A Constitutional Analysis of Same-Sex Marriage Cases

Litigation for Social Change in Japan

Minori OKOCHI*

This essay attempts to analyze Japanese judicial decision-making through political process theory, focusing on the same-sex marriage recognition cases currently being heard in several courts. I will first reveal the uniqueness of this litigation and then the importance of addressing it through process theory. Next, I will outline how the courts have interpreted the Constitution in each of the five cases currently being handed down, and identify the characteristics of Japanese judicial decision-making.

---

* After the manuscript of this article was completed, three High Courts declared the current law unconstitutional for failing to recognize same-sex marriage: Sapporo High Court, 14 March 2024, 判例タイムズ Hanrei Times 1524, 51; Tōkyō High Court, 30 October 2024, 2024WLJPCA10306001; Fukuoka High Court, 13 December 2024 [citation unknown]. These three High Courts ruled that the current law violates not only Art. 24 para. 2 but also Art. 14, making them even more proactive than the district courts, whose rulings are discussed below.

I. Introduction

1. Same-Sex Marriage Cases in Japan

Marriage equality has changed rapidly around the world in the last two to three decades. Since the 1990s, some European countries have begun to give legal recognition to same-sex couples, as in the case of civil unions. Now, at the beginning of the twenty-first century, the trend – particularly in Europe and North America – has been to allow open marriage, traditionally reserved for heterosexual couples, for same-sex couples. At the end of 2023, the number of countries recognizing same-sex marriage has risen to 35.

Japan, however, has moved slowly. The first local government recognition of partnerships appeared in 2015, and the first bill recognizing same-sex marriage was submitted to the Diet in 2019 – approximately 20 to 30 years behind leading countries. In other countries where change has not come from the political sector, litigation has played a major role in overcoming political stagnation. In Japan, however, human-rights guarantees for sexual minorities were not discussed in the courts until 2019, except for a few lawsuits filed by transgender parties.[1]

In 2019, class-action lawsuits were filed in five courts across the country to address this stagnant situation. The lawsuits sought damages on the ground that the 民法 (*Minpō*, Civil Code),[2] 戸籍法 (*Koseki hō*, Family Registration Law),[3] and other laws restricting marriage to heterosexual couples violate the Constitution and that the National Assembly's failure to enact legislation to resolve this situation is illegal under the 国家賠償法 (*Kokka baisyō hō*, National Compensation Law)[4].

In March 2021, the Sapporo District Court issued the first ruling.[5] Although no damages were awarded because the Diet's legislative inaction was not deemed illegal, the court clearly stated that the lack of any legal protection for same-sex couples violated Art. 14 para. 1 of the Constitution. This decision was widely reported in newspapers and other media and attracted a great deal of attention.

These same-sex marriage cases are currently being heard in five high courts and one district court.[6] There have been five district court rulings:

1 E.g., Supreme Court, 23 January 2018, 集民 Shūmin 261, 1; Supreme Court, 10 December 2013, 民集 Minshū 67, 1847.

2 Law No. 89/1896.

3 Law No. 224/1947.

4 Law No. 125/1947.

5 Sapporo District Court, 17 March, 判例時報 Hanrei Jihō 2487 (2021) 3.

6 The lawsuit, which has been heard by the district court now, was additionally filed in 2021.

two of them declared that the law as it stood was unconstitutional,[7] one upheld the constitutionality of the legislation,[8] and the remaining two rendered what are known as unconstitutional status rulings[9] pointing out that the status quo is in violation of the Constitution.[10] Each of these cases is unique in that they deal, in depth, with the constitutional compatibility of situations in which same-sex marriage is not legally recognized. Of course, the litigation has only just begun, and it remains to be seen what the higher courts – especially the Supreme Court – will decide. However, the behavior of these lower courts in same-sex marriage cases is a rarity in Japanese judicial practice, which is noteworthy not only from a practical point of view but also from a theoretical one.

2. Underdevelopment of Political Process Theory and Judicial Passivism in Japan

Moreover, these lawsuits can reaffirm the role of political process theory in Japan. Political process theory is not a new concept in the study of constitutional law in Japan. In the early 1990s, the political process theory advocated by John Hart Ely was introduced by Professor Shigenori Matsui and others, and it became widely known in Japan.[11] In Japan, however, the theory was generally understood as emphasizing the role of the democratic process in lawmaking and relatively limiting the role of the judiciary. While this theory offered a revolutionary perspective to Japanese constitutional law studies, which had been primarily concerned with finding ways to control democratic decision-making, it has not fully developed as a theory of judicial review. One reason for this may be that Japanese judicial practice has traditionally taken a passive stance toward lawmaking.

The Japanese judiciary – particularly the Supreme Court – is known for its reluctance in exercising judicial review. This is not simply because the Japanese Supreme Court has rendered only 11 decisions on the unconstitutionality of statutes in the 75 years since it acquired the power to review unconstitutionality. More broadly, this trend is attributed to an attitude of

7 Sapporo District Court, 17 March, 判例時報 Hanrei Jihō 2487 (2021) 3; Nagoya District Court, 30 May 2023, 2023WLJPCA05306001.

8 Ōsaka District Court, 20 June 2022, 判例時報 Hanrei Jihō 2537 (2023) 40.

9 "Unconstitutional status ruling" is a ruling that acknowledges that the situation in question violates the Constitution but does not declare it unconstitutional. It is often used in election litigation.

10 Tōkyō District Court, 30 November 2022, 判例時報 Hanrei Jihō 2547 (2023) 45; Fukuoka District Court, 8 June 2023, 2023WLJPCA06089003.

11 E.g., S. MATSUI [松井茂記], 司法審査と民主主義 [Judicial Review and Democracy] (1991).

excessive avoidance of intervention in the decisions of political branches, such as the broad recognition of legislative and administrative discretion. The substantive value judgements of judges and judicial activism based on them, which was the subject of criticism in political process theory, did not exist in Japan to begin with.

However, recent studies have shown that Japanese judicial practice is not necessarily passivist. Some have also highlighted that the attitude of the courts has been changing since the 2000s,[12] and same-sex marriage litigations are examples of this change. If Japanese judicial practice is changing, it is not surprising that views on political process theory are also changing.

Therefore, in the next section, I will address the attitude of Japanese courts toward social reform litigation.

II. Litigation for Social Change in Japan

1. Overview of Litigation for Social Change in Japan

It is true that Japanese judicial practice has often shown a reluctance to interfere with political decision-making. However, Japanese courts have also guaranteed and realized human rights to a considerable extent because their rulings nudged the political branches to legislate solutions to problems. This has already been indicated in various socio-legal studies, especially those on policy-making litigation or modern litigation. These studies often cite environmental litigation such as the Minamata Disease litigation and airport noise lawsuits, drug litigation such as the Hepatitis C litigation, and lawsuits raising the issue of segregation policies for leprosy patients as examples.

In fact, in the Kumamoto Minamata Disease Litigation, which challenged the responsibility of a company that emitted the substance that caused Minamata Disease, a series of court decisions from the district court stage recognized the company's responsibility,[13] leading to a compensation agreement with the company and the enactment of compensation legislation by the government. In the hepatitis C lawsuit, people infected with the hepatitis C virus through blood products approved by the Ministry of Health, Labor, and Welfare raised the illegality of the insurance medical administration, including the approval of the blood products. The court ruled that the administration was responsible,[14] which was apparently diffi-

12 E.g., H. Tomatsu [戸松秀典], 違憲・合憲の審査の動向 [The Trend of Constitutional Review], ジュリスト Jurist 1414 (2011) 21, 21–23.

13 E.g., Kumamoto District Court, 20 March 1973, 判例時報 Hanrei Jihō 696 (1973) 15; Fukuoka High Court, 16 August 1985, 判例時報 Hanrei Jihō 1163 (1985) 11.

14 E.g., Ōsaka District Court, 21 June 2006, 判例時報 Hanrei Jihō 1942 (2006) 23; Fukuoka District Court, 30 August 2006, 判例時報 Hanrei Jihō 1953 (2007) 11;

cult to accept at the district-court level. Subsequently, as settlement discussions at the high-court level were difficult, a resolution was reached through the enactment of remedial legislation. Several ongoing lawsuits were filed by people sterilized without their consent under the 優生保護法 (*Yusei hogo hō*, Eugenics Protection Act)[15], seeking state compensation.[16] These decisions were highly praised.

However, most of these lawsuits did not seek changes in policies that were still in place but rather sought compensation for injuries that had already occurred after the causes had been eliminated. The Kumamoto Minamata Disease lawsuit was filed in 1967, the year after companies stopped releasing the causative agent; in the Hepatitis C lawsuit, the blood products that caused the drug-induced hepatitis had not been manufactured and sold since about 1994, and the first lawsuit was filed eight years later, in 2002. The Eugenics Protection Act was substantially amended in 1996, and the relevant provisions had already been repealed. While it is true that the lawsuits provided an opportunity to advance political remedies that had been stalled, they should be distinguished from public lawsuits of the type that press for policy change, such as in the case of same-sex marriage.

2. Easy Cases/Hard Cases

In the leading Japanese studies of policy-making litigation, policymaking litigation are grouped into three categories: (1) human relations suits; (2) large-scale damage suits; and (3) public policy suits.[17] Same-sex marriage lawsuits fall under public policy suits, and most existing lawsuits fall under large-scale damage suits. In public policy suits, courts have not been as aggressive as in large-scale damage suits, where the difficulties generally associated with policymaking litigation are relatively mitigated.

Some have praised the effectiveness of policy formation litigation. Nevertheless, several issues have been raised, including the effectiveness of policy formation by courts,[18] the courts' ability to make decisions,[19] and the

---

Tōkyō District Court, 23 March 2007, 判例時報 Hanrei Jihō 1975 (2007) 2; Nagoya District Court, 31 July 2007, 訟務月報 Shōmu Geppō 54 (2007) 2143.

15 Law No. 156/1948.

16 Tōkyō High Court, 11 March 2022, 判例時報 Hanrei Jihō 2554 (2023) 12; Kumamoto District Court, 24 January 2023, 2023WLJPCA01239004; Shizuoka District Court, 24 February 2023, 2023WLJPCA02249002.

17 See, K. ROKUMOTO [六本佳平], 「現代型訴訟」とその機能 [The Contemporary Type Litigations and Their Functions], 法社会学 The Sociology of Law 43 (1991) 2, 6–8.

18 See, Y. WADA [和田仁孝], 裁判モデルの現代的変容 [Contemporary transformation of Trial model], in: Tanase [棚瀬] and others (eds.), 現代法社会学入門 [Introduction of the Sociology of Law] (1994) 129, 145–147. See also, G. ROSENBERG, The Hollow Hope: Can Courts Bring About Social Change? (2008).

relationship of judicial policy formation to democracy and legal ethics.[20] All of these issues overlap with political process theory's critique of judicial-centered jurisprudence, though their severity is greatly reduced in large-scale damage suits, especially in cases where, as noted above, the actual cause of harm has already been eliminated. The court's decision is limited to what the remedy should be, and it includes a group of lawsuits in which the judiciary can claim high institutional competence.

From the political sector's perspective, this group of lawsuits, where the issues are narrowly focused on remedies, offer relatively easy areas for compromise. In fact, in this group, a cooperative resolution is often achieved through settlements or political agreements after the lawsuits have progressed to some degree. This group of lawsuits can be considered easy cases.

In contrast, same-sex marriage litigation is a typical hard case. As same-sex marriage litigation seeks to force policy changes that affect an important part of the family system, it is impossible to avoid the difficulties inherent in policy-making litigation. Moreover, same-sex marriage litigation is not a clear-cut remedy for the harm, and it is difficult to expect the political side to compromise.

In hard cases, such as same-sex marriage, more persuasive argument is needed to justify the judiciary in daring to act aggressively instead of leaving the decision to politicians.

III. How Should the Judiciary Behave in Hard Cases?

1. Exceptional Cases for Judicial Activism

Under what conditions would judicial intervention be justified in social change lawsuits that are hard cases? One is to focus on the character of the case and identify exceptional cases in which the judiciary should act aggressively. Indeed, theorists committed to political process theory have called for judicial intervention in cases involving prejudice against discrete and insular minorities and in those where it is necessary to maintain the democratic process.

Four of the few Japanese Supreme Court decisions that have declared a law unconstitutional have concerned the right to vote or similar rights of sovereign citizens.[21] This can be explained in terms of preserving the dem-

19 See, S. Tanaka [田中成明], 裁判をめぐる法と政治 [Law and Politics of Trial] (1979).

20 See, T. Akiba [秋葉], 国籍法違憲判決と政策形成型訴訟 [Japanese Nationality Case and Judicial Policymaking], 法社会学 The Sociology of Law 80 (2014) 243, 251.

21 Supreme Court, 14 April 1976, 民集 Minshū 30, 223; Supreme Court, 17 July 1985, 民集 Minshū 39, 1100; Supreme Court, 14 September 2005, 民集 Minshū 59, 2087; Supreme Court, 25 May 2022, 民集 Minshū 76, 711.

ocratic process. However, the 2008 decision[22] that declared unconstitutional the 国籍法 (*Kokuseki hō*, Nationality Act),[23] which did not allow illegitimate children born to foreign mothers to acquire Japanese nationality if they were not acknowledged by their Japanese father before birth, falls under the category of guaranteeing the rights of minority groups.

With regard to the Nationality Act case, the fact that the issue was not unrecognized in the political process – and that, even though it was recognized, no political measures were taken to deal with it – could also support the judiciary's active intervention. The Nationality Act case was filed in 2005 with the active support of the JFC (Japanese-Filipino-children) Network, a non-profit organization established in 1994 to support children born to a Japanese father and Filipino mother. However, even before the lawsuit was filed, the issue was already being debated in the political process. For example, the Nationality Act was amended in 1984 in preparation for Japan's ratification of the Convention on the Elimination of All Forms of Discrimination against Women. During the deliberation process of this amendment, this issue was raised by a member of the Legislative Council of the Ministry of Justice, and organizations involved in family registration submitted a written opinion that the Nationality law should be revised. Therefore, the political process intentionally refrained from amending this article,[24] and the plaintiff's lawyers also felt that the political process could not be counted on; thus, they decided to file a lawsuit.[25]

The granting of nationality is an issue that requires professional and policy judgement and allows for broad legislative discretion. However, the political sector's deliberate avoidance of a resolution can be interpreted as a calculated exclusion of a minority from the political debate, albeit passively.[26] In such cases, active intervention by the judiciary is more likely to be called for.

Same-sex marriage lawsuits are also necessary for safeguarding the rights of sexual minorities and can be viewed similarly. In Japan, the discussion regarding the rights of sexual minorities has been limited until recently, in contrast to the emergence of the sexual minority rights movement in Europe and the United States during the 1970s. One reason for this could be attributed to the presence of Japanese-style homophobia, which differs from that of

22 Supreme Court, 4 June 2008, 民集 Minshū 62, 1367.

23 Law No. 147/1950.

24 AKIBA, *supra* note 20, 268.

25 AKIBA, *supra* note 20, 269.

26 See Bhagwat's argument, which finds the significance of the Equal Protection Clause of the U.S. Constitution in prohibiting the exclusion of hostile minorities from the political debate. See, A. BHAGWAT, The Myth of Rights: The Purpose and Limits of Constitutional Rights (2010) 220.

Western countries.[27] Japanese-style homophobia is a type of oppression in which same-sex attraction is seldom "openly despised or eradicated" but instead exists in a "concealed" form.[28] In contrast, some Western countries had punished same-sex sexual relationships until the 1980s, which ignited the rights movement of sexual minorities. Conversely, throughout Japan's history, instances of penalizing same-sex sexual acts have been few. This is believed to have led to a form of homophobia unique to Japan that has hindered the organization of sexual minorities. Under these circumstances, intervention by the judiciary could be justified in same-sex marriage cases to raise the issue of discrimination against sexual minorities.

Nevertheless, discussion in the political process surrounding same-sex marriage before the lawsuit was filed had been limited, in contrast to the Nationality Act case. Some have argued that the court should intervene at the appropriate time in light of developments in the political debate and legislation.[29] With little discussion to begin with, the court cannot even determine whether it is appropriate to intervene. This may be one reason why the Ōsaka District Court questioned the constitutionality of the issue but ultimately decided that it should be left to the political process to resolve.

Although a bill has yet to be proposed in the Diet, inquiries pertaining to sexual minorities have been posed to the government multiple times since around 2015 through parliamentary questioning. On each occasion, the government has repeatedly replied that "cautious contemplation is necessary." In light of the operation of Japan's parliamentary cabinet system, the plaintiffs argued that "there is no realistic prospect that the Diet, in cooperation with the government, will promptly begin considering the introduction of same-sex marriage in the future."[30] If so, there seems to be little difference between this case and the Nationality Act case.

2. Constitutional Interpretation

Another approach to justifying judicial activism in hard cases is to utilize an interpretive or applicable method that minimizes conflicts with politics. Interpretive methods that show judicial restraint, such as avoiding expansive

27 H. NAKAZATOMI [中里見博], 「同性愛」と憲法 [Homosexuality and Constitution], in: Mitsunari [三成] and others (eds.), 同性愛をめぐる歴史と法 [History and Law concerning on the homosexuality] (2015) 70, 81–83.

28 K. VINCENT [キースヴィンセント]/T. KAZAMA [風間孝]/K. KAWAGUCHI [河口和也], ゲイスタディーズ [Gay studies] (1997) 109–111.

29 J. ABE [阿部純子], 「プロセス」による自由の追求 [Pursuit of Freedom through "Process"] (2019) 431–432.

30 Brief no. 16 submitted by the plaintiffs to the Tōkyō District Court on 2 December 2020, at 19.

constitutional interpretations or avoiding constitutional judgement per se, are one of these devices. However, I would refer here to Bhagwat's argument, which was influenced by the political process theory of J. H. Ely.[31] As is well known, the Obergefell case, which gave legal recognition to same-sex marriage in the United States, was based on the violation of the right to marry recognized by the 14th Amendment's Due Process Clause and the Equal Protection Clause. Of these, the right to marry appears to be based on substantive rights. However, according to Bhagwat's approach, this case can be read as a remedy for the dysfunction of republicanism or democracy. This is because the lack of recognition of marriage as the foundation of society leaves no hope for choice based on individual autonomy and consequently no guarantee of participation in the legitimate political process.[32]

A reading of the Obergefell decision will not be discussed in this article. It is important to point out here that an approach that appeals to equality or individual autonomy is more compatible with process theory than one that appeals to substantive rights. This has implications for how the judiciary should behave in hard cases.

IV. Constitutional Interpretation in Same-Sex Marriage Cases

1. Four Types of Approaches to Same-Sex Marriage

The constitutionality of legal marriage being limited to opposite-sex relationships is particularly problematic with regard to three articles of the Japanese Constitution: Arts. 13, 14, and 24. In the aforementioned lawsuits, each of these articles was cited as a basis for claiming unconstitutionality.

Art. 13 establishes "the right of the people to life, liberty, and the pursuit of happiness." This article has been used in the past as the foundation for new rights not enumerated in the Constitution, including privacy and the right to self-determination. Consequently, the first approach is to seek the "right to marry" based on Art. 13. This approach can be characterized as appealing to substantive rights.

Art. 14 para. 1 guarantees equal treatment under the law. Although the lack of intensive constitutional review of equality clauses in past legal cases is an issue,[33] a possible argument is that the different treatment of individuals based on their sexual orientation cannot be justified.

---

31 Bhagwat, *supra* note 26. In Japan, Junko Abe provided a detailed reading of Bhagwat's book. Abe, *supra* note 29.

32 Abe, *supra* note 29, 442, 444.

33 In general, Japanese courts do not use the strict scrutiny test to review laws that utilize classifications based on specific classifications, as is the case in the United

Art. 24 pertains to marriage and family. Para. 1 holds that marriage shall be based solely on the consent of both sexes and is understood to guarantee the freedom to marry. Para. 2 states that the laws on marriage and family should be based on the dignity of the individual and the essential equality of the two sexes. However, historically, both academics and practitioners have thought that this provision cannot be relevant in a meaningful way. Issues such as the legal age of marriage and the prohibition period on remarriage have been considered under Art. 14 para. 1 and Art. 13. The interpretation of Art. 24 has never been disputed in courts. The Supreme Court first discussed the scope of Art. 24 guarantees in 2015,[34] arguing that Art. 24 para. 2 leaves "the establishment of the specific systems for the matters concerning marriage and family […] primarily to the Diet's reasonable legislative discretion" and defined the limits of the Diet's discretion by indicating the requirement of "individual dignity and the essential equality of the two sexes."

Two approaches are available according to Art. 24: one is based on Art. 24 para. 1 and affirms the freedom to marry. This has been generally understood to prohibit anything other than the consent of both parties – specifically, that of the head of the household, which was required under the former Civil Code as a requirement for marriage. This approach interprets the "freedom to marry" expansively and asserts that the Civil Code's requirement of heterosexual couples for marriage limits this freedom.

The other is to appeal to Art. 24 para. 2's reference to "the dignity of the individual" as a limit to legislative discretion using the Supreme Court's ruling in 2015. This approach is based on the premise that broad legislative discretion is allowed in family matters and that judicial intervention is justified, in exceptional cases, when it would be detrimental to individual dignity. This approach, which I refer to here as the dignity approach, may also be based on Art. 13, which refers in its first sentence, to "respect as individuals." Traditionally, it has not been common to derive special legal guarantees from this language, but the Defense Lawyers added this argument after the Sapporo District Court decision.

2. Summary of the Court Decisions

A summary of the constitutional arguments in the five decisions is as follows. Claims of substantive rights under Art. 13 and claims of freedom to marry under Art. 24 para. 1 were not recognized by any court; the basis for finding unconstitutionality was Art. 14 or Art. 24 para. 2.

States. However, as discussed below, in certain situations, they may state that they will "deliberately consider" the issue.

34 Supreme Court, 16 December 2015, 民集 Minshū 69, 2586; Supreme Court, 16 December 2015, 民集 Minshū 69, 2427.

a) Substantive rights based on Art. 13

Three district courts, namely Sapporo, Ōsaka, and Fukuoka, have issued judgements of constitutionality concerning the freedom to marry under Art. 13. The plaintiffs in the Tōkyō and Nagoya District Courts did not allege any substantive rights under Art. 13.

The Sapporo District Court stated that marriage is a juridical act that produces complex legal effects related to the status of individuals, making it hard to infer the right to same-sex marriage solely based on an interpretation of Art. 13 of the Constitution. The court explained that this is because, in certain aspects, it may be necessary to recognize that same-sex marriage creates a different legal status from heterosexual marriage. This would presuppose the understanding that marriage is an institution constructed by law. The Ōsaka District Court stated, more directly, that "freedom to marry is a freedom based on the institution of law, not a natural right."

The Fukuoka District Court went even further in its ruling. Unlike the Sapporo and Ōsaka district courts, the Fukuoka District Court affirmed that deciding whether to marry and with whom to marry at one's own will is a personal interest that should be respected for LGBTs as well. However, this interest does not constitute a personal autonomy right to form a family through marriage, which is a constitutional right guaranteed by Art. 13; rather, it implies only a personal moral interest. The court's decision also recognizes marriage as a legally constructed institution, therefore, LGBTs' 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 Art. 13.

b) Substantive rights based on Art. 24 para. 1

All five courts also displayed institution-oriented reasoning in their interpretation of Art. 24 para. 1. They focused on the term "both sexes" in Art. 24 para. 1, and its legislative history, leading them to hold that the term "marriage" in Article 24 refers exclusively to heterosexual marriages, and the right to marry does not apply to same-sex marriages.[35]

The plaintiffs contended that the understanding of "marriage" has evolved due to social changes and other factors; however, this argument was also dismissed by the courts. Three district courts, namely Tōkyō, Nagoya, and Fukuoka, held that it is not possible – at least for the time being – to interpret

35 The courts also denied that the constitution prohibits same-sex marriages. Even Ōsaka District held that it is not enough to say that the word "both sexes" should immediately be interpreted as meaning that the section positively prohibits marriage between persons of the same sex.

same-sex marriage as included in marriage under Art. 24 para. 1. According to the Nagoya District Court, it is still difficult to conclude that eliminating the possibility of opting for an alternative approach to realize the interests of same-sex couples and extending the existing legal marriage system to LGBTs is required by Art. 24 para 1 unambiguously.

c) Equality based on Art. 14

The Sapporo District Court based its judgement of unconstitutionality on Art. 14. The court stated that since the discriminatory treatment was based on sexual orientation, which is not a matter that can be chosen or changed by an individual, it requires careful consideration to determine whether the distinction has a rational basis. Such a reference that the concerned classification is based on something that cannot be changed at one's will is frequently employed by Japanese courts to heighten the level of scrutiny for judicial review. The Sapporo District Court ruled that the ability to enjoy the legal benefits of marriage is a great benefit that should be equally available to all people regardless of their sexual orientation. The legislature did not immediately lack a rational basis for not extending this provision to same-sex couples, but the fact that same-sex couples are denied the legal means to enjoy any of the legal benefits of marriage falls outside of the scope of the legislature's discretionary power, even if the legislature has broad legislative discretion.

Nevertheless, the Ōsaka, Tōkyō, and Fukuoka District Courts, while also referring to the classification, dismissed claims of unconstitutionality based on Art. 14 by plaintiffs. These three courts viewed the inequality as the inability of same-sex couples to use the institution of marriage rather than the lack of benefits associated with marriage. Since marriage under current law is an institution for heterosexuals only, it implies a rationale for distinguishing people based on sexual orientation.

The Nagoya District Court determined that the existing situation was in violation of Art. 14. Compared to the Sapporo District Court, the Nagoya District Court regarded the plaintiffs' Art. 14 concern regarding equality in the legal system pertaining to the family as a matter to be considered under Art. 24 para. 2. As a result, it concluded that it was a breach of not only Art. 24 but also Art. 14.

d) Dignity based on Art. 24 para. 2 or Art. 13

In the Sapporo District Court, the plaintiffs did not make a claim under Art. 24. para. 2; however, the other four courts examined this article. All four courts recognized the existence of the following important personal interests, though they are not constitutional rights: to form a family with a partner,

receive legal protection for living together, and gain social authorization (Tōkyō District Court); to be publicly recognized as a couple in society and be able to live together (Ōsaka District Court); to live together with a sincere intention for the purpose of permanent spiritual and physical union (Nagoya District Court); to determine on one's own whether or not to marry and whom to marry for the purpose of forming a family (Fukuoka District Court). Furthermore, the lack of recognition of same-sex couples as families and the absence of legal standing to enjoy the rights and benefits that come with marriage create a significant disadvantage for them. This infringes upon their individual dignity, which should be respected under Art. 24 para. 2.

The District Courts in Tōkyō, Nagoya, and Fukuoka have determined that same-sex couples were not provided with the necessary framework to obtain these important interests, in breach of Art. 24 para. 2. The Tōkyō and Fukuoka District Court did conclude that the current situation of same-sex couples was unconstitutional; however, they did not go as far as to rule that current laws limiting marriage to heterosexual couples were unconstitutional. The court's respect for legislative discretion is once again evident as alternative methods may alleviate the disadvantages experienced by same-sex couples, rather than simply expanding the institution of marriage.

The Ōsaka District Court acknowledged these problems faced by same-sex couples, but it found no breach of Art. 24 para. 2 because the discussion in the democratic process to address this issue had been inadequate. Though the Osaka District Court's stance differed from that of Tōkyō and Fukuoka District Courts, the disparity in viewpoints seems to be little.

3. Approaches from which the Courts Refrained

The five decisions commonly assumed the existence of broad legislative discretion on matters related to marriage. They stated that thorough judgement is required for matters related to marriage and family, taking into account various social factors such as national tradition and public sentiment, necessitating broad legislative discretion, and that the freedom to marry is based on the system established by the Diet. Therefore, the freedom to marry is only granted within the framework of the current system. This argument has been consistently applied in past Supreme Court decisions related to family matters,[36] resulting in judicial passivism.

It is worth noting that the Supreme Court's 2021 ruling, which rejected the claim that the current Civil Code is unconstitutional for not allowing room for married couples to take different surnames, was followed by a

36 Supreme Court, 16 December 2015, 民集 Minshū 69, 2427.

dissenting opinion by four judges;[37] their conclusion of unconstitutionality was based primarily on one's personal interest in their surname. While the majority opinion viewed the treatment of the surname as part of the system of marriage, the dissent recognized the existence of the personal interest involved in the surname that preceded the system and declared that marriage itself is not a service provided by the State but a human behavior that has been naturally established in society as a combination aimed at the lifetime cohabitation of both parties and recognized in society with a certain form. The dissenting opinion then argued that a system that impairs the freedom to "marry" in that sense is unconstitutional.

Thus, following this dissenting opinion, it would have been possible to reach a conclusion of unconstitutionality in same-sex marriage cases by viewing marriage as a natural act rather than an institution; however, the four courts which decided that the current situation, in which same-sex marriage is not recognized, is not in conformity with the Constitution, did not take this approach. As described below, they took the approach of maintaining the premise that marriage is a legally constructed institution, but limiting the legislative discretion over its institutional design.

Another way that the five courts did not go is to argue that the concept of marriage had changed because of a change in legislative facts. The results of polls conducted by media companies[38] show that, currently, public opinion in Japan regarding same-sex marriage is changing. The plaintiffs argued that the change in the popular concept of marriage entailed a new substantive right to same-sex marriage. However, courts held that the concept of marriage had never changed even considering these facts.

The courts have used legislative facts more modestly, relying on a change in legislative facts to conclude unconstitutionality on only two occasions. The first is the change in medical and scientific knowledge of same-sex attraction, which was considered a mental disorder until around the 1980s and is now recognized as a kind of inherent characteristic of a person that is determined irrespective of one's own will, as in the case of sex, race, and so on. This change in medical findings was commonly recognized by five courts and was used effectively to argue for equality violations in two courts. The other is the situation of control of the Diet's discretion under Art. 24 para. 2, which is discussed in the next section. The courts, in both ways, did not use legislative facts to make their own policy

37 Supreme Court, 23 June 2021, 集民 Shūmin 266, 1.

38 E.g., K. ISODA, Same-sex marriage "should be recognized by law," Asahi Shinbun, 21 February 2023, 3; "Same-sex marriage is 'unconstitutional'", Nihon Keizai Shinbun, 31 May 2023, 39.

judgements on behalf of the legislature, but to determine whether legislative discretion has been reasonably exercised.

4. Approaches Adopted by the Courts

What approach did the four courts of the same-sex marriage cases that found the status quo unconstitutional employ? The Sapporo District Court concluded that the matter was unconstitutional through the interpretation of Art. 14, which was obtained from prior precedents and theories, thereby intensifying the scrutiny on constitutional grounds. When assessing whether a violation of the equality principle has occurred, the court will consider the basis of the classification. If this is based on a characteristic that cannot be altered by an individual's own will, as enumerated in Art. 14, then the court must scrutinize its constitutionality more strictly.

The Supreme Court partially relied on this interpretation of Art. 14 in its 2008 ruling on the Nationality Act. In this case, the Supreme Court declared that the acquisition of the status of a child born in wedlock due to his or her parents' marriage is determined by an act relating to the parents' personal status, which cannot be influenced by the child's own intentions or efforts. In addition, the court emphasized the need to deliberately consider any reasonable grounds for distinguishing the requirements for acquiring Japanese nationality based on such matters. Although Japanese courts interpret the equality clause flexibly depending on the case, this ruling is understood to indicate one of the requirements for a strict screening of the clause. By stating that the exceptional conditions set forth by this precedent were met, the Sapporo District Court allowed for a more stringent review.

The other three district courts utilized the Supreme Court's 2015 ruling on the remarriage prohibition period, which held that Art. 24 para. 2 describes the limits of legislative discretion. As aforementioned, the Supreme Court's 2015 ruling indicated that a statute may be unconstitutional as a deviation or abuse of legislative discretion, even if does not violate Arts. 13 or 14, if it undermines "individual dignity and the essential equality of both sexes."

Three district courts emphasized original intent in interpreting the term "marriage" in Art. 24 para. 1 and held that the "right to marry" could not encompass same-sex marriages. However, they recognized that forming one's own family or receiving public approval for intimate bonding is of critical personal interest to all people regardless of their sexual orientation and is separate from the "right to marry." They argued that the absence of a legal system and the denial of access to these interests for LGBTs violated individual dignity and was unconstitutional.

These three courts relied on the legislative fact of social change to assess whether legislative discretion had been exceeded. The legislature is primar-

ily responsible for amending or creating laws to accommodate social changes; thus, the courts examined only whether its legislative discretion was abused in light of the new legislative facts.

In summary, the courts refrained from deriving the substantive right of same-sex marriage directly from the right of self-determination in Art. 13 or Art. 24 para. 1. Instead, they based their constitutional judgements on a theory narrowing the scope of legislative discretion. As a result, the ruling only deemed it unconstitutional to deny any and all legal protection to same-sex couples, leaving wide room for legislative action. Although these decisions appear to be extremely judicially positive when one looks at their conclusions, when one looks at the method of interpretation that leads to their conclusions, one can see that the courts are careful not to unduly interfere with the policy-making of the legislative branch.

5. Analysis

These courts' attitudes are met with some reluctance. When the same-sex marriage cases were filed in 2019, the core of the plaintiffs' claim was the freedom to marry under Art. 24 para. 1 and equality under Art. 14. In the court claim, the term "respect for the individual" appeared only in the context of a call for the recognition of the diversity of sexual orientations, and "dignity" was mentioned only in passages that laid the foundation for the egregiousness of the violation of Art. 14.[39] The parties who sought the right to marry were undeniably disappointed because the courts denied them this right.

However, in policy-making litigation, the court's ability to make judgements and respect for democracy is always in question. The courts' creation of substantive rights increases the tension in both aspects, and this is especially true in the case of rights that are deeply tied to institutions, such as marriage. Therefore, the fact that the courts struck a balance with democracy by taking the path of contracting legislative discretion rather than taking the approach of appealing to substantive rights can be positively evaluated. This attitude of the courts is close to the desirable judicial attitude based on political process theory.

Since same-sex marriage is a matter that involves guaranteeing the rights of minorities, who are always exposed to the danger of underrepresentation, it is important to build a logic that supports the court's active intervention more easily. Developing political process theory in Japan, in the current context, would also provide the courts with a time and method to act more proactively.

---

39 Complaint filed with Tōkyō District Court on February 14, 2019.