



JAPAN'S SAME-SEX MARRIAGE CASES: THE FIGHT TO ENSHRINE THE RIGHT TO SEXUAL AUTONOMY



LAWYERS FOR LGBT
AND ALLIES NETWORK
(LLAN)



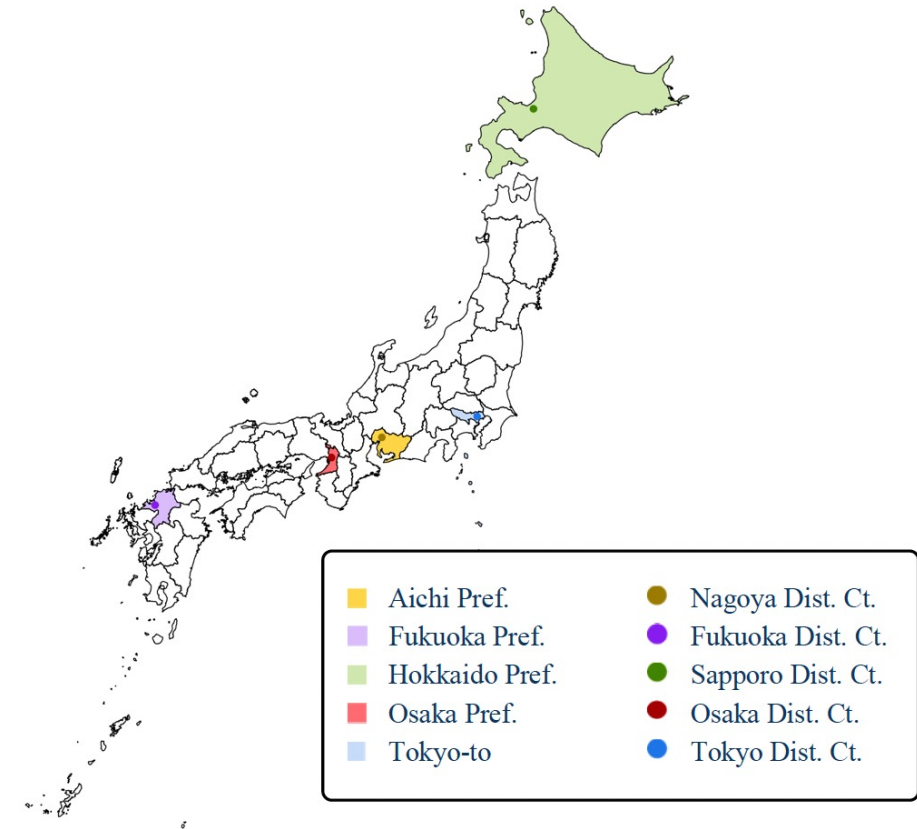
GUEST PRESENTATION
JANUARY 31, 2024



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FIVE CASES (2021-23)

- Sapporo District Court
- Osaka District Court
- Tokyo District Court
- Nagoya District Court
- Fukuoka District Court



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

PRESENTATION OUTLINE

- Differences in Japan and U.S. law
 - Constitutional text and history
- Research findings – case discussions & rankings
- Future predictions and reflections
- Questions & Discussion

JAPAN & U.S. LEGAL SYSTEMS: KEY DIFFERENCES & CONTEXT

- Civil law (Japan) vs. Common law (U.S.)
 - Stare decisis binding vs. persuasive authority
 - No SCOJ precedent; five trial court decisions in different jurisdictions
- Shades of constitutionality
 - Constitutional vs. “state of unconstitutionality” vs. unconstitutional
- U.S. federalist system; Japan’s prefectures not states
- Additional Context:
- Constitutional history of right to marry
- Judicial appointment system and domestic politics re: trial decisions

The background features a dense pattern of overlapping circles and rounded rectangular shapes in various colors including teal, dark blue, purple, olive green, and grey. A bright, multi-colored light streak (green, yellow, orange) enters from the top right corner and radiates across the top of the image.

CASE RANKINGS & REFLECTIONS

RESULTS OF TRIALS (2021-23)

- **Constitutional**; current marriage system does not conflict with constitutional provision or principle
- **Unconstitutional**; current marriage system conflicts with constitutional provision or principle
- **“State of unconstitutionality”**: law conflicts with a constitutional provision or principle, but remains valid

Summary of Marriage Equality Litigation in Five District Courts (2021-2023)

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

SAPPORO DISTRICT COURT (2021)

UNCONSTITUTIONAL
RANKING: GOLD (#2)

- Discrimination on the basis of sex is sex-based discrimination
- Issue: whether national marriage system violates same-sex couples' rights to enjoy the benefit to marry their chosen partner (Art. 13);
 - Government argued that everyone has the right to marry persons of the opposite sex and face the same prohibitions of marrying persons of the same sex; therefore, no discrimination.
- **Unconstitutional**; Art. 14 prevents differential treatment regardless whether it results from legislative intent to explicitly discriminate against a protected class of individuals (sex) or discriminatory application of "neutral" laws

SAPPORO (2021)

- Hawaii State Supreme Court ruling in Baehr v. Lewin (1993)
 - Discrimination on the basis of sex is sex-based discrimination
 - Equal protection clause of article I, section 5 of the Hawaii State Constitution

SAPPORO (2021)

- Outcome: unconstitutional per Article 14's equal protections against sex-based discrimination
- Defer to the National Assembly to address differential treatment.
- “Creating a system of marriage and family for same-sex couples inevitably will not (and cannot) be exactly the same as the system for heterosexual couples.” **Why not?**

OSAKA DISTRICT COURT

CONSTITUTIONAL
RANKING: TIN (#5)

- Legal loopholes and registered partnerships are sufficient
- Although same-sex couples do not enjoy the same legal benefits as heterosexual couples under the marriage system, these differences are reasonable and alternatives exist; therefore, no differential treatment (and discrimination)
- Reasoning: alternatives to marriage **substantially eliminate potential inequalities**; same-sex couples may **use workarounds to build close relationships with their partners**
- Problematic because:
 - Registered partnership system not nation-wide
 - Contracts, wills, etc. do not extend the same legal benefits as marriage

OSAKA DISTRICT COURT

- Traditional views
 - Who decides?
- Invented traditions?
 - Harald Fuess (divorce)
 - Frank Upham (LGBT stigma)

TOKYO DISTRICT COURT

“STATE OF
UNCONSTITUTIONALITY”
RANKING: BRONZE (#4)

- Formalism

WHETHER OR NOT A PROVISION OF LAW PROVIDES FOR DIFFERENTIAL TREATMENT BASED ON A SPECIFIC REASON SHOULD BE OBJECTIVELY JUDGED FROM THE PURPOSE, CONTENT, AND UNDERLYING PREMISE OF THE PROVISION; IT IS NOT APPROPRIATE TO MAKE SUCH A JUDGEMENT FROM THE ACTUAL OR POSSIBLE CONSEQUENCES ARISING FROM THE EXISTENCE OF THE PROVISION.

...EVEN THOUGH HOMOSEXUAL PERSONS, ETC. ARE UNABLE TO MARRY PERSONS WHO MATCH THEIR SEXUAL ORIENTATION, WHICH CREATES A DIFFERENCE IN THE POSSIBILITY OF MARRIAGE BETWEEN HOMOSEXUAL PERSONS, ETC. AND HETEROSEXUAL PERSONS, THAT IS NOTHING MORE THAN A DE FACTO CONSEQUENCE OR INDIRECT EFFECT ...

THE PROVISIONS UNIFORMLY ALLOW ALL PERSONS TO USE THE MARRIAGE SYSTEM, AND DO NOT THEMSELVES GIVE RISE TO FORMAL INEQUALITY BASED ON SEXUAL ORIENTATION.

THE PROVISIONS MERELY STIPULATE THE MARRIAGE BETWEEN A MAN AND A WOMAN, BUT DO NOT REQUIRE EITHER PERSON TO HAVE A PARTICULAR SEXUAL ORIENTATION AS A REQUIREMENT FOR MARRIAGE, NOR DO THEY PROHIBIT MARRIAGE ON THE GROUNDS THAT EITHER PERSON HAS A PARTICULAR SEXUAL ORIENTATION.

THEREFORE, THE PROVISIONS DO NOT DETERMINE THE AVAILABILITY OF MARRIAGE ON THE BASIS OF SEXUAL ORIENTATION.

NAGOYA DISTRICT COURT (2023)

UNCONSTITUTIONAL
RANKING: PLATINUM (#1)

- **Exclusionary Provisions in the Civil Code & Family Register Act violate Art. 24(2) of the Const.**
- Issue: whether the National Parliament exceeded its scope of reasonable legislation in creating a marriage system resulting in differential treatment of homosexual and heterosexual persons on the basis of sex(uality)
 - Inherent conflict between marriage system and respect for one's dignity, but **it's NOT reasonable**
- Reasoning: impairing personal dignity by prohibiting same-sex marriage via Provisions is **not reasonable or necessary** to fulfill Legislature's duty to establish national marriage system

NAGOYA (2023)

- Current Marriage System Constitutional
- Expand Art. 24(1) of the Constitution to include same-sex couples?
- Issue: whether Art. 24(1) of the Const. must be expanded to include same-sex couples
 - Text only refers to “husband and wife”
- **No violation; does not need to be expanded**
- Reasoning: National Parliament is not required to amend the national marriage system as the only means necessary to achieve marriage equality.
 - Nagoya court suggested establishing special rules for same-sex couples incapable of natural reproduction
 - Still focused on traditional view of family
 - “Marriage alternatives are good enough”

FUKUOKA DISTRICT COURT (2023)

UNCONSTITUTIONAL
RANKING: SILVER (#3)

- Same-sex couples face differential treatment
- Legitimizing same-sex couples' communal life through national certification is important to their social life. Cohabiting alone does not mitigate or remove this disadvantage.
- Disadvantages faced by same-sex couples cannot be mitigated or avoided through legal alternatives
- Registered partnership is non-binding and does not provide the same guarantees as marriage
- Same-sex couples have a **moral interest** to choose their marriage partner under Article 13, but the Fukuoka Court stopped short of recognizing a constitutional right for same-sex couples to get married

FINAL REFLECTIONS

- Cases on appeal to the High Courts
 - SCOJ by 2025
- SCOJ Third Petty Bench holding oral arguments on March 5, 2024 re: constitutionality of denying same-sex partner compensation as murder victim
- National Assembly
 - National registered partnership system or other alternative to marriage?
 - Civil Code Arts. 731-737 & Family Register Act with language specifically including same-sex couples
 - Special rules
- Anti-discrimination for same-sex families
 - Enact new laws re: anti-discrimination
 - Create protections on the basis of sexuality (not just sex)

FUTURE OPPORTUNITIES

UH Law International Programs

- Advanced J.D. & LL.M.



Download LLAN's translations & comment

- Asian-Pacific Law and Policy Journal Vol. 25 Issue 2

