure the extent of conflict between a law or act with the constitution, including "unconstitutional but valid," indicating a more severe constitutional infraction, albeit not requiring nullification. An "unconstitutional and invalid" refers to the most severe constitutional offenses. See e.g., Takashi Shirouzu, Chiba Univ. L. Sch., University of British Columbia Peter A. Allard School of Law Guest Lecture, Same-Sex Marriage in Japan: Moving Forward or Backward? (Mar. 14, 2023) (referring to the notion of "quasi-unconstitutional" as unique in Japanese legal judgment which symbolizes a warning of the potential for constitutional conflict. Japanese courts rarely issue "quasi-unconstitutional" judgments and have frequently done so in voting rights cases); *Japan Top Court Rules Vote Value Gap in 2022 Upper House Election Constitutional*, NHK (Oct. 17, 2023), https://www3.nhk.or.jp/nhkworld/en/news/20231018_23/ (Japan's High Courts in eight jurisdictions ruling the 2022 election outcomes were in a "state of unconstitutionality" with the Constitution's guarantee of vote equality under Article 15). Saori Yamamoto & Sakura Koyama, *Japan Court: Non-Recognition of Same-Sex Marriage Is "State of Unconstitutionality"*, NHK (Jun. 7, 2023), <https://www3.nhk.or.jp/nhkworld/en/news/backstories/2512/> (summarizing the Fukuoka District Court's same-sex marriage decision as in a "state of unconstitutionality"); Toko Sekiguchi, *Japan's Elections: In Unconstitutional State But Not Unconstitutional*, WALL STREET J. (Nov. 20, 2013), <https://www.wsj.com/articles/BL-JRTB-15504> (discussing the "various shades of constitutionality" the Japanese courts devised to measure constitutional conflicts, including Japan's election law).

⁵⁶ See cases cited *supra* note 7.

Summary of Marriage Equality Litigation in Five District Courts (2021-2023)					
Court	Sapporo ⁵⁷	Osaka ⁵⁸	Tōkyō ⁵⁹	Nagoya ⁶⁰	Fukuoka ⁶¹
Date of Decision	March 17, 2021	June 20, 2022	Nov. 30, 2022	May 30, 2023	June 8, 2023
Art. 13 ⁶²	●	●	-	-	●
Art. 14(1) ⁶³	●	●	●	●	▲
Art. 24(1) ⁶⁴	●	●	●	●	●
Art. 24(2) ⁶⁵	●	●	▲	●	▲
Ranking ⁶⁶	Gold	Tin	Silver	Platinum	Bronze
●	Unconstitutional; governmental action excluding same-sex marriage was unconstitutional under the applicable constitutional provision;				
▲	State of unconstitutionality; the Tokyo District Court acknowledged lack of any legal protection for same-sex marriage conflicts with Article 24(2); Fukuoka District Court held denying same-sex couples the same benefits as opposite-sex couples as a conflict with Article 24(2).				
●	Constitutional; government action did not result in constitutional violation; the Court denied petitioners' claims				

The five trial court decisions provide a glimpse into interpretations of constitutional rights and duties pertaining to same-sex marriage.⁶⁷ As a

⁵⁷ Sapporo District Court decision, *supra* note 7.

⁵⁸ Osaka District Court decision, *supra* note 7.

⁵⁹ Tokyo District Court decision, *supra* note 7.

⁶⁰ Nagoya District Court decision, *supra* note 7.

⁶¹ Fukuoka District Court decision, *supra* note 4.

⁶² KENPŌ, *supra* note 11 (“All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.”).

⁶³ *Id.* at art. 14, para. 1 (“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.”).

⁶⁴ *Id.* at art. 24, para. 1 (“Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.”).

⁶⁵ *Id.* at art. 24, para. 2 (“With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.”).

⁶⁶ Author’s ranking of outcome from the standpoint of supporting marriage equality, ranging from platinum (best), gold (very good), silver (good), bronze (favorable), and tin (not favorable).

⁶⁷ See e.g. sources cited *supra*, note 7.

civil law jurisdiction, Japan does not recognize the doctrine of *stare decisis* and views court decisions as mere persuasive authority to guide future interpretations.⁶⁸ The Supreme Court of Japan has not issued an opinion regarding the constitutionality of same-sex marriage prohibition under the Civil Code and Family Register Act, nor has it affirmed the constitutionality of same-sex marriage.⁶⁹ Thus, the status of same-sex marriage under Japan's marriage system remains uncertain without definitive interpretation by the Supreme Court of Japan or legislation by the National Assembly codifying same-sex marriage nationwide.

A. Sapporo District Court Issues Landmark First Ruling on Marriage Equality in Japan

The Sapporo District Court was the first trial court to consider the constitutionality of excluding same-sex couples from the Japanese marriage system, five years after municipalities in Japan established the first registered partnership system.⁷⁰ Sapporo District Court Chief Justice Tomoko Takebe and fellow justices Ichita Matsunaga and Yuya Kawano took a risk in hearing Japan's first same-sex marriage case because of the controversial nature of the legal matters concerning sexual minorities and gender in Japanese politics.⁷¹

⁶⁸ See generally Matsui, *supra* note 23.

⁶⁹ See generally Yūichiro Tsuji, *Article 24: Marriage and Gender Equality in Family Life*, in THE ANNOTATED CONSTITUTION OF JAPAN: A HANDBOOK (Colin P.A. Jones, ed.) 115-19 (2023) ("Japan has not recognized same-sex marriage and there are no Supreme Court rulings on the subject. The 2003 law enabling persons to change their legal gender specifically prohibits married persons from doing so, in part to prevent same-sex marriages from arising.").

⁷⁰ Shibuya and Setagaya wards in Tokyo established the first same-sex registered partnership systems in 2015, followed by Naha City in Okinawa Prefecture, Iga City of Mie Prefecture, and Takarazuka City in Hyōgo Prefecture in 2016. See e.g., Euan McKirdy, *Tokyo's Shibuya District Takes Steps to Recognize Same-Sex Partnerships*, CNN (Apr. 1, 2015), <https://www.cnn.com/2015/04/01/asia/japan-shibuya-same-sex-relationships-recognized/index.html> (Osaka was the first governmental entity to recognize and support the LGBT community by pledging to give consideration to LGBT issues and training staff to accommodate LGBT individuals' needs); *Sapporo Becomes 1st Major Japanese City to Recognize LGBT Couples*, KYODO NEWS (Jun. 1, 2017), <https://english.kyodonews.net/news/2017/06/17ccc62a211a-sapporo-becomes-1st-major-japanese-city-to-recognize-lgbt-couples.html>.

⁷¹ The judicial appointment system in Japan rotates judges every few years and incentivizes judges to align their decisions with majority (often conservative) view held within the Judiciary in order to avoid transfers to unpopular rural areas. See J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges so Conservative in Politically Charged Cases?*, 95 AMER. POL. SCI. REV. 331, 331-44 (2001) (characterizing lower court judges as agents of the legislative branch who are appointed by Supreme Court

The plaintiffs argued that “the Civil Code and the Family Register Act, which do not permit marriage between persons of the same sex, is a violation of Article 13, 14, Paragraph 1, and Article 24 of the Constitution, and that failure of the State to take necessary legislative measures is unlawful under Article 1, Paragraph 1 of the State Redress Act.”⁷²

The Sapporo District Court issued its decision on March 17, 2021, holding that failure to allow same-sex couples the legal right to marry violated the equal protections doctrine enshrined in Article 14 of the Constitution.⁷³ The Court reasoned that the existing marriage system was within the legislative branch’s discretion to decide when and how to amend the laws to address differential treatment faced by same-sex couples.⁷⁴

The Sapporo District Court’s ruling can be viewed as a victory, in principle, for marriage equality advocates in Japan signaling the possibility for other trial courts to consider challenges from same-sex couples whose marriage registrations were denied.⁷⁵ However, the Sapporo District Court

justices who are directly appointed by the National Diet dominated by the Liberal Democratic Party. Lower court judges are penalized for taking cases and issuing opinions disadvantageous to the LDP. Thus, the Sapporo District Court’s decision to hear the first same-sex marriage case despite LDP opposition to same-sex marriage is notable); *see also* Muraoka Keiichi, *Independence on the Bench: Political and Bureaucratic Constraints on the Japanese Judiciary*, NIPPON.COM (Jun. 22, 2020), <https://www.nippon.com/en/in-depth/a06803/>. *See generally* *The Japanese Judicial System*, JAPAN FED’N OF BAR ASS’NS, https://www.nichibenren.or.jp/en/about/judicial_system/judicial_system.html.

⁷² *See* Sapporo District Court decision, *supra* note 7 at 1.

⁷³ Sapporo District Court decision, *supra* note 7 at 12-19); *see also* Colin P.A. Jones, Article 14: Equal Protection of the Law, *in* THE ANNOTATED CONSTITUTION OF JAPAN: A HANDBOOK (Colin P.A. Jones, ed.) 63, 63-70 (2023).

⁷⁴ *See* Sapporo District Court decision, *supra* note 7 at 18 (“the specific system for same-sex marriage cannot be derived from the interpretation of [Articles 14(1) and 24 of] the Constitution. Therefore, we must wait for the discretionary judgment of the legislature.”); *see also* Colin P.A. Jones, Article 14: Equal Protection of the Law, *in* THE ANNOTATED CONSTITUTION OF JAPAN: A HANDBOOK (Colin P.A. Jones, ed.) 63, 63-70 (2023) ([E]quality in the 1946 Constitution is referenced in Article 14(1) in connection with spousal equality in Article 24(1) and the principle of gender equality in Article 24(2).”).

⁷⁵ *See* Ben Dooley, *Japan’s Support for Gay Marriage Is Soaring. But Can It Become Law?*, N.Y. TIMES (Nov. 27, 2019), <https://www.nytimes.com/2019/11/27/world/asia/japan-gay-marriage.html>.

rejected the plaintiffs' claims for compensation under the State Redress Act,⁷⁶ which was appealed and currently under review.⁷⁷

1. Whether Provisions Violate Articles 13 & 24 of the Constitution

The Sapporo District Court first considered whether the same-sex marriage provisions violate Articles 13 and 24 of the Constitution and concluded that marriage protections were not intended to include same-sex couples based on textual interpretations and legislative history pertaining to marriage in the Meiji Civil Code.⁷⁸ The Sapporo District Court held that "Articles 13 and 24 of the Constitution should not be interpreted as guaranteeing the right to same-sex marriage or the right to a specific system pertaining to same-sex marriage,"⁷⁹ granting the National Parliament "broad discretion in determining marriage and family matters in relation to same-sex couples."⁸⁰

Article 13 of the Constitution is generally understood as creating rights for individuals who were previously viewed as subjects of the Emperor with only rights afforded to them by the supreme monarch.⁸¹ Article 13 of the Constitution states "[a]ll of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs."⁸²

⁷⁶ See Frank Upham, *Same-Sex Marriage in Japan: Prospects for Change*, 15 ASIAN J. OF COMPARATIVE L. 195, 216-17 (2020) ("Tort claims against the government must be brought under the State Redress Act").

⁷⁷ Sapporo District Court decision, *supra* note 7 at 19-21; *see also* Kato, *supra* note 52 (summarizing the perspectives of the plaintiffs' lead attorney regarding the Sapporo District Court ruling).

⁷⁸ Sapporo District Court decision, *supra* note 7 at 10-12.

⁷⁹ *Id.* at 12.

⁸⁰ *Id.*

⁸¹ See KENPŌ *supra* note 11 ("Article 13. All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs."); *see generally* Tōru Enoki & Mark Levin, *Article 13: Respect for Individuals and the Right to the Pursuit of Happiness*, in THE ANNOTATED CONSTITUTION OF JAPAN: A HANDBOOK (Colin P.A. Jones, ed.) 57-63 (2023) ("The Meiji Constitution had no provision comparable to Article 13. The Meiji Constitution adopted German *Rechtsstaat* principles from the Prussian constitution of 1850, which allowed for a highly qualified notion of individual rights. Moreover, rights and freedoms did not inherently belong to individuals, but were granted to Japanese citizens by the State as subjects of the emperor who was sovereign. The emperor, as sovereign, sat above this structure with unlimited authority to rule the Japanese nation.").

⁸² See KENPŌ *supra* note 11 at art. 13; *see generally* Enoki & Levin, *supra* note 81, at 57-63 (specific rights derived from the right to the pursuit of happiness include the right to privacy, the environment, to sunshine, to tranquility, to a view, to beach access,

The Japanese marriage system is founded upon views toward the role of family in society enshrined in provisions in the Civil Code and Family Register Act initially enacted during the Meiji Restoration Era of 1868-1912, which were amended during the postwar occupation by the U.S. Allied Forces from 1945-52.⁸³ The Sapporo District Court analyzed legislative history in the Meiji Civil Code to determine whether national laws pertaining to marriage were intended to only legitimize opposite-sex couples, even without explicit prohibition of same-sex marriages.⁸⁴ The Sapporo court reasoned that “[w]hen the Meiji Civil Code was enacted, homosexuality was regarded as a kind of mental disorder or congenital disease that must be prohibited, and homosexual persons must be cured into heterosexuality.”⁸⁵ The Sapporo court further stated, “although there was no provision prohibiting same-sex marriage, marriage was understood to be between individuals of the opposite sex as a matter of course and thus there was no need to explicitly stipulate against same-sex marriage.”⁸⁶

The Sapporo District Court also considered Japanese societal views and legislative history to determine whether Meiji Restoration Era views changed regarding homosexuality and the exclusion of same-sex couples from the marriage system.⁸⁷ During the early postwar period of the mid-1940s, homosexuality was regarded as a “perverted sexual desire, and homosexual persons were seen as mentally deranged [in Japan and foreign countries].”⁸⁸ Therefore, the postwar Constitution enacted on May 3, 1946 did not mention same-sex marriage, and there is no legislative history

to be free from tobacco exposure, to health, to information, to access, to peaceful existence, and to self-determination).

⁸³ MEIJI CONSTITUTION, *supra* note 21; KENPŌ, *supra* note 11; *see generally* KOSEKI SHŌICHI, THE BIRTH OF JAPAN’S POSTWAR CONSTITUTION (1989).

⁸⁴ Sapporo District Court decision, *supra* note 7 at 10-12.

⁸⁵ *Id.* at 11.

⁸⁶ *Id.*

⁸⁷ Sapporo District Court decision, *supra* note 7 at 10-12 (“Matters relating to marriage and family require a comprehensive determination based on various social factors, including national tradition and public sentiment, and consideration of the overall principles that govern marital and parent-child relationships of the relevant era.”); *but see* discussion of Japan’s invented traditions regarding family and marriage, *supra* note 1.

⁸⁸ *See* Sapporo District Court decision, *supra* note 7 at 11. Homosexual relationships were an integral part of Japanese elite society in pre-modern society, exemplified by samurai’s relationships with younger males as a philosophical representation of duty and loyalty. *See e.g.*, Furukawa Makoto, *The Changing Nature of Sexuality: The Three Codes Framing Homosexuality in Modern Japan*, 7 U.S.-JAPAN WOMEN’S J. (Angus Lockyer, trans.) 98, 99-100 (1994) (chronicling the history of male homosexuality as a recognized practice in Japanese society through samurai and younger men as defined in the Nanshoku Code until the Edo period before it was later criminalized in the Sodomy Ordinance (*Keikan Code*) in 1873); *but see* Makoto & Lockyer, *supra* note 44 at 100.

documenting discussions to add same-sex marriage protections in the Civil Code through post-war amendments.⁸⁹ The Sapporo District Court held that “it is reasonable to construe the term ‘marriage’ in Article 24, Paragraph 1 to mean opposite-sex marriage and the freedom to marry as extending to opposite-sex marriage only.”⁹⁰ Accordingly, Provisions that do not recognize same-sex marriage do not violate Article 24, Paragraphs 1 and 2 of the Constitution.⁹¹

The Sapporo District Court further stated:

Article 739, Paragraph 1 of the Civil Code provides that marriage shall be effective upon notification pursuant to the Family Register Act and Article 74, Item 1 of the Family Register Act provides that persons who intend to marry shall provide notification of the married surname of the husband and wife. In this manner, the provisions of the Civil Code and the Family Register Act concerning the marriage system, as a whole, only allow marriage between individuals of the opposite sex (“opposite-sex marriage”), and no provision therein allows marriage between individuals of the same sex (“same-sex marriage”). Thus, the relevant provisions of the Civil Code and the Family Register Act concerning marriage (collectively, the “Provisions”) stipulate that only individuals of the opposite sex may marry.⁹² Accordingly, the Sapporo court considered whether the Provisions are in violation of Articles 13, 14(1), and 24 of the Constitution.⁹³

The Sapporo District Court concluded that “Article 24 does not guarantee any right to seek a particular system concerning marriage and

⁸⁹ See Sapporo District Court decision, *supra* note 7 at 11; KENPŌ, *supra* note 11 (“Article 24. Marriage shall be based only on the mutual consent of *both sexes* and it shall be maintained through mutual cooperation with the equal rights of *husband and wife* as a basis.”). *But see* Makoto & Lockyer, *supra* note 44 at 114-16 (interpreting the *Hentai Seiyoku* Code during the Meiji period as a response to patronizing geisha in red-light districts as and female homosexual relationships as social problems resulting in policies and other countermeasures punishing homosexual acts in the pre-war period).

⁹⁰ See Sapporo District Court decision, *supra* note 7 at 11.

⁹¹ *Id.*

⁹² See Sapporo District Court decision, *supra* note 7 at 2; MINPŌ [MINPŌ] [Civ. C.] art. 750-762 (provisions in Japan’s Civil Code pertaining to the legal effect of marriage referencing parties to marriage as “Husband and Wife”); Koseki-hō [Koseki-hō] [Family Register Act], Law No. 224 of 1947 (various provisions in the Family Register Act referring to married couples as consisting of “husband and wife,” such as Articles 6, 13, 14, 16, 74).

⁹³ See Sapporo District Court decision, *supra* note 7 at 2.

family.”⁹⁴ Furthermore, the Sapporo District Court concluded that “Article 13 of the Constitution ... does not guarantee any right to seek a specific system for same-sex marriage and the families created from such unions.”⁹⁵

Substantively ... marriage is a legal act that, simultaneously and subsequently, confers various legal effects tied to the status created by a relationship; namely, the creation of a family relationship between the parties to the marriage and their family, public certification of the relationship by means of the family register and legal status comprising a variety of legal rights and obligations based on that status. Based on the Provisions, we believe that it may be necessary to consider creating family relationships or legal statuses for same-sex marriage that differ from those for opposite-sex marriage, such as the provisions of the Civil Code that assume reproduction (Article 733 and seq.) and those concerning biological children (Article 772 and seq.). It is difficult to directly derive a system of same-sex marriage solely through the interpretation of Article 13 of the Constitution.⁹⁶

The Sapporo District Court held that the Provisions’ failure to recognize same-sex marriage does not violate Article 13 of the Constitution, and thus, did not require the National Parliament to amend the Provisions to include same-sex marriages solely on this basis.⁹⁷

2. Whether the Provisions Violate the Equal Protections Doctrine on the Basis of Sexual Orientation in Article 14(1) of the Constitution

The Sapporo District Court stated, “Article 14, Paragraph 1 of the Constitution sets forth the principle of equality under the law, and this provision should be interpreted to prohibit discriminatory treatment under the law unless there are reasonable grounds based on the nature of the matter.”⁹⁸ The Sapporo District Court conducted a two-part analysis to confirm if differential treatment on the basis of sexual orientation resulted from existing laws regulating marriage, and if so, whether reasonable grounds exist to legitimize the legislature’s inaction in amending these exclusionary provisions.⁹⁹

⁹⁴ *Id.* at 11.

⁹⁵ *Id.*

⁹⁶ *Id.* at 11-12.

⁹⁷ *Id.* at 12.

⁹⁸ See Sapporo District Court decision, *supra* note 7 at 12.

⁹⁹ *Id.*

First, the Sapporo District Court concluded there is differential treatment between heterosexual persons and homosexual persons based on access to legal benefits conferred from the marriage system.¹⁰⁰ The lack of choice of sexual orientation and societal views in Japan toward homosexuality was at the crux of the analysis of whether differential treatment existed.¹⁰¹

Notably, the Sapporo District Court classified sexual orientation as a personal characteristic equivalent to sex and race, based on current views toward homosexuality as an inherent quality that cannot be chosen by one's own will or changed by medical treatment.¹⁰² The Sapporo court broadened its interpretation of Article 14 of the Constitution to include "sexual orientation" where the text only references "sex" and "social status."¹⁰³

The Sapporo District Court rejected the defendant's argument that "since even homosexual persons can marry a person of the opposite sex, there is no differential treatment by sexual orientation," reasoning that although a homosexual person has the legal right to marry an individual of the opposite sex, this kind of marriage does not embody the fundamental essence of marriage and would cast doubts on whether this kind of marriage is valid.¹⁰⁴ This heteronormative argument raised by the defendant would ultimately be raised in future trials with different outcomes.¹⁰⁵ The court's position is summarized in the following excerpt:

¹⁰⁰ *Id.* at 12-13.

¹⁰¹ *Id.* ("The Provisions provide only for opposite-sex marriage. Heterosexual couples can choose either to marry and avail themselves of the Legal Benefits of Marriage, or not to marry and not receive the Legal Benefits of Marriage. But same-sex couples cannot marry even if they want to, and they cannot avail themselves of the Legal Benefits of Marriage. As such, there is differential treatment between heterosexual persons and homosexual persons in this respect.").

¹⁰² *Id.* at 13-14 ("Homosexuality is not currently regarded as a mental disorder. Although the causes of sexual orientation have not been discovered, it is possible to conclude that it is established knowledge that sexual orientation cannot be chosen at one's own will or changed at one's own will or by medical treatment. As such, it can be said that sexual orientation is a kind of personal characteristic which is determined irrespective of one's own will and is equivalent to sex and race.").

¹⁰³ Sapporo District Court decision, *supra* note 7 at 13-14. Similarly, the Hawaii Supreme Court held in its landmark ruling in *Baehr v. Lewin* that sex-based discrimination extends to actions targeting or disparately impacting sexual minorities. 852 P. 2d 44 (Haw. 1993) (holding that discrimination against sexual minorities is considered sex-based discrimination. The Hawaii Supreme Court held that the Hawaii Revised Statutes § 572-1, on its face, discriminates based on sex against the same-sex couples seeking to exercise their civil right of marriage, because the state law regulates access to marital status, thereby implicating the equal protection clause of article I, section 5 of the Hawaii Constitution).

¹⁰⁴ See Sapporo District Court decision, *supra* note 7 at 13.

¹⁰⁵

It can be said that enjoying the Legal Benefits of Marriage is an important legal interest for heterosexual persons, since Article 24 of the Constitution protects marriage as a system to realize such legal interest. Considering that the only difference between heterosexual and homosexual persons is their sexual orientation and sexual orientation cannot be chosen or changed at one's own will, it should be construed that there is no basis for differentiating between heterosexual and homosexual persons with respect to the value of their interest to enjoy the Legal Benefits of Marriage. Both heterosexual and homosexual persons must be able to equally enjoy such legal interest. Accordingly, the Differential Treatment can be regarded as distinguishing between heterosexual and homosexual persons in terms of the interest to enjoy the Legal Benefits of Marriage, which is an important interest that should be equally enjoyed irrespective of whether one is heterosexual or homosexual.¹⁰⁶

The Sapporo District Court concluded differential treatment exists because same-sex couples do not have access to the legal benefits available to married couples¹⁰⁷ since same-sex marriage is excluded from Japan's marriage system.¹⁰⁸ However, the National Parliament is not obligated to amend these provisions under Articles 13 and 24 of the Constitution to the extent that the differential treatment has a reasonable basis and is within the scope of its legislative discretion.¹⁰⁹

Next, the Sapporo District Court analyzed whether a reasonable basis existed for the current marriage system, which would legitimize the differential treatment homosexual persons face under the exclusionary

¹⁰⁶ *Id.* at 14.

¹⁰⁷ *Id.* at 19 (“The Provisions provide the institution of marriage to heterosexual persons, but fail to offer to homosexual persons any legal means to enjoy, even partially, the Legal Benefits of Marriage. Based on the foregoing, we must conclude that, even accepting its broad legislative discretion, the legislature has exceeded its discretion. The Differential Treatment, to that extent, must be considered a discriminatory treatment that lacks any reasonable basis.”).

¹⁰⁸ *Id.* at 13 (“The Provisions provide only for opposite-sex marriage. Heterosexual couples can choose either to marry and avail themselves for the Legal Benefits of Marriage, or not to marry and not receive the Legal Benefits of Marriage. But same-sex couples cannot marry even if they want to, and they cannot avail themselves of the Legal Benefits of Marriage. As such, there is differential treatment between heterosexual persons and homosexual persons in this respect.”).

¹⁰⁹ *Id.*

provisions limiting marriage to “husband and wife.”¹¹⁰ The Sapporo District Court concluded that preventing same-sex marriage based on homosexuality as a mental disorder was not accepted as a reasonable or truly compelling public welfare interest.¹¹¹ The Court concluded there is “no longer any scientific or medical basis for denying same-sex marriage based on belief that homosexuality is a mental disorder” according to advances in the early 1990s “when it became established knowledge in Japan and internationally that homosexuality is not a mental disorder.”¹¹² Furthermore, the Court recognized homosexuality as an inherent personal trait and not a choice that can be changed by the individual.¹¹³ Thus, the Court reasoned “the only difference between heterosexual persons and homosexual persons is their sexual orientation, which cannot be chosen or changed by one’s own will.”¹¹⁴ In light of this, there should be no difference in legal benefits that persons of any sexual orientation can enjoy.¹¹⁵

Additionally, limiting marriage rights to heterosexual couples for the purposes of bearing children was not recognized as a legitimate reason for excluding same-sex marriage.¹¹⁶ The Court reasoned, “the legal status of married couples does not vary based on whether or not they have children, are capable of bearing children, or have the intention to have children.”¹¹⁷ Legislative history of the Meiji Civil Code also revealed the main purpose of the marriage system was to protect the cohabitating relationship of married couples; not to bear or raise children.¹¹⁸

The Sapporo District Court concluded that the legislature exceeded its discretion in creating a marriage system that results in differential

¹¹⁰ *Id.* (“Although the legislature has broad discretion in determining marriage and family matters in relation to homosexual couples, it is necessary to consider whether the Differential Treatment has a reasonable basis and is within the scope of the above-mentioned legislative discretion of the legislature.”).

¹¹¹ See Sapporo District Court decision, *supra* note 7 at 15.

¹¹² *Id.*

¹¹³ *Id.* 7 at 14 (“...sexual orientation cannot be chosen or changed at one’s own will...”).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ The Sapporo District Court recognized the growing importance of marriage for purposes other than having children in recent years. *Id.* at 15 (“the legal status of married couples does not vary based on whether or not they have children, are capable of bearing children, or have the intention to have children. It should be left to the decision of an individual whether to bear and raise children, and the couples’ choice of not having children should also be respected.”).

¹¹⁷ See Sapporo District Court decision, *supra* note 7 at 15 (“It should be left to the decision of an individual whether to bear and raise children, and the couples’ choice of not having children should also be respected.”).

¹¹⁸ *Id.*

treatment on the basis of sexual orientation and the system creates discriminatory treatment lacking any reasonable basis.¹¹⁹ The Provisions fail to provide any legal means to homosexual persons to enjoy, even partially, the benefits of marriage.”¹²⁰

The Court ultimately deferred to the legislature to exercise its discretion in creating a system of marriage and family for same-sex couples, which “inevitably will not (and cannot) be exactly the same as the system for marriage and family of heterosexual couples.”¹²¹ The Court further stated that “the specific system for same-sex marriage cannot be derived from the interpretation of the Constitution,” and must be created by the National Parliament fulfilling its duty to provide a separate system granting same-sex couples legal benefits of marriage.¹²² The Sapporo District Court’s decision set precedent for an unconstitutional ruling to ultimately result in no immediate change or nullification to the problematic marriage provisions in the Civil Code and Family Register Act.

B. “Constitutional”: Osaka District Court Upholds Constitutionality of Same-Sex Marriage Prohibition

The Osaka District Court issued the second trial court decision examining the constitutionality of excluding same-sex couples from Japan’s marriage system, reaching a different conclusion from the Sapporo District Court.¹²³ On June 20, 2022, the Osaka District Court issued a 56-page decision upholding the constitutionality of same-sex marriage prohibition.¹²⁴ The Osaka court denied the plaintiffs’ pleas for compensatory relief to remedy differential treatment faced in the marriage registration process.¹²⁵ The plaintiffs alleged the rejection of their marriage registration was a violation of Articles 13, 14(1), and 24 of the Constitution, further arguing the National Assembly failed to codify rights for same-sex

¹¹⁹ *Id.* at 19.

¹²⁰ *Id.*

¹²¹ *Id.* at 18.

¹²² *Id.*

¹²³ See *e.g.*, sources cited *supra*, notes 7; *supra* Sections III.A, III.B.

¹²⁴ See Osaka District Court decision, *supra* note 7.

¹²⁵ “Article 16. Every person shall have the right of peaceful petition for the redress of damage, for the removal of public officials, for the enactment, repeal or amendment of laws, ordinances or regulations and for other matters; nor shall any person be in any way discriminated against for sponsoring such a petition. KENPŌ, *supra* note 11. Article 17. Every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official.” KENPŌ, *supra* note 11; See Osaka District Court decision, *supra* note 7 at 36.

couples to ensure non-discrimination.¹²⁶ The Osaka District Court's opinion upholding the constitutionality of same-sex marriage prohibitions provides insight into how the high courts may limit marriage to heterosexual couples.

1. Japan's Marriage System Exists to Recognize Heterosexual Couples, and Same-Sex Couples Have Sufficient Alternatives Through Legal Loopholes

The Osaka District Court used a textual approach in analyzing allegations that the Japanese marriage system results in differential treatment of same-sex and opposite-sex couples.¹²⁷ The Court relied on textual references to married couples as consisting of individuals of the opposite sex in the Civil Code and Family Registry Act to overlook evidence presented regarding evolving Japanese societal views toward non-traditional couples, and reinforced the heteronormative presumption in the existing marriage system.¹²⁸ The Osaka District Court reasoned that alternatives to marriage through workarounds under local ordinances and the Civil Code (e.g., contracts, wills, etc.) eliminate any potential inequalities same-sex couples experience on their individual freedoms to build close relationships with their partners.¹²⁹

The Osaka District Court recognized the inequalities homosexual persons face because they "do not have the same or a similar system of marriage as ... heterosexual persons in Japan, and consequently, cannot avail themselves of the various legal protections available to heterosexual persons by marriage, in particular including the Benefit of Public Recognition, and other important personal benefits."¹³⁰

The Osaka court stated, "marriage between persons of the opposite sex is a system that has been established historically and traditionally for the rational purpose of protecting the relationship between men and women

¹²⁶ Osaka District Court decision, *supra* note 7 (Issues and Summary of the Parties' Assertions).

¹²⁷ Osaka District Court decision, *supra* note 7 at 23-25.

¹²⁸ "[I]t can be understood that the marriage system in Japan, including the [Civil Code and Family Registry Act], *naturally* assumes the spouse to be of the opposite sex, and therefore this is a requirement for marriage" (emphasis added). Osaka District Court decision, *supra* note 7 at 14. "[M]arriage between persons of the opposite sex is a system that has been established historically [during the Meiji Restoration Era] and traditionally for the rational purpose of protecting the relationship between men and women in which they give birth to and raise children." *Id.* at 25.

¹²⁹ *Id.*

¹³⁰ *Id.*

in which they give birth to and raise children.¹³¹ Thus, they reinforced the idea that the purpose of marriage is for procreation and raising children.¹³²

According to the Osaka District Court's interpretation of Japan's existing legal framework, homosexual persons have access to similar legal protections through the Civil Code as those guaranteed under the marriage system to married heterosexual persons.¹³³ The Osaka court stated, "the freedom of homosexual persons to build close relationships with their desired partners is not limited, and other disadvantages are substantially eliminated or mitigated by the use of other systems under the Civil Code (contracts, wills, etc.)."¹³⁴

Homosexual persons have access to legal actions publicly recognizing their close connection through some local governments.¹³⁵ The Osaka court reasoned, "although [same-sex marriage] does not exist as a legal system, many local governments have begun to establish a Registered Partnership System for homosexual persons, and the [difference in benefits that exist between homosexual and heterosexual persons] are mitigated to a certain extent."¹³⁶ The Osaka court further stated that "it is possible to further mitigate the differences [between homosexual and heterosexual persons] by enacting a system similar to marriage or other individual

¹³¹ *Id.*

¹³² See Osaka District Court decision, *supra* note 7 at 25; cf. Sapporo District Court decision, *supra* note 7 at 15 (recognizing the growing importance of marriage for reasons other than having children).

¹³³ See Osaka District Court decision, *supra* note 7 at 25; cf. Sapporo District Court decision, *supra* note 7 at 10-19 (funding differential treatment exists between same-sex and opposite-sex couples resulting from the marriage system and suggesting the existing alternatives through civil acts are insufficient to eliminating disadvantages).

¹³⁴ Osaka District Court decision, *supra* note 7 at 25.

¹³⁵ See discussion regarding Japan's registered partnership system, *supra* Part II.

¹³⁶ See Osaka District Court decision, *supra* note 7 at 25. It should be noted that registered partnership systems in Japan are not uniform offering the same benefits to the individuals in all locations. Rather, the benefits vary substantially by degree of support and recognition. See e.g., Fukuoka Prefecture Partnership Oath System Implementation Guidelines, FUKUOKA PREFECTURE, <https://www.pref.fukuoka.lg.jp/contents/fukuokapartnership.html> (offering extensive benefits to same-sex registered partners, including public housing, medical coverage and treatment policies at select medical institutions, tax reduction for automobile registration for people caring for partners with disabilities, welfare, condolence payments for partners who die in a natural disaster, nursery school admission and transportation, among other benefits); *contra* 東京パートナーシップ証明制度, TOKYO METRO. GOV'T HUMAN RTS. DIV., <https://www.soumu.metro.tokyo.lg.jp/10jinken/sesaku/sonchou/partnership.html> (listing fewer specific support services for same-sex registered partners than Fukuoka).

legislation even under the current [Civil Code and Family Registry Act] provisions.”¹³⁷

The reluctance by conservative Japanese government officials to extend marriage to same-sex couples is evidenced in the outcome of the Osaka District Court.¹³⁸ The decision upholds the constitutionality of the Provisions limiting marriage to individuals of the opposite sex to preserve the existing legal system regulating marriage and perpetuates “traditional” Japanese values.¹³⁹

The Osaka District Court sidesteps the Article 14 analysis by refraining from characterizing the differences same-sex couples experience as “differential treatment” and further stating disadvantages can be mitigated by legal alternatives in the Civil Code.¹⁴⁰ The Osaka Court’s refusal to acknowledge differential treatment faced by same-sex couples widens the divide between homosexual and heterosexual persons by normalizing the treatment of these individuals as second-class citizens worthy only of limited protections afforded outside of the marriage system.¹⁴¹

2. Government Acted Reasonably by Enforcing Same-Sex Marriage Prohibitions Without Violating Article 14 of the Constitution

The Osaka District Court considered whether the degree of difference in the benefits existing between homosexual and heterosexual persons exceeds the scope of reasonable legislative discretion permitted by Article 14(1) of the Constitution.¹⁴² The Osaka court considered whether the National Assembly acted illegally in creating the Japanese Civil Code and Family Registry Act (“Provisions”), which only provide for marriage

¹³⁷ *Id.*

¹³⁸ See Osaka District Court decision, *supra* note 7 at 25; see also Motoko Rich & Hikari Hida, *The Religious Right’s Hidden Sway as Japan Trails Allies on Gay Rights*, N.Y. TIMES (May 17, 2023), <https://www.nytimes.com/2023/05/17/world/asia/japan-same-sex-marriage.html>; Ernils Larsoon, *Japan’s Religious Right Resists Marriage Equality*, EAST ASIA FORUM (July 13, 2023), <https://www.eastasiaforum.org/2023/07/13/japans-religious-right-resists-marriage-equality/>; Aurelia G. Mulgan, *Japan Mixes Religion and Politics*, EAST ASIA FORUM (Sep. 22, 2022), <https://www.eastasiaforum.org/2022/09/22/japan-mixes-religion-and-politics/>.

¹³⁹ See discussion regarding Japan’s “invented tradition” regarding marriage and homosexuality, *supra* note 1.

¹⁴⁰ Osaka District Court decision, *supra* note 7 at 25 (stating that differences same-sex couples face as a result of their ineligibility to get married may be mitigated through using other legal mechanisms in the Civil Code (contracts, wills, etc.) or enacting a system similar to marriage); see Ramseyer & Rasmusen, *supra* note 71.

¹⁴¹ *Id.*

¹⁴² Osaka District Court decision, *supra* note 7 at 25.

between the opposite sexes, and do not explicitly refer to marriage between homosexual persons.¹⁴³

The Osaka District Court acknowledged the inherent conflict between the marriage system and respect for one's individual dignity regardless of their sex and sexuality.¹⁴⁴ The Court stated, "a person's access to Japan's marriage system is fundamental to their dignity as an individual. However, the current marriage system is limited to marriage between persons of the opposite sex, and therefore, excludes persons on the basis of sexual orientation, which cannot be changed by one's will or effort."¹⁴⁵ Despite this acknowledgement, the Osaka court was reluctant to declare the National Assembly acted unconstitutionally in failing to amend the Civil Code and Family Register Act to allow same-sex marriage.

The Osaka District Court's analysis of Article 14 confirms its deference to the legislative branch to enact national laws to define the scope of same-sex equality under the law and prohibit discrimination.¹⁴⁶ The Osaka court interpreted Article 14(1) of the Constitution as providing equality under the law "by prohibiting discriminatory legal treatment, unless it is based on reasonable grounds in accordance with the nature of the matter."¹⁴⁷ The Osaka court interpreted Article 24(2) of the Constitution as "primarily entrust[ing] the establishment of a specific system concerning marriage and family matters to the reasonable legislative discretion of the Diet (i.e., the National Assembly)," which the Court further interpreted as authorizing the National Assembly to "define the limits of [legislative]

¹⁴³ *Id.* at 23-25.

¹⁴⁴ *Id.* at 17-21.

¹⁴⁵ *Id.* at 24.

¹⁴⁶ *Id.* at 23-25 ("Article 14, Paragraph 1 of the Constitution provides for equality under the law, and this provision should be construed to prohibit discriminatory legal treatment unless it is based on reasonable grounds in accordance with the nature of the matter."). Article 14 of the Constitution functions like the equal protection doctrine of the United States, albeit through codification rather than common law. Sex is enumerated as a protected class, whereas sexuality is not. KENPŌ, *supra* note 26. Article 14(1) states, "[a]ll of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin." *Id.*; U.S. Const. amend. XIV, § 2 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *see also* Matsui, *supra* note 24; Colin P.A. Jones, *Article 14: Equal Protection of the Law*, in *THE ANNOTATED CONSTITUTION OF JAPAN: A HANDBOOK*, (Colin P.A. Jones, ed.) at 65-66 (2023) (explaining that equality is mentioned in the 1947 Constitution of Japan as a general principle in Article 114(1) in connection with spousal equality in Article 24(1) and the principle of gender equality in Article 24(2)).

¹⁴⁷ *See* Osaka District Court decision, *supra* note 7 at 23 (citing various cases); *see also* KENPŌ, *supra* note 11 (codifying Japan's equal protections doctrine in Art. 14 of the Constitution of Japan).

discretion by requiring and providing guidelines that legislation shall be based on the dignity of the individual and the essentially equality of the two sexes.”¹⁴⁸

In essence, the Osaka court’s interpretation upheld the existing marriage system as the National Assembly’s exercise of its rational discretion over a marriage system based on the equality of men and women having equal rights to (heterosexual) marriage.¹⁴⁹ In other words, the National Assembly’s creation of the existing marriage system would only be deemed illegal if the National Assembly did not have rational discretion over legislating this matter.¹⁵⁰ More importantly, the Court’s decision confirmed the reluctance for conservative courts to find differential treatment exists for same-sex couples because these individuals may choose to marry persons of the opposite sex to enjoy the benefits of marriage.¹⁵¹ Instead, the Osaka District Court points to workarounds available through wills, contracts, and adoptions as adequate means for same-sex couples to enjoy similar benefits as married couples,¹⁵² albeit at a mere fraction of the full extent of benefits.¹⁵³

C. Tokyo District Court Rules Exclusionary Provisions Exist in a State of “Unconstitutionality”

The Tokyo District Court concluded the third case reviewing the constitutionality of excluding same-sex marriages under the Japanese marriage system on November 30, 2022, more than a year and a half after the first ruling by the Sapporo District Court.¹⁵⁴ The Tokyo District Court’s “state of unconstitutionality” ruling offered further insights into how courts might analyze the constitutionality of current same-sex marriage prohibitions. The Tokyo court considered similar claims as the aforementioned courts, reviewing 1) the constitutionality of relevant provisions in the Civil Code and the Family Register Act limiting marriage to opposite-sex couples under Articles 14(1) and 24 (1) and (2) of the Constitution; 2) whether the National Assembly fulfilled its obligations to take legislative measures enabling marriage for same-sex couples under

¹⁴⁸ See Osaka District Court decision, *supra* note 7 at 23; see also KENPŌ, *supra* note 11.

¹⁴⁹ See Osaka District Court decision, *supra* note 7 at 23-25.

¹⁵⁰ *Id.* at 24.

¹⁵¹ See *id.* at 23-25.

¹⁵² *Id.* at 23-25.

¹⁵³ See discussion on full list of legal benefits provided to married couples under the Civil Code, *supra* Part II.

¹⁵⁴ See cases cited *supra* note 7.

Article 1.1 of the State Redress Act; and 3) Plaintiffs' request for compensatory damages to remedy the discriminatory treatment experienced as a result of receiving certificates of non-acceptance for their marriage applications.

On November 30, 2022, the Tokyo District Court concluded that the Provisions in the Civil Code and Family Register Act do not violate Articles 14(1) or 24(1) and 24(2) of the Constitution, and therefore, the existing marriage system is constitutional.¹⁵⁵ However, the Tokyo District Court recognized the differential treatment same-sex couples face when participating in the marriage system.

1. State of Unconstitutionality Under Articles 14 or 24?

The Tokyo District Court reached a different conclusion than the earlier Sapporo decision regarding differential treatment based on sexual orientation as inherent to the marriage system.¹⁵⁶ However, the Tokyo court similarly rejected the government's argument without mandating any corrective action to prevent differential treatment for same-sex couples.¹⁵⁷

The Tokyo court also refrained from characterizing the differential treatment as discrimination on the basis of sexual orientation,¹⁵⁸ possibly to avoid triggering a constitutional mandate under Article 14(1) to amend the applicable provisions in the Civil Code and Family Register Act.¹⁵⁹ This reluctance to invalidate existing legislation suggests the judiciary's deference to the legislative branch in enacting national laws reflecting the current social norms regarding the role of family, acceptance of homosexuals, and marriage.¹⁶⁰

¹⁵⁵ See Tokyo District Court decision, *supra* note 7 at 48. In contrast, the Fukuoka District Court concluded the Provisions violate Articles 13, 14(1) and 24 of the Constitution and assessed damages to the government for omissions of the Assembly and of the Minister of Justice in failing to enact legislation recognizing same-sex marriage. See Fukuoka District Court decisions, *supra* note 4 at 42.

¹⁵⁶ See Tokyo District Court decision, *supra* note 7 at 38; see also Sapporo District Court decision, *supra* note 7 at 12-19; Nagoya opinion discussion, *supra* Section III.B.3.

¹⁵⁷ Tokyo District Court decision, *supra* note 7 at 13-15 (holding the Provisions do not violate Article 14, Paragraph 1 of the Constitution).

¹⁵⁸ See *id.* at 38.

¹⁵⁹ Sexual orientation is not enumerated as a protected class of individuals according to Japan's equal protections doctrine. See *supra* note 146.

¹⁶⁰ See Tokyo District Court decision, *supra* note 7 at 41 ("... On the other hand, matters concerning marriage and family should be determined by a comprehensive consideration of the overall norms of the familial relationship in each historical era, taking into account various factors in society, including national traditions and national sentiments"); see e.g., J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges so Conservative in Politically Charged Cases?*, 95 AMER. POL. SCI. REV. 331, 331-44

The Tokyo District Court's reasoning on "differential treatment" is particularly illustrative of the façade of neutrality in its interpretation of the exclusion of same-sex couples from the marriage system.¹⁶¹ The Tokyo court explained,

"[W]hether or not a provision of law provides for differential treatment based on a specific reason should be objectively judged from the purpose, content, and underlying premise of the provision; *it is not appropriate to make such a judgment from the actual or possible consequences arising from the existence of the provision.* The Provisions merely stipulate the marriage between a man and a woman, but do not require either person to have a particular sexual orientation as a requirement for marriage, nor do they prohibit marriage on the grounds that either person has a particular sexual orientation. Therefore, the Provisions do not determine the availability of marriage on the basis of sexual orientation."¹⁶²

The Tokyo court ultimately concluded, "[t]he Provisions uniformly allow all persons to use the marriage system, and do not themselves give rise to formal inequality based on sexual orientation."¹⁶³ The Tokyo court was only able to reach this conclusion by narrowly construing the applicable standard, which would require an explicit purpose of discriminating against same-sex couples on the basis of sexual orientation in order to find differential treatment existed.¹⁶⁴ Furthermore, the Tokyo court's statement that "it is not appropriate to make such a judgment [regarding differential treatment] from the actual or possible consequences arising from the existence of the provision" imagines a reality where the discriminatory impact of the law only exists in theory, and that any real-life implications must be disregarded to refrain from tainting the legal analysis.¹⁶⁵

The Tokyo District Court held that the National Diet fulfilled its mandate under Article 24(1) of the Constitution by enacting legislation creating a marriage system between the opposite sexes on the basis of "the socially accepted idea of marriage ... between those of the opposite sex to give birth to a child, raise the child, and live communally as a family,

(2001); Ronald J. Krotoszynski, *The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression*, 4 WIS. L. REV. 905, 984 (1998).

¹⁶¹ See Tokyo District Court decision, *supra* note 7 at 13-15.

¹⁶² Tokyo District Court decision, *supra* note 7 at 13-14.

¹⁶³ *Id.* at 14.

¹⁶⁴ See Tokyo District Court decision, *supra* note 7.

¹⁶⁵ *Id.*

leading to the next generation.”¹⁶⁶ Although the Tokyo court acknowledged the differential treatment on the basis of sexual orientation, it reasoned there are reasonable grounds for limiting marriage to opposite-sex couples, and in doing so, the legislature did not exceed the scope of its legislative discretion.¹⁶⁷

The possibility of the Supreme Court mandating the National Diet to amend provisions in the Civil Code and Family Register Act to prevent differential treatment based on sexual orientation hinges on the Court’s interpretation of what is within the legislature’s scope of reason in governing a national marriage system.¹⁶⁸

2. Enshrining Sexual Autonomy for Heterosexual Couples Based on Textual Interpretations and Drafters’ Intent (1889-1946)

The Tokyo District Court did not fully endorse traditional values limiting marriage on the basis of sexual orientation as a personal union between a man and a woman, stating that “it is difficult to unilaterally reject such [traditional] values.”¹⁶⁹ This statement indicates the prohibitions on same-sex marriage under the Civil Code and Family Register Act exist in a “state of unconstitutionality” without the court fully adopting Japan’s marriage system as aligning with other constitutional mandates concerning anti-discriminatory protections under Article 14 of the Constitution.¹⁷⁰

¹⁶⁶ See Tokyo District Court decision, *supra* note 7 at 38; see also KENPŌ, *supra* note 11.

¹⁶⁷ See Tokyo District Court decision, *supra* note 7 at 38; see also KENPŌ, *supra* note 11.

¹⁶⁸ Appellate decisions issued by the High Courts and the Supreme Court of Japan may result in “state of unconstitutionality” or “unconstitutional, but valid” rulings, which would acknowledge the inherent conflict of differential treatment of same-sex couples under the marriage system without mandating any changes. SAIKŌ SAIBANSHO [SUP. CT.] OCT. 25, 2023, 2 (LA) 43,993 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 1-36 (Japan), https://www.courts.go.jp/app/files/hanrei_jp/446/092446_hanrei.pdf; Karin Kaneko & Tomoko Otake, *Supreme Court Hands Down Landmark Decision on Transgender Rights*, JAPAN TIMES (Oct. 25, 2023), <https://www.japantimes.co.jp/news/2023/10/25/japan/crime-legal/transgender-supreme-court-ruling/>. The landmark SCOT decision on the transgender sterilization law in 2023 exemplifies how an “unconstitutional, but valid” ruling refers the matter back to the National Assembly to amend the unconstitutional provisions. SAIKŌ SAIBANSHO [SUP. CT.] OCT. 25, 2023, 2 (LA) 43,993 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 1-36 (Japan), https://www.courts.go.jp/app/files/hanrei_jp/446/092446_hanrei.pdf; Karin Kaneko & Tomoko Otake, *Supreme Court Hands Down Landmark Decision on Transgender Rights*, JAPAN TIMES (Oct. 25, 2023), <https://www.japantimes.co.jp/news/2023/10/25/japan/crime-legal/transgender-supreme-court-ruling/>.

¹⁶⁹ See Tokyo District Court decision, *supra* note 7 at 36.

¹⁷⁰ *Id.*

The Tokyo District Court's ruling was based on existing provisions regarding marriage, which are limited to persons of the opposite sex for the primary purpose of facilitating natural procreation. The Tokyo court stated, "it is *natural* to construe that 'marriage' as referred to in [Article 24(1)] refers to heterosexual marriage" because the text refers to "both sexes" and "husband and wife."¹⁷¹ The Tokyo court further stated:

In this regard, even despite the changes in social conditions surrounding homosexual persons and the importance of abolishing discrimination and prejudice against homosexuality, it needs to be considered further and carefully whether there exist social norms or social approval that same-sex couples who are clearly not capable of natural reproduction between themselves, in addition to being granted certain legal protections with respect to their personal union, be treated as being in the same kind of "marriage" as that between individuals of the opposite sex ...¹⁷²

Similarly, the Tokyo District Court echoed these heteronormative assumptions in its denial of the plaintiffs' argument that the differential treatment of same-sex couples evidence discrimination because of gender.

The Plaintiffs also argue that the Provisions [in the Civil Code and Family Register Act] demonstrate a discriminatory treatment based on gender. However, under the Provisions, both men and women can marry a member of the opposite sex, while neither men nor women can marry a member of the same sex, and neither men nor women are treated disadvantageously by reason of sex. Therefore, the Provisions cannot be regarded as discriminating based on sex.¹⁷³

The Tokyo District Court interpreted marriage protections under Article 14 and 24 of the Constitution to guarantee equality under the law based on sex (i.e., not sexual orientation) and to extend the right to marry only to opposite-sex couples based on its historical review of the drafters' intent.¹⁷⁴ The Tokyo court reasoned there was no evidence of discussions of same-sex marriage during deliberations in the Imperial Diet leading up to the enactment of the 1889 Meiji Constitution, nor any domestic or

¹⁷¹ Tokyo District Court decision, *supra* note 7 at 33 (emphasis added); see KENPŌ, *supra* note 11; see generally Shoichi Koseki, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION (1998).

¹⁷² See Tokyo District Court decision, *supra* note 7 at 35-36.

¹⁷³ Tokyo District Court decision, *supra* note 7 at 39.

¹⁷⁴ *Id.* at 33-34.

international laws documenting social norms or social approval supporting same-sex marriage.¹⁷⁵

Although the plaintiffs presented mounting evidence of changing domestic and international societal views supporting same-sex marriage, the Tokyo Court deemed the evidence insufficient to re-interpret Articles 24 of the Constitution to extend to same sex marriage.¹⁷⁶ The Tokyo Court reasoned that “a certain portion of the population ... place[s] great value on legal marriage [and] connect[s] marriage with having children.”¹⁷⁷ Thus, the Court’s analysis of differential treatment of same-sex couples on the basis of sex sidesteps the core issue by avoiding sexual orientation altogether. The Court asserts sexual orientation is not a protected class enumerated under Article 14.¹⁷⁸

3. Government’s Role in Regulating Sexuality and its Chilling Effect on Non-Heteronormative Relationships

The Tokyo District Court’s interpretation of Article 24 of the Constitution confirms that the mere existence of *any* view supporting traditional marriage is sufficient to adhere to outdated societal norms dating back to the eras before substantial progress advancing equality for sexual minorities had taken place domestically and abroad. This approach to construing the accepted societal norms limits the Court to existing legislation enacted by a traditionally conservative legislative branch rooted in political parties’ interests that may not accurately align with societal views.¹⁷⁹

In analyzing Article 24(1) of the Constitution, the Tokyo District Court held that this article “cannot be interpreted to require that legislation regarding marriage must defer to the free and equal decision of the

¹⁷⁵ See Tokyo District Court decision, *supra* note 7 at 33-34; *see also* MEIJI CONSTITUTION, *supra* note 22.

¹⁷⁶ See Tokyo District Court decision, *supra* note 7 at 36.

¹⁷⁷ See Tokyo District Court decision, *supra* note 7 at 35; *see also* MEIJI CONSTITUTION, *supra* note 22.

¹⁷⁸ The Sapporo District Court included sexual orientation as a protected class in its analysis of differential treatment experienced by same-sex couples under Article 14. Sapporo District Court decision, *supra* note 7 at 13; KENPŌ, *supra* note 10 at art. 24. For comparative law purposes, the U.S. courts have interpreted discrimination on the basis of sexual orientation as sex-based discrimination. *But see* Sapporo District Court decision, *supra* note 7 at 13; KENPŌ, *supra* note 11 at art. 24. “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” KENPŌ, *supra* note 11 at art. 24. *See e.g.*, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

¹⁷⁹ *See e.g.*, sources cited *supra* note 138.

individual parties.”¹⁸⁰ Rather, the role of government is to legitimize marriage to further national interests in promoting child-producing relationships,¹⁸¹ thus providing discretion to regulate the sex and sexuality of its citizens by incentivizing traditional heteronormative relationships and excluding all non-conforming relationships.¹⁸² The Tokyo court thus removes the sexual autonomy of non-conforming individuals by removing mutual consent by the parties as the basis for exercising one’s right to marry under Article 24 of the Constitution.¹⁸³ Thus, constitutional protections under Article 24 have no meaning for same-sex couples, in the absence of explicit language in the Provisions codifying same-sex marriage or viable alternatives through registered partnerships and other means.¹⁸⁴

D. “Unconstitutional”: Nagoya District Court Rules Exclusionary Provisions Excluding Same-Sex Couples are Unconstitutional

The Nagoya District Court considered the fourth case pertaining to the constitutionality of provisions excluding same-sex marriage and resulted in the second case concluding the provisions are unconstitutional, along with the earlier decision by the Tokyo District Court.¹⁸⁵ The legal team representing several same-sex couples¹⁸⁶ successfully petitioned the Nagoya District Court to recognize constitutional protections for same-sex couples that conflict with prohibitions under the marriage system.¹⁸⁷ The Nagoya court considered whether provisions under the Civil Code and

¹⁸⁰ See Tokyo District Court decision, *supra* note 7 at 37 (the Tokyo District Court’s ruling is not a general statement, but rather specific to legislation on same-sex marriage).

¹⁸¹ Japan’s constitution provides individuals with inherent rights that may be exercised, albeit to the extent exercising these rights do not conflict with the public welfare. In the context of individuals’ rights to marry, same-sex marriages may be understood as falling outside the scope of protections under Articles 13, 14, and 24 of the Constitution. See KENPŌ *supra*, note 11 at art. 12. “The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.” KENPŌ *supra*, note 11 at art. 12.

¹⁸² See Tokyo District Court decision, *supra* note 7.

¹⁸³ *Id.*

¹⁸⁴ See sources cited *supra* notes 37-40.

¹⁸⁵ See cases cited *supra* notes 59, 60.

¹⁸⁶ See *supra* Section II.A. *About Us*, MARRIAGE FOR ALL JAPAN, <https://www.marriageforall.jp/en/aboutus/>.

¹⁸⁷ Nagoya District Court decision, *supra* note 7.

Family Register Act violate Article 24, Paragraphs 1-2, and Article 14, Paragraph 1 of the Constitution.¹⁸⁸

1. Exclusionary Provisions in the Civil Code and Family Register Act Violate Article 24(2) of the Constitution

The Nagoya District Court held that prohibitions under the Provisions violate Article 24(2) of the Constitution, to the extent that same-sex couples cannot access appropriate benefits protecting their relationship in registration under the national marriage registration system.¹⁸⁹ The Nagoya Court recognized that Article 24(2):

delegates the establishment of a specific system regarding marriage and the family to the reasonable legislative discretion of the Diet ... and at the same time requires, and provides guidance that, such laws must be enacted from the standpoint of individual dignity and the essential equality of sexes, thereby placing a clear limitation on [discrimination against individuals seeking to marry a person of the same sex].¹⁹⁰

Nagoya Petitioners argued that Article 24(1) of the Constitution guarantees the freedom of marriage, (i.e., the freedom to marry only by consent of the two persons who wish to marry), without interference from a third party and that said freedom of marriage assumes the existence of a legal marriage system which provides protection, approval, and public authentication by stipulating legal requirements and effects to intimate perpetual cohabitation.¹⁹¹ The Petitioners argued that such freedom of marriage should be extended to same-sex couples, and the provisions which do not permit same-sex marriage impair their personal dignity.¹⁹² The Petitioners further argued that “[b]ecause such impairment of personal dignity cannot be found reasonable or necessary, the provisions also violate Article 24(2) of the Constitution.”¹⁹³

2. Extending the Scope of Marriage Rights for Same-Sex Couples Under Article 24(1) of the Constitution

The Nagoya District Court examined whether the text of Article 24(1) should limit marriage protections to marriages consisting of husband

¹⁸⁸ *Id.* at 21-42.

¹⁸⁹ *Id.* at 41.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 22.

¹⁹² *Id.*

¹⁹³ *Id.*

and wife.¹⁹⁴ The Nagoya District Court interpreted Article 24(1) of fulfilling the purpose of guaranteeing the freedom of individuals to decide whether to marry, as well as when and to whom based on mutual consent.¹⁹⁵ Since the constitutional text refers to marriage as a union of husband and wife, the Nagoya District Court examined whether the legal marriage system codified in the Civil Code and Family Registry Act must extend to same-sex couples under Article 24(1) of the Constitution.¹⁹⁶

The Nagoya District Court did not find a constitutional violation under Article 24(1), stating that the Japan's national marriage registration system does not need to be expanded to include same-sex couples.¹⁹⁷ Drawing upon examples of foreign countries with separate rules governing same-sex couples through partnership systems, the Nagoya District Court did not find that requiring the national marriage system to establish a system of protections for same-sex couples as the only means necessary to achieve the marriage equality stated in Article 24(1).¹⁹⁸ As an alternative to mandating a comprehensive reform of the national marriage registration system, the Nagoya District Court suggested special rules for same-sex couples incapable of natural reproduction through legislative policy as an acceptable means to preserve constitutional protection.¹⁹⁹

Nagoya District Court's interpretation of Article 24(1) offers a starting point for the lower courts to recognize a constitutional guarantee to marriage regardless of sexuality.²⁰⁰ The Nagoya District Court's recognition of the importance of adapting the marriage registration system to reflect current social factors (i.e., national traditions, public sentiment, other norms governing marital, and parent-child relationships) sets the foundation to examine the legitimacy of same-sex marriage prohibition as an infringement of individuals' rights.²⁰¹

¹⁹⁴ See Nagoya District Court decision, *supra* note 7 at 22-31. "Article 24 (1): Marriage shall be based only on the mutual consent of both sexes, and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis." KENPŌ, *supra* note 11.

¹⁹⁵ See Nagoya District Court decision, *supra* note 7 at 22-23.

¹⁹⁶ *Id.* at 23.

¹⁹⁷ *Id.* at 30.

¹⁹⁸ *Id.* at 29.

¹⁹⁹ *Id.*

²⁰⁰ Japanese courts are not required to follow prior decisions, however, prior decisions may serve as dicta guiding future analyses of similar issues. See generally Matsui, *supra* note 23 at 119-51.

²⁰¹ See Nagoya District Court decision, *supra* note 7 at 25.

3. Equal Protection Analysis Under Article 14 of the Constitution

The Nagoya District Court declared the marriage system unconstitutional for provisions excluding same-sex individuals from enjoying the benefit to marry their chosen partner, which violates the prohibition on sexual orientation discrimination.²⁰² Notably, the Nagoya District Court interpreted Japan's equal protections doctrine under Article 14, Paragraph 1 of the Constitution to prohibit legal discriminatory treatment unless it is on reasonable grounds in accordance with the manner.²⁰³

The Nagoya court's departure from "traditional" heteronormative assumptions about the purpose of marriage is evidenced in their rejection of the defendant's argument that the marriage system provides access to marriage regardless of sexual orientation; everyone has the right to marry persons of the opposite sex.²⁰⁴ In short, the Japanese government argued that everyone enjoys the right to enter into a heterosexual marriage, and equally, everyone is prohibited from marrying a person of the same sex.²⁰⁵

The Nagoya court interpreted Article 14 to prevent differential treatment regardless of whether it results from the legislative intent to explicitly discriminate against a protected class of individuals or through discriminatory application of "neutral" laws.²⁰⁶ The Nagoya District Court held the differential treatment the same-sex couples faced resulted from

²⁰² *Id.* at 21-29 (The Nagoya court considered the 1) changing views towards sexual orientation in Japan, as well as overseas in Europe and the U.S., drawing upon the field of psychology. 2) the evolution of Japan's marriage system and societal norms under the Meiji Civil Code, the enactment of the 1947 Constitution of Japan, and the amendment to the Civil Code in 1947. 3) trends in international organizations concerning the protection of international human rights of sexual minorities under the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social, and Cultural Rights (ICESCR). And 4) trends in foreign jurisdictions concerning the protection of same-sex couples through registered partnership systems, legal cohabitation, PACS, and civil union with de facto communal living); *contra* Osaka District Court decision, *supra* note 7 at 23-25; Tokyo District Court decision, *supra* note 7 at 13-15.

²⁰³ *Id.* at 41 (citing various Supreme Court of Japan cases pertaining to the scope of protections against discriminatory treatment of protected classes of individuals under Article 14(1) of the Constitution).

²⁰⁴ "The Plaintiffs argue that, by allowing the marriage of individuals who wish to marry the opposite sex (heterosexual couples) and disallowing the marriage of individuals who wish to marry the same sex (homosexual couples), the Provisions result in differential treatment of those that wish to marry based on their sexual orientation. The Defendant argues that the Provisions are not intended to create a distinction focusing on sexual orientation per se, but rather is neutral with respect to sexual orientation, and that the differential treatment argued by the Plaintiffs is only a de facto or indirect consequence arising from the application of the Provision." *Id.*

²⁰⁵ *Id.* at 29.

²⁰⁶ Nagoya District Court decision, *supra* note 7 at 41.

discriminatory prohibitions under the Civil Code and Family Register Act, and therefore, the applicable provisions are unconstitutional.²⁰⁷ Furthermore, the Nagoya Court declared the provisions as discriminatory in nature, denying the government's argument that the provisions were inherently neutral.²⁰⁸

The Nagoya Court recognized that marriage is only true as intended if "the marriage is between individuals with compatible sexual orientation."²⁰⁹ Therefore, even if marriage between individuals with incompatible sexual orientation is recognized, in the case of homosexual persons this would be synonymous with the marriage not being recognition (similarly, there would be no meaning if heterosexual persons are only permitted to marry persons of the same sex)...²¹⁰ This conclusion clarifies the importance of compatibility on the basis of sexuality as a fundamental part of marriage within the broader context of the National Diet's obligation to fully support marriage based on sexual compatibility and not merely to facilitate couples with the biological capacity to bear children.²¹¹

E. *"State of Unconstitutionality" Revisited: Fukuoka District Court Ruling of 2023*

The Fukuoka District Court issued the fifth ruling pertaining to same-sex marriage on June 8, 2023.²¹² The Fukuoka District Court found the marriage system exists in a "state of unconstitutionality" with Articles 14(1) and 24(2), as albeit within the National Assembly's reasonable exercise of its legislative discretion to establish a national marriage system.²¹³ In contrast with the Tokyo District Court's ruling, the Fukuoka District Court assessed damages to the government for omissions of the Diet

²⁰⁷ *Id.* at 41-43.

²⁰⁸ *Id.* at 41-42.

²⁰⁹ *Id.* at 42.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See Fukuoka District Court decisions, *supra* note 4; see also LLAN members prepared the English summary and full translation of the Fukuoka District Court decision on marriage equality., LAWYERS NETWORK FOR LGBT & ALLIES (July 11, 2023), <http://llan-japan.org/news/2276> (summarizing the Fukuoka District Court decision).

²¹³ Under Japanese law, a "state of unconstitutionality" ruling indicates a law or governmental action conflicts with a constitutionally protected right, although this violation does not require nullification or amendment. See Fukuoka District Court decisions, *supra* note 4; see generally Sekiguchi, *supra* note 55.

and of the Minister of Justice in failing to enact legislation recognizing same-sex marriage.²¹⁴

1. Legislative History and Textual Analysis of “Marriage” Under Article 24(1) of the Constitution

The Fukuoka District Court considered whether Article 24(1) of the Constitution guarantees the freedom of homosexual persons to marry, and if denying marriage to same-sex couples infringes on their constitutionally protected rights.²¹⁵ The court considered the legislative history of enacting Article 24(1) to determine whether textual references to “both sexes” and “husband and wife” were intended to assume marriage as between a man and a woman.²¹⁶

The Fukuoka Court concluded the drafters of Article 24(1) intended marriage to be between husband and wife (i.e., opposite-sex couples) as a progressive measure replace the patriarchal family unit with one

²¹⁴ Fukuoka District Court decisions, *supra* note 4 at 42 (“In light of the circumstances described above, although it has been clear that the Provisions violate Articles 13, 14(1), and 24 of the Constitution from quite a long time ago, the Diet members have failed to legislate for a long period of time without just cause, and the Minister of Justice failed to do so even though he had a duty to legislate. Therefore, the Defendant is liable for damages under Article 1 of the State Redress Act for damages caused by the omissions of the Diet and of the Minister of Justice in failing to enact legislation recognizing same-sex marriage”); See Tokyo District Court decision, *supra* note 7. Japanese citizens have a right to sue the government in tort under Article 17 of the Constitution and the State Redress Act for damages suffered through an illegal act of a public official. The plaintiffs in all five same-sex marriage cases sued in tort under the State Redress Act seeking damages resulting from the government’s rejection of their marriage applications; NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 17 (“Every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official”); Kokka Baishō Hō [Baishō Hō] [State Redress Act], Act No. 125 of 1947, art. 1 para. 1 (Japan) (“When a public employee who exercises the public authority of the State or of a public entity has, in the course of their duties, unlawfully caused loss or damage to another person intentionally or negligently, the State or public entity assumes the responsibility to compensate therefor”); Frank Upham, *Same-Sex Marriage in Japan: Prospects for Change*, 15 ASIAN J. OF COMPARATIVE L. 195, 217-18 (2020) (citing the State Redress Act implementing Article 17 of the Constitution as the source of law providing Japanese citizens with the right to bring tort claims against the government); Matsui, *supra* note 23.

²¹⁵ See Fukuoka District Court decisions, *supra* note 4 at 20-22.

²¹⁶ See Fukuoka District Court decisions, *supra* note 4; see also Dale M. Hellegers, WE THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION at 589 (2001) (attributing the evolution of gendered language in Article 24 to Beate Sirota Gordon, who was the only woman among the drafters of the 1946 Constitution of Japan); Chelsea S. Schieder, *The Only Woman in the Room: Beate Sirota Gordon, 1923-2012*, DISSENT (Jan. 15, 2013), <https://www.dissentmagazine.org/blog/the-only-woman-in-the-room-beate-sirota-gordon-1923-2012/>.

empowering the role of women in the family, although specific references to “both sexes” were not expressly intended to preclude same-sex couples.²¹⁷ The court further stated that freedom of marriage is an interest that should be respected under the Constitution but cannot be determined solely by the will of individuals seeking to get married.²¹⁸

The Fukuoka District Court indicated the possibility to expand the definition of “marriage” under Article 24(1) to include same-sex marriage as social norms, public awareness, and values change.²¹⁹ The Lawyers Network for LGBT and Allies further explained:

[w]hile the Court acknowledged that social acceptance and awareness of same-sex marriage is evolving — pointing to the legalization of same-sex marriage abroad and the implementation of partnership systems by local governments — it highlighted public opinion polls in Japan which demonstrated conflicting views on same-sex marriage. Because of this opposition, the Court concluded that same-sex marriage has not yet gained social recognition to the same extent as opposite-sex marriage, and that the term “marriage”

²¹⁷ “Even taking the legislative process into consideration ... the main purpose of Article 24 of the Constitution at the time of enactment was to realize freedom of equality in family matters, in particular the improvement of the status of women and protection of the family by abolishing the household system, and same-sex marriage was not discussed. [Furthermore], the lack of any evidence of references to same-sex marriage in the Diet’s deliberations at the time of the subsequent amendment of the Civil Code in 1947, it can be recognized that same-sex marriage was not contemplated at the time of the enactment of Article 24(1) of the Constitution...” Fukuoka District Court decisions, *supra* note 4 at 20-21.

²¹⁸ “[M]arriage is a legal system whereby requirements are prescribed by various laws based on the will of the individuals and rights and obligations arise uniformly when these requirements are met, and not something in which its requirements and effects can be determined solely by the will of the individuals. Similarly, the formation of a family based on marriage is not something for which the requirements and effects can be determined solely by the will of the individuals. The reason why the requirements regarding marriage are set out by law is because it is a *natural* consequence of the fact that marriage itself is a system under which the nation converts rights and obligations to a certain relationship, and a homosexual person’s freedom of marriage and their right of personal autonomy to form a family through marriage cannot go as far as being interpreted to be a constitutional right guaranteed by Article 13 of the Constitution,” (emphasis added). Fukuoka District Court decisions, *supra* note 4 at 23.

²¹⁹ “It is true that social norms, public awareness and values regarding marriage can change, and if, based on these changes in social norms etc., same-sex marriage and heterosexual marriage become no different as a matter of fact and from the perspective of the public’s social acceptance, then there is room to interpret same-sex marriage as being included in “marriage.” Fukuoka District Court decisions, *supra* note 4 at 21.

in Article 24(1) could therefore not yet be interpreted as including same-sex marriage.²²⁰

The Fukuoka District Court held the provisions are constitutional under Article 24(1) because the text specifically refers to “both sexes” and “husband and wife.”²²¹ The legislative history from the postwar amendments to the Civil Code and drafting of the 1947 Constitution further confirm that same-sex marriage was not contemplated as included (or excluded) in Article 24(1) of the Constitution.²²² Public perceptions, awareness, and social conditions have also not changed enough to expand the definition of “marriage” under Article 24(1) to include same-sex marriage.²²³

2. Moral Interest (but no Constitutional Right) for Homosexual Persons to Marry Under Article 13 of the Constitution

The Fukuoka District Court considered whether excluding same-sex marriages from the marriage system violates constitutionally protected rights of personal autonomy to form a family under Article 13 of the Constitution.²²⁴ The Fukuoka District Court held that the Provisions do not violate Article 13 of the Constitution, reasoning that marriage creates legal rights and duties between the married individuals with one another, as well

²²⁰ LLAN members prepared the English summary and full translation of the Fukuoka District Court decision on marriage equality, LAWYERS NETWORK FOR LGBT & ALLIES (July 11, 2023), <http://llan-japan.org/news/2276>.

²²¹ See Fukuoka District Court decisions, *supra* note 4 at 20 (The Fukuoka court did not find that same-sex marriage was contemplated as within the scope of Article 24(1) protections in the text or legislative history. The Fukuoka court using a textual analysis to understand Article 24(1) as guaranteeing equality of both sexes in the context of a woman's (or man's) choice to get married to someone of the opposite sex. The Fukuoka court further considered the legislative history at the time of enactment to find that Article 24(1) was a means to “realize freedom and equality in family matters, in particular the improvement of the status of women and protection of the family by abolishing the household system.”).

²²² See Fukuoka District Court decisions, *supra* note 4 at 20-21 (summarizing the legislative history of enacting the constitutional amendment establishing Article 24(1) that did not contemplate same-sex marriage); see also Dale M. Hellegers, WE THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION at 589 (2001) (attributing the evolution of gendered language in Article 24 to Beate Sirota Gordon, who was the only woman among the drafters of the 1946 Constitution of Japan). See generally Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U. INT'L L. & POL. 419 (2001); Chelsea S. Schieder, *The Only Woman in the Room: Beate Sirota Gordon, 1923-2012*, DISSENT (Jan. 15, 2013), <https://www.dissentmagazine.org/blog/the-only-woman-in-the-room-beate-sirota-gordon-1923-2012/>.

²²³ Fukuoka District Court decisions, *supra* note 4 at 20-22.

²²⁴ Fukuoka District Court decisions, *supra* note 4 at 22-23.

as with an administrative agency.²²⁵ The Court also stated that the choice of marriage partner is a moral interest which should be respected for same-sex couples.²²⁶ However, the Court declined to interpret this interest as a Constitutional right, and thus found that the Provisions do not violate Article 13.”²²⁷

The Fukuoka Court acknowledged the importance of marriage for same-sex couples as a moral interest, stating “the ability to use the marriage system is a matter that affects an individual throughout their lifetime, and given the importance of marriage in the public’s mind, it is recognized that deciding whether to marry and when and with whom to marry at one’s own will is a personal moral interest that *should be respected for homosexual persons as well*”²²⁸ However, the moral interest is not sufficient for same-sex marriage to receive constitutional protections under Article 13 of the Constitution.²²⁹

3. Article 14 Analysis: Whether Differential Treatment of Same-Sex Couples is Within the Legislature’s Reasonable Exercise of Discretion

The Fukuoka District Court considered whether the Provisions cause differential treatment by providing a national marriage system for heterosexual couples, but not for homosexual couples.²³⁰ The Fukuoka court conducted a two-part analysis to determine whether differential treatment existed for same-sex couples under the existing national marriage system, and if so, whether the differential treatment was within the legislature’s reasonable exercise of discretion.²³¹

The Fukuoka District Court did not find differential treatment resulted from the marriage system based on sex, reasoning that “both men and women can marry persons of the opposite sex and cannot marry persons of the same sex.”²³² Sexual orientation (i.e., as a form of sex-based

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ LLAN members prepared the English summary and full translation of the Fukuoka District Court decision on marriage equality, Lawyers Network for LGBT & Allies (July 11, 2023), <http://llan-japan.org/news/2276>; Fukuoka District Court decisions, *supra* note 4 at 22-23.

²²⁸ See Fukuoka District Court decisions, *supra* note 4 at 22-23 (emphasis added).

²²⁹ *Id.*

²³⁰ *Id.* at 23-27.

²³¹ See *supra* Section III.A.1., for further details on the two-part analysis under Article 14(1) of the Constitution; Fukuoka District Court decisions, *supra* note 4 at 23-27.

²³² Fukuoka District Court decisions, *supra* note 4 at 24.

classification) was the basis by which the Fukuoka District Court was able to find differential treatment.²³³ The Fukuoka District Court explained, “since the Provisions do not recognize marriage between persons of the same sex, there is differential treatment in that homosexual persons cannot use the marriage system.”²³⁴ The Fukuoka Court rejected the government’s argument that any differential treatment resulting from the Provisions were only a “de facto or indirect consequence,” not directly arising from sexual orientation.²³⁵

The Fukuoka District Court rejected the government’s argument that disadvantages faced by same-sex couples may be mitigated or avoided through legal alternatives (i.e., contracts, wills, and other procedures governing property division in the event of divorce, inheritance, etc.), albeit facing economic burden in accessing these workarounds.²³⁶ Further, the effect of the registered partnership is non-binding and does not provide the same guarantees as legal benefits conferred to married couples.²³⁷ The Court recognized that legitimizing same-sex couples’ communal life through national certification is important to their social life, and cohabitating alone does not mitigate or remove this disadvantage.²³⁸

Despite the differential treatment faced by same-sex couples, the Fukuoka District Court held the legislature acted within reason to maintain the current marriage system.²³⁹ Similar to prior courts, the Fukuoka Court held differential treatment of same-sex couples was reasonable because the socially accepted view of marriage was still limited to between husband and wife.²⁴⁰ Therefore, the right to marry under Article 24(1) of the Constitution could not expand to include same-sex couples.²⁴¹ Accordingly, the Provisions and differential treatment experienced by same-sex couples do not violate Article 14(1) of the Constitution.²⁴²

²³³ *Id.* at 24-27.

²³⁴ *Id.* at 24.

²³⁵ *Id.*

²³⁶ *Id.* at 25.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 24-27.

²⁴⁰ *Id.*

²⁴¹ *Id.* See KENPŌ, *supra* note 11.

²⁴² *Id.* See KENPŌ, *supra* note 11.

4. Article 24(2) Analysis (State of Unconstitutionality): Expanding “Other Matters Concerning Marriage and Family” and Calling for Equal Respect for Homosexual Persons

The Fukuoka Court finally considered whether the National Diet exceeded its scope of discretion in establishing a national marriage system that excludes same-sex marriage under Article 24(2) of the Constitution.²⁴³ The Fukuoka Court provided two reasons for its state of unconstitutionality ruling through its reading of Article 24(2). However, the Fukuoka Court concluded that the Provisions do not violate Article 24(2) because the formation of the marriage system is within the reasonable discretion of the Diet.²⁴⁴

First, the Fukuoka Court reviewed the legislative history of Article 24(2)’s enactment to use the underlying equity principles to expand the notion of family to include same-sex couples based on diversification within Japanese society.²⁴⁵ The Fukuoka District Court recognized the commitment to equality inherent in Article 24(2), despite textual references to marriage as between “husband” and “wife” to guide its reading of “other matters concerning marriage and family” within the context of homosexual persons seeking to establish a family as a married couple.²⁴⁶

The Fukuoka court stated, “although matters concerning the personal union of same-sex couples are not recognized as freedom of marriage under Article 24(1) of the Constitution, they fall under the category of ‘other matters concerning marriage and family’ under Article 24(2)...since they are questions on how to treat the will to live together with

²⁴³ *Id.* at 27-31. See KENPŌ, *supra* note 11.

²⁴⁴ Fukuoka District Court decisions, *supra* note 4 at 27-31; see also LLAN members prepared the English summary and full translation of the Fukuoka District Court decision on marriage equality, Lawyers Network for LGBT & Allies (July 11, 2023), <http://llan-japan.org/news/2276>.

²⁴⁵ Fukuoka District Court decisions, *supra* note 4 at 27-29 (recognizing that although the socially accepted ideas regarding marriage changed since the creation of the marriage system through the Meiji Civil Code to include couples who get married for reasons other than having children).

²⁴⁶ Same-sex marriage was not contemplated at the time Article 24 was drafted, as stated in prior trial court’s decisions. However, the Fukuoka Court reached a different conclusion through its interpretation of “other matters concerning marriage and family” through the lens of equality and respect for fundamental human rights inherent in the 1947 Constitution. See Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan’s Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U. INT’L L. & POL. 419, 422 & 471-73 (2001) (arguing that Japan’s constitution establishes a fundamental notion of respect for people as individuals under Article 13, which guides the reading of other constitutional provisions concerning individual rights); Fukuoka District Court decisions, *supra* note 4 at 27-31; see also LLAN members prepared the English summary and full translation of the Fukuoka District Court decision on marriage equality, Lawyers Network for LGBT & Allies (July 11, 2023), <http://llan-japan.org/news/2276>.

sincere intention for permanent mental and physical union between same-sex persons.”²⁴⁷ The Fukuoka court cautioned, “even though the concept of ‘family’ is considered to be centered on the whole union of husband and wife and their children, given the process of enactment of Article 24 ..., this does not now have to be so limited when the forms of marriage and family are diversifying, and public awareness of the nature of marriage and family is diversifying accordingly, and the inclusion of same-sex couples in ‘marriage and other matters relating to the family’ is a natural reading of [Article 24(2)].”²⁴⁸

Second, the Fukuoka Court recognized the exclusion of homosexual persons from the marriage system undermines their fundamental human rights, although not to an extent that would result in a constitutional violation.²⁴⁹ The Fukuoka Court read Article 24(2)’s language regarding “dignity of individuals” and “intrinsic equality of both sexes” to mandate that “homosexual persons should be respected the same as heterosexuals.”²⁵⁰ The Fukuoka Court recognized the plaintiffs “suffered serious disadvantages by not being able to use the system of marriage, not having the opportunity to enjoy the rights and benefits brought about by the [marriage] system, and not being legally recognized as a family.”²⁵¹ The Lawyers Network for LGBT & Allies explained, “the [Fukuoka District] Court acknowledged that same-sex couples are significantly disadvantaged by the lack of legal recognition of their relationships, and highlighted that refusing same-sex couples the benefits of the marriage system and the means to legally form a family undermined their individual dignity and put the Provisions in a state of violation of Article 24(2).”²⁵²

²⁴⁷ *Id.*

²⁴⁸ Fukuoka District Court decisions, *supra* note 4 at 27-28.

²⁴⁹ Fukuoka District Court decisions, *supra* note 4 at 28 (“Although the disadvantage of not being able to use the system of marriage does not necessarily violate Article 13 of the Constitution ... it can be said that the above-mentioned personal interests [as being respected as individuals entitled to enjoy the rights and benefits of the marriage system and be legally recognized as a family] are being violated.”).

²⁵⁰ Fukuoka District Court decisions, *supra* note 4 at 28.

²⁵¹ *Id.* at 28.

²⁵² *Id.* (concluding that “[u]nder the provisions, the Plaintiffs have suffered serious disadvantages by not being able to use the system of marriage, not having the opportunity to enjoy the rights and benefits brought about by the system, and not being legally recognized as a family, and such disadvantages cannot be overlooked as an infringement of personal interests in light of the dignity of individuals. Such disadvantage is an unforgivable violation of the dignity of individuals and a violation of their personal interests. In other words, marriage is one of the family units, and as mentioned above, the only system to select and certify a permanent partner in a mental and physical union is the system of marriage under the current law. The fact that same-sex couples do not have access to the system of marriage and cannot benefit from certification means that same-sex couples are not legally recognized as family”).

The Fukuoka District Court's reading of Article 24(2) offers ways for courts to interpret the scope of marriage protections to align with evolving societal views toward family to include same-sex couples and to provide equity between homosexual and heterosexual persons to eliminate serious disadvantages resulting from exclusion of same-sex couples from the marriage system. The Fukuoka court highlighted the registered partnership system as a potential alternative to extending the current marriage system by creating an alternative specifically for same-sex couples.²⁵³

IV. FUTURE PREDICTIONS: SCOJ & HIGH COURT APPEALS

In the absence of a clear standard from the Supreme Court of Japan, the lower courts will continue to inquire into the scope of protections for same-sex couples under Articles 24, 13, and 14 of the Constitution. All five trial court decisions are anticipated to be appealed, with the High Courts potentially issuing opinions as early as Spring 2024.²⁵⁴ Given the ongoing legal battles in various jurisdictions nation-wide, it seems inevitable for this constitutional issue to reach the Supreme Court of Japan by 2025.

The Supreme Court of Japan ("SCOJ") would optimistically interpret Articles 13, 14(1), and 24 of the Constitution to confirm the exclusion of same-sex couples from the right to marry is unconstitutional. If the SCOJ rules that the exclusion of same-sex marriage is unconstitutional and invalid, the National Assembly would be required to amend discriminatory Provisions in the Civil Code and Family Register Act to legalize same-sex marriage.²⁵⁵ If not, and if the Supreme Court decides that it is unconstitutional not to provide same-sex couples with any legal protections or a legal system for becoming a family, then the National

²⁵³ "The Registered Partnership System, which gives almost the same legal status as marriage to same-sex couples and confers legal rights and obligations, including the benefit of certification, on non-marriage partnerships between persons of the same sex, could, depending on its content, be an alternative to the marriage system." Fukuoka District Court decisions, *supra* note 4 at 30-31

²⁵⁴ Marriage for All Japan predicts the earliest Sapporo High Court decision is likely to be issued in the Spring of 2024, and the Osaka High Court and Tokyo District Court decisions are likely to be issued during 2024. However, it is unclear whether the Nagoya High Court and Fukuoka High Court decisions will be issued during 2024. E-mail from Makiko Terahara, Attorney with Freedom for Marriage for All (Oct. 10, 2023, 13:58 HST) (on file with author).

²⁵⁵ Alternatively, the SCOJ may conclude that the Provisions are in a "state of unconstitutionality" or "unconstitutional, but valid" which would not result in immediate nullification of the unconstitutional provisions in the marriage system. *See generally* Matsui, *supra* note 23; Sekiguchi, *supra* note 55; Kaneko & Otake Article 1, *supra* note 168.

Assembly will decide the scope and method for same-sex couples.²⁵⁶ Despite growing domestic and international pressures for Japan to recognize same-sex marriage, the National Assembly may continue to postpone efforts for partnership laws until priorities within the dominant political coalitions change or the judiciary mandates legal reform.²⁵⁷

The SCOJ's constitutional review of the marriage system under Article 13 could be influenced by cases pertaining to LGBT rights, including its landmark case declaring the law requiring transgendered individuals to undergo "gender affirmation" surgery (i.e., sterilization surgery) to legally change their gender in the family registry as unconstitutional.²⁵⁸ The SCOJ's decision mandates the relevant ministries in the executive branch to take the appropriate measures to not enforce the unconstitutional conditions in the 2003 special law and allow transgender individuals to change their gender without requiring sterilization surgery.²⁵⁹ Similarly, the SCOJ may revisit its 2019 decision to uphold the constitutionality of the Gender Identity Disorder law.²⁶⁰ There was a recent

²⁵⁶ Matsui, *supra* note 23; Sekiguchi, *supra* note 55; Kaneko & Otake Article 1, *supra* note 168.

²⁵⁷ See sources cited, *supra* notes 2-3.

²⁵⁸ The authors note the difference between gender affirmation surgery (i.e., surgery intended for a transgender person to appear or feel aligned with their true gender) and sterilization surgery (i.e., surgery removing reproductive organs eliminating the potential for procreation). SAIKŌ SAIBANSHO [SUP. CT.] OCT. 25, 2023, 2 (LA) 43, 993 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 1-36, https://www.courts.go.jp/app/files/hanrei_jp/446/092446_hanrei.pdf (SCOJ's Grand Bench ruling unanimously that surgical requirements for transgender individuals to remove their ovaries or testicles under a 2003 special law as highly invasive and too restrictive as a condition for changing one's gender legally, in violation of an individual's right to pursue happiness guaranteed under Article 13 of the Constitution); Kaneko & Otake Article 1, *supra* note 168; Karin Kaneko & Tomoko Otake, *Supreme Court May Adjust Requirement for Gender Status Change*, JAPAN TIMES (Sept. 27, 2023), <https://www.japantimes.co.jp/news/2023/09/27/japan/crime-legal/supreme-court-transgender-surgery-constitutionality/>; Tomoko Otake, *Calls Grow to Abolish Japan's Surgery Requirement for Gender Change*, JAPAN TIMES (Oct. 22, 2023), <https://www.japantimes.co.jp/news/2023/10/22/japan/society/transgender-surgery/>.

²⁵⁹ *Japan Government to Respond Properly to Ruling on Sex Change Rule*, NIPPON.COM (Oct. 25, 2023), <https://www.nippon.com/en/news/yjj2023102500874/japan-govt-to-respond-properly-to-ruling-on-sex-change-rule.html>; Kaneko & Otake Article 1, *supra* note 168; *List of Ministers*, PRIME MINISTER'S OFFICE OF JAPAN, https://japan.kantei.go.jp/101_kishida/meibo/daijin/index_e.html.

²⁶⁰ Although the Japanese courts do not follow *stare decisis*, the SCOJ's decision to review cases pertaining to transgender individuals' rights confirm the Court's recognition of personal autonomy of LGBT individuals in Articles 13 and 14, similar to the analyses in the same-sex marriage cases. See SAIKŌ SAIBANSHO [SUP. CT.] Jan. 23, 2019, 269 (KU) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] (Japan), https://www.courts.go.jp/app/hanrei_en/detail?id=1634 (The SCOJ Second Petty Bench

decision by the Shizuoka Family Court Hamamatsu Branch ruling in favor of a transgender man, finding discrimination against transgendered individuals in the GID law as unconstitutional under Article 13 of the Constitution.²⁶¹ Another transgender woman appealed to the SCOJ in 2022 to overturn a 2019 Okayama Family Court decision rejecting a similar claim seeking to legally change her gender in the family registry without gender reassignment surgery.²⁶² These pending SCOJ cases may lead to interpretations of discrimination against LGBT individuals under Articles 13 and 14 of the Constitution in ways that may establish a basis for legalizing same-sex marriage.²⁶³

unanimously holding Article 3(1)(iv) of the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder did not violate Articles 13 and 14(1) of the Constitution because the applicable provision does not force persons with gender identity disorder to undergo surgery to remove his/her/their reproductive glands in order to legally change their gender status. The SCOJ upheld the constitutionality of the Provision on the basis that people are not forced to undergo the aforementioned surgery, while recognizing the potential invasion into persons' bodies against their will. The SCOJ reasoned that the Provisions fulfill a necessary and appropriate purpose in preventing social confusion that would arise for parents if their child were allowed to rapidly change their gender status).

²⁶¹ See Kaneko & Otake Article 1, *supra* note 168; Mari Yamaguchi, *A Japanese Court Rules it's Unconstitutional to Require Surgery for A Change of Gender on Documents*, ASSOCIATED PRESS (Oct. 12, 2023), <https://apnews.com/article/japan-court-ruling-transgender-surgery-unconstitutional-94ded50a02d0f8f0a65992e7c7314aed>; Emily Boon, *A High Stakes Court Decision Looms for Trans Rights in Japan*, TOKYO REV. (Oct. 23, 2023), <https://www.tokyoreview.net/2023/10/high-stakes-court-decision-looms-trans-rights-japan/>; *Requiring Surgery for Gender Change Unconstitutional: Court*, JAPAN TIMES (Oct. 12, 2023), <https://www.japantimes.co.jp/news/2023/10/12/japan/japan-court-ruling-gender/>; *Japan Court Says Requiring Surgery for Gender Switch Unconstitutional*, KYODO NEWS (Oct. 12, 2023), <https://english.kyodonews.net/news/2023/10/a43de58c6e29-urgent-japan-court-nullifies-rule-requiring-surgery-for-gender-switch.html>.

²⁶² SAIKŌ SAIBANSHO [SUP. CT.] OCT. 25, 2023, 2 (LA) 43,993 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 1-36, https://www.courts.go.jp/app/files/hanrei_jp/191/092191_hanrei.pdf; *We Have Created an English Translation of Supreme Court's Ruling in the Ministry of Economy, Trade and Industry's Transgender Case*, LLAN, <http://llan-japan.org/news/2312>; Kaneko & Otake Article 1, *supra* note 168.

²⁶³ See sources cited, *supra* notes 260 & 262. SCOJ is opening up to recognizing LGBT rights through its ongoing consideration of the constitutionality of the transgender sterilization bill under Arts. 13 & 14. While these cases do not specifically touch upon the constitutionality of same-sex marriage, the cases signal the SCOJ's potential disposition in reviewing future appeals from the lower court decisions regarding same-sex marriage.

The SCOJ's landmark decision in *Special appeal case against a decision to dismiss a petition to change the treatment of gender*²⁶⁴ is a major victory for LGBT rights and may indicate the possibility of the justices favorably reviewing claims concerning same-sex marriage rights.²⁶⁵ More notably, the timing of SCOJ's landmark decision on transgender rights coincides with several appellate court reviews of lower court decisions regarding same-sex marriage and may signal more favorable outcomes for LGBT individuals.²⁶⁶

Amending Article 24 of the Constitution is not necessary to legalize same-sex marriage and has not been the likely path forward for prime ministers of the executive branch towards same-sex marriage legalization.²⁶⁷ The trial courts' analysis of marriage equality protection under Article 24 of the Constitution indicate the possibility for the National Assembly to enact national laws legalizing same-sex marriage, even where the constitution's text refers to marriage as between "husband" and "wife".²⁶⁸ Furthermore, the trial courts signaled the existence of a moral

²⁶⁴ SAIKŌ SAIBANSHO [SUP. CT.] OCT. 25, 2023, 2 (LA) 43,993 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 1-36, https://www.courts.go.jp/app/files/hanrei_jp/446/092446_hanrei.pdf; *We Have Created an English Translation of Supreme Court's Ruling in the Ministry of Economy, Trade and Industry's Transgender Case*, LLAN, <http://llanjan.org/news/2312>.

²⁶⁵ Several of the SCOJ justices will reach the mandatory retirement age of 70 by 2025, when the same-sex marriage cases are anticipated to be presented to the SCOJ. *See* KENPŌ, *supra* note 11 ("Article 79(5) The judges of the Supreme Court shall be retired upon the attainment of the age as fixed by law"); *See Justices of the Supreme Court*, COURTS IN JAPAN, <https://www.courts.go.jp/english/about/justice/index.html>; *JAPAN, JUDICIARIES WORLDWIDE*, <https://judiciariesworldwide.fjc.gov/country-profile/japan>; KENPŌ, *supra* note 11 ("Article 79(5) The judges of the Supreme Court shall be retired upon the attainment of the age as fixed by law"); Hideo Chikusa, *Japanese Supreme Court – Its Institution and Background*, 52 SMUL REV. 1719 (1999).

²⁶⁶ *See* sources cited, *supra* notes 258-261.

²⁶⁷ *See e.g.*, Constitutional Change in Japan, COUNCIL ON FOREIGN REL., <https://www.cfr.org/japan-constitution/>; *Japan Prime Minister Fumio Kishida Mentions Constitutional Revision, Imperial Succession in Likely Bid to Attract Conservatives*, YOMIURI SHIMBUN (Oct. 25, 2023), <https://japannews.yomiuri.co.jp/politics/politics-government/20231025-145393/>; Sheila A. Smith, *Will Abe's Legacy Be Constitutional Revision*, COUNCIL OF FOREIGN REL. (Jul. 11, 2022), <https://www.cfr.org/blog/will-abes-legacy-be-constitutional-revision>.

²⁶⁸ For example, same-sex marriage is legal in the State of Hawai'i, despite language in the Hawai'i State Constitution referring to marriage as exclusive to opposite-sex couples; *see* HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."); HAW. REV. STAT. § 572-1 (2013); *see also* *Loving v. Virginia*, 388 U.S. 1 (1967) (landmark ruling of the Supreme Court of the United States invalidating a state anti-miscegenation law banning interracial marriage as a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution); *cf.* The State of Alabama's constitution still prohibits interracial marriage, Alabama Const. art. IV, § 102 ("The legislature shall never

interest and constitutional mandate for the National Assembly to extend the right to marry to same-sex couples through national laws, albeit to the extent that failing to do so falls short of its legislative duty to create a marriage system available to all Japanese citizens.²⁶⁹ Thus, the National Assembly maintains its legislative discretion to determine when and how it is socially acceptable to legalize same-sex marriage nationally.²⁷⁰

Amending Provisions in the Civil Code and Family Register Act to include same-sex marriage protections would ensure consistent regulation of marriage regardless of sexual orientation, but is unlikely so long as major political parties are influenced by conservative religious organizations.²⁷¹ Former Prime Minister Shinzō Abe's assassination revealed the entanglement of Japanese politics in the Unification Church, and there are similar influences from ultra-conservative organizations including Sokka Gakkai who remain obstacles to same-sex legalization.²⁷² The Japanese government's ongoing lawsuit to dismantle the Unification Church may eliminate one source of political interference and realign views of elected officials in the National Diet with those of the plaintiffs in the same-sex marriage lawsuits.²⁷³ But given the prevalence of "traditional" values in Japanese politics, amending the Provisions to extend to same-sex marriage is not likely to garner the support necessary to fully integrate marriage equality into the national marriage system.²⁷⁴

pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro.”).

²⁶⁹ See cases cited, *supra* note 7.

²⁷⁰ Conservative views may remain dominant in the National Assembly, but recent governmental efforts to dismantle the Unification Church may remove a major source of resistance toward same-sex marriages. See e.g., Glosserman, *supra* note 3; Josh Ocampo, *supra* note 3.

²⁷¹ See e.g., Rich & Hida, *supra* note 138 (“Lawmakers, under pressure from the Shinto group and other traditionalist forces, have lagged behind public opinion, struggling to agree on even limited expressions of support for the rights of gay and transgendered people.”); Larsoon, *supra* note 138; Mulgan, *supra* note 138 (chronicling the entanglement between the ultra-conservative religious cult leaders of the Unification Church and former Japanese prime ministers, resulting in opposition to same-sex marriage and gender equality in support of “traditional family values” and “paternalistic family systems”).

²⁷² See e.g., Rich & Hida, *supra* note 138; Larsoon, *supra* note 138; Mulgan, *supra* note 138.

²⁷³ Kathleen Benoza & Kanako Takahara, *Government Seeks Court Order Revoking Unification Church's Status*, JAPAN TIMES (Oct. 12, 2023), <https://www.japantimes.co.jp/news/2023/10/12/japan/society/unification-church-dissolution-meeting>.

²⁷⁴ See e.g., Rich & Hida, *supra* note 138; Larsoon, *supra* note 138; Mulgan, *supra* note 138. But see Benoza & Takahara, *supra* note 273.

A separate national Registered Partnership System provides a means to respond to domestic and international pressures for Japan to liberalize its stance toward gay rights, while offering conservatives a way to preserve “traditional” family values. Giving legally binding effect to partnership oaths through registered partnerships could create legal benefits for matters essential to cohabitation and family life but may disadvantage same-sex couples if registered partnerships are not viewed equally with registered marriages. The National Assembly may consider a trial period for the national Registered Partnership System, drawing upon examples from European countries to determine the scope of legal benefits and obligations to extend to registered partnerships.²⁷⁵ These registered partnerships may provide opposite-sex couples with an alternative to marriage with less extensive legal rights and obligations. However, a tiered system of marriage and registered partnerships would reinforce a perception of marriage inequality based on sexual orientation, so long as same-sex couples are unable to fully enjoy the benefits of marriage.

The trial courts have considered same-sex marriage evolution in foreign jurisdictions to indicate the possibility of first introducing a partnership system to co-exist with the marriage system or gradually integrate according to various legal protections afforded to couples regardless of sex.²⁷⁶ As societal views toward the household evolve, the likelihood of a national registered partnership system is the logical next step for conservative Japanese lawmakers.²⁷⁷ However, the National Assembly may create a registered partnership system extending limited legal protections to same-sex couples concerning child custody, adoption, and other matters rooted in a traditional belief that marriage exists to support couples with the natural ability to bear children.²⁷⁸

Japan’s abuse of rights doctrine may offer an alternate legal theory for the SCOJ to determine whether the National Diet abused its discretion under Article 24(2) to create a marriage system resulting in unreasonable harm to same-sex couples.²⁷⁹ However, the courts take a formalistic role in

²⁷⁵ See examples of European marriage alternatives, *supra* notes 37-40.

²⁷⁶ See cases cited, *supra* note 7.

²⁷⁷ Domestic pressures to separate religion from politics and recent scandals involving the Unification Church’s connection to the conservative Liberal Democratic Party may result in a greater chance for the National Assembly to consider a national registered partnership system as the number of municipalities offering registered partnerships increases. See Rich & Hida, *supra* note 138; Larsoon, *supra* note 138; Mulgan, *supra* note 138.

²⁷⁸ See marriage alternatives discussed, *supra* notes 37-40.

²⁷⁹ Kazuaki Sono & Yasuhiro Fujioka, *The Role of the Abuse of Right Doctrine in Japan*, 35 LA. L. REV. 1037, 1037-57 (1975) (Citing the SCOJ’s abuse of right doctrine in *Mitamura v. Suzuki* (1972), “[i]n all cases a right must be exercised in such a fashion that the right of the exercise remains within a scope judged reasonable in light of

analyzing equal treatment and tends not to focus on differential treatment and discrimination, which could prove an insurmountable barrier to proving consequential damages resulted from the exclusion from the marriage system.²⁸⁰ The Japanese courts may refrain from analyzing differential treatment and discrimination as symptoms of underlying tensions between various constitutional protections afforded to individuals by over-emphasizing the importance of textual analysis of specific constitutional provisions concerning these fundamental rights.²⁸¹

IV. CONCLUSION: PROGRESSING BEYOND TRADITIONAL ASSUMPTIONS OF MARRIAGE

The legalization of same-sex marriage in Japan remains a pressing matter of civil rights, personal autonomy, and domestic politics involving all three branches of government. The historical, legal, and political contexts of the Japan's same-sex marriage cases are dynamic and evolving in response to international and domestic pressures.

The Japanese courts' consideration of same-sex marriage laws in foreign jurisdictions serve as a reminder that recent challenges to the right to marry in the U.S. may have parallels overseas to the anticipated appellate court decisions. The precise headcount of disenfranchised individuals - married same-sex couples residing in Japan who are denied legal recognition, as well as LGBT+ individuals who could potentially be denied the right to marry a same-sex partner - is not certain.

The National Assembly's reluctance to enact legislation to prohibit discrimination against sexual minorities and expand upon their equality under the law could result in the creation of a national partnership registration system as an alternative to fully extending marriage rights to same-sex couples. Ultimately, codifying legal protections for same-sex couples equal to those provided to heterosexual couples under the Civil Code and Family Register Act is necessary to enshrine the right to sexual autonomy in Japan.

the prevailing social conscience. When a conduct by one who purports to have a right to do so fails to show social reasonableness and when the consequential damages to others exceeding the limit which is generally supposed to be borne in the social life, we must say that the exercise of the right is no longer within its permissible scope. Thus, the person who exercises his right in such a fashion shall be held liable because his conduct constitutes an abuse of right.”); see also John O. Haley, *The Myth of the Reluctant Litigant*, in 4 J. OF JAPANESE STUD. 359, 359-90 (1978).

²⁸⁰ Japanese courts' approach to equal treatment issues in marriage is evidenced in its prior analysis of the marital surname system. See Kato & Toyoda, *supra* note 16; Craig Martin, *Glimmers of Hope: the Evolution of Equality Rights Doctrine in Japanese Courts from a Comparative Perspective*, 20 DUKE J. OF COMPAR. & INT'L L. 167, 167-244 (2010).

²⁸¹ See Kato & Toyoda, *supra* note 16; Martin, *supra* note 280.

Through Japan's same-sex marriage cases, Japan's judiciary memorialized the legal and historical facts underlying the existing legal framework regulating marriage in Japan. The individual cases may be interpreted as a small victory for the plaintiffs who prevailed, and an opportunity for further advocacy for those whose claims were denied. However, the cases collectively point to Japanese society's changing views toward same sex couples, and more broadly, the evolution of Japanese government's role in regulating the right to marry.