

Lawsuit as Lobbying: Understanding Same Sex Marriage and Other Constitutional Litigation in Japan

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Abstract: *This article uses same-sex marriage litigation currently before the courts in Japan as a vehicle for showing how a particular form of lawsuit—the claim for damages against the state for tortious legislative inaction—has become one of the leading tools for constitutional litigation in Japan.*

Keywords: *Japan supreme court, same-sex marriage, lobbying*

Introduction

When I first started studying Japanese law decades ago, one of the things it took me a while to understand was why anyone bothered with constitutional litigation. After all, Japan’s Supreme Court is famously “conservative,” though often that term seems to mean nothing more than that in almost eight decades it has only ruled statutory provisions unconstitutional in twelve instances, unlike the US Supreme Court which does so with a frequency that makes it routine.¹ It thus seems reasonable to ask why Japanese plaintiffs continue to bring constitutional cases when there seems no hope of winning them.

This author’s conclusion is that Japanese

constitutional litigation—particularly that taking place in recent decades—is best seen as a form of lobbying. This may seem to state the obvious, since public interest litigation intended in part to achieve political results outside of court happens everywhere and is noted in political and legal scholarship.² However, as this article will attempt to demonstrate, Japanese constitutional litigation has evolved in a manner that results in a specific cause of action commonly being used as a vehicle by which litigants effectively petition the courts to send a message to the Diet, Japan’s national legislature. This specific cause of action makes “winning” in the traditional sense—being awarded the relief sought in the claim—unnecessary.

The multiple cases challenging the lack of legally-recognized same sex marriage in Japan that have been in the news since 2021 are prime examples of this type of litigation lobbying. At the time of writing, five judgments had been rendered by the district courts of Tokyo, Osaka, Nagoya, Sapporo and Fukuoka.³ This article will explain why it is likely that these cases are not intended to achieve victory through a court ruling that directly mandates same sex marriages be permitted (as happened in the America in 2015 through the US Supreme Court’s ruling in *Obergefell v. Hodges*), but by getting Japan’s Supreme Court to deliver a message to the Diet that such a change in law is necessary.

The same sex-marriage cases—which at the

time of writing were still under appeal—will be considered later in this article. First, however, some contextual background is needed.

State Tort Claims and Constitutional Legislative Mandates

Two basic features of the Japanese constitution are important to understanding the thesis of this article. First, while Chapter III of the constitution enunciates a broad range of rights and freedoms, some are considered too vague or abstract to be enforceable directly through litigation. In other words, these rights are primarily legislative mandates that must be implemented by the Diet. For example, article 25 guarantees a “right to maintain the minimum standards of wholesome and cultured living,” and requires the state to endeavor “for the promotion and extension of social welfare and security, and of public health.” This is understood to be a “programmatically provision” which imposes a moral and political obligation on the Diet and the Cabinet to implement it.⁴ Other articles of Chapter III clearly envision legislative implementation. One of these is article 24(2), which mandates gender equality in family laws.

Second, article 17 of the constitution gives all people—Japanese nationals, at least—the right to seek redress from the state for damage suffered from the “illegal act of any public official.”⁵ That is what it says in the English version, but the Japanese would be better translated as “tortious acts of any public official.” The details are left up to the State Redress Act, but basic civil law tort principles such as negligence and dereliction of duty generally apply.

Judging the Legislature

These two features together account for what

may be a uniquely Japanese cause of action, one that has become the leading, and arguably most successful, means of litigation: the suit for damages under the State Redress Act resulting from tortious legislative *inaction*. In other words, a suit against the state based on injuries suffered by the Diet’s failure to enact legislation required by the constitution.

The first case of this type to reach the Supreme Court involved postal voting, which had been possible under electoral laws early in the post-war period but was abolished due to widespread abuse. However, a byproduct of abolition was the disenfranchisement of disabled persons unable to go to polling stations to vote. The case was brought by an elderly citizen who claimed damages due to being unable to vote, since the Diet had failed to provide a suitable alternative to postal voting when it abolished the system.

In a 1985 judgment, the Court rejected this claim. Noting that Diet members enjoy constitutionally-mandated legal immunity for their acts in the legislature, the Court concluded that:

as a general rule, members of the Diet in making laws incur only a political liability toward the people as a whole, not a legal obligation in relation to any right of a particular citizen, and, with the exception of the unlikely event of enactment of laws clearly contravening the fundamentals of the Constitution, the legislative acts of Diet members are not subject to assessment of their legality for the purpose of applying [the State Redress Act].⁶

This seems a pretty unequivocal *rejection* of claims that the state could be liable for Diet *inaction*, and it was probably intended as such

at the time. Yet, by articulating a rule was merely general rather than absolute, the Court acknowledged what seems the highly remote but still non-zero possibility of exceptions.

In 2001, the Kumamoto District Court found such an exception to apply in the abysmal treatment accorded to sufferers of Hansen's Disease (once more commonly known as leprosy). Those so afflicted had been required *by law*—the Leprosy Prevention Act of 1953—to live in isolated communities and were subjected to significant restrictions on their freedom until the law was repealed in 1996. This was literally decades after the disease had become treatable and there was no valid public health reason to continue keeping those suffering from it isolated. Finding the law unconstitutional and the Diet's prolonged failure to remedy it tortious, the district court awarded the plaintiffs damages.

If the government had appealed the Kumamoto court's ruling, the Supreme court might well have ruled in its favor. It usually does, after all. We can never know, however, because the government did not appeal. Plaintiff groups staged a sit-in in front of the Prime Minister's office and, after meeting with their representative, then-Prime Minister Jun'ichirō Koizumi made a political decision to waive appeals and let the judgment stand. The subsequent settlement with plaintiffs in this and other similar lawsuits saw an almost unprecedented official apology from all three branches of government.⁷ Thus, despite seeming to have been declared a generally unviable cause of action by the Supreme Court in the postal voting case, the suit for damages due to tortious legislative inaction generated an impressive win. However, it accomplished this only by being part of a broader strategy of lobbying and political action that ultimately produced results outside the courtroom. In this case, however, the legislation at issue had already been abolished, so it was about damages and attention rather than changing

the law.

Despite its broad rejection of this type of cause of action in the postal voting case and not having been involved in the resolution of the Hansen's Disease cases, the Supreme Court seems to have changed its view and found tortious legislative inaction claims to be a useful tool. Just four years after the Kumamoto case, the Supreme Court upheld a challenge to electoral laws which disenfranchised Japanese citizens living abroad. In its 2005 ruling it held that:

[i]n cases where it is obvious that the contents of legislation or legislative omission illegally violate citizens' constitutional rights or where it is absolutely necessary to take legislative measures to assure the opportunity for citizens to exercise constitutional rights and such necessity is obvious, but the Diet has failed to take such measures for a long time without justifiable reasons, the legislative act or legislative omission by Diet members should exceptionally be deemed to be illegal under [the State Redress Act].⁸

Finding the Diet's failure to act both unconstitutional and tortious, the Court ordered the state to pay the plaintiffs damages of 5,000 Yen each and, more importantly, confirmed that they were entitled to vote in future elections. The language quoted above is important, because it describes the standard for granting relief under the State Redress Act for legislative inaction and is thus mirrored in judgments in other cases making similar claims.

The Overseas Voting Rights Case was a significant victory and a very rare instance of the Supreme Court not only acknowledging the

existence of a constitutional problem, but actually doing something more than just talk about it. That said, voting rights is probably one of the few domains of Supreme Court constitutional jurisprudence that can reasonably be described as “activist.” Two of its earlier unconstitutionality rulings involved the unequal apportionment of Diet seats between rural and urban districts, but the court did not (arguably could not) do anything beyond declaring them unconstitutional and calling on the Diet to develop a solution.⁹

Although the malapportionment unconstitutional rulings stand out, in terms of their substantive impact, they blend seamlessly into a much larger body of Supreme Court malapportionment jurisprudence generated for what has become a well-organized campaign of litigation that routinely follows Diet elections. These cases, however, have generally sought to challenge the validity of the electoral results on equal protection grounds. In all of the decisions other than the two outright rulings of unconstitutionality, the Court has rejected the substantive claims (*i.e.*, the plaintiffs lose), but in some it has noted the existence of a “state of unconstitutionality” that is not quite yet outright “unconstitutional,” but which might be found to be so in future cases if the Diet fails to timely and appropriately redraw electoral districts. Looking at what, if anything, the Diet has done in the time since the issue was last litigated is thus an important consideration in these cases. These cases can thus also be seen as a form of highly specialized lobbying through litigation.

Marriage-related Legislative Inaction Claims

In litigation based on legislative inaction tort claims, what the Diet has or has not done in the past is important evidence. The same is true on what if anything the Court (but not lower courts, it seems) has said in prior rulings, since

these can be deemed to have put the Diet on notice of potential constitutional problems that need to be addressed by legislation.

For example, on December 16, 2015, the Supreme Court issued two significant judgments in cases claiming damages for tortious legislative nonfeasance in the context of marriage. One challenged a provision of the Japanese Civil Code (article 733) that prohibited only women from remarrying for a six-month period following dissolution of a prior marriage—a seemingly obvious violation of two separate constitutional equal protection mandates. The other challenged the requirement of article 750 of the Civil Code which requires married couples to have the same legal surname, a seemingly gender-neutral requirement which, according to the Court, sees the burden of name changes falling on wives in approximately 98% of marriages.

In the *Remarriage Prohibition Case*, the court found the women-only remarriage prohibition unconstitutional, but only to the extent it was greater than 100 days. The rationale was based on the relationship of the prohibition to the time periods involved in statutory presumptions of paternity elsewhere in the Civil Code and is now moot in any case, since the offending provision was stricken from the Code in 2022.

What is significant about the *Remarriage Prohibition Case* is that the court did not hold the legislative inaction tortious, citing in part a 1995 judgment finding the prohibition constitutional.¹⁰ Given that after that decision there were no subsequent judicial decisions that put the Diet on notice that “advancement in medical techniques and scientific technology and the changes in the social situation in Japan” might have rendered the six month prohibition constitutionally problematic, the Diet could not be considered to have been on notice of the need to change the law. The court thus declined to award any damages on the grounds of tortious legislative inaction

because:

it cannot be said that even though said part of the Provision restricts, without reasonable grounds, any rights or interests that are constitutionally guaranteed or protected and thus obviously violates provisions of the Constitution, that the Diet has failed to take legislative measures such as amending or abolishing said part of the Provision for a long period of time without legitimate grounds.¹¹

In other words: unconstitutional, yes, but not for long enough to have been tortious. The import of the case was, of course, in the unconstitutionality ruling, not the award of damages. By contrast, in the surname case, the Court declined to find the requirement unconstitutional and thus, the plaintiffs could not have suffered harm from legislative inaction. Given that tortious legislative inaction was precisely the claimed harm, the court's conclusion that, with respect to surnames in marriage, "[h]ow this type of system should be designed, including the circumstances concerning these matters, is a matter that needs to be discussed and determined by the Diet" comes across as completely circular.¹²

Yet, understood as a form of lobbying, it makes sense. Since this was the first time the Court was ruling on the issue, there was no record of prior judicial signaling about possible constitutional problems for the Diet to heed. There was thus also no record of the Diet deliberating the subject from the perspective of constitutionality. A dissenting judge referred to a 1996 proposal from the Minister of Justice's legislative council proposal that would have allowed for the option of separate surnames, but still had to acknowledge that "[t]his proposal was not prepared on the premise that the Provision was unconstitutional."

In 2021 the Court reaffirmed its holding in the 2015 surname case, rejecting an appeal from a Japanese couple challenging the refusal of a municipal mayor to register their marriage with different surnames declaring in essence that not enough time had passed or enough social change occurred since its last ruling to reconsider.¹³ In 2022 a petty bench of the Court rejected another legislative inaction tort claim to the surname requirement, noting that whatever legislative inaction might be relevant was not tortious.¹⁴

The Significance of Legislative Inaction Tort Claims

That tortious legislative inaction claims account for several of the Supreme Court's very small number of unconstitutionality rulings is itself significant, of course, but stopping there means missing what may be a more important paradigm shift. The ability to bring such claims means plaintiffs can focus on asserting the need for legislation rather than prevailing on their claim in court, since the ultimate goal is to win at the legislative or executive branches.¹⁵

"Winning" Japanese constitutional litigation by "losing" is a gradual process in any case, a war rather than a battle. Getting the court—or even a dissenting or concurring judge—to say something sympathetic in dicta, or to indicate that a different outcome might occur if nothing has changed by the time the next case on the same subject is heard is a victory, even if the case is ultimately dismissed. Battles may be won in court, but the war will be won elsewhere—in whatever ministry has jurisdiction over the matter, and the Diet. This is the true import of the otherwise ridiculous sounding "not unconstitutional but an unconstitutional situation" or "unconstitutional but plaintiff still loses"-type rulings that regularly emit from the courts.

Tortious legislative inaction has thus generated a steady stream of constitutional claims. Few have resulted in rulings in favor of plaintiff-appellants, but as we have already argued, “success” in these cases depends on what the court says about the situation, not how it disposes of the claim substantively. Through this mode of litigation, Japanese courts are now commonly called upon to judge whether the Diet is doing its job in implementing constitutional norms.

At the Supreme Court level, there have been rulings on claims of harm resulting from its failure to cover students under the National Pension disability scheme and, more recently, on the failure to enable voters overseas to participate in constitutionally-mandated supreme court judicial retention elections.¹⁶ In the former case—a Petty Bench judgment—the plaintiffs lost on the grounds that the court could not “find the legislature’s failure to take such measures to be significantly unreasonable.” In the latter, the Grand Bench rendered the court’s twelfth and most recent ruling finding a statute unconstitutional, citing the years of Diet inaction since its decision addressing essentially the same issue in the 2005 *Overseas Voting Case* to be tortiously unconstitutional.

Lower courts hear these cases first, of course, and not all make their way to the top of the judicial pyramid. Some are still undergoing appeals (as is the case with the same sex marriage cases), a process which can take years. For example, in 2023 the Sendai High Court rejected State Redress Act claims from plaintiffs who were forcibly sterilized under the National Eugenics Act, a 1947 law that remained on the books until 1996.¹⁷ Those who have followed the endemic problem of parental child abduction will be interested to know that in October 2022 the Tokyo District Court ruled against plaintiffs seeking damages for the Diet’s failure to enact laws to prevent one parent from abducting their children during

marriage.¹⁸ Whether the Supreme Court will ever rule substantively on these matters remains to be seen.¹⁹

The Possible Merits of Legislative Inaction Tort Claims

That they seem to say one thing in their opinions but then do the other in their substantive rulings has long been a feature of Japanese courts. Judge Kaoru Inoue wrote several books complaining about the practice of inserting unnecessary dicta in judgments—*dasoku hanketsu* (“snake leg judgments”) as he called them—almost two decades ago.²⁰ However, he described the practice as a bug, whereas it clearly seems to have become a feature.

From the perspective of the courts and plaintiffs, the practice might have a range of merits. First, for courts, it would seem to avoid the “what if we render a judgment and it is ignored” problem that courts everywhere face, but particularly in jurisdictions like Japan where judges are not vested with the broad and widely-accepted contempt powers of their counterparts in common law countries.²¹ On this point, it is worth noting that when the Supreme Court found a statutory provision unconstitutional for the first time in 1973—an article of the Penal Code which punished people who murdered their parents or grandparents particularly severely—the offending law remained on the books for almost two decades.²² This is essentially also the problem faced by the Court when it found an election unconstitutional—invalidating the election on that ground would have either resulted in chaos, or being ignored to avoid such an outcome.

Second, damage claims under the State Redress Act may be particularly useful to litigants and courts alike, since they offer a broader range of possible outcomes within the

existing framework of litigation, which, to oversimplify slightly, is usually a process that results in a binary win/lose zero-sum outcome as each particular claim is being brought. In legislative inaction tort cases, the plaintiffs may often sue for what may be nominal damages, indicating they do not care whether they are awarded or not; the damages merely open the door to a courtroom which may generate a result that is useful in other ways; publicity at the lower court level, and perhaps a warning to the Diet from the Supreme Court.

Damages were awarded in the *Overseas Voting Rights* case, but in the amount of only 5,000 yen. Clearly, they were not the goal. Claims of nominal damages are grounds for litigation in places other than Japan; indeed, in Anglo-American tort law provable damages are not even elements of the cause of action for some claims, such as trespass or tort. But the plaintiffs who bring such claims typically still expect to win, even if they don't get any money out of it. In Japanese constitutional tort cases, winning isn't even necessary. Indeed, we need to redefine "winning the case" to even debate the subject properly.

Damages sought in the *Remarriage Restriction Case* were not nominal, but were not awarded because, as already noted above, the Diet's inaction was not considered by the court to have been tortious. No tort, no damages. In fact, as one of the rare instances of the Court declaring a statutory provision unconstitutional, the *Remarriage Restriction Case* is so universally counted as a "win," that it is easy to forget that the dispositive result was a "loss"—the plaintiff-appellant's claim was *dismissed*, precisely because there was no tortious causation of the plaintiff's damages. No matter: based on the unconstitutionality part of the judgment the Diet amended the Civil Code the following year to match the judgment. This impact was presumably the desired outcome in any case, making the plaintiff's inability to collect the 1.65M yen in damages

claimed insignificant to them.²³

Third, the fact that courts can render judgment *against* plaintiffs on the grounds that they have not suffered loss or damage, or if they have, they were not the result of tortious conduct by the state, might be considered a useful feature to lower court judges. This is because they can rule *against* plaintiffs more freely, while saying supportive things about the plaintiff's claim and critique of the government, and such an outcome may be the plaintiff's goal in any case.

The most famous example of this dynamic may be the 2008 ruling by a panel of the Nagoya High Court that the dispatch of the Self Defense Forces to Iraq violated the constitution.²⁴ It did so, however, in a ruling which rejected *all* of the plaintiff-appellants' claims, including one for nominal damages suffered as the result of the "unlawful" dispatch. Thus, the dispatch was unconstitutional, but not in a way that the courts could do anything about; not directly, at least. Nor did the government have to recall the SDF from Iraq, since they won. Indeed, for lower court judges resolving cases in this way may have the added merit of being not subject to appeal by the government, which technically "won" at the Nagoya high court. It is widely believed that judges (other than those on the Supreme Court) who rule against the government in any type of case are likely to experience career stagnation for their trouble (and be overruled on appeal). If true, a mechanism that allows judges to have it both ways—to dispense social justice while at the same time ruling in favor of the government—would be understandably attractive.²⁵

Fourth, another way of looking at the tortious legislative inaction claim may be that it gives courts an indirect way of issuing what are essentially advisory opinions despite a procedural regime which offers no formal avenues for doing so. In this respect, it is

instructive to compare to the manner in which same sex marriage was achieved judicially in Taiwan in 2017. The Constitutional Court of Taiwan has jurisdiction to conduct an abstract judicial review on constitutional questions certified to it by other branches of government. A request for such a review originating from the Taipei Municipal Government, which was charged with marriage registrations in the municipality, was one of the claims that led to the court's ruling. By contrast, similar to the US Supreme Court, Japan's highest court requires a "case or controversy"—an actual dispute—to pass judgment on a constitutional question. The legislative inaction tort claim is a way to offer what is essentially an advisory judgment without requiring the government to do anything...right away.

Fifth, when framed as a legislative inaction tort, parties can bring actions that might otherwise be barred as moot. For example, the *Remarriage Prohibition Case* involved a six-month waiting period. Given the length of time it takes for cases to be resolved at initial trial let alone be appealed to the Supreme Court, the prohibition period would have passed by the time any court made a decision, making it arguably unnecessary for courts to do anything. In other words, if the plaintiff were claiming that, for example, the prohibition burdened her ability to remarry when she wished, by the time a court decided she would already be free to remarry and thus not need judicial relief. Framing as a claim for damages for a harm already suffered avoids this trap.

Sixth, damage claims for tortious legislative inaction give courts a vehicle for evaluating the performance of the legislature. This can be done using both international comparisons and a review of domestic activity. Despite there not being any constitutional requirement or other legal mandate that Japan follow what other countries do, it seems routine in cases on legislative inaction for courts to review what "peer countries" have done on the similar

issue. All of the same sex marriage cases discussed below contain extensive comparisons of the spread of the institution in other countries.

As for legislative history, the legislative inaction cause of action allows courts to use it in a way that may seem strange, in that it focuses not on what the legislature did, but whether it did anything at all. It also enables courts to use what could be called *failed* legislative history to bolster an argument. For example, the Civil Code amendments recommended in 1996 by the MOJ Legislative Council and cited by the dissent in the *Remarriage Prohibition Case* and in connection with the litigation of other family law matters, were never adopted by the Diet. Yet despite being essentially a failed attempt at legislation, the recommendations are surprisingly impactful decades later by way of references to them in court decisions evaluating legislative inaction.²⁶

Finally, for the Supreme Court, the ability to use a "middle path" in resolving constitutional challenges would seem a useful way of maintaining, even expanding its relevance and authority. When viewed as part of a broader legislative effort, Petty Bench rulings on constitutional matters take on more significance. The Supreme Court is actually *four* courts: three Petty Benches comprised of five judges each, and the Grand Bench when all fifteen judges sit together *en banc*. Most of the court's routine work is conducted by Petty Benches, while the Grand Bench only issues a few decisions a year, if that. By law (article 10 of the Courts Act), Petty Benches cannot rule on the constitutionality of a law, regulation or act of government unless it is doing so to find it consistent with prior Grand Bench judgments on the same issue. In other words, rulings of unconstitutionality can only be rendered by the Grand.

Thus, an interesting feature of Japanese

constitutional litigation is that if it is a Petty Bench ruling on your claim, you should know in advance that you are going to lose (unless you are the government). Returning to a theme of the opening paragraph of this article, one might reasonably wonder why litigants bother to participate in proceedings before the Petty Bench at all given the predictability of the outcome. Yet it again makes more sense if the case has merit as a form of lobbying. Petty Benches may not be able to declare statutes unconstitutional, but they form not just a body of jurisprudence, but a historical record that can be referenced by the court in future cases on the same issue.

For example, in 2019 the 2nd Petty Bench of the Court dismissed a challenge to the 2004 statute that made it possible for individuals to legally change their gender. One of the requirements for availing oneself of the law was that the applicants had to have had their reproductive organs removed. The plaintiff-appellant in the case had sought to change their gender without complying with the requirement, asserting it violated the constitution. The Petty Bench rejected the challenge, but in doing so noted that the considerations underlying the law:

may change according to the changes, etc. in the social circumstances concerning the recognition of gender status according to the gender identity and understanding of the family system, *and it should be said that constant examination is required to determine whether such provision is in compliance with the Constitution.* However, when the purpose of the Provision, the manner of the abovementioned constraint and the current social circumstances, etc. are compared and examined in a comprehensive manner, the Provision cannot be said to be in violation of Article

13 and Article 14, paragraph (1) of the Constitution of Japan *at this point of time* (emphasis added).²⁷

This can be seen as almost an *invitation* to judges and future litigants to continue actively bringing cases on the issue, and perhaps in the future either the Diet would amend the law, or the court would issue a different decision.²⁸ On October 25, 2023 the latter did in fact happen, when the Grand Bench found the sterilization requirement to violate article 13 of the constitution and remanded for further proceedings.²⁹ Admittedly this was not a legislative inaction tort claim (cases involving the registration of changes in personal status have other routes of appeal), but the cases of that nature which proceeded it built a foundation and the 2023 decision specifically describes itself as amending the 2019 decision referenced above.

In this respect, the 2023 case is similar to another significant unconstitutional ruling, the 2013 *Out-of-Wedlock Inheritance Discrimination Case* in which the Grand Bench found Civil Code provisions that granted inferior inheritance rights to children born out of wedlock to violate the equal protection guarantee of Article 14.³⁰ That case was not about legislative inaction tort either. However, what the two cases may have in common is that the court system was in a position to enforce their rulings even without the offending statutes being amended. The Civil Code inheritance provisions were in fact promptly amended, but even if they hadn't been, any inheritance dispute between heirs born in and out of wedlock would be brought to court, which could then impose a solution based on the Civil Code as modified by the Court's ruling. Similarly, a legal change of gender requires a court order, and courts are now presumably free to simply ignore the unconstitutional sterilization requirement in

the law (if it remains unchanged) in issuing the necessary orders.

That this dynamic is at play is suggested by the fact that mere weeks after the Grand Bench issued its historic decision in the *Out-of-Wedlock Inheritance Discrimination Case* in a unanimous decision that cited social changes leading to more acceptance of different family types, and Japan's entry in the UN Convention on the Rights of the Child which prohibits discrimination based on birth, five of the same judges sitting on the 1st Petty Bench rejected a state redress claim challenging the constitutionality of the requirement that parents filing a notification of birth self-report as to whether the child is born out of wedlock.³¹ This outcome may seem at odds with the previous case which found discrimination based on birth unconstitutional, but it may simply be the case that in the inheritance case the court was in a position to self-implement its judgment, whereas striking down the birth reporting case (which would have required a Grand Bench ruling in any case) could only be implemented if the Ministry of Justice modified the way in which the family registry system was operated.³²

Thus, it may be the case that legislative inaction tort claims are more useful for claims where the Courts are unable to self-implement the outcome of a ruling of unconstitutionality. This may be an important factor in the same sex marriage litigation, since, marriage being the core of the family registration system, it seems highly unlikely the Court could self-implement a judgment requiring same sex marriages to be legalized.

The Same Sex Marriage Cases

With this background out of the way, we can turn to the same sex marriage cases.

Despite resulting in judgments over a period

spanning three calendar years, the cases were all brought in 2019, except for one dated 2020. Each sought the same quantum of damages: JPY 1,000,000, a clear sign that all the cases were part of the same lobbying campaign. The cases were brought as part of a campaign orchestrated by Marriage for All Japan, a foundation established in 2019. The foundation's website is quite transparent about the nature of the litigation.³³ The website is also unequivocal that the cases are not about money; the claim for damages is simply a vehicle for getting into court and thus giving a court the opportunity to declare the lack of equality in the law of marriage unconstitutional. It also states that recourse to the courts is necessary because those seeking same sex marriage are a minority, and the Diet is a fundamentally majoritarian institution.

Japan has fifty district courts (one for each prefecture except Hokkaidō, which has four), but the five cases were brought in the courts of Tokyo, Osaka, Nagoya, Fukuoka, and Sapporo. Not only are these some of the largest cities in Japan, but their district courts are among the most prestigious within the court system. Among other things, these are also the locations of five of the nation's eight appellate High courts (the other three being in Hiroshima, Sendai, and Takamatsu).

Interestingly, three of the five cases included plaintiffs who were foreign nationals. Under article 6 of the State Redress Act, non-Japanese plaintiffs can only sue the Japanese state if there is mutuality with their state of origin. In other words, if Japanese people can't sue the United States in a US court, then Americans cannot do the reverse in a Japanese court. Developed countries generally allow suits against the state regardless of nationality, so it is not a major issue. Nonetheless, in the same sex marriage cases, mutuality had to be proven by the foreign plaintiffs.

A hint that that the judiciary itself might be in

favor of these suits being brought can be discerned from the judgments for all being available on the courts.go.jp official website (lower court judgments are not all made available in this way, and which judgments do get published through official channels is an interesting question we cannot dwell on further here). While most court descriptions on the landing page of the court website contain dry descriptions such as “murder case” or “suit for redress from state,” on the page for the Fukuoka District Court judgment, it is described as the “marriage for everyone lawsuit.” This too seems indicative of at least a part of the judiciary’s attitude towards the cases.

That said, in all five cases the plaintiffs “lost,” which is to say their claims for damages were rejected. For the most part the five judgments cover similar ground. This is unsurprising. As part of an orchestrated campaign, similar evidence and arguments would have been submitted to all the courts.

Thus, all of the judgments addressed the history of marriage law and social attitudes towards homosexuality in Japan, and trends in recognition of same sex marriage elsewhere in the world. All mention the number of local government bodies in Japan introducing same sex partnership registration systems, a number that grows impressively as the judgments are issued: it is 60 in the Sapporo judgment (March 2021), 130 in the Osaka judgment (June 2022), 209 in the Tokyo judgment (November 2022) and 242 in the Fukuoka judgment (June 2023).

There were some differences. Only three judgments addressed claims that the failure to provide for same sex marriage infringed on the right of pursuit of happiness guaranteed by article 13. All five asserted violations of the equal protection requirement of articles 14(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”), and the provisions of article 24. Article 24 contains two separate mandates, and thus separate claims were made and addressed differently by the courts.³⁴

The Sapporo judgment was issued first, and probably remains most noteworthy since it declared the failure to legislate same sex marriage unconstitutional (but the plaintiffs to have not suffered any damages). However, the court only found a single constitutional problem. Noting that article 24(1) specifically envisions marriage as being between a man and a woman, it was not possible to find an article 13 violation in the failure of the Diet to provide for a system of marriage that went beyond that.

With respect to article 14(1), however, the Sapporo court enumerated the various benefits of marriage in connection with areas such as parental authority and property and inheritance rights that could not be enjoyed by same sex couples. Here the court found that given the growing acceptance of homosexuality and same sex couples, the failure of the legislature to take any steps to make available to same sex couples *any* of the benefits enjoyed by different sex couples who are legally married was a form of unreasonable discrimination in violation of article 14(1). The Sapporo case was widely reported as the court finding the lack of same sex marriage unconstitutional, but it is important to appreciate that the ruling distinguishes between legal marriage itself and the various advantages, rights, and benefits accruing to the *status* of being legally married. Thus, the court implies that the constitutional problem could be remedied by providing at least *some* of those benefits to same sex couples without full recognition of same sex marriage.³⁵

Having noted the constitutional violation, in language referencing the standard set forth in the *Overseas Voting Rights Case* for redress for

legislative under the State Redress Act, the Sapporo court found that it could not be said that the Diet had failed to take measures to remedy an obvious constitutional problem “for a long time.” All five courts hearing the same sex marriage challenges arrived at the same conclusion on this point using essentially the same language.

The Osaka judgment also rejected the article 13 and 24 claims on essentially the same grounds. Unlike the Sapporo court, however, the Osaka court devoted less attention to the disadvantages suffered by same sex couples unable to marry legally, and even noted that the Civil Code provided alternate means to mitigate them, such as contracts and wills. Noting evidence of surveys of public opinions about homosexuality, it also concluded that it was too early to conclude that a majoritarian Diet would never legislate in favor of sexual minorities. As to the article 14(1) equal protection claim, the court found that not providing for same sex marriages was within the reasonable discretion of the Diet and thus there was no violation of that provision either. There being no constitutional violation, the question of whether the State Redress Act applied was moot.

The Tokyo District Court first addresses the article 24(1) claim, and reaches a conclusion similar to the Osaka court, that the clear language of the clause addresses male-female marriages, and although there is much wider awareness and acceptance of homosexuality today than when the constitution was drafted, it was not clear—yet—that this interpretation should be changed. Insofar as article 24(1) referenced male-female marriages and called for the establishment of a family law system based around it, the failure to provide for a system of same sex marriage could not be said to violate the equal protection mandate of article 14(1).

Nor could the Tokyo court find the lack of same

sex marriage to be considered discrimination based on sex, since it did not burden either males or females specifically because of their sex. Unlike the Osaka court, however, the Tokyo court found the current situation whereby of laws on marriage that granted various benefits to married couples that were currently unavailable to same sex couples could be said to violate article 24(2) of the constitution. However, since there were various ways of remedying this deficiency legislatively, not all of which required merely extending the current system of marriage to same sex couples, it could not be said that the lack of provisions for same sex marriage was unconstitutional. This seemingly contorted logic is a classic example of a court having it both ways in a legislative inaction tort case. But using this logic, the court was able to clearly state that the legislature should do *something* but what it did was still a matter of legislative discretion.

The Nagoya District Court found the lack of same sex marriage laws to violate both articles 24(2) and 14(1). However, noting the history of legislative recognition of same sex marriage in other countries, and historical and social developments on Japan on the same subject, it could not go so far as to find the Diet had failed to remedy to a clear constitutional problem for a prolonged period. Thus, there could be no recovery under the State Redress Act based on a claim of legislative inaction.

As with the other courts, the Fukuoka District Court noted that article 24(1) clearly anticipated a system of male-female marriage, and that the failure to provide for same sex marriage could not be a violation of it. The court did, however, acknowledge that it might be possible for a right to same sex marriage to be inferred or derived through analogy under the provision in the future. Declining also to find a right to same sex marriage rooted in article 13, the court turned to the article 14(1) equal protection claim. As with the Tokyo

court, the Fukuoka court concluded that, insofar as article 14(1) anticipated a system of male-female marriage, it could not be said to be a violation of the Diet's discretion to provide for that system but not same sex marriage as well.

The Fukuoka court also found the constitutional violation in article 24(2), noting that unlike article 24(1), it applied not just to marriage but "all other matters relating to the family," a much broader concept. The disadvantages suffered by same sex couples in not being able to marry was thus an infringement of the plaintiffs' rights under article 24(2). However, given the complex interrelated considerations that had to be considered in legislation relating to the family, and the relatively recent acceptance of homosexuality, it could not be said that the Diet had failed to address a clear constitutional problem for a long time. So again, no relief under the State Redress Act.

Concluding Remarks

The five judgments were issued by district courts, the initial courts of general jurisdiction in Japan. Four of the five judgments found some sort of constitutional violation, with a split as to whether it arises under article 14(1), article 24(2) or both. They are currently under appeal, meaning there will be high court judgments and within a few years there will likely be a Supreme Court ruling on the constitutionality of current laws denying same sex couples the benefits of legal marriage. The Supreme Court will ultimately decide on the locus of the constitutional violation—if it finds there to be one at all. The fact that multiple courts found the situation problematic should give hope that the court will at least find there to be "an unconstitutional situation." But it seems unlikely the Court will rewrite the law (it can't) or even find the plaintiffs to have suffered actionable harm.³⁶

The district court judgments are long

frustrating reads. Part of the reason is that, unlike Supreme Court decisions that need only address questions of law, district courts must also describe their findings of facts, and there was clearly a significant body of evidence to be digested and analyzed. As noted previously, this evidence included a detailed survey of legal, social and political developments in Japan and abroad.

The judgments may annoy some lawyers from the Anglo-American tradition who are more accustomed to heroic judgments by courts that bring about immediate change. The "sort of unconstitutional but not really unconstitutional yet" character of the rulings often might come across as an exercise in high-order pedantry intended to create the appearance of the courts doing something while obfuscating how little they actually are doing.

Yet this view only holds if you look at the cases in isolation and expect triumphant victories. Even without such victories, the judgments make perfect sense if you look at them as part of an ongoing lobbying campaign. Still, who the lower courts are lobbying is an interesting question. By simply generating news, the courts can be seen to be putting pressure on Diet members, though it is unclear whether its members will listen. The courts are, of course, also announcing a particular view of the cases to the courts above them, including the Supreme Court. However, there is no particular reason why the top court should accept any of them. Nor do there appear to be any instances of the Supreme Court citing lower court rulings as evidence that the Diet was on notice of a constitutional problem that it needed to fix.

As noted at the outset, Japan's Supreme Court is often described as "conservative."³⁷ With respect to State Redress Act claims based on the tort of legislative inactivity, the Court seems to have actively embraced the role such claims enable and now actively uses it to evaluate whether the Diet is doing its job

“properly.” This role actually goes far beyond what is articulated in article 81 of the constitution, which is to be the “court of last resort with power to determine the constitutionality of any law, order, regulation or official act.” Textually, this provision anticipates the court reviewing only what other branches of government *do*, but the court now asserts itself beyond that role to evaluate what the other branches have *not* done or telling them what they *should* do. So perhaps it is not so conservative after all.

In acting as lobbyists, what Japanese courts do—if anything—depends on what the Diet does or does not do. If the Supreme Court decides, as did some of the District Courts—that the problem is not in the lack of legal marriage for same sex couples, but the lack of access to the *benefits* of legal marriage—then legislation which conferred just some of those benefits without extending full legal marriage to such couples would logically remedy the constitutional problem. For a while, at least.

It is tempting to regard the Japanese judiciary’s acceptance of a role in rating legislative action and inaction as a tacit admission of defeat; a way to remain relevant without really doing anything. The counterpoint would be that in embracing such claims the courts may have

achieved far greater significance than if they had focused on issuing brave one-off judgments that were ignored or that resulted in the other branches of government developing a more adversarial relationship with the judiciary.

Arguably the larger problem with courts focusing on being agents of lobbying activities is that it risks degrading the important role courts are supposed to play in protecting minorities from the tyranny of the majority. As is noted by *Marriage for All Japan*, the organization orchestrating the same sex litigation, sexual minorities have limited recourse in the majoritarian Diet. The impact of district courts or even the Supreme Court sending messages to the Diet that the lack of same sex marriage (or at least its benefits) is unquestionably powerful when compared to other, more “traditional” forms of lobbying. Yet, lobbying through litigation is still an approach that ultimately depends on a majority of Diet members agreeing to a change. It can also take a long time. Yes, the Supreme Court might send a signal to the Diet that the benefits of legal marriage should be extended to same sex couples. But if the Diet does nothing, it will require another cycle of litigation that simply pushes meaningful change into the future, possibly for an entire generation.

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Notes

¹ See, for example: Law, David S., *The Anatomy of a Conservative Court: Judicial Review in Japan* (October 10, 2012). *Public Law in East Asia* (Albert H.Y. Chen & Tom Ginsburg eds., Ashgate 2013), *Texas Law Review*, Vol. 87, p. 1545, 2009, Washington U. School of Law Working Paper No. 09-06-02, Available at SSRN: <https://ssrn.com/abstract=1406169>. Note that while it is common to focus on the small but growing number of instances of rulings

where the Supreme Court has found a provision in a Japanese statute to violate the constitution, there is a similar number of rulings where the court finds a particular application of a statute or other government act to be unconstitutional.

² See, e.g. Feldman, David, “Public Interest Litigation and Constitutional Theory in Comparative Perspective.” *The Modern Law Review*, vol. 55, no. 1, 1992, pp. 44-72. JSTOR, <http://www.jstor.org/stable/1096844>. Accessed 21 Nov. 2023. Note Feldman does not use the word “lobby” anywhere in this article.

³ For example: Japan court finds same-sex marriage ban unconstitutional, BBC News, March 17, 2021, at: <https://www.bbc.com/news/world-asia-56425002>; Japan: Osaka court rules ban on same-sex marriage constitutional, BBC News, June 20, 2022, at: <https://www.bbc.com/news/world-asia-61670667>; Japan court: Non-recognition of same-sex marriage is 'state of unconstitutionality,' NHK World, June 8, 2023, at: <https://www3.nhk.or.jp/nhkworld/en/news/backstories/2512/>. The judgments are available on the courts.go.jp website as follows: Sapporo District Court judgment of March 17, 2021 (https://www.courts.go.jp/app/hanrei_jp/detail?id=90200), Osaka District Court judgment of June 20, 2022 (https://www.courts.go.jp/app/hanrei_jp/detail?id=91334), Tokyo District Court judgment of November 30, 2022 (https://www.courts.go.jp/app/hanrei_jp/detail?id=91778), Nagoya District Court judgment of May 30, 2023 (https://www.courts.go.jp/app/hanrei_jp/detail?id=92316), Fukuoka District Court judgment of June 8, 2023 (https://www.courts.go.jp/app/hanrei_jp/detail?id=92164).

⁴ Explanations of programmatic provisions generally also refer to the Public Assistance Act of 1950, article 1 of which clearly declares its purpose to be the implementation of article 25. However, despite widespread acceptance of the notion of programmatic provisions, other examples such as this where a statute clearly identifies itself as fulfilling a specific constitutional mandate are rare.

⁵ In English, Japan’s constitution appears to establish universal human rights enjoyed by “the people.” However, in Japanese, these are rights of *kokumin* or, Japanese people. Some provisions describe rights using terms such as “any person,” but they appear in a document which, including the title of Chapter III, articles 11, 12, and 97 refer to *all* rights granted in the constitution as being those of the Japanese people. Article 17 does say “any person” can bring a claim against the Japanese state, but article 6 of the State Redress Act only grants foreign nationals a conditional right to do so, suggesting the safe assumption is that it is a statutory right rather than a constitutional one for foreign nationals.

⁶ Supreme Court, 1st Petty Bench Judgment of November 11, 1985. An English translation of the judgment is available at: https://www.courts.go.jp/app/hanrei_en/detail?id=80. Note that although the “official” translation of the 国家賠償法 available at Japanese government’s Law in Translation website calls the law the “State Redress Act” translation of Supreme Court judgments render the title as “Law Concerning State Liability for Compensation,” but both refer to the same statute.

⁷ Characteristically, the apology from the Supreme Court came fifteen years later than the other two branches of government. The Court had used its administrative powers over the court system to require routine trials involving Hansen’s Disease sufferers to be conducted in special isolated courtrooms, a seemingly blatant violation of constitutional norms.

⁸ Supreme Court, Grand Bench judgment of September 14, 2005. English translation available at: https://www.courts.go.jp/app/hanrei_en/detail?id=1264.

⁹ Both of the cases in which the Supreme Court found malapportionment so egregious as to be unconstitutional, the claims were based not damages for tortious legislative inaction, but that the elections were invalid. This is not an uncommon remedy for electoral claims, but to declare an election constituting the Diet invalid several years later would have potentially both invalidated everything the Diet did during the intervening period and left the country without a validly-constituted Diet to remedy the problem. Supreme Court, Grand Bench judgment of April 14, 1976, English translation available at:

https://www.courts.go.jp/app/hanrei_en/detail?id=48; Supreme Court, Grand Bench judgment of July 17, 1985, English translation available at:

https://www.courts.go.jp/app/hanrei_en/detail?id=79.

¹⁰ Supreme Court, 3rd Petty Bench judgment of December 5, 1995, available at:

https://www.courts.go.jp/app/hanrei_jp/detail2?id=76107 (not translated).

¹¹ Supreme Court, Grand Bench judgment of December 16, 2015, 69 Minshū 2427, English translation available at: https://www.courts.go.jp/app/hanrei_en/detail?id=1418.

¹² Supreme Court, Grand Bench judgment of December 16, 2015, 69 Minshū , English translation available at: https://www.courts.go.jp/app/hanrei_en/detail?id=1435.

¹³ Supreme Court. Grand Bench decision of June 23, 2021, English translation available at: https://www.courts.go.jp/app/hanrei_en/detail?id=1824.

¹⁴ Supreme Court, 3rd Petty Bench judgment of March 22, 2022, judgment available (Japanese only) at: https://www.courts.go.jp/app/hanrei_jp/detail2?id=91054. This case is interesting in that unlike in the 2015 judgment, the Court obliquely acknowledges the odd positive discrimination enjoyed by those Japanese who marry foreign nationals, since the same-surname requirement does not apply in such unions.

¹⁵ Most legislation actually passed by the Diet is proposed by the Cabinet.

¹⁶ Supreme Court, 2nd Petty Bench judgment of September 28, 2007 (Student disability pensions), English translation available at:

https://www.courts.go.jp/app/hanrei_en/detail?id=913; Supreme Court, Grand Bench judgment of May 25, 2022 (overseas voting in judicial retention elections), English translation available at https://www.courts.go.jp/app/hanrei_en/detail?id=1890.

¹⁷ Japan high court rejects appeal for damages over forced sterilization, Kyodo News, June 1, 2023, available at:

<https://english.kyodonews.net/news/2023/06/dcda565d0620-japan-high-court-rejects-appeal-for-damages-over-forced-sterilization.html>. The claims were rejected on the grounds of the passage of the statute of limitations.

¹⁸ Tokyo District Court judgment of January 25, 2023, available (in Japanese only) at:

https://www.courts.go.jp/app/files/hanrei_jp/809/091809_hanrei.pdf. Citing a body of domestic legislation and international treaties had joined, the court rejected the premise that the Diet had been inactive. No tort, no damages.

¹⁹ The Supreme Court is free to reject appeals from High Courts without dwelling on the merits through a short ruling that simply states the claim does not merit consideration. In many of the judgments where it does make a substantive statement about the issue at bar, it does so after first noting that the claim does not merit consideration, but that it is going to consider it anyways.

²⁰ I published a review of one of them, see; Colin P.A. Jones, Kaoru Inoue, Shihô no

shaberisugi [Blabbermouth Judiciary]: Moral Relief, Legal Reasoning and Judicial Activism in Japan, *Emory Int'l L. Rev.* Vol. 19, P. 1563, 2005. See also, Colin P.A. Jones, Judiciary's 'snake legs' exposed, *Japan Times*, Apr. 29, 2008, available at:

<https://www.japantimes.co.jp/community/2008/04/29/issues/judiciarys-snake-legs-exposed/>.

²¹ This is not to say that Japanese judges have no powers whatsoever; there is a specific statute (the Maintenance of Order in Courtrooms Act of 1952) which empowers judges to impose summary punishments on parties who disrupt or frustrate court proceedings.

²² Supreme Court, Grand Bench judgment of April 4, 1973, English translation available at: https://www.courts.go.jp/app/hanrei_en/detail?id=38. The law remained on the books, but prosecutors refrained from bringing charges under it until it was excised when the Penal Code was overhauled in 1995. More recently, Supreme Court rulings that a statute is unconstitutional have generally resulted in prompt legislative action.

²³ Note that "losing" typically means being ordered by the court to pay "litigation costs." However, these are mostly filing fees which are calculated based on the amount claimed and are thus not significant. To the extent most parties engaged in impactful constitutional litigation can be assumed to have the assistance of lawyers working for free or highly-reduced fees, the filing fees are likely immaterial.

²⁴ Nagoya High Court judgment of April 17, 2008, 2056 Hanji 74, judgment available in Japanese at: https://www.courts.go.jp/app/hanrei_jp/detail4?id=36331.

²⁵ By the time the Nagoya High Court judgment in the preceding case had been issued, the presiding judge of the panel had reportedly already retired and taken up a new job as a law professor. There are a variety of books and articles on the subject of judicial careers, mostly in Japanese, but for a useful and recent overview of a number of viewpoints, including interviews with Professor Hitoshi Nishikawa, probably the leading authority on the subject, see journalist Ryūchi Kino's on-line article: *Fushigi na saibannjinji: daikkai - kuni wo makashita saibankan ha sasen sareru* [The strangeness of judge HR: Part 1 - judges who rule against the country are sidelined], *Slow News* website, August 7, 2022, available at: <https://note.com/slownewsjp/n/n9796b40166ca>.

²⁶ Since its leadership is dominated by career prosecutors whose primary expertise and experience are in criminal matters, the Ministry of Justice depends to a degree on judges on secondment for expertise on civil law issues. In fact a judge on secondment is usually the head of the MOJ's Civil Affairs Bureau. This raises the interesting possibility that that despite having been rejected by the Diet, the amendments to the Civil Code proposed by the Ministry of Justice legislative council in 1996 represent an *institutional* view of the judiciary and the MOJ about laws that should have been passed long ago but weren't. This would explain the odd prominence of references to the 1996 proposal in cases such as both the *Surname Case* and the *Remarriage Prohibition Case*. It was also referenced in the 2013 *Out-of Wedlock Inheritance Discrimination Case*, which found Civil Code provisions that discriminated against heirs born out of wedlock unconstitutional on equal protection grounds. A revision to this part of the Civil Code had also been part of the 1996 proposal. Supreme Court, Grand Bench decision of September 4, 2013, English translation available at:

https://www.courts.go.jp/app/hanrei_en/detail?id=1203. One of the judges in that case, Itsuda Terada, recused himself from the decision, reportedly on the grounds of having been on prolonged secondment to the MOJ's Civil Affairs Bureau including during the period when the 1996 proposal was formulated. While the recusal might suggest the MOJ-Judiciary

relationship had no impact on the outcome, the court has several dozen research judges who assist the court with research and drafting, thus rendering the opinions of the court (but not individual dissents and concurrences) institutional outputs. Masako Kamiya, Chōsakan: Research Judges Toiling at the Stone Fortress, *Washington University Law Review*, Vol. 88, Issue 6, P.1601, 2011.

²⁷ Supreme Court, 2nd Petty Bench judgment of January 23, 2019, English translation available at: https://www.courts.go.jp/app/hanrei_en/detail?id=1634.

²⁸ Supreme Court. 3rd Petty Bench judgment of November 30, 2021. By contrast, a 2021 judgment of the 3rd Petty Bench challenging another requirement of the same law—that persons seeking to change their children not have any minor children—was dismissed without any such commentary. A dissenting judge noted that the law had previously been amended in 2008, prior to which the requirement was that applicants have no children, even adults.

²⁹ Supreme Court, Grand Bench decision of October 25, 2023, judgment (Japanese only) available at: https://www.courts.go.jp/app/hanrei_jp/detail2?id=88274.

³⁰ See note 25 for citation.

³¹ Supreme Court, 1st Petty Bench judgment of September 26, 2013, English translation available at: https://www.courts.go.jp/app/hanrei_en/detail?id=1205.

³² That said, the same can be said of the Remarriage Prohibition Case which invalidated the statutory requirements for registering a subsequent marriage. However, as noted, framed as a damage claim, the substantive outcome was the petitioner’s claim was rejected. Moreover, as indicated in Note 25, it may have been a legislative change the Ministry of Justice already desired but had seen stymied by the Diet.

³³ <https://www.marriageforall.jp/>

³⁴ For ease of reference, the full text of article 24 is set forth below. (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. (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.

³⁵ See, for example: Japan court finds same-sex marriage ban unconstitutional, BBC News, March 17, 2021, available at: <https://www.bbc.com/news/world-asia-56425002>.

³⁶ For what it is worth, if I had to bet, I would expect the Supreme Court to find a violation of article 14(1), because that is where multiple other unconstitutional rulings have arisen.

³⁷ See, for example: David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan* (October 10, 2012). *Public Law in East Asia* (Albert H.Y. Chen & Tom Ginsburg eds., Ashgate 2013), *Texas Law Review*, Vol. 87, p. 1545, 2009, *Washington U. School of Law Working Paper No. 09-06-02*, Available at SSRN: <https://ssrn.com/abstract=1406169>.