

DECISIONS THAT DECLARED LAWS UNCONSTITUTIONAL AND THEIR IMPACT ON JAPANESE FAMILIES

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I. INTRODUCTION

Before the Japanese Constitution was adopted, the old Civil Code under the Meiji Constitution governed family life in Japan. The old law did

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not extend suffrage to women, who were also not recognized as being able to conclude contracts. The eldest son, rather than the wife, inherited the home and farm upon the death of the father. These traditions were derived from the feudal system of the Edo period.

When the Japanese Constitution of 1947 replaced the Meiji Constitution after World War II, universal suffrage was achieved, and equality between men and women was declared in Article 14 of the new constitution.¹ In addition, Article 24 affirmed that a marriage may only take place with the mutual consent of both the husband and wife.² The marriage must be maintained through mutual cooperation and on the basis of the equal rights of the husband and wife.³

Given these changes, it appears that the legal system that was introduced with the new constitution resulted in reforming the Japanese family law system. However, the judiciary has struggled against the current of conventional and closed ideas in Japanese society. The most famous case in this regard is the Supreme Court case known as the patricide case, the facts of which are described later in this paper, which involved a girl who was repeatedly raped by her own father.⁴ She was prosecuted under Article 200 of the Criminal Code, which stipulated that a person who kills a parent or a spouse's parent is punishable by death or life imprisonment with hard labor.⁵ At the same time, Article 199 of the Criminal Code stated that a person who kills another person shall be punished with death or imprisonment with hard labor for not less than three years.⁶ The Supreme Court struck down Article 200 on the basis of Article 14 of the Constitution and opined that the means of achieving the law's goals were too harsh.⁷ However, it took twenty-two years after this decision for the article to be amended by legislature.⁸

This paper first reviews several cases involving human rights issues that have arisen under Japanese family law and the constitution, including

1. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 14 (Japan).

2. *Id.* art. 24.

3. *Id.*

4. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan).

5. KYŪ KEIHŌ [OLD PEN. C.] 1880, art. 200 (Japan).

6. *Id.* art. 199.

7. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan).

8. KEIHŌ [PEN. C.] (Japan) (deleting art. 200 as last amended by Law No. 91, May 12, 1995); Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan).

two relevant 2015 Supreme Court decisions. The Court upheld the constitutionality of Article 750 of the Civil Code, which requires married couples to choose either the husband's or the wife's family name, emphasizing the tradition of couples using the same family name.⁹ On the other hand, the court struck down Article 733 of the Civil Code, which prohibited women from remarrying within six months of a divorce.¹⁰ The court stated that 100 days was a reasonable period to wait before a woman should be permitted to remarry.¹¹

Second, focusing on the justices' opinions in these two cases, this paper will consider the constitutionality of these decisions and the Supreme Court's function of imposing its interpretations on the two other branches of government: the executive and the legislative branches.

II. HISTORY OF THE STATUS OF FAMILY AND WOMEN UNDER THE JAPANESE CONSTITUTION

A. *Drafting History of the Japanese Constitution*

The Japanese Constitution was adopted on May 3, 1947.¹² Under the previous (Meiji) constitution, only male adult suffrage was guaranteed with regard to the election of public officials, although women participated in the general election of the Imperial Diet in 1946.¹³ Moreover, women were not

9. KYŪ MINPŌ [OLD CIV. C.] 1898, art. 750 (Japan); Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2586, <http://www.courts.go.jp> (Japan).

10. KYŪ MINPŌ [OLD CIV. C.] 1898, art. 733 (Japan); Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 25 (o) no. 1079, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2427, <http://www.courts.go.jp> (Japan).

11. *Id.*

12. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (Japan).

13. Hiroko Tomida, *The Association of New Women and its Contribution to the Japanese Women's Movement*, 17 JAPAN F. 49, 49–51 (2005), <http://www.tandfonline.com/doi/abs/10.1080/0955580052000337468#aHR0cDovL3d3dy50YW5kZm9ubGluZS5jb20vZG9pL3BkZi8xMC4M.DgwLzA5NTU1ODAwNTIwMDAzMzc0Njg/bmVIZEFjY2Vzcz10cnVlQEBAMA>. Public officials were purged from public service on January 4, 1946, and universal suffrage was achieved on April 10 of that year. *Rebuilding of Political Parties and General Election*, NAT'L DIET JAPAN: MODERN JAPAN IN ARCHIVES, <http://www.ndl.go.jp/modern/e/cha5/description05.html#c551> (last visited Nov. 5, 2017). In spite of these prohibitions, and before the current constitution was established, Raichō Hiratsuka worked to achieve universal suffrage around 1920, and Hiratsuka, Husae Ichikawa, and Mumeo Oku established the New Women's Association (Shin Fujin Kyokai). Tomida, *supra* note 13. See also DAI NIHON TEIKOKU [MEIJI KENPŌ] [CONSTITUTION] (Japan).

able to form political associations or take part in political activities under the Maintenance of Public Order Act, known as *Chian Iji Hou*.¹⁴

Also, under the old Civil Code¹⁵ and the Meiji Constitution, the eldest son was the head of the family and succeeded to all property, including the house and the land, when the head of the household passed away.¹⁶ Married women were not competent to take legal action, and in a divorce, women were not eligible for the right to the distribution of property.¹⁷ In addition, only women were subject to criminal liability for adultery under the old Criminal Code.¹⁸

When the United States General Headquarters (GHQ) and the Japanese government worked together to propose the draft of the new constitution, General Courtney Whitney hired Ms. Beate Sirota Gordon to work on provisions related to human rights.¹⁹ She advanced women's rights in the draft of the constitution.²⁰ The provisions for women became more advanced at that time, and the equality of men and women was legally acknowledged.²¹ The articles she drafted included those related to both women and children. For example, pregnant women and women with children would be protected under the new constitution and would be subsidized when necessary.²² Illegitimate children would not be legally discriminated against and would be given the same rights as legitimate children.²³ Adopting a child would require the consensus of both the husband and wife, and the adopted child would be treated equally as a

14. Chian Iji Hou [Maintenance of Public Order Act], Law No. 46 of 1925 (Japan) (The Maintenance of Public Order Act is also sometimes called the Peace Preservation Law). *See also* MASASHI TSUJIMOTO & YOKO YAMASAKI, THE HISTORY OF EDUCATION IN JAPAN (1600–2000) 71 (2017).

15. KYŪ MINPŌ [OLD CIV. C.] 1898, art. 732, 749–51, 964 (Japan).

16. *Id.* arts. 754–55, 807, 964(3) (noting that there was an exception for a female head of household, although her authority was more limited than a male's authority).

17. *Id.* art. 732 (Japan).

18. KYŪ KEIHŌ [OLD PEN. C.] 1880, art. 183 (Japan). This system was abolished by amendments to the Civil and Criminal Codes in 1947. Kanako Takayama, *Reform of the Criminal Justice System in Japan*, 82 INT'L REV. PEN. L. 245, 245 (2011); HISTORY OF LAW IN JAPAN SINCE 1868 297–98 (Wilhelm Röhl ed., 2005).

19. BEATE SIROTA GORDON, THE ONLY WOMAN IN THE ROOM 104 (1st ed. 1997).

20. *Id.* at 106.

21. *Id.* at 107–08, 113–16, 125. Later, Ms. Gordon noted that the United States Constitution did not have specific provisions for women's rights. *Id.* at 107–08.

22. GORDON, *supra* note 19, at 111.

23. *Id.* at 117–18.

member of the family.²⁴ The privilege of the eldest son would be abolished, and every child would be given equal opportunity in spite of the circumstances of his or her birth.²⁵ Compulsory education would be required for eight years in public school.²⁶ Middle and higher education would be provided free of charge.²⁷ The government would be authorized to support gifted children.²⁸ All children would be eligible to receive free medical treatment for their teeth and eyes.²⁹ School-aged children could not engage in full-time employment.³⁰ Regarding adults, every adult person would be given the right to pursue an occupation.³¹ If he or she could not obtain it, the government would provide the necessary minimum financial support.³² Women would be eligible for any occupation, including political positions, and they would receive the same wage as that of males who provided the same service.³³

The Japanese government objected to Ms. Gordon's drafts, because the Japanese had no background to accept equality between men and women.³⁴ However, this twenty-two-year-old woman's opinion was reflected in Articles 14 and 24 of the Japanese Constitution.³⁵ She referred to Articles 109, 119, and 122 of the Weimar Constitution, the First Amendment of the United States (U.S.) Constitution, the Finland Constitution, and the 1924 Soviet Constitution.³⁶

24. *Id.*

25. *Id.*

26. *Id.* at 118.

27. GORDON, *supra* note 19, at 118

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. GORDON, *supra* note 19, at 118.

33. *Id.* See also MIYOKO TSUJIMURA, *KENPŌ TO KAZOKU* [CONSTITUTION AND FAMILY] 79–84 (Nihon Kajo Shuppan 2016) (Japan).

34. TATSUO SATO, *NIHONKOKU KENPŌ SEITEI SI* [HISTORY OF THE CONSTITUTION OF JAPAN] (Yuhikaku 1962) (Japan).

35. See *NIHONKOKU KENPŌ* [KENPŌ] [CONSTITUTION], arts. 14, 24 (Japan).

36. U.S. CONST. amend. I; Finland Constitution (Suomen perustuslaki), Ch. 2 § 6, 1999; CONSTITUTION OF THE UNION OF SOCIALIST SOVIET REPUBLICS [SOVIET CONSTITUTION] Jan. 31, 1924 (Soviet Union); DIE VERFASSUNG DES DEUTSCHEN REICHS [WEIMAR CONSTITUTION] Aug. 11, 1919, art. 109, 119, 122 (Ger.); GORDON, *supra* note 19, at 107–08.

B. Three 1986 Statutes of Women in Society

A constitution typically binds the government in its relations with its citizens but not the relationships of private citizens among themselves. It is controversial when the constitution is applied to relationships between private citizens. One famous case is the Nissan automobile case in which Nissan set different retiring ages for males (sixty years old) and females (fifty-five years old).³⁷ The Supreme Court ruled the employment provision void under Article 90³⁸ of the Civil Code.³⁹

The textbook on the Constitution of Japan classifies relationships among private parties into three positions.⁴⁰ The first position emphasizes constitutional values and that constitutional norms are not directly applicable to the relationship between publishers and authors.⁴¹ The second position uses general basic provisions of the Civil Code to affect a constitutional norm between private parties.⁴² If a contract exists, the constitutional norm applies through basic principles, such as the bona fide (good faith) articles of the Civil Code used to interpret a contract.⁴³ If there is no contract, as in the case of a traffic accident, then principles that guide public order and morality are applied.⁴⁴

The third position recognizes no effect of a constitutional norm in relationships between private parties.⁴⁵ Only statutes can assist with providing a remedy. The Japanese Supreme Court has not clarified which position it is likely to take.⁴⁶ Currently, German constitutional theory is

37. Saikō Saibansho [Sup. Ct.] Mar. 24, 1982, Showa 54(o) no. 750, 35 SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 300, <http://www.courts.go.jp> (Japan).

38. MINPŌ [CIV. C.] art. 90 (Japan).

39. Saikō Saibansho [Sup. Ct.] Mar. 24, 1982, Showa 54(o) no. 750, 35 SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 300, <http://www.courts.go.jp> (Japan).

40. KOJI SATO, NIHON KOKU KENPŌ RON [JAPANESE CONSTITUTION] 164–69 (Seibundo 2011) (Japan) [hereinafter SATO 2011]; TOSHIHIKO NONAKA, MUTSUO NAKAMURA, KAZUYUKI TAKAHASHI & KATSUTOSHI TAKAMI, KENPŌ I [CONSTITUTION I] 248–56 (Yuhikaku 2012) (Japan) [hereinafter NONAKA ET AL. I].

41. SATO 2011, *supra* note 40, at 165, 166–69; NONAKA ET AL. I, *supra* note 40, at 250–51.

42. MINPŌ [CIV. C.] arts. 90, 709 (Japan).

43. SATO 2011, *supra* note 40, at 165; NONAKA ET AL. I, *supra* note 40, at 249–50.

44. SATO 2011, *supra* note 40, at 165; NONAKA ET AL. I, *supra* note 40, at 249–50.

45. SATO 2011, *supra* note 40, at 165; NONAKA ET AL. I, *supra* note 40, at 249–50.

46. Saikō Saibansho [Sup. Ct.] Dec. 12, 1973, Showa 43 (o) no. 932, 27 SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1536, <http://www.courts.go.jp> (Japan); Saikō Saibansho [Sup. Ct.] July 19, 1974, Showa 42 (gyo tsu) no. 59, 28 SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 790, <http://www.courts.go.jp> (Japan).

influential. Advocates of German constitutional studies argue that the state has a duty and responsibility to protect the rights of private citizens against infringement by a private third party.⁴⁷

Shigenori Matsui argues that the three above-mentioned classifications should be abandoned.⁴⁸ Matsui classifies the relationship between statutes and private parties into four types.⁴⁹ The first type is when a specific statute orders a certain action by a private party.⁵⁰ The second is when a specific statute authorizes a private citizen to act.⁵¹ The third occurs when there is no statute.⁵² Finally, the fourth type occurs when a specific statute prohibits a private citizen from acting.⁵³ Matsui argues that the “public welfare” doctrine would apply in the first and second cases.⁵⁴ In the fourth case, no state responsibility arises.⁵⁵ In the third case, private action is permitted and not prohibited by any statute.⁵⁶

Even after the Japanese Constitution was adopted, the gender role model in the family was partially maintained. Court decisions and the Japanese legal system, which are based on civil law, have influenced the lives of people as well. For the family environment in Japan, three statutes enacted in 1986 promoted the social status of women, addressed lifestyle and work life, and provided opportunities for women to work outside.⁵⁷

47. TAKESHI OYAMA, *KIHONKEN HOGO NO HŌRI* [PRINCIPLE REGARDING PROTECTION OF BASIC RIGHTS] (Seibundo 1998) (Japan); *see also* SATO 2011, *supra* note 40, at 168.

48. SHIGENORI MATSUI, *NIHONKOKU KENPŌ* [CONSTITUTION OF JAPAN] 325–26 (Yuhikaku 2007) (Japan).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. MATSUI, *supra* note 48.

54. *Id.*

55. *Id.*

56. *Id.* at 324.

57. Danjo Koyō Kikai Kintou Hou [Act on Securing Equal Employment Opportunity and Treatment Between Men and Women in Employment], Law No. 113 of 1972, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp> [hereinafter Danjo]; Roudousha Haken Jidyō no Tekiseina Uneino Kakuho Oyobi Haken Roudousha no hogo tou ni Kansuru Houritsu [Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers], Law No. 88 of 1985, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp> [hereinafter Roudousha] (noting this act is sometimes also called the *Temporary Staffing Services Law* (emphasis added)); Kokumin Nenkin-hō [National Pension Law], Law No. 141 of 1947, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp> (as amended in 1959, and again in 2012 by Law No. 99) [hereinafter Kokumin].

First, the Equal Employment Opportunity Law (*Danjo Koyo Kikai Kintou Hou*) prohibits gender discrimination in the workplace.⁵⁸ Its purpose was to promote equality in recruitment, employment, and retirement or dismissal.⁵⁹ In 1997, this law was partially amended and regulations to protect women, such as the prohibition of overtime or midnight work, were abolished.⁶⁰ According to its original goal, however, the revised act does still require legally equal treatment in recruitment, employment, and retirement or dismissal.⁶¹

Second, the Temporary Staffing Services Law (*Roudousha Haken Jigyou no Tekiseina Uneino Kakuho Oyobi Haken Roudousha no hogo tou ni Kansuru Houritsu*) provides for certain employment conditions and guarantees the rights of employees.⁶² Employers typically hire temporary workers at cheaper rates than regular workers. Workers can choose flexible working styles. This Temporary Staffing Services Law has been amended several times.⁶³ The 2006 revised Act provided an extension of part time workers' contracts, as well as improvements to welfare expenses.⁶⁴

Third, the National Pension Act provides tax reductions for female homemakers who belong to Category III Insured as defined by the National Pension (*Kokumin-Nenkin-Dai-San-Gou-Hi-Hokensha*).⁶⁵

Only those with income under 1.3 million yen receive a tax reduction for filing income taxes as a husband's dependent.⁶⁶ This law classifies people in Japan into three categories. Category I is for self-employed persons, students, and unemployed persons.⁶⁷ Category II is for public officials or salaried workers.⁶⁸ Persons in this category receive the common national pension in addition to a welfare pension.⁶⁹ Category III is for unemployed wives of persons in Category II.⁷⁰ Unemployed wives do not

58. Danjo, *supra* note 57, at art. 5.

59. *Id.* art. 1.

60. *Id.* arts. 27–31.

61. *Id.* arts. 5–6.

62. Roudousha, *supra* note 57.

63. *Id.* (noting that the *Temporary Staffing Services Law* was amended in 1999 and 2006 (emphasis added)).

64. *Id.* art. 40(2) (as most recently amended by Law No. 82 in 2016).

65. Kokumin, *supra* note 57, at art. 7(3).

66. *Id.*

67. *Id.* art. 7(1).

68. *Id.* art. 7(2).

69. *Id.* (noting, for example, that public officials need to pay welfare insurance premium).

70. Kokumin, *supra* note 57, at art. 7(3).

have to pay tax, because they are their husbands' dependents for the purpose of receiving a pension.⁷¹ If the wives work outside the home and earn over 1.3 million yen, they must pay employee pension and social insurance premiums.⁷²

Another limitation has prevented wives from working outside of the home, a spousal deduction for housewives who can claim the deduction as long as their income is less than 1.3 million yen a year.⁷³ Japanese housewives have been reluctant to earn more than 1.3 million yen a year. The obligation to pay higher taxes associated with higher earnings may limit their revenue-making capacity when they decide to work outside the home.

In late 2016, the Japanese government revised the spouse dependent deduction from 1.3 to 1.5 million yen per year.⁷⁴ This revision requires companies to change their regulations in order for spouses to receive additional payments.⁷⁵ This is a reflection that family life in Japan is changing.

III. DECISIONS UNDER THE JAPANESE CONSTITUTION

The Supreme Court is the last and highest court in the judiciary under the Japanese Constitution.⁷⁶ Japanese lower courts have concrete judicial review under Article 81 of the Japanese Constitution.⁷⁷ The judiciary reviews disputes of law under the Court Act.⁷⁸

71. *Id.*

72. Haigūsha Kōjo [Spouse Deduction], National Tax Agency Regulation No. 1191 of 2014, <http://www.nta.go.jp/taxanswer/shotoku/1191.htm> (Japan).

73. *Id.*; see also Kokumin, *supra* note 57, at art. 7(3).

74. *Haigūsha Kōjo Oyobi Haigūsha Tokubetsu Kōjo no Minaosi ni Tsuite* [About Revision of Spouse Deduction and Spouse Special Deduction], NAT'L TAX AGENCY, <https://www.nta.go.jp/gensen/haigusya/index.htm> (Japan) (last visited Nov. 5, 2017) [hereinafter *About Revision of Spouse Deduction*]. *Nen Zeisei Taikō Wo Kakugi Kettei* [Cabinet Decision on Fiscal Year 2005 Taxation Outline Deduction of Spouse Deduction etc.], NIKKEI SHIMBUN (Dec. 22, 2016, 13:32), [http://blog.goo.ne.jp/kzunoguchi/e/937b9d3c573216bece30277a3bd29bb1?fm=entry_awc\(Japan\)](http://blog.goo.ne.jp/kzunoguchi/e/937b9d3c573216bece30277a3bd29bb1?fm=entry_awc(Japan)) [hereinafter *Fiscal Year 2005 Taxation*].

75. *About Revision of Spouse Deduction*, *supra* note 74; *Fiscal Year 2005 Taxation*, *supra* note 74.

76. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 81 (Japan).

77. Saikō Saibansho [Sup. Ct.] Oct. 8, 1952, Showa 27 (ma) no. 23, 6(9) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 783, <http://www.courts.go.jp> (Japan).

78. Saibansho Hou [Japanese Court Act], Law No. 48 of 2013, art. 3(1), translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp>.

Under the new Japanese Constitution, pre-war family conventions have survived and have emerged in Japanese courts in several cases. The Japanese judiciary took part in introducing human rights concepts to the Japanese people through Articles 14 and 24 of the Japanese Constitution.⁷⁹ When the constitutionality of statutes, orders, regulations, or their disposition is in dispute and a precedent is overruled, the Grand Bench of the Supreme Court reviews the case.⁸⁰ The Petty Court can review the case, if it is clear, by referring to Grand Bench decisions.⁸¹

Japanese Constitutional Law courses teach that Article 14 of the Japanese Constitution declares equal opportunities, not equal outcomes. One explanation is that the classes enumerated under Article 14 of the Japanese Constitution, which state that there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin, have historically been used as justification for discrimination.⁸² Per se distinctions based on these enumerated classes are presumed to be discriminatory. The government must argue that differential treatment is reasonably constitutional.⁸³ However, different treatment based on the effort and ability of the individual is considered constitutional.

In other differential treatment, in spite of effort and origin, people are sometimes in weak or fragile situations. Social rights as provided in Article 25 of the Japanese Constitution⁸⁴ take on the role of assisting economically fragile people.⁸⁵ A person who argues that differential treatment is unconstitutional takes on the burden of proving that it is unconstitutional.⁸⁶

79. See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], arts. 14, 24 (Japan).

80. *Id.* art. 81.

81. *Id.* arts. 80–81.

82. *Id.* art. 14.

83. SATO 2011, *supra* note 40, at 196, 208; JOHN RAWLS, A THEORY OF JUSTICE (Belknap Press of Harv. U. Press, rev. ed. 1999) (discussing how Rawls theory has been influential on Japanese constitutional studies).

84. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 25 (Japan).

85. Some Japanese constitutional scholars think Article 25 represents the political agenda with no legal norm. See SATO 2011, *supra* note 40, at 363; NONAKA ET AL. I, *supra* note 40, at 502–03.

86. Yuichiro Tsuji, *Article 9 and the History of Japan's Judiciary: Examining its Likeness to American and German Courts*, 68 TSUKUBA J.L. & POL. 35 (2016) (Japan); see also SATO 2011, *supra* note 40, at 196, 208; NONAKA ET AL. I, *supra* note 40, at 278.

A. The Patricide Case and Article 200 of the Criminal Code

One of the most famous cases, referenced earlier in this paper, concerns patricide. The case involves a junior high school student who was repeatedly raped by her own father.⁸⁷ Her mother left the house after learning that her own daughter was pregnant by her husband.⁸⁸ The daughter tried to leave as well, but in vain.⁸⁹ She had five children as a result of the rapes, two of whom died.⁹⁰ Another six were aborted and she later underwent sterilization.⁹¹ When she was twenty-nine, she met a man at her workplace that she was eager to marry.⁹² She did not run away at that point because her sister, who was still living at home, might have been put in danger.⁹³ Upon telling her father about her work colleague, he became angry, put her in confinement, and raped her.⁹⁴ Eventually, she became desperate and strangled him.⁹⁵ At that time, she was twenty-nine years old and her father was fifty-three years old.⁹⁶

87. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan); Charles Qu, *Parricide, Equality and Proportionality: Japanese Courts' Attitude Towards the Equality Principle as Reflected in Aizawa v Japan*, 8 MURDOCH U. ELECTRONIC J.L. ¶4 (2001).

88. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan); Qu, *supra* note 87.

89. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan); Qu, *supra* note 87.

90. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan); Qu, *supra* note 87.

91. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan); Qu, *supra* note 87.

92. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan); Qu, *supra* note 87.

93. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan); Qu, *supra* note 87.

94. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan); Qu, *supra* note 87.

95. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan); Qu, *supra* note 87.

96. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan); Yuko Taniguchi, *Songoku Satsujin Ga Kieta Hi [The Day When Patricide Crime Was Disappeared]*, CHIKUMA SHOCBŌ (1987) (Japan); Qu, *supra* note 87.

In 1973, the Grand Bench of the Japanese Supreme Court⁹⁷ struck down Article 200⁹⁸ of the Criminal Code. While accepting the law's purpose that children should respect parents, the court felt that the penalty was too harsh to be sustained, as compared to the punishment for regular murder provided under Article 199.⁹⁹

Among the fifteen justices who reviewed this decision, Justice Takezo Shimoda's dissenting opinion noted that Article 200 should be left to the legislature, not to the court.¹⁰⁰ Six justices concurring still objected to the majority opinion approving special provisions for patricide.¹⁰¹ At the end, fourteen justices, with one dissenting, decided the case.¹⁰² Eight justices upheld the court's reasoning, with six dissenting.¹⁰³ Accepting this decision that declared the law unconstitutional, the Ministry of Justice sent an official notice that Article 199 should be applied, even in cases of patricide.¹⁰⁴

In 1995, Article 200 was deleted by the legislature, after some twenty years.¹⁰⁵ Some conservative members in the ruling party have objected,

97. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan); Hidenori Tomatsu, *Equal Protection of the Law*, 53 L. & CONTEMP. PROB. 109, 112 (1990); Qu, *supra* note 87.

98. KEIHŌ [PEN. C.] ch. XXVI, art. 200 (Japan) (deleting art. 200 as last amended by Law No. 91, May 12, 1995); Qu, *supra* note 87; Tomatsu, *supra* note 97.

99. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan); Qu, *supra* note 87; Tomatsu, *supra* note 97.

100. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan) (Shimoda, J., dissenting); Qu, *supra* note 87; Tomatsu, *supra* note 97.

101. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan); Qu, *supra* note 87; Tomatsu, *supra* note 97.

102. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan) (joining the majority opinion were Ishida, C.J., Iwata, Murakami, J., Sekine, J., Fujibayashi, J., Okahara, J., Kishi, J., and Amano, J., with concurring opinion written by Tanaka, J., Shimomura, J., Irokawa, J., Oshumi, J., Ogawa, J., and Sakamoto, J.); Qu, *supra* note 87; Tomatsu, *supra* note 97.

103. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan); Qu, *supra* note 87; Tomatsu, *supra* note 97.

104. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan); Tomatsu, *supra* note 97.

105. KEIHŌ [PEN. C.] (Japan) (deleting art. 200 as last amended by Law No. 91, May 12, 1995).

favoring Article 200 of the Criminal Code, even after this decision.¹⁰⁶ Decisions declaring a law unconstitutional under concrete judicial review do not delete the provisions of the statutes.¹⁰⁷ Under Article 41 of the Japanese Constitution, the sole and highest organ of the state to pass a bill is the Diet.¹⁰⁸ Therefore, only the legislature can amend statutes at their own discretion.

This case shows an instance where the Japanese judiciary assumed the role of introducing the concepts of human rights and equality to the Japanese people.¹⁰⁹

B. Article 900(iv), Constitutional Order of 1995

The Civil Code governs relationships regarding family and between couples.¹¹⁰ The first sentence of Article 900, Item iv of the Civil Code, provides different inheritance distributions between legitimate and illegitimate children.¹¹¹

The Japanese judiciary determined Article 900 to be constitutional in 1995.¹¹² In this case, a girl named Masao Tabata was born in a very conventional family during the Meiji Constitution era and under the old Civil Code.¹¹³ Her older brother had already passed away.¹¹⁴ Her father Tonesaku Tabata wanted her to keep his family name, Tabata.¹¹⁵ His daughter Masao married four times in attempts to keep the family name and two of the marriages were considered legal.¹¹⁶

106. *Small Committee on Judicial Affairs for Revision of Article 200 of Criminal Code*, DIET (July 17, 1973), <http://kokkai.ndl.go.jp/SENTAKU/syugiin/071/0081/07107170081003c.html> (Japan).

107. Nihonkoku Kenpō [KENPŌ] [CONSTITUTION], arts. 76, 81 (Japan).

108. *Id.* art. 41.

109. See Yuichiro Tsuji, *Constitutional Law Court in Japan*, 66 TSUKUBA J.L. & POL. 65 (2016).

110. MINPŌ [CIV. C.] pt. V, ch. III (Japan).

111. *Id.* art. 900.

112. Saikō Saibansho [Sup. Ct.] July 5, 1995, Heisei 3 (kyo) no. 143, 49(7) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1789, <http://www.courts.go.jp> (Japan).

113. See KYŪ MINPŌ (OLD CIV. C.) 1898, art. 732 (Japan).

114. Saikō Saibansho [Sup. Ct.] July 5, 1995, Heisei 3 (kyo) no. 143, 49(7) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1789, <http://www.courts.go.jp> (Japan).

115. *Id.*

116. *Id.*

In this particular case, the father adopted Masao's husband as his son.¹¹⁷ The second marriage to Gensaku, father of Katsuhiko Fukunishi, was not considered a legal marriage due to the strong objections of the father.¹¹⁸ Katsuhiko was born as an illegitimate child between Gensaku and Masao, but was taken away from them and given to the Fukunishi family.¹¹⁹ The Fukunishi family had no son at that time and Katsuhiko was, in fact, their sole heir.¹²⁰ Two years later, the Fukunishi family had a son, and it became undesirable to adopt Katsuhiko as a legal son.¹²¹ The father of the Fukunishi family acknowledged Katsuhiko as an illegitimate child, even though the father of Fukunishi was not the biological father.¹²² Even after the old Civil Code was amended, the distinction between legitimate and illegitimate children still remained under Article 900 of the Civil Code.¹²³ Some of the relatives in the Tabata family complained that the child Katsuhiko should not be eligible to succeed because he left the Tabata family and his children should not be eligible to succeed to their grandmother's inheritance.¹²⁴ They pointed out that the new Civil Code was very beneficial for the grandchildren of Katsuhiko.¹²⁵ Katsuhiko was discriminated against by his birth family, the Tabatas, because he grew up with the Fukunishi family, and he was also discriminated against by the Fukunishi family for being born in the Tabata family.¹²⁶

The majority of the Supreme Court thought that the distinction between legitimate and illegitimate was reasonable in so far as it respects legal marriage and protects illegitimate children, and its distinction was not clearly or remarkably unreasonable in relation to the legislative purpose.¹²⁷

It seems that the 1995 order rested on the belief that the inheritance system was based on the individual, and that the provisions regarding

117. *Id.*

118. *Id.*

119. Saikō Saibansho [Sup. Ct.] July 5, 1995, Heisei 3 (kyo) no. 143, 49(7) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1789, <http://www.courts.go.jp> (Japan).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* Most provisions of the Civil Code were drastically amended just after World War II; most regarding the feudal system were abolished although Article 900 remained. Saikō Saibansho [Sup. Ct.] July 5, 1995, Heisei 3 (kyo) no. 143, 49(7) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1789, <http://www.courts.go.jp> (Japan).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

statutory shares of inheritance were designed to operate in a supplementary way in cases where there is no designation by testament.¹²⁸ The 1995 order supported legislative intent in favor of constitutionality through a multitude of factors. When designing the system, tradition, social environment, perception of the people, other factors have to be considered, and the system of inheritance in each country more or less reflects these factors. Furthermore, a contemporary system of inheritance is closely related to the idea of family in a given country, and the system cannot be established without considering the rules of marriage and family in that country. It should be concluded that the way the inheritance system is established is left to the reasonable discretion of the legislature by taking all these into consideration.¹²⁹

The 1995 order noted: As long as the Civil Code adopts the principle of legal marriage, the provision gives preferential treatment to the spouse who has been in a marital relationship with the deceased and his or her child(ren) in terms of the statutory share in inheritance, while at the same time, it assures that a child born out of wedlock will have a certain statutory share in inheritance so as to protect such child.¹³⁰

This order held that legislative discretion was not excessively unreasonable in relation to the reason for enacting Article 900 of the Civil Code, and that it did not exceed the scope of reasonable discretion granted to the legislature. There were concurring opinions from Justices Itsuo Sonobe, Tsuneo Kabe, Katsuya Onishi, Hideo Chikusa, and Shinichi Kawai.¹³¹

C. The Dissenting Opinion in the 1995 Order Would Become Mainstream in the Courts

Justices Toshijirou Nakajima, Masao Ohno, Hisako Takahashi, Yukinobu Ozaki, and Mistuo Endo wrote dissenting opinions.¹³² The dissenting justices thought that distinction by origin went unconstitutionally beyond the scope of the legislative purpose of supporting legal marriage

128. Saikō Saibansho [Sup. Ct.] July 5, 1995, Heisei 3 (kyo) no. 143, 49(7) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1789, <http://www.courts.go.jp> (Japan); *see also* Kazuhiro Ohishi, *Rippou furakui ni taisuru sihō sinsa* [Judicial Review on Legislative Omission], 14 HAKUOH REV. L. & POL. 171 (2007) (Japan).

129. Saikō Saibansho [Sup. Ct.] July 5, 1995, Heisei 3 (kyo) no. 143, 49(7) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1789, <http://www.courts.go.jp> (Japan).

130. *Id.*

131. *Id.*

132. *Id.* (Nakajima, J., Ohno, J., Takahashi, J., Ozaki, J., & Endo, J., dissenting).

and protecting children.¹³³ They explained that Articles 14 and 24 of the Japanese Constitution set the limitations of legislative discretion.¹³⁴ These five dissenting opinions became the majority in the 2013 order.¹³⁵ They were of the opinion that the children were subject to uncontrollable attribution beyond reasonable distinction.¹³⁶ The purpose of the law and the means to achieve the distinction should be substantially related.

Reasonableness alone could not be sustained in this case. Supporting legal marriage might be reasonable, but the distinction between legitimate and illegitimate children was beyond their will and effort. The distinction gave the social impression that illegitimate children were inferior to legitimate children.¹³⁷ The legislative fact might have been consistent at that time, but it has changed significantly since then. Social impressions, changes in foreign countries' legal systems, domestic movement to amend the statute or conclude treaty, and changed legislative fact should be considered when reviewing the provision.¹³⁸

The dissenting opinion noted that the decision declaring the provision unconstitutional should not be retroactive in effect because it might infringe on the legal stability of this case.¹³⁹ This opinion did not constitute the majority in 1995. Reading only the majority opinion, and not the dissenting opinion, it would be doubtful to conclude that the 2013 order referenced legislative facts in support of constitutionality so much changed that they were completely lost in the eighteen years since the 1995 order. In the patricide case, it took twenty-two years before legislative action followed through.¹⁴⁰ Legislative fact theory is a useful tool for a majority of justices to persuade others. It might be easier for a justice to declare statutes obsolete and to ask the legislature to revise in order to avoid serious conflicts with the parliament.

133. *Id.*

134. Saikō Saibansho [Sup. Ct.] July 5, 1995, Heisei 3 (kyo) no. 143, 49(7) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1789, <http://www.courts.go.jp> (Japan).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Saikō Saibansho [Sup. Ct.] July 5, 1995, Heisei 3 (kyo) no. 143, 49(7) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1789, <http://www.courts.go.jp> (Japan).

140. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan). KEIHŌ [PEN. C.] (Japan) (deleting art. 200 as of Law No. 91, May 12, 1995).

D. The 2013 Order That Declared the Provision Unconstitutional

In the 2013 order, ancestor "A" passed away in July 2001, and the heirs argued that the provisions of Article 900(iv) were unconstitutional under Article 14 of the Japanese Constitution.¹⁴¹ The Supreme Court vacated and remanded the case to the High Court by holding the provisions in Article 900(iv) unconstitutional.¹⁴²

The Supreme Court explained that the inheritance system sets rules as to who is to inherit the property of the decedent, and in order to define the inheritance system, the circumstances in each country such as the tradition, social conditions, and public sentiments should be taken into consideration.¹⁴³ Furthermore, since the modern inheritance system is closely related to the concept of a family, it cannot be defined without ignoring the rules, people's perceptions, etcetera. regarding marital or parent-child relationships in the country. It is left to the reasonable discretion of the legislature to define the inheritance system while comprehensively considering all these factors. The major issue disputed in the present case was, within the inheritance system defined in that manner, whether or not the distinction made by the provision in terms of the statutory shares in inheritance between children born in wedlock and children born out of wedlock constituted discriminatory treatment without reasonable grounds. "If there is no reasonable ground for making such distinction even when the abovementioned discretionary power vested in the legislative body is taken into consideration, it is appropriate to construe that said distinction is in violation of Article 14, paragraph 1 of the Constitution."¹⁴⁴

Differential treatment relates to the distinction of legal marriage and de facto marriage. The Japanese Civil Code respects legal marriage over a de facto marriage.¹⁴⁵

The Japanese Civil Code, revised in 1947, abolished the principle that the eldest son was the head of the family and preserved the right to succession.¹⁴⁶ The code still stated, however, that the statutory share for a

141. Saikō Saibansho [Sup. Ct.] Sept. 4, 2013, Heisei 24 (kyo) no. 985, 67(6) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1320, <http://www.courts.go.jp> (Japan).

142. *Id.*

143. *Id.*

144. *Id.*

145. MINPŌ [CIV. C.] arts. 731, 744–45 (Japan).

146. *Id.* arts. 735, 746, 749, 750–51.

child born out of wedlock would be one half that of a child born in wedlock, under Article 900.¹⁴⁷

The 2013 Supreme Court Order held that the provision in Article 900, Item iv of the Civil Code was unconstitutional.¹⁴⁸ The Supreme Court explained that this provision would control in the absence of a designation of the shares in inheritance by a will.¹⁴⁹ The Supreme Court reviewed the limits of legislative discretion under Article 14 of the Japanese Constitution. The factors to review, such as tradition, social conditions, and public sentiments, would change along with the times.

The judiciary constantly reviews individuals' dignity and equality under the law. The facts based on the 1947 Civil Code have changed. In 1947, the prevailing traditional obstacle for equal treatment under the new constitution was that the eldest son was the head of the family.¹⁵⁰ At that time, when revising the code, the family law system and other systems of inheritance in other countries were referenced. Since then, circumstances surrounding legal marriage in Japan have changed in line with changes in social and economic circumstances, and people's perceptions of marriage and family have changed as well. People's lifestyles have also changed. All of these changes brought about the evolution in the inheritance system in the Civil Code.

Japan ratified the International Covenant on Civil and Political Rights (ICCPR) in 1979.¹⁵¹ However, the 1995 order recognized differential inheritance treatment between children born in wedlock and those born out of wedlock.¹⁵² The United Nations Human Rights Committee advised Japan to remove the distinction.¹⁵³ The 1995 order deemed Article 900 of the Civil Code to be constitutional.¹⁵⁴ Five justices dissented and questioned its reasonableness because, by that time, the form of marriage

147. *Id.* art. 900.

148. Saikō Saibansho [Sup. Ct.] Sept. 4, 2013, Heisei 24 (kyo) no. 985, 67(6) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1320, <http://www.courts.go.jp> (Japan).

149. *Id.*

150. MINPŌ [CIV. C.] arts. 735, 746, 749, 750–51 (Japan).

151. *See generally* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

152. Saikō Saibansho [Sup. Ct.] Sept. 4, 2013, Heisei 24 (kyo) no. 985, 67(6) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1320, <http://www.courts.go.jp> (Japan).

153. Concluding Observations of the Human Rights Comm.: Japan, ¶ 18, U.N. Doc. CCPR/C/79/Add.102 (Concluding Observations/Comments), (Nov. 19, 1998).

154. Saikō Saibansho [Sup. Ct.] July 5, 1995, Heisei 3 (kyo) no. 143, 49(7) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1789, <http://www.courts.go.jp> (Japan).

and parent-child relationships had already changed.¹⁵⁵ The reasonableness of supporting a distinction between children born in wedlock and those born out of wedlock was no longer supported. It was deemed unconstitutional in July 2001.¹⁵⁶ The reason why the court in the 2013 order used this date is because the Japanese court had exercised judicial review on this issue in a concrete case in July 2001.¹⁵⁷

It is not clear which factors made the court change its perspective, but Article 900(iv) was held unconstitutional in the 2013 order.¹⁵⁸ However, it did not overrule the 1995 order.¹⁵⁹ The losing party made a special appeal (*Tokubetu Koukoku*) to the Supreme Court and argued infringement of the statutes in the case.¹⁶⁰ The Court made the decision in a special order.¹⁶¹ The standard of judicial review is puzzling, because the Supreme Court declared the 1995 order to be unconstitutional but did not overrule it. Yasuyuki Watanabe explains that not every judicial review holds the purpose and means to achieve a goal.¹⁶² Kazuhiko Ohishi explains that the general standard of judicial review did not change with the 2013 order and that only the legislative facts had changed, at least in July 2001, and the two-step review for the purpose and means to achieve a goal was not used in the 2013 order.¹⁶³

One explanation is that legislative fact is included in the Civil Code, unlike other constitutional decisions,¹⁶⁴ in relation to the Criminal Code. In

155. *Id.*

156. *Id.*

157. Tsuji, *supra* note 86.

158. Saikō Saibansho [Sup. Ct.] July 5, 1995, Heisei 3 (kyo) no. 143, 49(7) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1789, <http://www.courts.go.jp> (Japan).

159. Lawrence Repeta, *Limiting Fundamental Rights Protection in Japan—the Role of the Supreme Court*, in CRITICAL ISSUES IN CONTEMP. JAPAN 42 (Jeff Kingston ed., 2013) (arguing for more active courts in Japan).

160. Saikō Saibansho [Sup. Ct.] Sept. 4, 2013, Heisei 24 (kyo) no. 985, 67(6) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1320, <http://www.courts.go.jp> (Japan).

161. *Id.*

162. Yasuyuki Watanabe, *Byodo gensoku no dogumatic [Die Dogmatik des Gleichheitssatzes]*, 82 RIKKYŌ HŌGAKU [ST. PAUL'S REV. L. & POL.] 1 (2011).

163. Ohishi, *supra* note 128; TSUJIMURA, *supra* note 33, at 174 (focusing on the rationality test in the 1995 order, with five justices using the substantially reasonable test and the court using the rationality test in the 2013 order as well).

164. Saikō Saibansho [Sup. Ct.] Apr. 30, 1975, Heisei 43 (kyo) no. 120, 29(4), SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 572, <http://www.courts.go.jp> (Japan); Saikō Saibansho [Sup. Ct.] Nov. 22, 1972, Heisei 45 (kyo) no. 23, 26, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 572, <http://www.courts.go.jp> (Japan); TOSHIHIKO NONAKA, MUTSUO NAKAMURA, KAZUYUKI TAKAHASHI &

cases in which the constitutionality of a certain criminal sanction is disputed,¹⁶⁵ actions such as conducting unauthorized business are prosecuted. The court revealed a lack of attention by the legislature, but as in the 1995 order, changes in legislative fact were helpful to the justices in asking parliament to amend the Civil Code—to avoid serious conflict and allow a longer time to amend the statute so as to encourage the legislature to amend it. However, legal stability regarding predictability may be lost in making such decisions.¹⁶⁶ The 2013 order was based so much on reasoning surrounding human dignity that it did not even mention the provisions of the constitution.¹⁶⁷

In sum, this 2013 order limited the effect of the unconstitutional decision by not overruling its precedent. However, there is another way to restrict its effect by time scale.

E. Time Limit of the 2013 Order in Declaring A Law Unconstitutional

Three months after the 2013 decision, Article 900(iv) of the Civil Code was amended in the parliament with a very quick resolution compared with the patricide case.¹⁶⁸ One of the reasons for the quick response was the effect of a decision declaring a law unconstitutional. The 2013 order recognized that the unconstitutional conditions began in 2001, sending an easily understandable message to the legislature.

The Civil Code provides that succession occurs when an ancestor passes away.¹⁶⁹ The new provision of the Civil Code regarding succession occurred after September 5, 2013.¹⁷⁰ The amended provision of the Civil Code applies only to cases in which there is a legitimate and an illegitimate child.¹⁷¹ The Supreme Court held the provision unconstitutional on

KATSUTOSHI TAKAMI, KENPŌ II, CONSTITUTION II 303–05 (2012) (Japan) [hereinafter NONAKA ET AL. II].

165. NONAKA ET AL. I, *supra* note 40, at 474–81 (introducing two levels of judicial review); *see also* SATO 2011, *supra* note 40, at 665–71; NOBUYOSHI ASHIBE, KENPŌ [CONSTITUTION] 389 (2015) (Japan).

166. TSUJIMURA, *supra* note 33, at 185 (discussing the 2013 order, which emphasized legal stability but did not mention a purpose or any means to achieve a purpose).

167. Yasue Nukatsuka, *Kongaisi Hōtei Sōzokubun Sabetsu Saikōsai Daihōtei Iken Kettei [2013 Unconstitutional Order]*, 400 HŌGAKU KYŌSITSU 4 (2014).

168. MINPŌ [CIV. C.] art. 900(iv) (Japan).

169. *Id.* art. 882.

170. *Id.* art. 900(iv).

171. *Id.*; *see also* Tsuji, *supra* note 86; SATO 2011, *supra* note 40, at 666. *See generally* NONAKA ET AL. II, *supra* note 164, at 319.

September 4, 2013.¹⁷² The 2013 order noted a few points for succession cases that occurred before September 5, 2013.

The court noted that on July 2001 at the latest has no effect on any legal relationships that have already been fixed by rulings or other judicial decisions on division of estate, agreements on division of estate or other agreements, etcetera made on the assumption of the provision of the first sentence of the proviso to said item with regard to other cases of inheritance that have commenced during the period after July 2001 until said judgment is made.¹⁷³

The Supreme Court reserved several comments on the time scale. First, Article 900(iv) was unconstitutional for inheritance cases beginning in July 2001.¹⁷⁴ Second, the unconstitutional order did not control decisions or agreements for distributions of the family court from 2001 to 2013.¹⁷⁵ The Ministry of Justice explains that the 2013 order has de facto binding power.¹⁷⁶ The 2013 order applies to similar cases that occur thereafter. In some cases, partition of inheritance takes time after the ancestor passes away, even if succession already occurred.

After September 4, 2013, if an heir wanted to fix distribution for a case in which succession occurred between July 2001 and September 4, 2013, the distribution between a legitimate child and an illegitimate child would be the same.¹⁷⁷ If the distribution for an heir had already been fixed by an agreement or judgment, the legal relationships had already been completed, and the 2013 order would not hold. The Ministry of Justice explains that if the partition of inheritance is not completed, then the legal relationship is not yet fixed.¹⁷⁸ An order by the family court or an agreement among heirs completes inheritance and fixes the legal relationship.¹⁷⁹ The Ministry of Justice released a notice to keep legal stability, consistent with this instance of concrete judicial review.¹⁸⁰ The 2013 order restricts the influence of the Supreme Court order on a time scale, based on legal stability of the family

172. Saikō Saibansho [Sup. Ct.] Sept. 4, 2013, Heisei 24 (kyo) no. 985, 67(6) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1320, <http://www.courts.go.jp> (Japan).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Minpō no Itibu ga Kaisei Saremasita [A Revision of the Civil Code]*, MINISTRY JUST., http://www.moj.go.jp/MINJI/minji07_00143.html (last visited Nov. 5, 2017) (Japan).

178. *Id.*

179. *Id.*

180. *Id.*

relationship once twelve years has passed.¹⁸¹ Thus, it has de facto binding power.

The legislature has the responsibility to amend a statute after a decision by the Supreme Court declares it unconstitutional, but the Japanese Constitution does not specify a reasonable period for the legislature to amend or abolish a statute.¹⁸² The constitution granted legislative power to the Diet, but legislative inaction might permit a party to ask for damages under the State Redress Act (*Kokka Baishou Hou*).¹⁸³

F. Nationality Act Decision of 2008

The Supreme Court held Article 3(1) of the Nationality Act¹⁸⁴ to be unconstitutional in 2008. The Supreme Court used the purpose and means review approach. Here, two cases were decided on the same date—June 4. In the first case, the child of an unmarried Philippine mother and a Japanese father submitted an application for nationality to the Ministry of Justice on the grounds that the child received affiliation through the father after he was born.¹⁸⁵ The ministry denied the application.¹⁸⁶

In the second case, a son and a mother were ordered to leave Japan because they lacked Japanese nationality.¹⁸⁷ Under the Immigration Control and Refugee Recognition Act,¹⁸⁸ their objections were denied.

181. See SATO 2011, *supra* note 40, at 668–69.

182. *Id.*; see also Yuichiro Tsuji, *Law Making Power in Japan—Legislative Assessment in Japan*, 10 KOR. LEGIS. RES. 173 (2016).

183. *Kokka Baishou Hou* [State Redress Act], Law No. 125 of 1947, art. 1, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp>.

184. *Kokuseki Hou* [Nationality Act], Law No. 147 of 1950, art. 3(1), translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp> [hereinafter *Kokuseki Hou*].

185. *Saikō Saibansho* [Sup. Ct.] June 4, 2008, Heisei 18 (gyo tsu) no. 135, 62(6) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 101 (Japan); *Saikō Saibansho* [Sup. Ct.] June 4, 2008, Heisei 19 (gyo tsu) 164, 228 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 101 (Japan).

186. *Saikō Saibansho* [Sup. Ct.] June 4, 2008, Heisei 18 (gyo tsu) no. 135, 62(6) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan); *Saikō Saibansho* [Sup. Ct.] June 4, 2008, Heisei 19 (gyo tsu) 164, 228 SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan).

187. *Saikō Saibansho* [Sup. Ct.] June 4, 2008, Heisei 18 (gyo tsu) no. 135, 62(6) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan); *Saikō Saibansho* [Sup. Ct.] June 4, 2008, Heisei 19 (gyo tsu) 164, 228 SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan).

188. *Shutsu Nyukoku Kanrihu* [Immigration Control and Refugee Act], Law No. 319 of 1951, art. 1, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp>.

They argued that Article 3(1) of the Nationality Act was unconstitutional under Article 14 of the Japanese Constitution.¹⁸⁹

The Japanese Nationality Act uses *jus sanguinis* to determine nationality.¹⁹⁰ A child has the nationality of his or her father or mother, regardless of his or her birthplace.¹⁹¹ Article 2 of this act provides that a child is a Japanese citizen if his or her mother or father is a Japanese citizen at the time the child is born.¹⁹² Article 3(1) permits those under twenty years of age to acquire legitimate child status through parental marriage or legal acknowledgment by the father, a process known as “*Ninchi*” in Japanese.¹⁹³

In Japan, the family relationship between a mother and child starts at birth.¹⁹⁴ The child is a legitimate child of the mother.¹⁹⁵ Under Article 3(1) of the Japanese Nationality Act, the father is eligible to acknowledge (*Ninchi*) only while the mother is pregnant, in cases where the mother and father are not married.¹⁹⁶ However, illegitimate children may not acquire Japanese citizenship after birth, even when they are acknowledged by the father.¹⁹⁷ These illegitimate children can acquire Japanese citizenship only after the mother and father become legally married.¹⁹⁸

The Supreme Court majority held that Article 3 of the Nationality Act was unconstitutional under the equal protection clause of Article 14 of the Japanese Constitution.¹⁹⁹ Article 10 of the Japanese Constitution provides that Japanese nationality is fixed by statute.²⁰⁰ The Japanese Nationality Act provides requirements for acquiring or losing Japanese nationality.²⁰¹

The nation's traditional, political, social, and economic environment works to fix these requirements of nationality in the legislature. The distinction caused by the requirements for nationality under the Nationality Act would be unconstitutional if this distinction were to have no reasonable

189. Kokuseki Hou, *supra* note 184, at art. 3.

190. *Id.*

191. *Id.* art. 2.

192. *Id.*

193. *Id.* art. 3.

194. Kokuseki Hou, *supra* note 184, at art. 3.

195. *Id.* art. 3(1).

196. *Id.*

197. *Id.*

198. *Id.*

199. TSUJIMURA, *supra* note 33, at 152–66.

200. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 10 (Japan).

201. Kokuseki Hou, *supra* note 184.

grounds for justification. If the legislature acts beyond the scope of its discretion, the judiciary can regard the provision as unconstitutional under the equal protection clause of Article 14 of the Japanese Constitution.

Japanese nationality is a very important legal status that protects not only fundamental rights but also one's eligibility to receive public assistance. A child who is born cannot change his or her condition—whether or not the parents are married—by his or her own effort or ability.

In 1984, the Nationality Act was amended to grant Japanese nationality only after the father and mother got married, apart from the process of legitimation (*Jun-sei*).²⁰² On the other hand, children born of a Japanese father and a non-Japanese mother can receive Japanese nationality through acknowledgement by the father during the pregnancy of the mother.²⁰³ This amendment works to follow the principle of *jus sanguinis*. The legislature was of the opinion that those children who could not acquire Japanese nationality by nature would be able to establish a “close relationship” with a foreign country, apart from Japan.²⁰⁴

Article 3(1) of the Japanese Nationality Act used *jus sanguinis* and the legal marriage between a Japanese father and a non-Japanese mother to mean a close relationship with Japan.²⁰⁵ The distinction in Article 3(1) of the Japanese Nationality Act was based on reasonability of purpose at the time it was amended in 1984.

In this case, the plaintiff submitted registration for Japanese nationality in 2003, at which time the legislative argument to support constitutionality had already been lost.²⁰⁶ The decision to strike down Article 3(1) of the Japanese Nationality Act as unconstitutional did not mean that all

202. MINPŌ [Civ. C.] art. 789 (Japan).

203. Kokuseki Hou, *supra* note 184, at art. 3.

204. Saikō Saibansho [Sup. Ct.] June 4, 2008, Heisei 18 (gyo tsu) no. 135, 62(6) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan); Saikō Saibansho [Sup. Ct.] June 4, 2008, Heisei 19 (gyo tsu) 164, 228 SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan).

205. Saikō Saibansho [Sup. Ct.] June 4, 2008, Heisei 18 (gyo tsu) no. 135, 62(6) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan); Saikō Saibansho [Sup. Ct.] June 4, 2008, Heisei 19 (gyo tsu) 164, 228 SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan).

206. Saikō Saibansho [Sup. Ct.] June 4, 2008, Heisei 18 (gyo tsu) no. 135, 62(6) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan); Saikō Saibansho [Sup. Ct.] June 4, 2008, Heisei 19 (gyo tsu) 164, 228 SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan).

provisions, including legitimation, became void in their entirety.²⁰⁷ Legitimation to cover the principle of *jus sanguinis* still remained.²⁰⁸

The Supreme Court cited the patricide case and used the purpose and means to achieve a goal approach.²⁰⁹ A change of legislative fact was one of the critical factors. Japanese concrete judicial review only addressed the individual plaintiffs in this case and excluded others in the same position. In any case, the legislature amended the Japanese Nationality Act in 2008.²¹⁰ It is not clear how long the judiciary needs to declare that legislative facts have changed so as to make a statute obsolete.

IV. TWO FAMILY LAW DECISIONS IN 2015

In December 2015, the Japanese Supreme Court rendered two decisions in the area of family law. The Court upheld Article 750 of the Civil Code as constitutional, requiring a married couple to choose either the husband's or the wife's family name.²¹¹ The Court emphasized the Japanese tradition of using the same family name for a couple.²¹² On the one hand, the Court struck down Article 733 of the Civil Code, which prohibited women from remarrying within six months of a divorce.²¹³ On the other hand, the Court stated that a 100-day waiting period was constitutionally reasonable.²¹⁴

207. Saikō Saibansho [Sup. Ct.] June 4, 2008, Heisei 18 (gyo tsu) no. 135, 62(6) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan); Saikō Saibansho [Sup. Ct.] June 4, 2008, Heisei 19 (gyo tsu) 164, 228 SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan).

208. Saikō Saibansho [Sup. Ct.] June 4, 2008, Heisei 18 (gyo tsu) no. 135, 62(6) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan); Saikō Saibansho [Sup. Ct.] June 4, 2008, Heisei 19 (gyo tsu) 164, 228 SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan); *see also* SATO 2011, *supra* note 40, at 108, 119.

209. Saikō Saibansho [Sup. Ct.] June 4, 2008, Heisei 18 (gyo tsu) no. 135, 62(6) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan); Saikō Saibansho [Sup. Ct.] June 4, 2008, Heisei 19 (gyo tsu) 164, 228 SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan); Ohishi, *supra* note 128.

210. Kokuseki Hou, *supra* note 184, at art. 3.

211. MINPŌ [Civ. C.] art. 750 (Japan).

212. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2586, <http://www.courts.go.jp> (Japan).

213. MINPŌ [Civ. C.] art. 733 (Japan).

214. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2586, <http://www.courts.go.jp> (Japan).

A. Same Surname Decision in 2015

The Supreme Court upheld Article 750 of the Civil Code as constitutional in December 2015.²¹⁵ The plaintiffs sought damages as a result of legislative inaction to amend Article 750 of the Civil Code.²¹⁶ They argued that they had a right not to be forced to change their family name upon marriage, and that social pressure and discrimination to change the family name to that of the husband's family name infringed upon their equal protection rights under Article 14 of the Japanese Constitution.²¹⁷ Those who wanted to keep the wife's family name could not get married, which infringed upon the freedom to marry as provided in Article 24 of Japanese Constitution and also violated the Convention on the Elimination of All Forms of Discrimination Against Women.²¹⁸

The Supreme Court responded that the right not to be forced to change one's family name is a personal right and a symbol of one's personality.²¹⁹ The articles of the Civil Code regulate and control concrete personal rights in light of the constitution. The Supreme Court thought that it was inappropriate to argue that being forced to change one's family name upon marriage infringed upon the personal rights set forth in the constitution.²²⁰

The intent of the articles regulating the family under the Civil Code, confirming that members using the same surname would belong to the same family, reflect a fundamental component of society. Their purpose is constitutionally reasonable. Change of family status is subject to an individual's will upon marriage, and thus, females are not forced to give up their surname against their will.²²¹ The family name has an identification function in relation to others, and the right to establish or change one's own family name depends solely upon one's own will. A change of surname upon marriage is expected.

Responding to the argument that it is an infringement of equal rights under the constitution, the Supreme Court stated that Article 750 did not discriminate based on gender. No formal unequal treatment was caused by Article 750 because the majority of couples use the husband's surname and

215. *Id.*

216. *Id.*

217. *Id.*

218. Convention on the Elimination of all Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter Convention on Discrimination].

219. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2586, <http://www.courts.go.jp> (Japan).

220. *Id.*

221. *Id.*

because husbands and wives discuss and conclude which family name is to be adopted.²²²

The Supreme Court explained that the purpose of Article 24 of the Japanese Constitution, which guarantees the right to choose whether to marry, whom to marry, and when to marry, is subject to individual choice.²²³ On the other hand, Article 750 of the Civil Code addresses the effects of marriage.²²⁴ Giving up a marriage because of Article 750 does not necessarily lead to an infringement of Article 24 of the constitution. Married women can use their family name as their common name in their social lives.

The Supreme Court further explained that Article 24 of the constitution is only a suggestion and guideline for the legislature.²²⁵ The family is regulated under the general perspective of relationships between parents and family, and couples are subject to the times in which they live. These influences include national tradition, social factors, and circumstances surrounding the family. Personal rights and equal protection rights take various forms and legislative discretion is very broad. The means to achieve the goal are further fixed by social status, the environment in which people are living, and the standpoint of the family as it changes from time to time.

The judiciary reviews the effects of this system under Article 24 of the Constitution and reviews the reasonableness of Article 750 in light of human dignity and equal treatment between males and females.²²⁶ The same surname tradition was established in 1898.²²⁷ It is reasonable to think that having the same surname is a fundamental component of being a family. A child born between a husband and a wife using the same surname is then assumed to be legitimate and protected under their guardianship.

Five dissenting opinions saw Article 750 of the Civil Code as unconstitutional.²²⁸ Justice Kiyoko Okabe noted in her opinion that the number of females working outside the home is increasing and that it is

222. *Id.*

223. *Id.*

224. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2586, <http://www.courts.go.jp> (Japan).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* (Okabe, J., Onimaru, J., Sakurai, J., Yamura J., & Kiuchi J., dissenting).

reasonable for a woman to keep her family name after marriage.²²⁹ Without exception, the use of a different surname for a woman could cause a loss of personal identification. The majority of couples using the husband's surname reflects the actual power balance in our society. A requirement to change one's surname could be unconstitutional in so far as it infringes upon one's personal identification and leads to a sense of losing one's identity.²³⁰ One cannot use an alias in public documents and identification by an alias versus official name brings about new issues. Women are participating more and more in society such that the background of the provision is becoming lost. Losing one's identity goes against the dignity of the individual and gender equality under Article 24 of the constitution.²³¹ Furthermore, Justice Okabe emphasized that instances of divorce, remarriage, non-marriage, and late marriage are increasing and that the function of the surname is being lost.²³²

Justice Michiyoshi Kiuchi argued in his dissenting opinion that Article 750 of the Civil Code should be unconstitutional because at least one person in the couple is obligated to give up his or her surname.²³³

Justice Kiuchi doubts that the sense of being a family member is cultivated through the same surname.²³⁴ Children are not born with a sense of whether they have the same surname as other family members. Having the same surname is not proof of a relationship between a child and a parent or of being a married couple.

Justice Yoshiki Yamaura concurred with Justice Okabe and noted that the Diet has the responsibility to amend Article 750.²³⁵ He referenced a Korean Constitutional Court decision that held a similar provision in Korea to be unconstitutional.²³⁶ The same opinion has also been referenced by the Commission of the Convention on the Elimination of All Forms of Discrimination Against Women.²³⁷

This decision was controversial among Japanese constitutional scholars. The scholars criticized the majority for allowing broad legislative

229. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2586, <http://www.courts.go.jp> (Japan).

230. *Id.*

231. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 24 (Japan).

232. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2586, <http://www.courts.go.jp> (Japan).

233. *Id.* (Kiuchi, J. & Okabe, J., dissenting).

234. *Id.*

235. *Id.* (Yamaura, J., dissenting).

236. *Id.*

237. Convention on Discrimination, *supra* note 218.

discretion and denying personal rights that are protected under the constitution. A name signifies a person under a legal system, which leads to attachment to that name.²³⁸

The Court explained that a surname has meaning as an individual's name, because the family name and the first name work together to identify a person in society.²³⁹ Scholars criticized the majority opinion by stating that the family name belongs to society. A certain uniform standard is needed. Unlike the first name, a family name has an important function in recognizing members of "one" family.²⁴⁰ A surname is assumed to change when family relationships change in instances such as marriage.²⁴¹ Thus, Article 750 is related to personal rights protected under Article 13 of the constitution.

Kazuyuki Takahashi explains that a name is used to identify oneself in social life.²⁴² Recognizing the vital function of people living with autonomy in social life, this constitutional right is guaranteed. Takahashi opines that the Court should have analyzed whether there is a legitimate public interest in changing a surname.²⁴³ The majority opinion distinguished the surname from the first name, stating that a surname is granted by the government but is not guaranteed as a human right.²⁴⁴ For Takahashi, this was an arbitrary interpretation.²⁴⁵

The legislature has discussed revising Article 750 since 1996.²⁴⁶ Former Justice Tokuji Izumi argued that the mission of the judiciary had been abandoned because the cabinet did not propose a bill and the

238. Manabu Ishizaki, *Fufu Bessei Soshō* [Constitutionality of Article 750 in the Same Surname Decision] 104 SHIN HANEI KAISETSU WATCH 3 (2016).

239. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2586, <http://www.courts.go.jp> (Japan).

240. Shuhei Ninomiya, *Saidai Han Heisei 27.12.16 To Kenpō Teki Kachi No Jitsugen* [Realization of Constitutional Value and the Supreme Court Decision of Heisei 27.12.16] 737 KOSEKI JIHOU 28 (2016).

241. *Id.*

242. Kazuyuki Takahashi, *Fufu Bessei Soshō Dōsi Kyousei Gōken Hanketu Ni Mirareru Saikousaino Sikō Yōsiki* [Perspective of the Supreme Court in the Same Surname Decision], 879 SEKAI [WORLD] 144, 144 (2016).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

legislature did not amend the law, leading the plaintiff to take the issue to court in this case.²⁴⁷

The majority opinion must have responded by saying that Article 750 conflicts with the ICCPR.²⁴⁸ Miyoko Tsujimura was disappointed that the court did not mention the ICCPR and thinks that, in the future, the Court will allow all people to retain their surnames after getting married if they so choose.²⁴⁹ The right of a married couple to use separate surnames is within the legislature's discretion.²⁵⁰

B. *Prohibition of Remarriage Decision in 2015*

The Supreme Court²⁵¹ held Article 733(1)²⁵² to be unconstitutional beyond the 100-day waiting period. In this case, the wife-plaintiff divorced her former husband in 2008 because of domestic violence and because she was pregnant by her current partner.²⁵³ She needed to wait for six months after the divorce before she could remarry.²⁵⁴ In 2011, she claimed emotional damage, resulting from legislative inaction to amend Article 772 of the Civil Code, in the Okayama District Court.²⁵⁵ The district court and

247. Tokuji Izumi, *Concerning the Japanese Public's Evaluation of Supreme Court Justices*, 88 WASH. U. L. REV. 1769, 1777 (2011). All fifteen justices of the Supreme Court are selected from among judges, prosecutors, lawyers, and scholars. *Id.* Except for the Chief Justice, all justices are appointed by the cabinet. *Id.* These appointments are left to the autonomy of the judiciary to some extent. *Id.*; *Court System of Japan: Judges*, SUP. CT. JAPAN 10, http://www.courts.go.jp/english/judicial_sys/Court_System_of_Japan/index.html (last visited Nov. 5, 2017) (explaining that for lower court judges, the Supreme Court names nominees and submits the list to the cabinet). For instance, Tokuji Izumi is a career judge. Izumi, *supra* note 247, at 1777–78 (explaining a career judge's opinion does not necessarily conform to conservative opinion).

248. ICCPR, *supra* note 151; *see also* Hajime Yamamoto, *Transu Nashonaru To Domestikku No Aida De Yureru Saikousai* [Swinging Between Transnational and Domestic], 883 HÖRITSU JIHOU 3 (2016).

249. TSUJIMURA, *supra* note 33, at 280–81.

250. *Id.*

251. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 25 (o) no. 1079, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2427, <http://www.courts.go.jp> (Japan).

252. MINPŌ [Civ. C.] art. 733(1) (Japan).

253. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 25 (o) no. 1079, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2427, <http://www.courts.go.jp> (Japan).

254. *Id.*

255. Okayama Chiho Saibansho [Okayama Dist. Ct.] Oct. 18, 2012, Heisei 23 (wa) no. 1222 (Japan), <http://d1-law.com> (as case no. 28211675) (Japan).

the Hiroshima High Court held the requirement to be constitutional.²⁵⁶ The plaintiffs argued that this provision was unconstitutional under Articles 14 and 24 of the Japanese Constitution.²⁵⁷ The Legislative Council of the Ministry of Justice advised in 1996 that Article 733 should provide a 100-day waiting period, but conservative members of the Diet prevented an amendment to Article 733.²⁵⁸

It is necessary to examine Article 772²⁵⁹ before analyzing Article 733(1). Article 772 of the Civil Code provides for three scenarios regarding the status of a child.²⁶⁰ First, a child conceived during marriage is presumed to be the child of the husband.²⁶¹ Second, a child born within 300 days after divorce is presumed to be the child of the divorced husband.²⁶² Third, a child born after remarriage is presumed to be the child of the new husband.²⁶³

When a wife gets a divorce and remarries immediately, a child born within 200 days after the divorce would be presumed to be the child of the ex-husband and not of the new husband.²⁶⁴ Therefore, the period of prohibition of remarriage was provided for in Article 733(1).²⁶⁵ A duplication of presumptions occurs from the 201st to the 300th day, but Article 733 prohibited remarriage for a six-month period in any event.²⁶⁶

In December 2015, the majority opinion of the Supreme Court held that the purpose of Article 733(1) is to avoid duplication of the presumption of paternity so as to prevent paternity-related disputes.²⁶⁷ At the time the Civil Code was drafted, during the Meiji Constitution era, it was considered

256. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 25 (o) no. 1079, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2427, <http://www.courts.go.jp> (Japan).

257. Okayama Chiho Saibansho [Okayama Dist. Ct.] Oct. 18, 2012, Heisei 23 (wa) no. 1222 (Japan), <http://dl-law.com> (as case no. 28211675) (Japan); *see also* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], arts. 14, 24 (Japan).

258. Minpō no Ichibu no Hōan [Legislative Outline that Revises Part of Civil Code], MINISTRY JUST., http://www.moj.go.jp/shingi1/shingi_960226-1.html (last visited Nov. 5, 2017) (Japan); *see also* MINPŌ [Civ. C.] art. 733 (Japan).

259. MINPŌ [Civ. C.] art. 772 (Japan).

260. *Id.* art. 772(1).

261. *Id.*

262. *Id.* art. 772(2).

263. *Id.* art. 772(1).

264. MINPŌ [Civ. C.] art. 772(1) (Japan).

265. *Id.* art. 733(1).

266. *Id.*

267. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 25 (o) no. 1079, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2427, <http://www.courts.go.jp> (Japan).

reasonable to impose a remarriage ban of six months, which is longer than the present 100 days, not only for the couple but also in the interest of the child.

The legislature generally regulates family and couple relationships by taking into consideration national tradition, social factors, and circumstances surrounding the family. Article 24 of the Japanese Constitution sets limits on legislative discretion.²⁶⁸ The judiciary reviews provisions in light of their reasonableness to sustain the constitutionality of these provisions as established by the legislative branch. Today, as medical technology develops, this foundation is being lost. The Supreme Court said that imposing a 100-day waiting period was reasonable and appropriate but imposing a period beyond 100 days would be unconstitutional and unreasonable.²⁶⁹

Justices Ryuko Sakurai, Katsumi Chiba, Takehiko Ohtani, Yoshinobu Ohnuki, Naoto Ohtani, and Tsuneyuki Yamamoto wrote concurring opinions.²⁷⁰ They agreed with the majority that a waiting period of 100 days was constitutional under Article 14 or 24(2) of the Japanese Constitution.²⁷¹ They believed that the prohibition period should be as short as possible.²⁷² Even within 100 days, the prohibition of remarriage must be lifted in certain cases.²⁷³ The purpose of Article 733 was thought to be sustained as long as it avoided a presumption of two fathers and prevented disputes regarding paternity.²⁷⁴

The lack of presumption of paternity is not limited to cases where a child is born within 100 days under Article 733(2).²⁷⁵ There are cases where the biological mother was too old to be pregnant or paternity was not presumed, because the husband was missing for three years.²⁷⁶

268. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 24 (Japan).

269. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 25 (o) no. 1079, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2427, <http://www.courts.go.jp> (Japan).

270. *Id.* (Sakurai, J., Chiba, J., T. Ohtani, J., Ohnuki N. Ohtani, J., & Yamamoto, J., concurring).

271. *Id.* See also NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], arts. 14, 24 (Japan).

272. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 25 (o) no. 1079, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2427, <http://www.courts.go.jp> (Japan) (Sakurai, J., Chiba, J., T. Ohtani, J., Ohnuki N. Ohtani, J., & Yamamoto, J., concurring).

273. *Id.*

274. MINPŌ [Civ. C.] art. 733 (Japan).

275. *Id.* art. 733(2).

276. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 25 (o) no. 1079, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2427, <http://www.courts.go.jp> (Japan).

Additionally, when the wife has undergone sterilization, it is clear that she cannot bear a child.²⁷⁷

When the couple registers a marriage, the officer reviews only the formal documentary items.²⁷⁸ Thus, new couples must file medical evidence to rebut a presumption of paternity by the former husband if the woman has been previously married.²⁷⁹

Justice Kaoru Onimaru opined that all of Article 733 was unconstitutional because the overlap of the presumption occurs only in exceptional and limited cases.²⁸⁰ Even though the purpose of Article 733 is legitimate, a uniform prohibition to cover rare cases is too broad to maintain reasonableness under Articles 14 and 24 of the Japanese Constitution.²⁸¹ Clear and simple regulations should be prepared by the legislature for family and couple relationships.

Justice Michiyoshi Kiuchi explained that scientific DNA data analysis can objectively clarify paternity.²⁸² Therefore, a prohibition period for remarriage to prevent confusion of paternity is no longer meaningful.

Justice Yoshiki Yamaura's dissenting opinion argued that Article 733(2) restricts women through a legal technique to prevent the presumption of fatherhood.²⁸³ There are very few instances where a woman bears a child where the question of paternity overlaps with the former and the new husband. A prohibition covering all women is meaningless. An individual remedy for children should be provided by the legislature. Justice Yamaura showed how a South Korean Constitutional Law Court held a similar provision of the Civil Code to be unconstitutional in 2005.²⁸⁴

The remarriage prohibition and the same surname decision in 2015 illustrates several points. First, the judiciary will refrain from acting beyond legislative discretion and restricts the scope of its decisions on unconstitutionality. It should provide guidelines for the legislature to follow in amending laws when necessary. The members of the Diet are not legal experts. A simpler and easier message would be helpful for them to react to court decisions. In this case, the court struck down the additional eighty days as unconstitutional and held that a waiting period of 100 days

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 25 (o) no. 1079, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2427, <http://www.courts.go.jp> (Japan) (Onimaru, J., concurring).

282. *Id.* (Kiuchi, J., concurring).

283. *Id.* (Yamaura, J., dissenting).

284. *Id.*

was constitutional.²⁸⁵ The parliament should modify Article 733 immediately. Even though technology continues to develop, paternity disputes lead to litigation costs that can still be burdensome for the general public.²⁸⁶

Second, the minority opinion of the Supreme Court is not critical to the parties in these particular cases, but over time, it could function as the majority opinion. Constitutional law scholars have the responsibility to disseminate these opinions throughout Japan.

C. Local Government and Same Sex Marriage

Under Article 24 of the Japanese Constitution, the phrase “the mutual consent of both sexes” is subject to interpretation.²⁸⁷ If this language means both females and males, it would be unconstitutional to admit same-sex marriage. Otherwise, it would be constitutional to read that “of both sexes” means “of two parties.” This interpretation would prohibit polygamy.

Several decisions of the Japanese Supreme Court show that it takes a long time to pass or amend statutes in the Diet. Article 41 of the Japanese Constitution provides that legislative power belongs solely to the Diet.²⁸⁸ Deliberations in parliament under constitutionalism shall consider the opinions of the minority, marginalized people, and freedom of speech as these are channeled between the legislature and the people.

When the deliberative floor of central Tokyo does not work well, the local government might be a model for the Diet. Chapter 8 of the Japanese Constitution provides for local self-government.²⁸⁹ A local government may pass ordinances for regions within its jurisdiction, but not for all of Japan’s territory.

285. See KOJI TONAMI, KENPŌ [CONSTITUTION] 433 (Gyosei 1999) (Japan); see also Anzai Fumio, *Sihū sinša to rippou sairyō ron* [Judicial Review and Legislative Discretion] 47(1) RIKKYŌ HŌGAKU [ST. PAUL’S REV. L. POL.] 10, 10 (1997) (Japan); Hidemori Tomatsu, *Hū no moto no byōdū ni kakawaru hanrei riron* [Decision Theory on Equality Under the Law], in TOMATSU & NOSAKA, KENPŌ SOSHŪ NO GENJŪ BUNSEKI [ANALYSIS ON THE PRESENT STATE OF CONSTITUTIONAL LITIGATION] 190, 190 (2012) (Japan).

286. TSUJIMURA, *supra* note 33, at 245. Tsujimura feels that the court’s opinion neglects the minority; other remedies should be prepared by the legislature. *Id.*

287. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 24 (Japan).

288. *Id.* art. 41.

289. *Id.* arts. 92–95.

In 2015, Shibuya ward passed an ordinance to deal with relationships of same-sex couples in the same way as legal marriage.²⁹⁰ The reason for passing this ordinance was that some lesbian, gay, bisexual, and transgender (LGBT) couples could not rent rooms and were prevented from visiting their partners in the hospital for medical checkups or other procedures.²⁹¹ Shibuya ward approved eight couples and issued them registration documents.²⁹²

In Setagaya ward, the mayor issued a protocol for the registration of same-sex couples as partnerships.²⁹³ Twenty-nine couples have registered.²⁹⁴ Yokohama city opened space for members of the LGBT community to communicate.²⁹⁵ In Chiba city, more than fifty percent of citizens are projected to register as same-sex couples.²⁹⁶

Registered same-sex couples do not receive the same tax and inheritance treatment as legally married couples.²⁹⁷ These ordinances motivate the Diet to pass relevant statutes, although strong conservative members object to amending the Japanese Constitution.

290. Shibuya-ku Danjo Byodo Oyobi Tayo-sei o Soncho Suru Shakai o Suishin Suru Jorei [Shibuya Ward Ordinance to Promote a Society that Respects Gender Equality and Diversity], <https://www.city.shibuya.tokyo.jp/kusei/jorei/jorei/lgbt.html> (Japan); *see* Shibuya-ku Danjo Byodo Oyobi Tayo-sei o Soncho Suru Shakai o Suishin Suru Jorei [Shibuya Ward Ordinance to Promote a Society that Respects Gender Equality and Diversity], Ordinance of 2015, pmbi., art. 10, https://www.city.shibuya.tokyo.jp/kusei/jorei/jorei/pdf/danjo_tayosei.pdf (Japan) [hereinafter *Shibuya*]; *see also* Shibuya-ku danjo byōdō oyobi tayō-sei o sonchō suru shakai o suishin suru jōrei ni suite no shōsasshi [Regulations to Promote a Society that Respects Gender Equality and Diversity in Shibuya-ku] (2015), https://www.city.shibuya.tokyo.jp/kusei/jorei/jorei/pdf/lgbt_sasshi.pdf (Japan) [hereinafter *Shibuya Booklet*].

291. Shibuya Booklet, *supra* note 290; *see also* Meg Murphy, *Tokyo's Setagaya Ward to Begin Legally Recognizing Same-sex Partnerships*, JAPANTODAY (July 31, 2015, 7:00 AM), <https://japan.today.com/category/national/tokyo-setagaya-ward-to-begin-legally-recognizing-same-sex-partnerships>.

292. *See* Shusuke Murai, *Tokyo's Shibuya and Setagaya Wards Issue First Same-Sex Partnership Papers*, JAPAN TIMES (Nov. 5, 2015), <https://www.japantimes.co.jp/news/2015/11/05/national/social-issues/shibuya-set-issue-first-certificates-recognizing-sex-couples/#.Wf-3VROPLow>.

293. Dousei Pa-tona-sippu Nitsuite [About the Setagaya Ward Same-Sex Partnership Oath] (2017), SETAGAYA-KU [SETAGAYA CITY], <http://www.city.setagaya.lg.jp/kurashi/101/167/1871/d00142701.html> (Japan) [hereinafter *Setagaya*].

294. Murai, *supra* note 292. Unlike Shibuya ordinance, Setagaya ward issues a certificate under inner guideline. *Id.* *See also* Shibuya, *supra* note 290; Setagaya, *supra* note 293.

295. *LGBT: "Yokohama Diversity Parade" Walking with Smiles*, MAINICHI NEWSPAPERS (Oct. 15, 2016, 17:26), <http://mainichi.jp/articles/20161016/k00/00m/040/012000c> (Japan).

296. Justin McCurry, *Tokyo's Shibuya Ward is First in Japan to Recognize Same-sex Marriage*, TOKYO SHIMBUN (Mar. 31, 2015, 7:50 PM), <http://www.tokyonp.co.jp/article/national/list/201604/CK2016041202000250.html>.

297. MINPŌ [Civ. C.] arts. 731–49.

V. THE FUNCTION OF A DECISION THAT STRIKES DOWN A LAW AS UNCONSTITUTIONAL

In Japan, the effect of a decision on the constitutionality of a law applies only to the litigants in the case under concrete judicial review. The decision on the unconstitutionality of a law by the Supreme Court has no function to automatically delete the provisions at issue because the law-making power belongs solely to the Diet. The drafting history of the Japanese Constitution shows that there was serious concern over leaving absolute power to the judiciary. The concern was over the issue of where sovereign power should reside.

Although a decision on the unconstitutionality of a law only binds the parties and the government in a particular case, it must be respected by the other branches of government. As in Article 200 of the Criminal Code, the prosecutor applied the provision governing regular murder, Article 199 and not Article 200, for a murder case where a child killed his or her parents after the Supreme Court had rendered its decision on the relevant case.²⁹⁸

Soon after the remarriage prohibition case in 2015, the Ministry of Justice notified municipalities to accept marriage registrations as early as 100 days after a divorce.²⁹⁹ The legislature must respect decisions on the unconstitutionality of a law and rapidly amend or abolish the pertinent provisions. However, it took twenty-two years to amend the relevant statutes in the patricide case.

These cases illustrate some of the obstacles in the floor deliberations of the Diet. There is no specific time limit obligating the legislature to amend or abolish statutes under the Japanese Constitution, although the Supreme Court indicates some guidelines for legislative action.

Decisions on the unconstitutionality of a law are retroactive only for litigants and do not generally hold for other cases under concrete judicial review and Article 41, as the Diet has the sole law-making power.

By analyzing the scope of the decisions on the unconstitutionality of various laws, it might be possible to distinguish criminal from civil and administrative cases. In criminal law, court decisions generally apply retroactively, but final decisions would not automatically invalidate other past decisions. In administrative or civil law cases, decisions in general do not apply retroactively.

298. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 265, <http://www.courts.go.jp> (Japan).

299. Ministry of Justice, Minpō no Ichibu to Kaisei Suru Hōritsu Nitsuite [About the Handling of Family Registering Affairs Due to the Enforcement of the Law to Amend Part of the Civil Code] (June 3, 2008), <http://www.moj.go.jp/MINJI/minji0400059.html> (Japan) [hereinafter Handling of Family Registering Affairs].

The Supreme Court announces decisions on the unconstitutionality of a law, and sends them to the cabinet and the Diet. This means that the decision should hold for similar cases in the future. Judicial review under the Japanese Constitution is a concrete rather than an abstract review. The application of a decision on the unconstitutionality of a law means that the application of that law to the specific facts of a concrete case will be unconstitutional even as the text of the statute on its face remains constitutional.³⁰⁰

Regarding Article 900(iv), the order that rendered the provision unconstitutional in 2013, limited its effect to a specified time scale on the ground that the legal stability of family relationships for inheritance purposes needed to be maintained.³⁰¹ If the distribution to an heir was already fixed by an agreement or judgment, the legal relationship would be complete. The 2013 order did not overrule the 1995 constitutional order, but it managed to maintain legal stability through the uniform treatment of families—preventing confusion with other family relationships.³⁰²

These decisions did not set forth a time limit for the legislature to act. In subsequent analyses, when voting on disparity cases, the Japanese Supreme Court reached decisions on the unconstitutionality of laws, even as these provisions remained effective through the Administrative Litigation Act.³⁰³ In 1976, the Supreme Court adopted the *Iken-Jotai* condition doctrine for the first time by invoking Article 31(1) of the Administrative Case Litigation Act in an action for revocation of an administrative decision.³⁰⁴ It used an application by analogy method, known as *Jijo Hanketsu*.³⁰⁵ The 1976 decision rejected the claim that

300. Saikō Saibanashō [Sup. Ct.] Nov. 28, 1962, Showa 30(o) no. 2961, 16 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1593 (Japan) (involving confiscation of the property of third parties, this was a controversial decision as to whether the law at issue was unconstitutional on its face or in its application); see also SATO 2011, *supra* note 40, at 671; NONAKA ET AL. II, *supra* note 164, at 323, 332(c).

301. Saikō Saibansho [Sup. Ct.] Sept. 4, 2013, Heisei 24 (kyo) no. 985, 67(6) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1320, <http://www.courts.go.jp> (Japan).

302. *Id.*

303. Yuichiro Tsuji, *Vote Value Disparity and Judicial Review*, SINGAPORE L. REV. (forthcoming 2016).

304. Gyousei Jiken Soshō Hou [Administrative Case Litigation Act.], Act no. 139 of 1962, art. 31, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=1922&vm=04&re=02> (Japan).

305. *Id.*

Article 219 of the Public Officer Election Act clearly prohibited the application of Article 31(1) of the Administrative Case Litigation Act.³⁰⁶

The Supreme Court explained that parliament must address unconstitutional states or conditions within a reasonable time.³⁰⁷ If it fails to do so, the judiciary can make a determination of unconstitutionality. Today, lower courts can declare unconstitutionality in cases of voting disparities. In the disparity voting case referenced above, the effect was not retroactive for the litigants.

Dissenting or concurring opinions are not critical as precedent to bind future cases, but they play the role of sending a message to other government branches. For the cases involving Article 733 of the Civil Code, the dissenting opinion of Yamaura noted that, under the Meiji Constitution, the old patriarchy had been maintained in the Civil Code, while Justice Kiuchi suggested the availability of advanced medical technology.³⁰⁸ Additionally, after the decisions on the unconstitutionality of the law but before amendment by the legislature, the Ministry of Justice ordered the office of municipalities to accept marriage registrations just 100 days after divorce.³⁰⁹ As in the patricide case, the conservative members of parliament are reluctant to respond in some cases.

VI. CONCLUSION

Under the Meiji Constitution, women did not enjoy the same rights as men. Female suffrage was not recognized and women could not form associations or take part in the parliament. Under the old Civil Code, only the eldest son succeeded to the property of the family.

A young American lady who was raised in Japan suggested an advanced proposal for equal rights after working with the GHQ. The Japanese government, however, rejected her proposal because they referenced traditions that did not exist in Japan.

The Japanese Constitution provides for equal rights in Articles 14 and 24 by stating that marriage shall be based only on the mutual consent of

306. Koshoku Senkyo Hou [Japanese Public Officer Election Act], Act no. 100 of 1952, art. 219, translated in (Japanese Law Translation [JLT DS]), <http://www.japanese-lawtranslation.go.jp> (Japan).

307. Saikō Saibansho [Sup. Ct.] Apr. 14, 1976, Showa 49 (gyo tsu) no. 75, 30(3) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 233, <http://www.courts.go.jp> (Japan).

308. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2586, <http://www.courts.go.jp> (Japan) (Yamaura, J., dissenting & Kiuchi, J., concurring).

309. Handling of Family Registering Affairs, *supra* note 299.

both sexes, and that it shall be maintained through mutual cooperation on the basis of equal rights between the husband and the wife.³¹⁰

The constitution governs the relationship between the government and private citizens. The judiciary uses the constitution in some cases to invalidate contracts between companies and laborers. There are controversies with regard to whether constitutional norms directly apply to relationships among private citizens.

In 1986, three major statutes to guarantee equal protection were passed, impacting the fields of labor and national pension.³¹¹

Decisions of the judiciary have been influential as a remedy for unequal treatment in conventional family law. Under concrete judicial review, the judiciary sends messages to the legislature to revise statutes. Article 41 declares that the sole law-making organ is the Diet, so the judiciary cannot amend the statutes being reviewed.³¹² Under concrete judicial review, the judgment only applies to the parties in litigation. In the patricide case, the Ministry of Justice did not prosecute under the article in question in similar cases.

In the distinction between legitimate and illegitimate children, the Supreme Court held Article 900 to be constitutional in 1995.³¹³ This case shows that conventional customs survive even under the current Japanese Constitution. Dissenting opinions argued that children cannot choose their parents and are subject to uncontrollable attributions.³¹⁴ Decisions on the unconstitutionality of a law may cause other similar family relationship issues. The dissenting justice proposed that the decision should not be retroactive, but this proposal did not receive the support of the majority.³¹⁵

In 2013, the Supreme Court announced by order that Article 900 was unconstitutional.³¹⁶ The Grand Bench of the Supreme Court called all fifteen justices to change precedent and determine the constitutionality of the order and statutes.³¹⁷ The 2013 order did not overrule the 1995 order.

310. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 14 (Japan).

311. Danjo, *supra* note 57; Roudousha, *supra* note 57.

312. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 41 (Japan).

313. Saikō Saibansho [Sup. Ct.] July 5, 1995, Heisei 3 (kyo) no. 143, 49(7) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1789, <http://www.courts.go.jp> (Japan).

314. Saikō Saibansho [Sup. Ct.] July 5, 1995, Heisei 3 (kyo) no. 143, 49(7) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1789, <http://www.courts.go.jp> (Japan) (Nakajima, J., Ohno, J., Takahashi, J., Ozaki, J., & Endo, J., dissenting).

315. *Id.*

316. Saikō Saibansho [Sup. Ct.] Sept. 4, 2013, Heisei 24 (kyo) no. 985, 67(6) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1320, <http://www.courts.go.jp> (Japan).

317. *Id.*

The 2013 order noted that Article 900 would control in the absence of a designation of the shares of inheritance by a will and pointed out that some factors to limit legislative discretion such as tradition, social conditions and public sentiment, would change along with the times.³¹⁸ First, this order shows that dissenting opinions may subsequently become mainstream in Japanese family law decisions.

Second, the Court may reveal a lack of attention by the legislature. The judiciary is obligated to constantly review statutes and hold them unconstitutional if the legislative facts that supported the statutes have changed. Recommending a change of legislative fact is a helpful tool to receive majority support among justices, thus avoiding serious conflicts and delays in amending the statute. It also encourages the legislature to amend statutes. However, legal stability may be sacrificed through such decisions. The 1995 order supported legislative fact in favor of constitutionality by making reference to several influences including tradition, social environment, perception of the people, and other factors. Justices do not have to change the general standard of judicial review but can depend on changed legislative fact.

Third, the Ministry of Justice can quickly respond when it receives understandable messages from the judiciary. This limits the scope of an order declaring similar cases unconstitutional. The judiciary cannot state a specific time limit for the legislature to amend a statute. The 2008 decision under the Nationality Act shows that the judiciary may review legislative purpose and the means a law uses to achieve a goal even when that goal is not yet clear.³¹⁹ This decision supported the legislative fact carried forward from 1984 even though it had been lost by 2008. It is not clear how long it will take for the judiciary to declare that a legislative fact has changed and that statutes are now obsolete. A 2015 decision also upheld the article in the Civil Code addressing surnames for couples.³²⁰ The Supreme Court stated that family traditions have not changed so much to allow the judiciary to declare this provision unconstitutional.³²¹ Constitutional law scholars are mainly against this decision. Another 2015 decision held

318. *Id.*

319. Saikō Saibansho [Sup. Ct.] June 4, 2008, Heisei 18 (gyo tsu) no. 135, 62(6) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan); Saikō Saibansho [Sup. Ct.] June 4, 2008, Heisei 19 (gyo tsu) 164, 228 SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 101, <http://www.courts.go.jp> (Japan).

320. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2586, <http://www.courts.go.jp> (Japan).

321. *Id.*

Article 733(1) to be unconstitutional regarding limitations on remarriage.³²² In this case, national tradition, social factors, and other circumstances contributed to the decision.³²³ This case shows that a judicial decision can be used as a guideline for the legislature to amend a statute in question in a certain way.

Fourth, while a minority opinion of the Supreme Court may not be critical for the parties to the case at bar, it can function as a majority opinion in the future.

Fifth, several decisions of the Japanese Supreme Court show that it takes the Diet a significant amount of time to pass or amend a statute. Local government initiatives can serve as models for statutes in the Diet.

The decisions of the Supreme Court have led the dialogue on how couples and families should act in Japanese society. The judiciary can gain trust as a fair umpire of the general public discourse through the persuasiveness of its decisions. Tradition, legislative discretion, and legislative fact are some of the interpretive tools that judges may use.

322. Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 25 (o) no. 1079, 69(8) SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 2427, <http://www.courts.go.jp> (Japan).

323. *Id.*

