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Same-Sex Marriage in Japan and the Role of Courts in a Dominant Party System

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Japan is the only country in the G7 yet to recognize same-sex marriage or civil unions,¹ despite a spirited campaign from Japanese civil society seeking such recognition, leading to some reform at the local government level. A key reason for the non-recognition at the national level is the position of the Liberal Democratic Party (LDP), Japan's dominant party, which has ruled almost without interruption since 1955; many other parties in the Japanese Diet (legislature) support same-sex marriage,² as does a majority of the public. In recent years, advocates for same-sex marriage have turned to the courts, raising the question whether Article 14 of the Japanese Constitution, which protects against discrimination, or Article 24, which addresses marriage rights, requires the legalization of same-sex marriage. In this context, the role of Japanese courts in enforcing constitutional rights within a dominant party system arises for consideration.

At the time of writing, the constitutional issues concerning same-sex marriage have been addressed in three decisions at District Court level in separate proceedings. The first decision, by the Sapporo District Court on 17 March 2021,³ found that the failure to provide for same-sex marriage was unconstitutional under Article 14, but not Article 24. The second decision, by the Osaka District Court on 20 June 2022,⁴ found that the current law was not unconstitutional under either provision. The third decision, by the Tokyo District Court on 30 November 2022,⁵ found that the current law was not unconstitutional under either provision, but opined that due to the obstacles placed in the way of family life for same-sex couples, it

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¹ The United States, United Kingdom, France, Germany and Canada have all recognized same-sex marriage. Italy has recognized same-sex civil unions.

² See 'Saninsen 2022 no Kaku Seitō Kōyaku wo Ichiran de Hikaku [Comparing Each Party Promises at a Glance in the Upper House Election 2022]' (*Senkyo*, 7 July 2022)

<<https://go2senkyo.com/articles/2022/07/07/69339.html>> accessed 1 May 2023.

³ Sapporo District Court, 17 March 2021, Hei 31 (wa) no 267 (Japan)

<https://www.courts.go.jp/app/files/hanrei_jp/200/090200_hanrei.pdf> accessed 1 May 2023 ('Sapporo Decision'). English quotes are drawn from an informal translation: Lawyers for LGBT and Allies Network, 'English Translation' <<https://www.call4.jp/file/pdf/202104/61a29f5c979833bd939d8fbd09e6a75a.pdf>> accessed 1 May 2023.

⁴ Osaka District Court, 20 June 2022, Hei 31 (wa) no 1258 (Japan)

<https://www.courts.go.jp/app/files/hanrei_jp/334/091334_hanrei.pdf> accessed 1 May 2023 ('Osaka Decision').

⁵ Tokyo District Court, 30 November 2022, Hei 31 (wa) no 3465 (Japan)

<https://www.courts.go.jp/app/files/hanrei_jp/778/091778_hanrei.pdf> accessed 1 May 2023 ('Tokyo Decision'). After the writing of this article, but before its publication, two additional decisions relating to same-sex marriage were handed down at District Court level. On 30 May 2023, the Nagoya District Court agreed with the Sapporo District Court that the current marriage law was unconstitutional under Article 14(1), and also found that it was unconstitutional under Article 24(2). On 8 June 2023, the Fukuoka District Court found that the current law was not unconstitutional, but echoed the Tokyo District Court in opining that it was in an 'unconstitutional state' under Article 24(2). To date, additional proceedings before the Tokyo District Court have not yet reached judgment, while appeals are on foot before the Sapporo, Osaka and Tokyo High Courts.

was in an ‘unconstitutional state’ (a form of deference used previously by the Japanese judiciary to avoid a finding of outright unconstitutionality). In reaching this result, both the Osaka and Tokyo District Courts deferred to the Diet’s legislative discretion regarding marriage and the family.

The article raises the possibility that such judicial deference may be problematic in the context of a dominant party system. Considering, as well, the legal doctrinal arguments under the Constitution, there is a good case that courts in Japan should find that the failure to provide for same-sex marriage is unconstitutional. Analysis of the same-sex marriage issue in Japan also has wider implications for understanding the role of courts in interpreting and enforcing constitutional rights. The position of the LDP illustrates the way in which a dominant party can serve as an obstacle to achieving rights protection that appears to be owed to minorities under a constitution, while the theoretical considerations that arise in an analysis of Japan’s dominant party system point to the possibility of more contextually sensitive approaches to deference in the adjudication of constitutional rights.

This article is structured as follows. First, I discuss Japan’s dominant party system, considering issues that may arise with the protection of constitutional rights through political processes under a dominant party, and the possible implications for deference by courts to the democratically elected legislature in such a system. Second, I turn to the same-sex marriage issue in Japan, discussing both the legal doctrinal position under the Constitution, focusing on Articles 14 and 24 as considered in the recent court decisions, and the wider political context that may have a bearing on the adjudication of these issues. Finally, I conclude that, in the circumstances, the preferable path for the courts in Japan is to find that provision for same-sex marriage is constitutionally required.

1 The protection of constitutional rights in a dominant party system

Particular difficulties may arise with entrusting the protection of constitutional rights to democratic processes within a dominant party system. In this Part, I outline the dominant party system in Japan, before turning to consider aspects of the constitutional significance of this status, and the possible consequences that may arise for judicial deference.

1.1 Japan as a dominant party system

Kenneth Greene describes dominant party systems as ‘hybrids that combine meaningful electoral competition with continuous executive and legislative rule by a single party for at least 20 years or at least four consecutive elections’.⁶ The LDP has ruled Japan (in coalition with Kōmeitō) since the 2012 election, after a short period of government by the Democratic Party of Japan (DPJ) that was perceived negatively by the Japanese public, leading to the DPJ’s electoral defeat.⁷ Since then, the LDP has won further general elections in the lower house (House of Representatives) in 2014, 2017 and 2021, satisfying Greene’s definition of

⁶ Kenneth F Greene, *Why Dominant Parties Lose: Mexico’s Democratization in Comparative Perspective* (CUP 2007) 12. For other possible definitions, see Matthijs Bogaards, ‘Counting Parties and Identifying Dominant Party Systems in Africa’ (2004) 43 *European Journal of Political Research* 173.

⁷ See Kenji E Kushida and Phillip Y Lipsy, ‘The Rise and Fall of the Democratic Party of Japan’ in Kenji E Kushida and Phillip Y Lipsy (eds), *Japan under the DPJ: The Politics of Transition and Governance* (Brookings 2013) 1, 15. Kōmeitō, the long-time coalition partner of the LDP, is generally viewed as more supportive on issues relating to sexual minorities, but it is unclear how much impact this may have on policy: see, eg, ‘Komeito and US Envoy Agree LGBTQ Law Needed Before G7’ (*Japan Times*, 9 February 2023) <<https://www.japantimes.co.jp/news/2023/02/09/national/komeito-us-lgbt-law-g7/>> accessed 1 May 2023.

four consecutive election wins, though not the alternative criterion of 20 years in power. It has also won upper house (House of Councillors) elections in 2013, 2016, 2019 and 2022. In this period, there have been three prime ministers from the LDP: Shinzō Abe, Yoshihide Suga, and Fumio Kishida (the current prime minister at the time of writing).

However, the LDP's recent 10-year span of government omits the important context that Japan has been ruled almost continuously by LDP-led governments since 1955 (the '1955 system'), with only two brief periods of non-LDP governance, of which the 2009–2012 period happened to be one. In that sense, Greene's criteria (although satisfied) may fail to reflect the extent of the LDP's dominance. This dominance began in 1955 after the left and right wings of the Japan Socialist Party merged, and then the two conservative parties, the Democratic Party and the Liberal Party, merged to form the LDP.⁸ The LDP ruled continuously until 1993, when several non-LDP parties, including the Socialist Party, cobbled together a coalition that survived for a few months.⁹ The LDP then joined the coalition government, and by 1996, the prime minister was once again from the LDP.¹⁰ The next period of non-LDP-led government was the brief rule of the DPJ in 2009–2012.

To explain the LDP's remarkable success in electoral politics, Stephen Johnson points to the failures of the opposition, noting that 'political, social and economic change of a degree and intensity which elsewhere might have resulted in the alternation of the governing regime, was felt just as keenly, if not more so, in Japan between 1955 and 1993' and 'under such conditions, the opposition had rich electoral opportunities'.¹¹ Nonetheless, the opposition parties failed to cooperate effectively. For example, Johnson states that '[i]n every House of Representatives election between 1972 and 1983, Japanese opposition parties received more votes than the ruling Liberal Democratic Party', yet they did not coordinate at the national level for various organizational reasons.¹² Thus, the fragmented and ineffective nature of the opposition is one reason often cited for LDP success. That tendency has continued since 2012, with the DPJ collapsing in support after its short time in office (and dissolving in 2016), and the opposition fragmenting.¹³

Ethan Scheiner in his account of the LDP's dominant position emphasizes the role of clientelism, coupled with Japan's fiscal centralization, as the LDP is 'able to use the resources of the state – especially in the form of subsidies and funding of projects in areas such as construction – to encourage particular regions to support the party'.¹⁴ The 'resource edge' has proved 'doubly advantageous for the LDP because it also encouraged donors to contribute money to LDP candidates, who, if victorious, could continue distributing state resources'.¹⁵ Junnosuke Masumi similarly states that since its formation 'the LDP has nurtured and maintained its electoral *jiban* [support] through the interest distribution structure. Because the vote-getting ability of business associations and agriculturists was critical

⁸ Junnosuke Masumi, 'The 1955 System in Japan and Its Subsequent Development' (1988) 28 *Asian Survey* 286, 286.

⁹ See Purnendra C Jain, 'A New Political Era in Japan: The 1993 Election' (1993) 33 *Asian Survey* 1071.

¹⁰ Takashi Inoguchi, 'A Step Toward One-Party Predominance: Japan's General Election of 20 October 1996' (1997) 32 *Government and Opposition* 48, 52.

¹¹ Stephen Johnson, *Opposition Politics in Japan: Strategies under a One-Party Dominant Regime* (Routledge 2000) 1.

¹² *ibid* 57.

¹³ Kishida and Lipsky (n 7) 7.

¹⁴ Ethan Scheiner, *Democracy without Competition in Japan: Opposition Failure in a One-Party Dominant State* (CUP 2006) 2; see also 60–63, 68–89.

¹⁵ *ibid* 2.

... massive subsidies were invested into these sectors'.¹⁶ Steven Reed contends that, following the rise and fall of the DPJ, clientelism under the LDP has resumed.¹⁷

Further factors highlighted in the literature as explaining LDP success include the support of the media;¹⁸ the economic growth of the post-war period;¹⁹ the use of a parliamentary, rather than a presidential, system of government;²⁰ malapportionment in the electoral system favouring rural areas (which has been considered in various cases by the Supreme Court);²¹ other aspects of the electoral system, particularly the single non-transferable vote in multi-member districts system prior to its reform in 1994;²² opposition weakness at the local level;²³ the radicalism of the Socialist Party when it was the main opposition party, which may have made it unpalatable to some voters;²⁴ and the LDP's political flexibility 'in responding to social change by pragmatically meeting, at least somewhat, the demands of a wide range of social groups when it has had to'.²⁵ However, this flexibility may have limits, as the case of same-sex marriage seems to suggest.

1.2 The constitutional significance of the LDP's dominant party status

With Rosalind Dixon, I have previously considered the significance of the dominance of the LDP in Japan, in the context of 'informal' constitutional change (which occurs otherwise than through formal amendment).²⁶ However, the implications of the LDP's dominant party status are likely to extend beyond this. In an insightful article, Sujit Choudhry discusses the dominance of the African National Congress (ANC) in South Africa.²⁷ Noting that 'first-order judicial review is directed at the "foreground" of constitutional rights, whereas second-order judicial review tackles the "background rules that structure partisan political competition"',²⁸ he argues for second-order doctrines to be adopted by the Constitutional Court of South Africa that address the ANC's dominant role in that country.²⁹ Adopting a different focus from Choudhry (and eschewing the suggestion that courts need to develop

¹⁶ Masumi (n 8) 304.

¹⁷ Steven R Reed, 'Patronage and Predominance: How the LDP Maintains Its Hold on Power' (2022) 25 *Social Science Japan Journal* 83. For other factors, see Jordan Hamzawi, 'Old Party, New Tricks: Candidates, Parties, and LDP Dominance in Japan' (2022) 23 *Japanese Journal of Political Science* 283.

¹⁸ Masumi (n 8) 305–306.

¹⁹ Johnson (n 11) 3. See also Yasusuke Murakami, 'The Age of a New Middle Mass Politics: The Case of Japan' (1982) 8 *Journal of Japanese Studies* 29.

²⁰ Scheiner (n 14) 24.

²¹ *ibid* 57–58. See also William Somers Bailey, 'Reducing Malapportionment in Japan's Electoral Districts: The Supreme Court Must Act' (1997) 6 *Pacific Rim Law & Policy Journal* 169.

²² Gary W Cox and Emerson Niou, 'Seat Bonuses under the Single Nontransferable Vote System: Evidence from Japan and Taiwan' (1994) 26 *Comparative Politics* 221; Hiroto Katsumata, 'Chūsenkyokusei to Seitō kan Kyōsō [Party Competition under the Single Non-transferable Vote System]' (2020) 71 *Nenpō Seijigaku* [Annals of Japanese Political Science Association] 368.

²³ Scheiner (n 14) 4–6, 108–145.

²⁴ Hideo Otake, 'Defense Controversies and One-Party Dominance: The Opposition in Japan and West Germany' in T J Pempel (ed), *Uncommon Democracies: The One-Party Dominant Regimes* (Cornell 1990).

²⁵ Michio Muramatsu and Ellis S Krauss, 'The Dominant Party and Social Coalitions in Japan' in T J Pempel (ed), *Uncommon Democracies: The One-Party Dominant Regimes* (Cornell 1990) 303.

²⁶ Rosalind Dixon and Guy Baldwin, 'Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate' (2019) 67 *American Journal of Comparative Law* 145.

²⁷ Sujit Choudhry, "'He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1.

²⁸ *ibid* 18, citing Samuel Issacharoff and Richard H Pildes, 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) 50 *Stanford LR* 643, 647–48.

²⁹ Choudhry (n 27) 34.

new doctrines to address the LDP's position), this article applies a 'first-order' approach and analyses the protection of constitutional rights in a dominant party system.

There are two particular considerations that may arise in respect of rights protection in a dominant party system. The first is that democratic means of ensuring respect for constitutional rights are potentially weaker than in competitive systems, which places more emphasis on courts to uphold this aspect of the constitutional order. In part, this may be due to the lack of alternation in government: if the dominant party is not concerned with a particular rights issue (perhaps because it is not of interest to its voter base or elites within the party), it is difficult to have confidence that it will be addressed given that opposition voices who may have such concerns are excluded from power. This possibility may have particular salience in relation to protections for vulnerable minorities, including sexual minorities. A related issue is that the dominant party might be less heedful of rights because of an absence of political checks on its power. Scheiner explains this possible tendency as follows:

Where one party is dominant, there is little competition, and, as a result, the dominant party need not be very responsive. Party competition forces political elites and voters alike to consider alterations to the existing political agenda; examine alternative ideological, cultural, or policy ideas; and reevaluate which societal groups should be represented by the government and how. ... The quest for electoral support can also force parties to look out for the interests and desires of societal groups that might otherwise go ignored and unrepresented. Most of all, the presence of a viable opposition and party competition provides the ultimate check against unrestrained power. As long as a party fears loss of office, it will be much less likely to act arbitrarily.³⁰

The second consideration is that in a dominant party system, objections to judicial review on the basis that it is 'counter-majoritarian' may be less compelling because of issues with the democratic mandate of the dominant party, and accordingly there is less reason for courts to hesitate in enforcing rights on this basis. These objections focus on the idea that judicial enforcement of constitutional rights, especially in a system of 'strong form' judicial review involving strike-down powers, overrides decisions of the legislature, which is democratically elected and thus thought to represent the majority will.³¹ However, it is doubtful whether such a concern is as relevant in a dominant party system because the dominant party may be winning elections due to structural or other issues, rather than truly representing the majority will. These structural issues may include, for example, patronage and clientelism by the dominant party, and opposition ineffectiveness and fragmentation.³²

Such difficulties might be accepted even by dedicated opponents of judicial review of constitutional rights. For example, in setting out a case against judicial review, Jeremy Waldron assumes that there are 'democratic institutions in reasonably good working order'.³³ Waldron also acknowledges elsewhere the possibility that 'while in an ideal world Parliament's legislation should be immune from judicial challenge, in the real world of (eg) modern day New Zealand, our legislative procedures have become so impoverished that another layer of review is necessary' because 'it is not enough to show that legislatures can deal responsibly with rights or that they have done so in the past. The question is: what do

³⁰ Scheiner (n 14) 7–8.

³¹ See generally Alexander M Bickel, 'Foreword: The Passive Virtues' (1961) 75 Harvard LR 40; Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346. See also Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009).

³² See, eg, Greene (n 6) 6.

³³ Waldron (n 31) 1360.

they actually do, as currently constituted?’³⁴ Although Waldron does not refer specifically to the problem of dominant parties, there is cause to doubt that in a dominant party system, democratic institutions can be assumed to be in ‘reasonably good working order’ when one looks at what they ‘actually do, as currently constituted’.

In Japan, there is less reason to expect that the Diet, under the near continual sway of the LDP, will be as concerned to protect rights as it might be in a system of alternating parties in power; this may increase the importance of the role of the courts in doing so. The LDP’s hold on power and the resultant exclusion of opposition voices may carry the risk that the government does not ever pay sufficient attention to particular rights issues. Further, although the rule of the LDP possibly represents the majority will in a certain sense, there are structural issues, such as clientelism and the failures of opposition parties, that complicate its democratic mandate. The collapse of the DPJ after its brief time in government in 2009–2012 serves to illustrate the lack of a viable alternative to the LDP. In essence, it often appears that the LDP wins elections by default. Although the LDP does have a democratic mandate of some kind, the dominant party system can be viewed as qualifying this mandate.

1.3 Theoretical consequences for judicial deference in Japan?

These issues with dominant party democracy may have theoretical significance for judicial deference – an implicit feature of constitutional arrangements in many legal systems, including that of Japan³⁵ – because deference is often considered to constitute a form of recognition of the democratic political context. For example, Lord Hope of the UK House of Lords has written, in relation to rights under the Human Rights Act 1998 (UK), that ‘[i]n some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body’.³⁶ Yet, in a dominant party system, there seems to be less reason to respect the opinion of this body – it may be both less ‘considered’ due to its potentially lesser regard for rights and less meaningfully ‘elected’ due to its more ambiguous democratic mandate. The logic that supports judicial deference applies less in a dominant party system, as the political context affects the assumptions that underpin deference.

In addition to democratic considerations, institutional competence is a rationale often advanced in the literature on deference.³⁷ Similarly, the Supreme Court of Japan has said that ‘[m]atters concerning marriage and the family should be decided while taking into consideration various factors in the social situation including the national traditions and the people’s sentiments, and by making a comprehensive assessment with a focus on the overall rules in terms of the relationships between husbands and wives and between parents and

³⁴ Jeremy Waldron, ‘Compared to What? Judicial Activism and the New Zealand Parliament’ [2005] NZLJ 441, 442.

³⁵ See, eg, Yasuo Hasebe, ‘The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Freedoms’ (2007) 5 *International Journal of Constitutional Law* 296, 297; Shigenori Matsui, ‘Why Is the Japanese Supreme Court So Conservative?’ (2011) 88 *Washington University LR* 1375. Discussion of this issue in the Japanese context often focuses the political question doctrine (*tōchi kōi ron*): see Yasuo Hasebe, ‘Sunagawa Jiken Hanketsu ni Okeru Tōchi Kōi Ron [The Political Question Doctrine in the Sunagawa Case]’ (2015) 87 *Hōritsu Jihō* [Law Report] 44; Po Liang Chen and Jordan T Wada, ‘Can the Japanese Supreme Court Overcome the Political Question Hurdle?’ (2017) 26 *Washington International LJ* 349. This doctrine is not relevant to the same-sex marriage cases, but courts in those cases have deferred to the Diet in other ways.

³⁶ *R v Director of Public Prosecutions ex parte Kebilene* [2000] 2 AC 326, 381.

³⁷ See generally Alison L Young, ‘In Defence of Due Deference’ (2009) 72 *MLR* 554; Aileen Kavanagh, ‘Defending Deference in Public Law and Constitutional Theory’ (2010) 126 *LQR* 222.

children of the times', and this supports the Diet's reasonable legislative discretion in the area under Article 24(2) of the Constitution.³⁸ However, the Diet's institutional competence on rights issues, including those related to marriage and the family, in circumstances of single party dominance seems doubtful, since it may have a tendency to pay insufficient regard to the protection of constitutional rights.

The presence of the LDP as a dominant party therefore seems to undermine possible reliance by courts on deference, which, as will be explored below, is an aspect of some recent decisions on same-sex marriage. Arguably, courts operating in this context can afford to place less emphasis on deferential reasoning such as acknowledging the legislative discretion of the Diet in order to avoid the finding of a constitutional violation. Although one possibility is for Japanese courts to abandon deference altogether in this environment, another is for them to consider single party dominance as a factor relevant to the appropriate level of deference to the democratic process. If they were to adopt such an approach, Japanese courts could not be expected to inquire into the reasons for single party dominance, complex matters about which there may be evidential difficulties. However, they might take notice, whether explicitly or implicitly, of the fact of single party dominance and its associated tendencies (alongside the general political circumstances, such as public opinion and opposition parties).

The case for Japanese courts to be aware of single party dominance in calibrating their level of deference may be particularly strong when the LDP as dominant party stands as the obstacle to rights protection measures supported by both the public and opposition parties, which is the case for same-sex marriage. The fact that single party dominance may be only one factor relevant to deference does not mean that it cannot be important in the right circumstances, particularly in cases where there are compelling legal doctrinal arguments in favour of a certain interpretation of a right but the courts' deference to the Diet serves as the main reason why they avoid reaching the seemingly stronger legal conclusion. Further, in responding to this factor, the suggestion is not that courts should develop new doctrines in an effort to compensate for dominant party rule. It is merely that in constitutional rights review, courts should be more ready to follow the legal doctrinal analysis where they consider that it leads, rather than restraining their conclusions out of deferential considerations.

Although it might seem to be a significant step for courts to be aware of aspects of the political context in this way, it would not, in fact, go particularly far beyond what they often already do. For example, in its decision on the constitutionality of reducing inheritance for children born out of wedlock, the Supreme Court took notice of arguments made in the Diet about the impugned law, reform proposals, changes in the social and economic circumstances, people's perceptions of the issue, and legislative trends overseas.³⁹ The courts in Japan addressing same-sex marriage made reference to opinion polls, local government measures for same-sex couples, and the possibility of change through democratic processes, though their consideration of these political circumstances omitted reference to the LDP's dominant position. However, the risk posed by deference to the Diet without awareness of the presence of a dominant party is that courts participate in a fiction about the quality of the democratic processes to which they are deferring. As will be seen, this is the trap into which some courts may have fallen in respect of same-sex marriage.

³⁸ Japanese Supreme Court, 16 December 2015, Hei 25 (o) no 1079, 69 Saikō Saibansho Minji Hanreishū [Minshū] 2427 (Japan).

³⁹ See Japanese Supreme Court, 4 September 2013, Hei 24 (ku) no 984, 67 Saikō Saibansho Minji Hanreishū [Minshū] 1320.

2 The same-sex marriage issue

In Japan, the dominant position of the LDP is a key barrier to the legal recognition of same-sex marriage, exemplifying some of the difficulties that democratic rights protection may face in a dominant party system. This is so despite popular support for same-sex marriage, civil society engagement, and the actions of opposition parties and local governments, none of which has led to progress towards legalization at the national level. As a result, the matter might end up being addressed by the Supreme Court before a solution is reached (barring a change in the political situation). This would not be by any means unusual, since in a number of countries, courts have played an important role in addressing the issue of same-sex marriage, as will be discussed below.

Currently, the Japanese Civil Code (*Minpō*) does not provide for same-sex marriage or even same-sex civil unions or partnerships. As the Sapporo District Court outlined in its decision, Article 739(1) of the Civil Code provides that marriage shall be effective upon notification pursuant to the Family Register Act (*Kosekihō*), while Article 74 Item 1 of that latter Act provides that persons who intend to marry shall provide notification of the married surname of the ‘husband and wife’ (*fūfu*).⁴⁰ In the view of the Sapporo District Court, ‘the relevant provisions of the Civil Code and Family Register Act concerning marriage ... stipulate that only individuals of the opposite sex may marry’.⁴¹

In not making provision for same-sex marriage, or even same-sex unions, Japan is in an unusual position for an advanced economy. According to the Human Rights Campaign, there are 34 countries where same-sex marriage is legal,⁴² including most developed economies. However, although Japan’s position is unusual among its economic peers, it is less so in the context of its Asian neighbours. Taiwan is the only country in Asia to have legalized same-sex marriage, having done so in 2019 following a judicial decision.⁴³ In Thailand, lawmakers have been considering recognition of same-sex unions,⁴⁴ while in India the Supreme Court heard a case on same-sex marriage in 2023, though the result is not yet known at the time of writing.⁴⁵ In Singapore, when a provision banning sodomy was repealed in 2022, the prime minister indicated that there was no intention to introduce same-sex marriage.⁴⁶

Nonetheless, Japan’s stance may seem surprising given that prior to modernization in the Meiji period, homosexuality had a significant degree of acceptance. Gary Leupp explains that ‘in the Tokugawa period (1603–1868) ... male homosexual behavior [referred to by various terms, including *nanshoku*] was extremely common, at least in towns and cities’.⁴⁷ From the start of the Meiji period, ‘Western cultural influence was a major factor in the decline of the

⁴⁰ Sapporo Decision, 2.

⁴¹ *ibid.*

⁴² Human Rights Campaign, ‘Marriage Equality Around the World’ <<https://www.hrc.org/resources/marriage-equality-around-the-world>> accessed 1 May 2023.

⁴³ See Ming-sho Ho, ‘Taiwan’s Road to Marriage Equality: Politics of Legalizing Same-sex Marriage’ (2019) 238 *China Quarterly* 482.

⁴⁴ ‘Thailand Edges Closer to Legalising Same-Sex Unions’ (*Reuters*, 16 June 2022) <<https://www.reuters.com/world/asia-pacific/thailand-edges-closer-legalising-same-sex-unions-2022-06-15/>> accessed 1 May 2023.

⁴⁵ See Aishwarya Singh, Rahul Bajaj and Tarunabh Khaitan, ‘A Pathway for the Supreme Court in Ensuring Marriage Equality’ (*The Wire*, 18 April 2023) <<https://thewire.in/law/a-pathway-for-the-supreme-court-in-ensuring-marriage-equality>> accessed 1 May 2023.

⁴⁶ Tessa Wong, ‘377A: Singapore to End Ban on Gay Sex’ (*BBC News*, 22 August 2022) <<https://www.bbc.co.uk/news/world-asia-62545577>> accessed 1 May 2023.

⁴⁷ Gary P Leupp, *Male Colors: The Construction of Homosexuality in Tokugawa Japan* (California 1995) 1.

nanshoku tradition’, but it also reflected ‘the collapse of the feudal structure that had shaped the development of male homosexuality in Japan’ given that many such ‘relationships were rooted in, and mirrored, the lord-retainer bond’.⁴⁸ Intolerance towards homosexuality has abated in recent years: Rei Naka outlines that ‘[a]ttitudes toward homosexuality in Japan have liberalized extensively over the past four decades’.⁴⁹ However, there remains some taboo around homosexuality in Japan.⁵⁰

The trend towards liberalization of attitudes has been reflected in the policies of some local governments, but not the recognition of same-sex marriage at the national level. Beginning with a move by Shibuya ward in Tokyo in 2015,⁵¹ many local governments have moved to certify same-sex partnerships at their level of government.⁵² Partnerships have been embraced in even the most populous subnational jurisdiction in Japan: in June 2022, the Tokyo Metropolitan Assembly passed a bill introducing a same-sex partnership system.⁵³ Under Tokyo’s rules, which entered into force in November 2022, partnership status provides some benefits to same-sex couples in relation to areas such as housing, loans and insurance, consent for surgery, and hospital visitations.⁵⁴ There is even limited recognition of children in some local government measures.⁵⁵ However, marriage equality at the national level remains important for matters such as inheritance, immigration and children.⁵⁶ The grant of visas to members of same-sex couples who have married in overseas jurisdictions where same-sex marriage is legal has also proved to be a vexed issue.⁵⁷

Due to the lack of progress towards same-sex marriage in national politics, advocates in civil society such as the organization Marriage for All Japan have turned their attention to the courts, with mixed results so far. Some courts have recognized same-sex couples as being in *de facto* marriages.⁵⁸ Further, currently, there are six lawsuits on foot challenging the constitutionality of the failure to recognize same-sex marriage at the national level, brought

⁴⁸ *ibid* 203.

⁴⁹ Rei Naka, ‘Gendered Trajectories to Tolerance: Men’s and Women’s Changing Attitudes toward Homosexuality in Japan, 1981–2019’ (2022) *Journal of Homosexuality*, 15.

⁵⁰ See Frank K Upham, ‘Same-Sex Marriage in Japan: Prospects for Change’ (2020) 15 *Asian Journal of Comparative Law* 195, 198–200.

⁵¹ See Shusuke Murai, ‘Tokyo’s Shibuya and Setagaya Wards Issue First Same-Sex Partnership Papers’ (*Japan Times*, 5 November 2015) <<https://www.japantimes.co.jp/news/2015/11/05/national/social-issues/shibuya-set-issue-first-certificates-recognizing-sex-couples/>> accessed 1 May 2023.

⁵² See Masahiro Sogabe, ‘Status of Same-Sex Marriage Legislation in Japan’ (2020) 15 *National Taiwan University LR* 1, 8; Tōru Enoki, ‘Nihonkoku Kenpō ni Okeru Dōseikon no Ichi [The Position of Same-Sex Marriage under the Japanese Constitution]’ (2020) 135 *Senshū Hōgaku Ronshū* [The Journal of Law and Political Science] 15, 19–20.

⁵³ Ryotaro Nakamaru, ‘Tokyo Passes Ordinance to Recognize Same-Sex Partnerships’ (*Bloomberg*, 16 June 2022) <<https://www.bloomberg.com/news/articles/2022-06-16/tokyo-passes-ordinance-to-recognize-same-sex-partnerships>> accessed 1 May 2023.

⁵⁴ See Will Fee and Eric Johnston, ‘Tokyo Begins Recognition of Same-Sex Partnerships’ (*Japan Times*, 1 November 2022) <<https://www.japantimes.co.jp/news/2022/11/01/national/social-issues/tokyo-same-sex-partnership-system-start/>> accessed 1 May 2023.

⁵⁵ Anika Osaki Exum, ‘LGBTQ+ “Familyship” Systems Expand in Japan amid Absence of National Law’ (*Japan Times*, 1 May 2023) <<https://www.japantimes.co.jp/news/2023/05/01/national/lgbtq-familyship-system-spread/>> accessed 1 May 2023.

⁵⁶ See Marriage for All Japan, ‘Dōshite Dōseikon [Why Same-Sex Marriage]’ <<https://www.marriageforall.jp/marriage-equality/>> accessed 1 May 2023.

⁵⁷ See Kyodo News, ‘Japan Court Rejects Long-Term Stay Visa for US Man in Same-Sex Marriage’ (30 September 2022) <<https://english.kyodonews.net/news/2022/09/31607c098903-court-rejects-long-stay-visa-for-gay-us-man-married-to-japanese.html>> accessed 1 May 2023.

⁵⁸ Sogabe (n 52) 8–9.

for compensation under the State Redress Act (*Kokka Baishō Hō*).⁵⁹ As described above, while the Sapporo District Court found that the failure to recognize same-sex marriage was unconstitutional (though dismissing the claim for compensation), the Osaka and Tokyo District Courts ruled to the opposite effect. The Sapporo, Osaka and Tokyo decisions are being appealed to the applicable High Courts.⁶⁰ In order to analyse how courts in Japan should respond to the same-sex marriage issue, I turn now to consider both the legal doctrinal position and the political context.

2.1 Legal doctrinal position

The Japanese Constitution was promulgated on 3 November 1946 and entered into force on 3 May 1947. Article 24 of the Constitution is often perceived as an obstacle to recognition of same-sex marriage. Article 24(1) provides that: ‘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.’ Article 24(2) provides that: ‘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.’ This provision was evidently intended to protect the rights of women and advance the equality of the sexes. However, the reference to ‘both sexes’ (*ryōsei*) and ‘husband and wife’ (*fūfu* – with the characters literally meaning husband and wife) has been taken by some to mean that Article 24 is restricted to opposite-sex marriage.

However, the constitutional position is more complex than it seems: Article 24(2) refers more broadly to ‘family’, not merely to ‘marriage’, and in any event Article 24 is not the only relevant provision of the Constitution. In a broadly stated right to individual self-determination, Article 13 provides that: ‘All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.’ Further, addressing equality and non-discrimination, Article 14(1) provides that: ‘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.’ The prohibition of discrimination under Article 14(1) in respect of ‘social status’ (*shakaiteki mibun*) has been interpreted by some scholars, such as Tōru Enoki, as providing a possible basis for a constitutional requirement for same-sex marriage.⁶¹

Indeed, where a constitution has a provision protecting non-discrimination and equality, the argument for same-sex marriage based on these considerations has a strong pedigree in overseas case law. In South Africa, the Constitutional Court relied principally on a right to

⁵⁹ Marriage for All Japan, ‘Saiban Jōhō [Lawsuit Information]’ <<https://www.marriageforall.jp/plan/lawsuit/>> accessed 1 May 2023. For background on the cases, including the procedural significance of proceedings under the State Redress Act rather than the Administrative Case Litigation Act, see Upham (n 50) 204–206, 216–217. See also Erin Gallagher, ‘Mixed Messages from Japanese Courts on Same-Sex Marriage’ (*Council on Foreign Relations*, 26 July 2022) <<https://www.cfr.org/blog/mixed-messages-japanese-courts-same-sex-marriage/>> accessed 1 May 2023.

⁶⁰ See ‘Plaintiffs Appeal against Osaka Court Ruling Same-Sex Marriage Ban Constitutional’ (*Mainichi*, 1 July 2022) <<https://mainichi.jp/english/articles/20220701/p2a/00m/0na/009000c>> accessed 1 May 2023; ‘Plaintiffs Appeal Tokyo Court Ruling on Same-Sex Marriage’ (*Japan Times*, 13 December 2022) <<https://www.japantimes.co.jp/news/2022/12/13/national/crime-legal/tokyo-same-sex-marriage-ruling-appeal/>> accessed 1 May 2023.

⁶¹ See Enoki (n 50) 27–32.

equality in its own same-sex marriage case.⁶² As Sachs J put it, ‘[t]he exclusion of same-sex couples from the benefits and responsibilities of marriage ... represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples’.⁶³ In Taiwan, the Constitutional Court similarly found that the failure to provide for same-sex marriage constituted a violation of a right to equality, as well as freedom of marriage.⁶⁴ The Court reasoned that there was a lack of rational basis for the differential treatment of same-sex and opposite-sex couples in part because ‘[t]he Marriage Chapter ... does not set forth the capability to procreate as a requirement for concluding an opposite-sex marriage’.⁶⁵

A less compelling example might be that of the US Supreme Court: although the opinion of the Court in *Obergefell v Hodges*, delivered by Kennedy J, placed emphasis on the Equal Protection Clause of the Fourteenth Amendment to the US Constitution, it also seemed to invoke the somewhat mystical doctrine of ‘substantive due process’ under the Due Process Clause of that Amendment.⁶⁶ The judgment indicates the pitfalls in reaching beyond equality to support same-sex marriage, as the reliance on substantive due process represents a point of potential vulnerability, particularly in the wake of *Dobbs v Jackson Women’s Health Organization*.⁶⁷ In his concurring opinion in that case, Thomas J called for reconsideration of *Obergefell* because of its reliance on substantive due process.⁶⁸ This suggests that basing the right to same-sex marriage on a vague and contested doctrine was a risky move. Moreover, it was one that fails to gel with the ordinary understanding of what is at stake: in the political sphere, the rallying cry is for ‘marriage equality’, not ‘marriage due process’.

Similarly, in Japan, there is a good argument that the Constitution compels recognition of same-sex marriage under Article 14(1). As interpreted by the Supreme Court, Article 14(1) ‘prohibit[s] discriminatory treatment under the law unless such treatment is based on reasonable grounds in line with the nature of the matter’.⁶⁹ The test requires examining the legislative purpose and assessing the impugned law’s reasonableness given that purpose.⁷⁰ Since it is possible to marry a partner in an opposite-sex relationship but not in a same-sex relationship, this might be viewed as discrimination on the basis of social status.⁷¹ There is arguably no purpose that makes the differential treatment reasonable because there is no relevant distinction between opposite-sex and same-sex couples that justifies granting marriage rights to one and not the other. To the extent that a purpose may relate to the possibility of childbearing in opposite-sex relationships, this would not place the current law on reasonable grounds. Although same-sex couples cannot reproduce without outside

⁶² *Minister of Home Affairs v Fourie* [2005] ZACC 19 (South Africa), [79], [114], citing Constitution of the Republic of South Africa 1996, s 9(1), (3).

⁶³ *ibid* [71]–[72].

⁶⁴ Constitutional Court of the Republic of China, Judicial Yuan Interpretation No 748, 24 May 2017 (Taiwan), citing Constitution of the Republic of China 1947, Arts 7, 22.

⁶⁵ *ibid* [22].

⁶⁶ (2015) 576 US 644 (United States), 672–73.

⁶⁷ (2022) 597 US ___ (United States).

⁶⁸ *ibid* 3 (Thomas J, concurring).

⁶⁹ Japanese Supreme Court, 16 December 2015, Hei 25 (o) no 1079, 69 Saikō Saibansho Minji Hanreishū [Minshū] 2427 (Japan).

⁷⁰ *ibid*.

⁷¹ Enoki (n 50) 30–32.

assistance,⁷² not all opposite-sex couples who marry are fertile, and this is not imposed as a condition of opposite-sex marriage, as the Taiwanese court noted.

Because the Article 14(1) argument seems sufficient, it may not be necessary to rely upon Article 13 or 24(1), and doing so may invite difficulties. The terms of Article 13 are broad and general, and those of Article 24(1) are ambiguous. There is a possibility of reading the phrase ‘both sexes’ in Article 24(1) more in the sense that the rights in question extend to both sexes, not that a marriage under the provision has to be between both sexes. Moreover, what is translated as ‘husband and wife’ might be read less literally in the sense of ‘married couple’. However, this would be a contentious reading textually. Nonetheless, the provision does not say that it prohibits same-sex marriage; to read its references to ‘both sexes’ and ‘husband and wife’ as constituting such a prohibition seems implausible. The better view may be that the provision fails to address same-sex marriage, meaning that it has no implications for same-sex marriage (but also does not serve as a barrier to same-sex marriage).

This was broadly the approach of the Sapporo District Court in its decision on same-sex marriage of 17 March 2021. The Court first accepted various facts regarding the history of homosexuality in Japan and elsewhere, foreign legislative trends, and opinion polling on the issue of same-sex marriage.⁷³ Turning to its legal analysis, it then accepted that Article 24(1) referred only to opposite-sex marriage, and further held that Article 13, as a general provision, could not be read as establishing a right to same-sex marriage.⁷⁴ However, it went on to say that the failure to provide for same-sex marriage violated Article 14(1). Although acknowledging the Diet’s legislative discretion in relation to marriage and the family, because same-sex couples could not marry, there was differential treatment and it was necessary to examine whether there was a reasonable basis for it that placed it within that discretion.⁷⁵

The Court opined that ‘sexual orientation is a kind of personal characteristic which is determined irrespective of one’s own will and is equivalent to sex and race’.⁷⁶ There was no reasonable basis for the differential treatment because homosexuality had ceased to be regarded as a mental disorder, and sexual orientation could not be changed at will.⁷⁷ The Court reasoned as follows:

Considering that the only difference between heterosexual and homosexual persons is their sexual orientation and sexual orientation cannot be chosen or changed at one’s own will, it should be construed that there is no basis for differentiating between heterosexual and homosexual persons with respect to the value of their interest to enjoy the Legal Benefits of Marriage. Both heterosexual and homosexual persons must be able to equally enjoy such legal interest. Accordingly, the Differential Treatment can be regarded as distinguishing between heterosexual and homosexual persons in terms of the interest to enjoy the Legal Benefits of Marriage, which is an important interest that should be equally enjoyed irrespective of whether one is heterosexual or homosexual.⁷⁸

⁷² But see, eg, Kazue Muta, Yayo Okano and Satomi Maruyama, *Joseitachi de Ko wo Umi Sodateru to Iu Koto [Having and Raising Children as Women]* (Hakutakusha 2021).

⁷³ Sapporo Decision, 3–16.

⁷⁴ *ibid* 16–19.

⁷⁵ *ibid* 19–21.

⁷⁶ *ibid* 22.

⁷⁷ *ibid* 22–32.

⁷⁸ *ibid* 23.

However, the Court declined to issue relief under the State Redress Act.⁷⁹ The Supreme Court has explained the effect of Article 1(1) of this Act as being that Diet members' legislative action or inaction is only deemed to be illegal, sounding in damages, 'where provisions of a law restrict, without reasonable grounds, any rights or interests that are constitutionally guaranteed or protected and thus obviously violate provisions of the Constitution, and yet, the Diet has failed to take legislative measures such as amending or abolishing these provisions of the law for a long period of time without justifiable grounds'.⁸⁰ The Sapporo District Court found that this test was not satisfied.⁸¹ This conclusion seems plausible: although, on the better view, the current law violates the Constitution in failing to provide for same-sex marriage, that might not be sufficiently 'obvious' at the present time. Despite this, the Court's decision makes clear its opinion that the failure to provide for same-sex marriage is unconstitutional.

In contrast, in its judgment of 20 June 2022, the Osaka District Court found that the failure to provide for same-sex marriage was not unconstitutional. Similarly to the Sapporo District Court, the Osaka District Court accepted that sexual orientation was not something that could be changed at will, though sexual behaviour could be changed.⁸² It noted changes in the perception of homosexuality, the status of same-sex marriage in foreign systems, local government measures that had been introduced in Japan, and opinion polls on the issue of same-sex marriage.⁸³ However, the Osaka District Court placed emphasis on the language of Article 24, and the traditional meaning of marriage, to find that there was no violation of Article 24(1) in failing to provide for same-sex marriage, nor of Article 13 given that Article 24(1) was the more specific provision.⁸⁴

Turning to Article 24(2), the Court emphasized the Diet's legislative discretion, and pointed to the traditional connection between marriage and children.⁸⁵ Although acknowledging that same-sex couples were denied significant benefits, and that the opinion polls were in favour of same-sex marriage, the Court highlighted the possibility of same-sex partnerships, and cited ongoing debate and the democratic process, including the prospect of future consideration by the Diet.⁸⁶ Thus, there was no current violation of Article 24(2), though there was a possibility that the law would become unconstitutional in the future.⁸⁷ Further, the Court accepted that Article 24 could not be read as prohibiting same-sex marriage.⁸⁸

As to Article 14(1), the Court's consideration of this point was surprisingly cursory at less than four pages of a 41-page judgment.⁸⁹ It rejected the defendant's argument that the law was not discriminatory on the basis that it did not require a specific sexual orientation as a condition for marriage, given the essence of marriage as involving the forming of a bond with a chosen partner.⁹⁰ Further, it acknowledged that homosexuals were deprived of legal

⁷⁹ *ibid* 32–35.

⁸⁰ Japanese Supreme Court, 16 December 2015, Hei 25 (o) no 1079, 69 Saikō Saibansho Minji Hanreishū [Minshū] 2427 (Japan).

⁸¹ Sapporo Decision, 32–35.

⁸² Osaka Decision, 4.

⁸³ *ibid* 4–21.

⁸⁴ *ibid* 23–26.

⁸⁵ *ibid* 27–30.

⁸⁶ *ibid* 30–37.

⁸⁷ *ibid* 37.

⁸⁸ *ibid* 24–25.

⁸⁹ *ibid* 37–40.

⁹⁰ *ibid* 38.

protections enjoyed by heterosexuals because there was no legal system even similar to marriage for homosexuals.⁹¹ However, it emphasized the relevance of children, the partnership system available under some local governments as reducing the disadvantages same-sex couples faced, and the Diet's discretion.⁹² Since it was not unconstitutional, the failure of the Diet to legalize same-sex marriage was also not illegal under the State Redress Act.⁹³ Accordingly, the Court dismissed the application.⁹⁴

The Tokyo District Court's judgment of 30 November 2022 similarly did not accept the claim of the unconstitutionality of the existing marriage laws. The Court outlined the history, including that homosexuality had ceased to be treated as a mental illness, opinion polls, overseas legislative trends, and local government measures in Japan relating to same-sex couples.⁹⁵ It then focused on the traditional meaning of marriage, the relevance of being able to bear children, and the language of Article 24(1), rejecting the proposition that the constitutional meaning of marriage had changed, despite conceding social change around the understanding of same-sex couples.⁹⁶ At about two and a half pages, the Tokyo District Court's analysis of Article 14(1) was even briefer and more dismissive than that of the Osaka District Court, and it relied once again on the ability to bear children, the application of Article 24(1) only to opposite-sex couples, and the scope of legislative discretion as the basis for finding that there was a reasonable basis for the differential treatment, and therefore no violation of that provision.⁹⁷

However, the Tokyo District Court engaged in a detailed consideration of Article 24(2) as a possible basis for challenging the existing legislation.⁹⁸ That was because Article 24(2) refers not just to 'marriage' but also to 'family',⁹⁹ and, given the barriers that same-sex couples faced, the current law made it difficult for them to have a family.¹⁰⁰ The Court also canvassed changes in society, local government measures, developments in other countries and public opinion polls showing support for same-sex marriage.¹⁰¹ The Court opined that the absence of a legal system for same-sex couples to become partners and families lacked a reasonable reason in the light of their individual dignity, and could be said to be in an 'unconstitutional state' under Article 24(2) (*kenpō 24-jō 2-kō ni ihan suru jōtai ni aru to iu koto ga dekiru*),¹⁰² but not constitute an actual constitutional violation. As a matter relating to marriage and the family, the legislature had a reasonable discretion on how to construct a legal system to recognize same-sex couples because it had to take into account such factors as the country's traditions, social conditions, and public sentiment.¹⁰³ Therefore, it was realistic to entrust the matter to the legislature and there was no violation of Article 24(2).¹⁰⁴

⁹¹ *ibid* 39.

⁹² *ibid* 39–40.

⁹³ *ibid* 40–41.

⁹⁴ *ibid* 41.

⁹⁵ Tokyo Decision, 21–36.

⁹⁶ *ibid* 38–42.

⁹⁷ *ibid* 42–45.

⁹⁸ *ibid* 45–54.

⁹⁹ *ibid* 46.

¹⁰⁰ *ibid* 50.

¹⁰¹ *ibid* 51.

¹⁰² *ibid* 52–53, 55.

¹⁰³ *ibid* 53.

¹⁰⁴ *ibid* 54.

Viewed from a purely legal doctrinal perspective, the analysis under Article 14(1) of both the Osaka District Court and the Tokyo District Court shows flaws. The emphasis by the Osaka District Court on the possibility of same-sex partnerships under the local government systems is of doubtful relevance, because these measures currently provide only limited benefits that are not the equivalent of marriage, and do not cover immigration, inheritance, child custody and other matters. For example, in its coverage of the case, the *Japan Times* reported in relation to a same-sex couple under the Kyoto partnership system that ‘they can’t get a joint mortgage for their home or spousal residence status for [one partner]’ while ‘[the other partner] can’t receive government benefits during child care leave once the couple’s baby is born since she is not legally the spouse’.¹⁰⁵

The ability to have children, mentioned by both courts, is not a sound basis on which to distinguish between same-sex and opposite-sex couples, given that the latter may not always be fertile. Nor, as the Tokyo District Court conceded,¹⁰⁶ will it always be the case that same-sex couples are unable to bear children and raise a family, albeit with assistance (though some opposite-sex couples might also need assistance such as fertility treatments). Further, the Tokyo District Court’s reference to Article 24(1) in this context seems odd, since a grant of rights to opposite-sex couples by that provision arguably should not constrain the terms of Article 14(1). The analysis of the Sapporo District Court in respect of Article 14(1) is to be preferred: there are no reasonable grounds on which to treat same-sex and opposite-sex couples differently in respect of marriage. The Tokyo District Court’s analysis under Article 24(2) shows an interesting alternative path, though one that it might not be necessary to reach given the strength of the position under Article 14(1).

2.2 Political context

Yet the doctrinal legal analysis, although important, omits what may be the biggest problem with these judgments: deference. In the Osaka District Court judgment, there was a discussion of the possibility of achieving change through the ‘democratic process’ (*minshuteki katei*), noting the ‘momentum’ (*kiun*) behind such efforts, though with ongoing debate about how to recognize same-sex couples.¹⁰⁷ Unsurprisingly, this discussion did not mention the biggest obstacle to achieving change through the democratic process: the dominant position of the LDP and its prolonged failure to act. In reaching its decision, the Osaka District Court placed extensive reliance on the legislative discretion (*rippō sairyō*) of the Diet.¹⁰⁸ The Tokyo District Court similarly relied upon legislative discretion,¹⁰⁹ and sought to entrust the matter to the Diet, while its finding of an ‘unconstitutional state’ under Article 24(2) without actual unconstitutionality is a form of deference that has been used previously by Japanese courts in the context of electoral malapportionment decisions. As the *Japan Times* interpreted it, the Tokyo District Court’s ruling ‘is pressuring the legislature to take action, and if they don’t, it could lead to an unconstitutional ruling down the road’.¹¹⁰

¹⁰⁵ Kanako Takahara, ‘Unpacking Japan’s Latest Ruling on Same-Sex Marriage’ (*Japan Times*, 29 June 2022) <<https://www.japantimes.co.jp/news/2022/06/29/national/social-issues/explainer-ruling-same-sex-marriage/>> accessed 1 May 2023.

¹⁰⁶ Tokyo Decision, 41.

¹⁰⁷ Osaka Decision, 35–36.

¹⁰⁸ See, eg, *ibid* 27–28, 32–33, 37–41.

¹⁰⁹ See, eg, Tokyo Decision, 37–38, 43–47, 53–55.

¹¹⁰ See Kanako Takahara, ‘Mixed Messages: What the Tokyo Court’s Same-Sex Marriage Ruling Really Means’ (*Japan Times*, 2 December 2022) <<https://www.japantimes.co.jp/news/2022/12/02/national/crime-legal/tokyo-court-same-sex-marriage-ruling-explainer/>> accessed 1 May 2023.

However, this acknowledgment of legislative discretion, and expectation that the matter can be entrusted to the democratic process or the Diet in the absence of a finding of outright unconstitutionality, may be overly abstract, because the question of whether to defer to the legislature's discretion cannot realistically be divorced from the political realities of the legislature as it actually functions and is constituted. As discussed in Part I, in the context of a dominant party system such as Japan's, there may be less reason to trust that the legislature under a dominant party will address rights problems, while the democratic mandate that would serve as an implicit theoretical basis for such deference is more ambiguous. These issues might be particularly acute when opposition parties and a majority of the public support the proposed reform, as is the case in respect of same-sex marriage.

Several other parties, including the current main opposition party, the Constitutional Democratic Party of Japan (CDP), support changing the law to allow same-sex couples to marry.¹¹¹ Opposition parties submitted bills in 2019 and again in 2023 to recognize same-sex marriage by amending the Civil Code.¹¹² However, the grip on power of the LDP in the Diet has meant that the views of other parties have had little political impact. Referring to another controversial point of policy on which the LDP has stood firm – the requirement that married couples share the same surname – Masahiro Sogabe explains that ‘the Liberal Democratic Party, which has almost always been a ruling party since the 1950s, is basically conservative, and many of its members embrace traditional family views. This is the reason why the amendment of the provision on the married couple's surname is not realized. The same is true for legislation that allows same-sex marriage’.¹¹³

In 2019, the LDP released a Q&A to explain its position on same-sex marriage, pointing to the fact that Article 24 of the Constitution purportedly does not recognize same-sex marriage, and calling for careful consideration of the issue.¹¹⁴ In 2020, then Prime Minister Shinzō Abe (who, after completing his term in office, later passed away in tragic circumstances) elaborated on the LDP's position in remarks to the House of Councillors:

Article 24 of the Constitution stipulates that marriage shall be based solely on the consent of both sexes, and under the current Constitution, it is not envisaged that same-sex couples will be allowed to enter into marriage. Whether or not the Constitution should be amended to recognize same-sex marriages may be something that should be discussed, but we believe that this is an issue that is fundamental to the nature of the family in Japan and requires extremely careful consideration.¹¹⁵

Nonetheless, in accordance with the tendency of the LDP to move some way towards addressing concerns raised by critics, there have been tentative steps towards the recognition of sexual minorities, though these have not led to significant results as yet. In 2021, a bill from the LDP seeking to address discrimination on the basis of sexual orientation and gender identity was abandoned amid opposition from conservatives within the party, notwithstanding

¹¹¹ See ‘CDP Vows to Legalize Same-Sex Marriages, Alter Refugee Policy’ (*Asahi Shimbun*, 14 September 2021) <<https://www.asahi.com/ajw/articles/14439955>> accessed 1 May 2023.

¹¹² ‘Japan's Main Opposition CDP Submits Bill for Same-Sex Marriage’ (*Japan Times*, 6 March 2023) <<https://www.japantimes.co.jp/news/2023/03/06/national/same-sex-marriage-bill/>> accessed 1 May 2023.

¹¹³ Sogabe (n 52) 6.

¹¹⁴ Jiyū Minshu Tō [Liberal Democratic Party], ‘Seiteki Shikō Seidōitsusei (Seijinjin) ni Kansuru Q&A [Q&A on Sexual Orientation and Gender Identity]’ (June 2019) 37 <https://storage.jimin.jp/pdf/news/policy/132489_1.pdf> accessed 1 May 2023.

¹¹⁵ Sogabe (n 52) 7.

its support from the opposition CDP.¹¹⁶ Meanwhile, despite the judicial decisions, there has been no sign of any move to introduce same-sex marriage or civil unions for same-sex couples. In 2022, the current prime minister, Fumio Kishida, made a statement in the Diet, echoing Abe's language, that same-sex marriage 'relates to the very foundation of what a family means in Japan, and must be considered extremely carefully'.¹¹⁷

The LDP is not a monolith, and there are significant differences between its various factions. However, the similar framing came despite the fact that Kishida is from the Kōchikai faction, a more moderate or even 'liberal' faction of the LDP, unlike Abe, who was from a large conservative faction (Seiwakai).¹¹⁸ (In 2017, Kishida said that Abe 'is conservative, dare I say, a hawk. I am liberal, a dove'.¹¹⁹) In February 2023, Kishida repeated similar remarks, calling for 'extreme caution' in relation to same-sex marriage.¹²⁰ Shortly after making this statement, Kishida fired his executive secretary over derogatory comments made to reporters about same-sex couples.¹²¹ Subsequently, Kishida has said that he does not consider that disallowing same-sex couples to marry is 'unjust discrimination by the state'.¹²² As of the time of writing, a bill to 'promote understanding' is again the subject of legislative attention.¹²³

Another potential impact on LDP policy is the close ties between many politicians and outside groups such as the Nippon Kaigi, Shintō Seiji Renmei, and the Unification Church.¹²⁴ The Unification Church, in particular, has been under significant scrutiny after former prime minister Abe was assassinated in a shooting motivated by the links between the LDP and the

¹¹⁶ 'Japan Ruling Party Abandons LGBT Bill as Consensus Elusive' (*Nikkei*, 29 May 2021) <<https://asia.nikkei.com/Politics/Japan-ruling-party-abandons-LGBT-bill-as-consensus-elusive>> accessed 1 May 2023.

¹¹⁷ Ryotaro Nakamaru, 'Tokyo Passes Ordinance to Recognize Same-Sex Partnerships' (*Bloomberg*, 16 June 2022) <<https://www.bloomberg.com/news/articles/2022-06-16/tokyo-passes-ordinance-to-recognize-same-sex-partnerships>> accessed 1 May 2023.

¹¹⁸ Myles Carroll, *The Making of Modern Japan: Power, Crisis, and the Promise of Transformation* (Brill 2021) 212; Tobias Harris, 'Abe's Legacy' in Robert J Pekkanen, Steven R Reed and Daniel M Smith (eds), *Japan Decides 2021* (Springer 2023) 87, 91.

¹¹⁹ Harris (n 118) 91.

¹²⁰ Isabel Reynolds, 'Japan's Kishida Rebuffs Calls for Marriage Equality Ahead of G-7' (*Bloomberg*, 2 February 2023) <<https://www.bloomberg.com/news/articles/2023-02-02/japan-s-kishida-rebuffs-calls-for-marriage-equality-ahead-of-g-7>> accessed 1 May 2023.

¹²¹ 'Kishida Fires Senior Aide over Homophobic Comments' (*Japan Times*, 5 February 2023) <<https://www.japantimes.co.jp/news/2023/02/05/national/politics-diplomacy/masayoshi-arai-japan-same-sex-marriage-hate/>> accessed 1 May 2023. The influence of the bureaucracy is often thought to be important in Japan, though it may be unclear what, if any, role it is playing in respect of the same-sex marriage issue.

¹²² Mari Yamaguchi, 'Japan PM: Ban on Same-Sex Marriage Not Discrimination' (*AP News*, 1 March 2023) <<https://apnews.com/article/japan-kishida-lgbtq-samesex-marriage-discrimination-43baf7af74baf0d8b908124b19eabf0e>> accessed 1 May 2023.

¹²³ See Kohei Morioka, 'LDP to Postpone Talks about LGBT Bill until After Elections Are Over' (*Asahi Shimbun*, 5 April 2023) <<https://www.asahi.com/ajw/articles/14868325>> accessed 1 May 2023. Entitled 'Bill for Promoting Public Understanding of the Diversity of Sexual Orientation and Gender Identity' (*Seiteki Shikō oyobi Jendā Aidentiti no Tayōsei ni Kansuru Kokumin no Rikai no Zōshin ni Kansuru Hōritsuan*), this bill was introduced to the Diet on 18 May 2023. It was passed in June 2023, with the support of the governing coalition and some opposition parties, after minor amendments were made. Although stating a basic principle of respecting individuals with human rights and not tolerating unfair discrimination by reason of sexual orientation and gender identity, the provisions seek to realize this principle by raising public understanding, without legislating any legal status for same-sex couples or binding non-discrimination norms in respect of sexual orientation and gender identity.

¹²⁴ Will Fee, 'In Japan, Ties between Politics and Religion Run Deep' (*Japan Times*, 2 August 2022) <<https://www.japantimes.co.jp/news/2022/08/02/national/japan-politics-religion-ties/>> accessed 1 May 2023.

Church. Significantly, the Church is a staunch opponent of the rights of same-sex couples. In an article in *Nikkei*, Rurika Imahashi and Alice French write that ‘the extent to which this relationship [between the LDP and the Church] has influenced government policy remains up for debate’, but ‘[o]ne area in which the church could have exerted influence is on issues of gender and sexuality. ... [It has] been instrumental in opposing LGBTQ rights, activists say’.¹²⁵ The potential influence of the Unification Church over the LDP is striking given its small number of members relative to the population of Japan.

Indeed, the LDP’s stance on same-sex marriage is in opposition to the views of the public. For example, an *Asahi* poll in March 2021 showed 65% support for legalizing same-sex marriage, with only 22% opposed (up from 41% in favour, 37% opposed in 2015), including, interestingly, a majority of LDP supporters.¹²⁶ Similarly, an *NHK* poll held in July 2021 recorded 57% in support and 37% opposed.¹²⁷ Among supporters of same-sex marriage in the *NHK* poll, 76% claimed that there is an equal right to marry anyone, while 15% pointed to love being good, and 7% said same-sex marriage was recognized overseas.¹²⁸ Opponents of same-sex marriage were more divided in their reasons: 36% referred to declining birth rates, 36% said that marriage had to be between a man and a woman, and 24% were concerned about the collapse of the traditional family.¹²⁹ It is against this background of wide popular support, but prolonged political inaction, that the locus of activity shifted to the courts.

The Supreme Court has the power to conduct judicial review of the constitutionality of any law, order, regulation or official act under Article 81 of the Constitution, but it is often thought to be ‘conservative’ when it comes to exercising this power. Sogabe states that the Court is ‘known for its extreme judicial reluctance with regard to unconstitutional review. ... In particular, there has been a tendency to allow the Diet wide legislative discretion in matters relating to the family’.¹³⁰ David Law argues more forcefully that the Court ‘has been described as the most conservative constitutional court in the world, and for good reason’, both ‘in the sense of being so passive and cautious that it almost never challenges the government’ and of ‘shar[ing] the ideological views and preferences’ of the LDP.¹³¹ He expresses concern that the Supreme Court has not struck down enough laws and that when it has done so, they have not been ‘momentous’.¹³² Law points to the way that appointments are made and the institutional pressures on sitting justices (imminent retirement, high workload, and limited personnel) as explaining this tendency.¹³³

¹²⁵ Rurika Imahashi and Alice French, ‘Strings Pulled: Dissecting Japan’s Unification Church Problem’ (*Nikkei*, 7 September 2022) <<https://asia.nikkei.com/Spotlight/The-Big-Story/Strings-pulled-Dissecting-Japan-s-Unification-Church-problem>> accessed 1 May 2023.

¹²⁶ ‘Dōseikon, Hōritsu de Mitomeru Beki 65% Asahi Shinbun Yoron Chōsa [Same-Sex Marriage Should Be Recognized in Law 65% Asahi Shimbun Public Opinion Poll]’ (*Asahi*, 22 March 2021) <<https://www.asahi.com/articles/ASP3P7DSCP3MUZPS003.html>> accessed 1 May 2023.

¹²⁷ ‘Jendā Shakai no Honne wa? NHK Yoron Chōsa Yori [Gender – Society’s True Opinion Is? An NHK Public Opinion Poll]’ (*NHK*, 1 July 2021) <<https://www.nhk.or.jp/gendai/comment/0029/topic023.html>> accessed 1 May 2023.

¹²⁸ *ibid.*

¹²⁹ *ibid.*

¹³⁰ Sogabe (n 52) 15.

¹³¹ David S Law, ‘The Anatomy of a Conservative Court: Judicial Review in Japan’ (2009) 87 *Texas LR* 1545, 1546–47.

¹³² *ibid.* 1547.

¹³³ *ibid.* 1549–86. For other possible explanations of the approach of the Supreme Court, see Matsui (n 35). For a different view of Japanese courts, see Upham (n 50) 206–215.

However, perhaps there is some cause for hesitation about criticism of the Supreme Court, bearing in mind the politicized and activist nature of some other countries' judiciaries, such as that of the United States. On one tenable view, the Supreme Court of Japan is not wrong to exercise its strike down power sparingly and to recognize that it is an extreme measure; some caution might be preferable to overconfidence, which often seems to be the problem elsewhere. That is particularly so when considering that in Japan the Cabinet Legislation Bureau already 'meticulously' reviews bills that are proposed by the Cabinet for constitutionality.¹³⁴ However, judicial restraint is to be distinguished from judicial abdication, and when the legal case is strong enough, as it seems to be in the case of same-sex marriage, there is good reason for even a cautious court to act.

A study by Mark Ramseyer and Eric Rasmusen suggests that statistically, judges who rule against the preferences of the LDP are less likely to advance within the judicial hierarchy.¹³⁵ In this way, the dominance of the LDP may operate in the opposite direction proposed here: by increasing, rather than reducing, the tendency to defer to the government. However, Yasuo Hasebe observes that the Supreme Court's 'attitude toward constitutional review is apparently changing. The current Court is not the same timid, docile, and conservative court of the twentieth century'.¹³⁶ Some boldness may be apparent in the field of family law. In 1995 a provision that discriminated against children born out of wedlock in respect of their inheritance was upheld,¹³⁷ before the Court reversed course in 2013 and found that it violated Article 14(1).¹³⁸ In 2015, the Court determined that a timed prohibition on remarriage after divorce applying to women was partially unconstitutional under Articles 14(1) and 24(2),¹³⁹ though a law requiring married couples to have the same surname was found constitutional.¹⁴⁰

Judicial determination of the issue of same-sex marriage would not be unusual. Of the countries in which same-sex marriage is legal, 23 legalized same-sex marriage through legislation (some after popular votes), while 10 did so through court decisions (or through legislation following court decisions).¹⁴¹ Moreover, same-sex marriage has in some cases become widely accepted by the public in the years after a judicial decision. After Brazil legalized same-sex marriage due to a decision of the National Justice Council in 2013, public opinion was mixed: a poll conducted by the Pew Research Center in 2013–14 showed 45% in support of same-sex marriage and 48% opposed.¹⁴² However, by May 2021, an Ipsos poll

¹³⁴ See Hasebe, 'The Supreme Court of Japan' (n 35) 298–99.

¹³⁵ J Mark Ramseyer and Eric B Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (Chicago 2003) 60–61, 80–81.

¹³⁶ Yasuo Hasebe, 'The Supreme Court of Japan, One Step Forward (But Only Discreetly)' (2018) 16 *International Journal of Constitutional Law* 672, 673.

¹³⁷ Japanese Supreme Court, 5 July 1995, Hei 3 (ku) no 143, 49 Saikō Saibansho Minji Hanreishū [Minshū] 1789 (Japan).

¹³⁸ Japanese Supreme Court, 4 September 2013, Hei 24 (ku) no 984, 67 Saikō Saibansho Minji Hanreishū [Minshū] 1320 (Japan).

¹³⁹ Japanese Supreme Court, 16 December 2015, Hei 25 (o) no 1079, 69 Saikō Saibansho Minji Hanreishū [Minshū] 2427 (Japan).

¹⁴⁰ Japanese Supreme Court, 16 December 2015, Hei 26 (o) no 1023, 69 Saikō Saibansho Minji Hanreishū [Minshū] 2586 (Japan).

¹⁴¹ Human Rights Campaign (n 40).

¹⁴² Pew Research Center, 'Religion in Latin America – Chapter 5: Social Attitudes' (13 November 2014) <<https://www.pewresearch.org/religion/2014/11/13/chapter-5-social-attitudes/>> accessed 1 May 2023.

indicated that 55% of Brazilians supported same-sex marriage, and only 18% opposed all legal recognition for same-sex couples.¹⁴³

Nonetheless, a judicial decision in favour of same-sex marriage is not completely without risk. Gerald Rosenberg argues, in relation to same-sex marriage, that ‘those who rely on the courts absent significant public and political support will fail to achieve meaningful social change and may set their cause back’.¹⁴⁴ The possibility of backlash is apparent from the response to an Inter-American Court of Human Rights advisory opinion requested by Costa Rica, which found that the American Convention on Human Rights required the legalization of same-sex marriage.¹⁴⁵ The decision was controversial in Costa Rica, and Fabricio Alvarado, a religious conservative opposed to same-sex marriage, ended up winning the first round of the presidential election, though he lost in the second round.¹⁴⁶ The experience in Costa Rica may also point to the difficulties faced by supranational courts, in particular, when seeking to rule on same-sex marriage.¹⁴⁷

To the extent that supranational courts might need to be careful about dictating to states, that may not apply in quite the same way to national courts. Even so, as Hasebe outlines, there is a risk that more proactive courts could result in the politicization of judicial appointments; he says that ‘[i]f the judiciary audaciously expands its power, then it is only to be expected that the political branch will attempt to exert influence over its decisions’.¹⁴⁸ If that were to occur, rather than serving as a needed check on the dominance of the LDP, the courts could instead become an instrument of it. Although this is a risk, if the courts only act to protect constitutional rights in cases where there are compelling legal arguments that support its interpretations, it should be able to minimize the possibility of a backlash. Moreover, there

¹⁴³ Ipsos, ‘LGBT+ Pride 2021 Global Survey Points to a Generation Gap around Gender Identity and Sexual Attraction’ (9 June 2021) <<https://www.ipsos.com/en/lgbt-pride-2021-global-survey-points-generation-gap-around-gender-identity-and-sexual-attraction>> accessed 1 May 2023.

¹⁴⁴ Gerald N Rosenberg, ‘Saul Alinsky and the Litigation Campaign to Win the Right to Same-Sex Marriage’ (2009) 42 John Marshall LR 643, 668.

¹⁴⁵ Inter-American Court of Human Rights, Advisory Opinion OC-24/17 of 24 November 2017, <https://www.corteidh.or.cr/docs/opinion/es/seriea_24_eng.pdf> accessed 1 May 2023. See also Lucas Lixinski, ‘Rights Litigation Piggybacking: Legal Mobilization Strategies in LGBTIQ International Human Rights Jurisprudence’ (2021) 31 Florida Journal of International Law 273.

¹⁴⁶ See Evelyn Villarreal Fernández and Bruce M Wilson, ‘Costa Rica’s 2018 Elections: The Two Alvarados, between Deepening Division and Democratic Dependability’ (*LSE*, 8 February 2018) <<https://blogs.lse.ac.uk/latamcaribbean/2018/02/08/costa-ricas-2018-elections-the-two-alvarados-between-deepening-division-and-democratic-dependability/>> accessed 1 May 2023.

¹⁴⁷ A more cautious approach is apparent from European supranational courts. The European Court of Human Rights has not found a right to same-sex marriage: see David Feldman, ‘Marriage, Identity and the European Court of Human Rights’ in Jill Marshall (ed), *Personal Identity and the European Court of Human Rights* (Routledge 2022), ch 6. However, failure to provide for any form of legal recognition of same-sex couples may constitute a violation of Articles 8 and 14 of the European Convention on Human Rights: see Giulio Fedele, ‘Strasbourg’s Coming Out’ (*Verfassungsblog*, 5 June 2023) <<https://verfassungsblog.de/strasbourgs-coming-out/>> accessed 16 June 2023. Decisions of the European Court of Justice relating to same-sex marriage have focused on its competency over freedom of movement: see Shambhvi Sinha, ‘Same Sex Parentage to Be Given Legal Recognition across All EU Member States – Landmark Ruling by CJEU’ (*LSE*, 17 May 2022) <<https://blogs.lse.ac.uk/humanrights/2022/05/17/same-sex-parentage-to-be-given-legal-recognition-across-all-eu-member-states-landmark-ruling-by-cjeu/>> accessed 1 May 2023.

¹⁴⁸ Hasebe (n 136) 680. It is also conceivable that this risk is more pronounced in a system in which amending the constitution is difficult (rigidity), as it can be difficult to override a judicial interpretation. In Japan, under Article 96 of the Constitution, there is a requirement for amendment of two-third approval in both houses of the Diet and then a majority popular vote. This represents a high bar. Scholars have ranked the Japanese Constitution as among the hardest to amend: see, eg, Astrid Lorenz, ‘How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives’ (2005) 17 Journal of Theoretical Politics 339, 359.

may be less risk of backlash in circumstances where the view of the public, as well as that of opposition parties, aligns with the judicial action but has been blocked because of a dominant party system, as in the case of same-sex marriage.

Further, it may be relevant that Japan's system of government seems flexible enough to respond to a ruling in favour of same-sex marriage. In terms of the presence of checks and balances, Japan's system is somewhere in the middle between countries like the US (with many such checks) and the UK (with few). In systems with many veto points that make it difficult to pass legislation, legislatures may struggle to respond effectively to a finding that a law is unconstitutional. That may be particularly so for presidential systems in which the president wields a veto alongside a bicameral parliament. Japan's system is parliamentary, and veto points are not excessive, particularly as the lower house (the House of Representatives) can override the upper house (the House of Councillors) with a two-thirds majority vote.¹⁴⁹ If courts do find the current marriage law unconstitutional, it would not be difficult for the Diet to address the matter with new legislation.

3 Conclusion

The Sapporo District Court's decision shows that it is clearly tenable, and indeed persuasive, to consider the failure to provide for same-sex marriage to be unconstitutional under Article 14(1), in a way that echoes the approaches taken by other courts around the world. In contrast, the Osaka and Tokyo District Courts' reasoning, despite containing dicta that are helpful to same-sex marriage proponents, shows flaws – in particular, undue deference to the Diet in the context of the dominant party status of the LDP. As the same-sex marriage issue shows, political checks that contribute to respect for constitutional rights may be weaker under a dominant party system while considerations that support deference seem less persuasive due to structural factors undermining the democratic mandate of the ruling party. Courts arguably cannot, in deferring to the elected branches, assume the pristine character of legislative decision-making when this might be untethered from reality.

However, that conclusion is not intended to suggest any expectation that Japan's current political circumstances are necessarily permanent. The LDP has a dominant position, but the possibility that it will lose future elections and its dominant status will end is a real one. Such transitions from dominant party systems have taken place in the past in other democracies such as Israel, India and Mexico, and such a change seemed, for a short time, to be possible in the two short periods of non-LDP rule in Japan since 1955, though these experiments ultimately proved abortive. Nonetheless, the next such attempt might succeed, and end up establishing a consolidated two-party system in which the LDP faces a viable challenger. Should the political system in Japan shift away from being a dominant party one in the future, it would be necessary to reconsider the situation in the changed context.

Equally, it cannot be ruled out that the political position of the LDP on same-sex marriage may shift and the governing coalition in Japan will move to legislate for same-sex marriage or civil unions. The LDP sometimes meets its critics halfway, though it has not done so on this issue and, at the time of writing, there are no signs that the party position will change. Barring some shift in Japanese politics, the dominant status of the LDP is an ill omen for the hope of same-sex couples in Japan to experience true equality before the law. However, that

¹⁴⁹ See Japanese Constitution, Article 59. A two-thirds majority is not required for approval of the budget (Article 60) and treaties (Article 61).

equality is guaranteed to them under the Constitution. It is hoped that the courts, perhaps bearing in mind their particular role within a system of government otherwise dominated by the LDP, will act to legalize same-sex marriage on the basis of equality if the political system continues to fail to deliver this reform.