Legitimacy-Based Discrimination and the Development of the Judicial Power in Japan as Seen through Two Supreme Court Cases

Colin P.A. Jones*

Abstract

In September of 2013 the Supreme Court of Japan issued two judgments dealing with the constitutionality of statutory schemes that discriminated based on legitimacy. The first case resulted in the Court finding the provision unconstitutional, a rare occurrence in Japan. The second case found no constitutional problem to exist. This article will compare and contrast the two decisions while explaining the family law context in which they arose. It also offers an explanation of how the Court could arrive at two seemingly contradictory conclusions at almost the same time in its history.

I. INTRODUCTION

II. AN OVERVIEW OF THE SUPREME COURT AND THE JUDICIAL POWER IN JAPAN

III. THE INHERITANCE CASE

A. The Case within the Context of Japanese Family Law

B. The Facts, Issues and Rationale

ii. The Facts

iii. The Issues
I. INTRODUCTION

In September 2013, Japan’s Supreme Court issued two separate judgments relating to the constitutionality of statutory and regulatory provisions that discriminated based on legitimacy. In both cases, the opinion of the Court was unanimous. The first, decided on September 4, found unconstitutional Article 900(iv) of the Japanese Civil Code, which granted to children born out of wedlock a statutory share of inheritance only half that accorded legitimate children. Such action violated the...
constitutional guarantee of equal treatment under the law and was thus void with respect to the estate at issue. This case will be referred to in this article as the "Inheritance Case."

The second case, decided on September 26, involved an equal protection challenge to Article 49(2)(i) of the Family Register Act, which requires parents reporting a birth to indicate whether or not the child was born in wedlock. In this case the court found no constitutional violation. It will be referred to as the "Registration Case."

Both cases arose under Article 14(1) of the Constitution of Japan, which reads as follows: "All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin."4

II. AN OVERVIEW OF THE SUPREME COURT AND THE JUDICIAL POWER IN JAPAN

Under Article 81 of the Japanese Constitution, "[t]he Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act." This has inheritance of an child out of wedlock shall be one half of the share in inheritance of a child in wedlock, and the share in inheritance of a sibling who shares only one parent with the decedent shall be one half of the share in inheritance of a sibling who shares both parents.


2 Inheritance Case, supra note 1.

3 Saikō Saibansho [Sup. Cl.] (1st Petty Bench) Sept. 26, 2013, 2012 (Gyō tsu) no. 399, 67 Saikō Saibansho Minji Hanreishū [Minshū] 1384, available at http://www.courts.go.jp/english/judgments/ text/ 2013.09.26-2012.-Gyo-Tsu-.No..399.html (English translation) [hereinafter Registration Case]. Article 49(1) of the Family Register Act requires the report of a birth to be filed with the registration authorities within 14 days of birth (or three months if the child is born abroad). Kosekihō [Family Register Act], Act No. 224 of 1947, art. 49, para. 1. Paragraph (2) of the same article contains a list of items of information that need to be included in the report, including (i) gender and "whether the child is born in or out of wedlock." Id. para. 2.

4 Nihonkoku Kenpō [Kenpō] [Constitution], art. 14, para. 1. In addition to the equal treatment mandate contained in paragraph (1), paragraphs (2) and (3) prohibit peerages and any type of hereditary honor. See Nihonkoku Kenpō [Kenpō] [Constitution], art. 14.

5 Nihonkoku Kenpō [Kenpō] [Constitution], art. 81.
been interpreted as being an “ancillary” power of constitutional review (*futaiteki iken shinsaken*), meaning that there must be a justiciable case or controversy before the Court in order for it to make a constitutional determination, similar to the US System. Such a requirement necessitates that inferior courts also have the power to rule on constitutional issues, even though the Constitution itself only clearly vests the power in the Supreme Court.

Fifteen justices sit on the Court, which is actually four distinct panels, or benches. There are three Petty Benches comprised of five justices each. These dispose of most of the Court’s docket, which is voluminous, since in theory the Supreme Court has the final word on matters of interpretation involving all areas of Japanese law, not just the Constitution.

In addition to the three Petty Benches, all fifteen justices sometimes sit *en banc* as the Grand Bench. Under the Court Act, only the Grand Bench may issue a ruling of unconstitutionality or overrule a prior Grand Bench interpretation. By contrast, a Petty Bench may resolve the matter if it involves a constitutional ruling consistent with the prior Grand Bench decision.

This brings us to an important difference between the two cases; the Inheritance Case was decided by the Grand Bench. Article 900(iv) of the Civil Code had previously been found not to violate Article 14(1) of

---

7 Id. at 120-21.
8 See SAIBANSHOHÔ [Courts Act], Act No. 59 of 1947, art. 5, para. 1, 3 (stating the Supreme Court is comprised of a Chief Justice and fourteen Justices of the Supreme Court).
10 Id. art. 2.
11 See SAIBANSHOHÔ [Court Act], Act No. 59 of 1947, art. 10. (providing that “a petty bench may not give a judicial decision” in cases in which involve a determination on the constitutionality of law, cases in which a “law, order, rule or disposition is to be decided as unconstitutional,” and cases in which an interpretation or application of the Constitution is contrary to a “decision previously rendered by the Supreme Court”).
12 According to Supreme Court rules, a case may also be referred from a Petty Bench to the Grand Bench in the event of a split among the Petty Bench panel or when otherwise deemed appropriate. Supreme Court Trial Rules, art. 9.
the Constitution in a 1995 Grand Bench decision (referred to in this article as the “1995 Decision”). This view was affirmed in subsequent Petty Bench decisions as well. Thus, even before the decision was announced, the mere news that the Inheritance Case was reviewed by the Grand Bench caused speculation that the 1995 Decision would be overturned; only a Petty Bench decision would have been required to reaffirm the constitutionality of Article 900(iv).

Conversely, the Registration Case was heard by a Petty Bench. The decision did not find a statute or government act to be unconstitutional or conflict with a prior Grand Bench precedent on the issue.

III. THE INHERITANCE CASE

A. The Case within the Context of Japanese Family Law

Since its establishment in 1947, Japan’s Supreme Court has only held a provision in a statute to be unconstitutional on nine occasions, most recently the Inheritance Case. The reluctance of the Supreme Court to invalidate legislation on constitutional grounds is one reason why some scholars refer to the Court as being highly “conservative” or describe

13 Saikō Saibansho [Sup. Ct.] (Grand Bench) July 5, 1995, 1991 (ku) no. 143, 49
14 See, e.g., Saikō Saibansho [Sup. Ct.] (2nd Petty Bench) Sept. 30, 2009, 1314
16 Sup. Ct. Admin. Rules, supra note 9, art. 9.
17 Registration Case, supra note 3.
18 See David S. Law, The Anatomy of a Conservative Court: Judicial Review in Japan, 87 TEX. L. REV. 1545, 1547 (2009) (noting that in 2009 (before the Inheritance Case) the Supreme Court of Japan ruled eight statutes unconstitutional since the Court’s creation in 1947).
19 Inheritance Case, supra note 1. The Supreme Court has also held the application of statutes and regulations – i.e., government acts – to be unconstitutional on about a dozen other occasions. See Law, supra note 18, at 1547-48 (describing laws and rules found unconstitutional by the Supreme Court of Japan).
judicial constitutional review as having “failed” in Japan. This article will neither seek to endorse nor challenge these characterizations.

Suffice it to say, however, the Inheritance Case is significant. Not only is it one of the Court’s few unconstitutionality rulings, but it is the first instance of the Court invalidating a provision of the Japanese Civil Code. Containing the rules of property, contract, tort, family law and inheritance, the Civil Code is one of the most basic canons of Japanese law. Much of it also predates the current Constitution by half a century, although parts, particularly the sections dealing with family law and inheritance, were substantially rewritten during the American occupation, as is discussed in more detail below.

For this reason alone, the Inheritance Case may prove particularly important. In addition to the discriminatory provisions of Article 900(iv), the Civil Code contains a number of other provisions that would on their face seem suspect under Article 14(1), including: different age thresholds for marriage based upon gender (Article 731),\(^21\) a requirement prohibiting remarriage within six months of divorce applicable only to women (Article 733),\(^22\) a statutory presumption that a child born to a woman within 300 days of her divorce is her ex-husband’s (Article 772),\(^23\) and the default vesting in mothers of sole parental authority over children born out of wedlock (Article 819(4)).\(^24\) Some of these provisions would seem constitutionally problematic, not only under Article 14(1) but also under Article 24. Article 24 of the Constitution requires that all laws pertaining to marriage and the family be “enacted from the standpoint of individual

\(^{20}\) See, e.g., David S. Law, Why Has Judicial Review Failed in Japan?, 88 WASH. U. L. REV. 1425 (2011) (evaluating the historical, cultural, political, and institutional explanations for the failure of judicial review in Japan); Shigenori Matsui, Why Is the Japanese Supreme Court so Conservative?, 88 WASH. U. L. REV. 1375 (2011) (examining why the Japanese Supreme Court has developed such a conservative constitutional jurisprudence).

\(^{21}\) MINPÔ [MINPÔ] [Civ. C.] 1896, art. 731 (“A man who has attained 18 years of age, and a woman who has attained 16 years of age may enter into marriage.”), available at http://www.japaneselawtranslation.go.jp/law/detail/?re=02&co=01&ia=03&x=29&y=9&al[]=C&ky=civil+code&page=27.

\(^{22}\) Id. art. 733.

\(^{23}\) See id. art. 772 (stating a presumption that the husband is the father of a child conceived during marriage, and that a child born within 300 days after dissolution of the marriage is “presumed to have been conceived during marriage.”).

\(^{24}\) See id. art. 819, para. 4. (“A father shall only exercise parental authority with regard to a child of his that he has affiliated if both parents agree that he shall have parental authority.”).
dignity and the essential equality of the sexes”. This language is even reiterated in Article 2 of the Civil Code. Nonetheless, these discriminatory provisions have been upheld by prior Supreme Court precedents finding them not to violate the constitution.

Therefore, the Inheritance Case might signal the tantalizing possibility of the Court more actively challenging the other inequalities and anachronisms that remain enshrined in the Civil Code, notwithstanding decades of change in Japanese society. As we shall see, however, the Registration Case suggests otherwise.

B. The Facts, Issues and Rationale

i. The Facts

The facts of the Inheritance Case are simple enough. A decedent - “P” - died in July 2001, leaving as heirs his legitimate children (the Appellees) and children born out of wedlock (the Appellants). The Appellees had petitioned the trial court for a declaratory judgment confirming Appellants’ statutory share of P’s estate. Finding no constitutional problems, the trial court ordered that the estate be distributed in accordance with Article 900(iv), that is, with Appellants receiving only half the shares of Appellees. Appeals eventually resulted in the case being heard by the Supreme Court.

25 Nihonkoku Kenpō [Kenpō] [Constitution], art. 24.
26 See Minpō [Minpō] [Civ. C.] 1896, art. 2 (“This Code must be construed in accordance with honoring the dignity of individuals and the essential equality of both sexes.”), available at http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=Civi l+Code&x=0&y=0&ia=03&ky=&page=4 (Part I, II and III) [hereinafter Minpō Parts I-III].
28 Inheritance Case, supra note 1, para. 1.
29 Id.
30 Id.
ii. The Issues

In order to arrive at its conclusion that the Civil Code provision violated the constitution, the Grand Bench had to deal with two major issues. The first was justifying the reversal of its own holding in the 1995 Decision.\(^\text{31}\) Eighteen years is not a long time in jurisprudential terms, so the Court had to articulate a reason why what had recently been constitutional no longer was. The second was implementation.\(^\text{32}\) By the time the Court issued its ruling over a decade had passed since P’s death. In order to give relief to the Appellants, it would have to find that Article 900(iv) was unconstitutional at the time of P’s death. If such a ruling had general retroactive effect, it could potentially throw into question the validity of the settlement of thousands of other estates that had been achieved during the interim. How the Court dealt with both of these issues is discussed in more detail below.

iii. The Rationale

On its face, the differing treatment accorded illegitimate children by Article 900(iv) would seem to present a \textit{prima facie} case of discrimination based on “social status or family origin” in violation of Article 14(1).\(^\text{33}\) However, due to the central role of marriage in Japanese family law and the historical context described in Part IV.A.1, the provision survived for over half a century. In the 1995 Decision, the Court devoted several pages of text to explaining why Article 900(iv) \textit{did not} violate the equal protection clause, as encapsulated in a summary paragraph:

> Since the Civil Code has adopted the system of marriage by law, the reason of enactment of the Provision has a reasonable ground. The fact that the Provision set out the statutory inheritance share of an illegitimate child at one-half that of the legitimate child cannot be regarded as excessively unreasonable in relation to the reason of enactment, and exceeded the scope of reasonable discretion granted to the legislature. The Provision cannot

\(^{31}\) \textit{See id.} pt. 3 (explaining the Court’s rationale for ruling counter to the 1995 Decision).

\(^{32}\) \textit{See id.} pt. 4.

\(^{33}\) \textit{See} \textit{NIHONKOKU KENPÔ [KENPÔ] [CONSTITUTION]}, art. 14 (“All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.”).
be regarded as an unreasonable discrimination and is against Article 14, paragraph 1 of the Constitution.\textsuperscript{34}

From an institutional perspective, for the Supreme Court the real challenge in the Inheritance Case would seem to have been how to overturn the 1995 Decision without simply declaring it to have been a mistake. This was in fact the view expounded by the five judges who dissented from that holding, as well as subsequent academic criticism.\textsuperscript{35} Furthermore, the challenge is greater than it first appears. Although 18 years separated the issuance of the two judgments, the Inheritance Case Court had to find Article 2001(iv) unconstitutional as of 2001 (when P died), a mere six years after the 1995 Decision was rendered. In the author’s view, it is hard to describe the Grand Bench as having risen to the challenge, but given these circumstances that is perhaps not unsurprising.

As its starting point, the Court noted that in 1947 the Civil Code was amended to provide for an egalitarian system of inheritance in place of the pre-war system of katoku sōzoku under which a single heir (typically the eldest son) would inherit the status of head of household together with control of the household’s assets (see discussion at Part IV.A.1).\textsuperscript{36} Nonetheless, a proviso from the pre-amendment code that accorded illegitimate children an unequal share in certain circumstances was incorporated into the new code. According to the Court, at the time these amendments were made the Japanese people had a discriminatory attitude towards children born out of wedlock.\textsuperscript{37} Furthermore, the Court noted that during the legislative process frequent reference had been made to various other countries of the world which at the time also had statutory provisions that discriminated against illegitimate children in matters of inheritance.\textsuperscript{38}

The Court also spent some time discussing social change, a theme that is central to its unconstitutionality ruling.\textsuperscript{39} Since the current Article 900(iv) was enacted in 1947, Japan experienced rapid economic

\textsuperscript{34} 1995 Decision, supra note 13 (summarizing the reasoning in the case).


\textsuperscript{36} Inheritance Case, supra note 1.

\textsuperscript{37} Id.

\textsuperscript{38} Id.

\textsuperscript{39} Id.
development and the decline of extended families.\textsuperscript{40} Life expectancy increased, resulting in a greater need to provide for aging parents and spouses (reflected in a 1980 amendment to the Civil Code increasing the size of statutory share of a decedent’s estate accorded to surviving spouses).\textsuperscript{41} Japanese people started getting married later in life (or not at all) and had fewer children if they did.\textsuperscript{42} As a result, there had developed increasing diversity in the views of Japanese people regarding marriage and how families should be that has been accompanied by growth in the variety of family and marital structures.\textsuperscript{43}

The factual rationale – if it may be described in such terms – is actually hard to follow. The Court noted that the number of children born out of wedlock had decreased until the late 1970s, but has increased since.\textsuperscript{44} While asserting in one place that Japanese people have come to embrace different and more diverse attitudes towards marriage and family structures compared to days gone by, elsewhere the Court notes that unlike western countries, some in which births out of wedlock account for over 50\% of all births, in Japan they accounted for only 2.2\% in 2011.\textsuperscript{45} The Court takes this as a sign that notwithstanding the diverse attitudes of Japanese towards family, the importance of legal marriage is still deeply rooted in the national consciousness\textsuperscript{46} – not so much change after all, it seems.

The Court then turns its eyes again abroad, particularly to European nations (where religion was supposedly the reason for discrimination against the illegitimate) that had phased out legal distinctions between children based on legitimacy. Germany eliminated them in 1998 and France in 2001, leaving Japan one of the few countries in the world still having inheritance rules that discriminated against heirs born out of wedlock.\textsuperscript{47}

Also relevant was Japan’s ratification of the International Covenant on Civil and Political Rights in 1979 and the UN Convention on

\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} See id. (noting that neither the United States nor European countries continue to distinguish between children born in or out of wedlock for inheritance as Japan does).
the Rights of the Child in 1994. Both instruments prohibit discrimination based on birth. The Court further explained that the respective UN committees overseeing these conventions had issued multiple recommendations that Japan eliminate the discriminatory provisions from its law, the most recent in 2010. This is noteworthy, since it has been observed that references by the Supreme Court to human rights instruments are rare (although the Court previously made such a reference in the Nationality Act Case discussed below). It is thus probably even more unusual for the Court to refer to criticism of Japan by UN human rights bodies as part of its rationale. This might be a sign of the Court being progressive, but could as easily be an indicator of a weak rationale being bolstered by whatever was at hand.

The Court also drew on past litigation in related cases. It mentioned changes in regulations relating to the registration of children born out of wedlock as well as several lower cases challenging the discriminatory effect of such registration systems (cases that do not appear to merit mention in the Registration Case). The Court attached particular attention to the Grand Bench’s own 2008 decision in what is referred to in this article as the Nationality Act Case (discussed below) and which also involved a form of statutory discrimination related to birth status.

Legislative and regulatory history also features in the rationale of the Inheritance Case, but primarily in the form of descriptions of unsuccessful initiatives. According to the Court, various ministerial and legislative committees had been proposing amendments to Article 900 to remove the discriminatory provisions, the earliest in 1979, the most recent

49 Id.
51 Inheritance Case, supra note 1.
Yet for all the alleged social change, legal developments, and other factors given by the Court in explanation, the rationale of the decision remains unconvincing. It fails to come even close to identifying anything in the nature of a “tipping point” in Japanese social conditions between the 1995 Decision and the 2013 Inheritance Case. After all, much of the social change and diversification of attitudes cited by the Court were arguably well underway before 1995. Similarly, some of the legislative efforts and both of the international treaties discussed in the case predate the 1995 Decision.

A tipping point would have been difficult to identify anyways, given that Petty Bench decisions subsequent to the 1995 Decision had reconfirmed the constitutionality of Article 900(iv), the most recent in 2009 (referred to below as the “2009 Decision”).55 The Court in the Inheritance Case judgment does refer to the 2009 Decision, but only references the dissenting and concurring opinions (discussed in subpart E.1 below), which support the Court’s conclusion in the Inheritance Case.

Commendable as the Court’s holding regarding the unacceptability of discrimination between heirs based on their legitimacy may be, it nonetheless appears to have been arrived at through nothing more than a bundle of assertions leading to a pre-ordained conclusion. Ironically, the somewhat contorted rationale may be due to the comparatively low and amorphous standard of review the Court applied.

C. Standards of Review

53 Inheritance Case, supra note 1.

54 The use of legislative history even by the US Supreme Court is still a complex and sometimes controversial subject, particularly since the appointment to the Court of Justice Scalia, who has been openly critical of the use of legislative history as an interpretive tool. See, e.g. David Law & David Zaring, Law Versus Ideology: The Supreme Court and the Use of Legislative History, 51 WM. & MARY L. REV. 1653, 1658-59 (2010). References to the history of legislative failures may not be as incongruous as they seem. As noted elsewhere in this article, constitutional claims are sometimes raised in the form of suits for damages against the state due to legislative nonfeasance by the Diet, as was the case in the Registration Case.

Despite the clear wording of Article 14(1), all that is generally required for a statutory provision having discriminatory effect is for it to have a “rational basis” (gōritekina konkyo), a fairly low threshold that can be traced back to a 1964 Grand Bench decision that is also the starting point for the analysis in the Registration Case.\textsuperscript{56} Constitutional scholars have long argued that at least the categories specifically enumerated in Article 14(1) (race, creed, sex, social status and family origin) should enjoy a higher standard of judicial scrutiny when used as the basis for discriminatory treatment by law or government acts.\textsuperscript{57} The Supreme Court, however, has not attached any special significance to the enumerated categories and for most of its history has uniformly applied an extremely low standard of review in upholding discriminatory legislation of all types. For example, as described by Professor Craig Martin: “The Supreme Court of Japan has almost exclusively, until 2008, employed a rudimentary ‘rationality test’ similar to that initially developed in the early equal protection cases in the United States, and it has applied it universally in respect of all forms of discrimination.”\textsuperscript{58}

In other words, the standard of review in Japanese equal protection cases in Japan has long been comparable to the US “rational basis” standard, the lowest standard of review used by the Supreme Court. Since virtually all government activities are justified based on the public welfare and it is rare for governments to engage in blatantly irrational discrimination, this standard has resulted in most equal protection claims failing, though of course the same could be said for constitutional claims of any other type as well. In the family sphere, other discriminatory


\textsuperscript{57} See, e.g., SHIGENORI MATSUI, THE CONSTITUTION OF JAPAN 176 (2011) (“[W]hile most academics have suggested the courts should distinguish between forms of discrimination and employ a more vigorous standard of review to discrimination based on the grounds enumerated in article 14, the Supreme Court has not shared this view. Rather, it has viewed discrimination based on these enumerated grounds merely as examples of unreasonable discrimination and has thus applied a very lenient standard of review to many forms of discrimination.”).

provisions of the Civil Code have been upheld based on this rational basis standard.\(^{59}\)

This being the case, what may be surprising about equal protection jurisprudence in Japan is not that there have been so few successful challenges based on Article 14(1), but that there have been any at all. For many, the surprise is likely to be compounded by reading the very first instance in which the Japanese Supreme Court found a statute unconstitutional, a decision based on the finding of an Article 14(1) violation.

The so-called “Patricide Case” of 1973 resulted in the Court invalidating provisions of the Penal Code that resulted in the punishment for homicide varying depending upon the relationship between the killer and the victim; persons who killed parents or other lineal ascendants were subject to more severe punishments than those who killed strangers or children or descendants.\(^{60}\) Although the Court was almost unanimous in finding the provision unconstitutional, there was a significant disparity of rationales as to why. As noted by Professor Martin, the Court never precisely identified the type of discrimination at issue in the case even though that would seem to be the crux of an equal protection case.\(^{61}\) The true significance of the Patricide Case is thus best sought in it being the first instance of the Supreme Court invalidating a statute and perhaps as a partial rejection of the feudally-rooted Confucian system of social ordering that had long prevailed in Japan.\(^{62}\)

\(^{59}\) For example, the women-only six month waiting period for remarriage was upheld because it was intended to serve the rational goal of preventing the occurrence of conflicting presumptions about paternity. Law, supra note 18.


\(^{61}\) Martin, supra note 58 at 201. Note that as in the Inheritance Case, the Court in the Patricide Case also had to deal with a prior holding of the Court finding the provision at issue to be constitutional. See id. at 200 & n.98 (citing Saikō Saibansho [Sup. Ct.] (1st Petty Bench) May 24, 1956, 10 Saikō Saibansho KEII HANREISHŪ [KEISHŪ] 734). Note also that the majority of Justices upheld the concept of the moral precepts about respecting elders being incorporated into law, finding the penal code provision to be unconstitutional not because the punishments for elder-slaying were harsher than for other types of homicide, but because they were *disproportionately* harsher. Id. at 201.

\(^{62}\) See id.
Although the Patricide Case may offer little as an example of coherent Article 14(1) jurisprudence, three of the Court’s unconstitutionality rulings preceding the Inheritance Case were also made on equal protection grounds. However, two of these involved malapportionment in Diet seats. Since those cases also implicated Article 44 of the Constitution, which enunciates a separate equal-protection guarantee in connection with rights of political participation, they are best considered as applying a different standard than was applicable to the Inheritance Case.

The Nationality Act Case was the next instance of the Court invalidating a law based only on the equal protection guarantee in Article 14. The Nationality Act Case also involved statutory discrimination related to birth status. Specifically, the Nationality Act contained a provision that made children born out of wedlock to a Japanese father eligible for Japanese citizenship only if the Japanese father had


64 This characterization is an oversimplification intended to avoid being sidetracked by an extremely dense area of constitutional jurisprudence. As noted by one scholar, the fact that courts have treated the enumerated categories of prohibited discrimination in Article 44 the same as those in Article 14(1), that is, as a list of examples rather than categories subject to higher scrutiny, suggests that Article 44 does not establish a higher standard of review. Tomonobu Hayashi, Article 44 in SHINKIHONHŌ KOMENTARU – KENPO 319 (Hitoshi Serizawa, Masato Ichikawa, Shōjirō Sakaguchi eds., 2011). Prevailing academic theory holds that Article 44 should be construed as establishing a higher standard of review. Id. It could also be argued that the malapportionment cases can be further distinguished because voting rights also implicate the right to choose public officials under Article 15 and the basic principle of popular sovereignty supposedly underlying the entire Constitution and expressed in its Preamble and in Article 1. Academic theory aside, in its November 2013 rulings on malapportionment, the Grand Bench did not appear to attach any particular significance to Article 44, mentioning it once or twice as a relevant provision and then including it in subsequent references to “Article 14(1) etc. [tō],” Saikō Saibansho [Sup. Ct.] (Grand Bench), Nov. 20, 2013 (Gyo-Tsu) no. 226, available at http://www.courts.go.jp/english/judgments/text/2013.11.20-2013.-Gyo-Tsu-.No..209%2C.210%2C.211.html (English translation).

65 See Nationality Act Case, supra note 52.
acknowledged paternity before birth. Even if a Japanese father acknowledged paternity after birth, a child born out of wedlock could only be eligible for Japanese nationality if the parents subsequently married. The Grand Bench found this form of discrimination to be unconstitutional.

One of the reasons the Nationality Act accorded disparate treatment to children born out of wedlock depending upon when paternity was acknowledged was to prevent fraudulent acknowledgments being used for the purpose of conferring nationality. In theory, it would be possible for unscrupulous Japanese men to “sell” Japanese nationality to the children of foreigners by acknowledging paternity for a fee. In a world of simple rational basis scrutiny, this might have been enough for the provision to pass muster. In its opinion, the Court noted that preventing fraudulent acknowledgements of paternity was a rational policy goal, yet concluded there was not a rational connection between that goal and the distinction imposed by the law:

[W]e should conclude that although the legislative purpose itself from which the Distinction is derived has a reasonable basis, reasonable relevance between the Distinction and the legislative purpose no longer exists due to the changes in social and other circumstances at home and abroad, and today, the provision of . . . the Nationality Act imposes an unreasonable and excessive requirement for acquiring Japanese nationality. Moreover, since the Distinction involves another distinction . . . we must say that it causes a child born out of wedlock who satisfies only the requirement of being acknowledged by a Japanese father after birth to suffer considerably disadvantageous discriminatory treatment in acquiring Japanese nationality, and even if we take into consideration the discretionary power vested in the legislative body when specifying requirements for acquisition of Japanese nationality, we can no longer find

66 Nationality Act, Act No. 147 of 1950, art. 3, para. 1 (Japan).
67 Id.
68 Nationality Act Case, supra note 52.
69 See id. ("[I]f Japanese nationality is to be granted to a child by reason of acknowledgment by a Japanese father before legitimation takes place, fictitious acknowledgement is likely to occur in an attempt to acquire Japanese nationality.").
any reasonable relevance between the consequence arising from the Distinction and the aforementioned legislative purpose.\textsuperscript{70}

The Court thus seemed to be applying a new standard of review in a discrimination case, one that despite continuing to be framed in terms of “rationality,” went further to look at the balance of interests at stake. As characterized by Professor Martin, the majority opinion contains all the elements of the framework of a Canadian-style “proportionality analysis”.\textsuperscript{71} For this reason, Martin characterizes the Nationality Act Case as a possible turning point, a “glimmer of hope” that the Court might be moving in the direction of a more nuanced and, perhaps more importantly, a higher standard of review in discrimination cases.\textsuperscript{72}

D. The Inheritance Case: Another Glimmer of Hope?

Despite the new direction suggested by the Nationality Act Case, the 2013 Inheritance Case displays few signs of this higher standard being applied. Even using the rational basis standard, the Court had to articulate why a statutory provision that had been found to have a rational basis not only in 1995 but in 2009 as well no longer did. As discussed above, it is questionable whether the Court presented a convincing argument even with this low standard, so perhaps applying a higher standard would have required more specificity and, paradoxically, been more difficult.

Yet perhaps the Court did not need to do more in this respect if its goal was to challenge a form of discrimination that most rational people would find difficult to justify, particularly since the discrimination is based on an attribute that victims have no control over – the marital status.

\textsuperscript{70} Id.
\textsuperscript{71} Martin, supra note 58, at 235.
\textsuperscript{72} The Nationality Act Case is generally regarded as an example of “progressive” or “successful” judicial review in Japan and has been widely praised by Japanese and foreign scholars alike. While not objecting to the substantive result, the author actually found the case to be disturbing. Despite being a highly fractious judgment with a majority opinion, two separate dissenting opinions and several concurring opinions, the one point on which virtually all of the justices seemed to be able to agree was that “Japanese nationality… [is] an important legal status that means a lot to people in order to enjoy the guarantee of fundamental human rights, obtain public positions or receive public benefits in Japan.” Nationality Act Case, supra note 52 (emphasis added). Similar language to this taken from the majority opinion appears in the dissenting and concurring opinions as well. See id. What that language implies regarding the fundamental human rights of non-citizens in Japan is a subject that will have to be left for another day.
of their parents.\textsuperscript{73} If one assumes that the Court decided to overturn the 1995 Decision first and developed the rationale later, the explanation given in the Inheritance Case may be as much as one can expect.

The preceding is likely a very “American” view of the rationale given in the Inheritance Case. Constant disappointment with the lack of apparent depth of analysis is the likely fate of most American lawyers reading Japanese Supreme Court judgments. Starting with the deep continental roots in Japanese law and jurisprudence, there are some very basic differences in approach to constitutional cases between the courts of Japan and the United States, differences that have both been explained at great length elsewhere but that also render expectations of American-style analysis unrealistic.\textsuperscript{74} Still, it is hard to find a further “glimmer of hope” in the Inheritance Case, at least with respect to the manner in which the Court reached its conclusion.\textsuperscript{75}

E. Implementation

i. The Significance

Insofar as in the Inheritance Case the Supreme Court arrived at a decision that many people probably agree with, albeit a decade or two late, the rationale by which it did so may not be particularly important.\textsuperscript{76}

\textsuperscript{73} See 1995 Decision, supra note 13 (dissenting Toshijiro et al.) (“Discriminating by law against an illegitimate child, who is by no means responsible for the birth, on the ground of birth is in excess of the purpose of legislation [Article 900(iv)], i.e. the respect for and protection of marriage; there is no substantial relationship between the purpose of the law and the means of achieving it, and therefore, it cannot be found to be reasonable.”).

\textsuperscript{74} See, for example, 88 WASH. U. L. REV. 1601 (2011), the entire issue of which is devoted to subjects discussed at a symposium on the subject of “Decision Making of the Japanese Supreme Court.”

\textsuperscript{75} In part to draw attention to another difference between the constitutional jurisprudence of the Japanese Supreme Court and constitutional courts such as the US Supreme Court, it should be noted that, due to timing, this article was written without the benefit of reference to the commentary typically published by the lead research judge who helped the Justices with researching and writing the opinion. See Masako Kamiya, “Chōsakan”: Research Judges Toiling at the Stone Fortress, 88 WASH. U. L. REV. 1601 (2011).

\textsuperscript{76} Even significant Japanese Supreme Court cases seem to be fated to be reduced to a one or two sentence proposition, usually expressing a general principle, which is then reproduced in annotations and is what students have to remember in tests. The Supreme Court helps this process along by underlining those parts of its judgments that it considers particularly significant. With respect to the portion of the Inheritance Case describing the rational the Court used to arrive at is finding
However, from the standpoint of the evolution of the judicial power in Japan, the case may prove to be highly significant for a different reason: the manner in which it dealt with the tricky problem of the potential impact of its unconstitutionality ruling.

To understand the significance of the Inheritance Case in this light, it may help to look more closely at the 2009 Decision – the most recent prior instance in which the Court had reaffirmed the constitutionality of Article 900(iv). Since the majority opinion merely followed the holding of the 1995 Decision, it did not need to do anything more than declare the provision to be constitutional and reject the appeal. A strong dissent by Justice Imai, who had also been on the court in the Nationality Act Case, argued that the Court should have applied the higher standard of review from the Nationality Act Case to find Article 900(iv) to be unconstitutional.\textsuperscript{\textcircled{77}}

In the author’s opinion, however, the most instructive part of the 2009 Decision is the concurrence of Justice Takeuchi Yukio, the only member of the Court who was still on the bench when the Inheritance Case was decided. Prophetically, Justice Takeuchi starts with the proposition that the majority opinion was only confirming that Article 900(iv) did not lack a rational basis for Article 14(1) purposes as of the year 2000 (when the estate at issue went into probate), and that it was still possible for changes in social circumstances to render the provision unconstitutional in the future.\textsuperscript{\textcircled{78}} This is the conclusion the Court reached a mere four years later in the 2013 Inheritance Case.\textsuperscript{\textcircled{79}}

Despite concurring in the majority opinion, Justice Takeuchi nonetheless expressed the view that as of 2009, there was a “strong possibility” that the provision was now unconstitutional.\textsuperscript{\textcircled{80}} However, he continued, nine years had passed since the estate at issue was probated,
and if the Court were to declare Article 900(iv) to be void on constitutional grounds effective as of 2000, the validity of countless estate settlements during that period would be thrown into uncertainty. Additionally, cases might be reopened and the law would be thrown into confusion.

ii. The Dilemma

This view that “the law is unconstitutional but if we invalidate it a lot of people would be inconvenienced” may well express the dilemma faced repeatedly by the Supreme Court in the development of its constitutional jurisprudence. Certainly this view has played a key role in the long succession of malapportionment cases. What should the Court do and what can the Court do are two very different questions and, in the author’s opinion, the Court’s resolutions can often be understood as an exercise in paying lip service to the former question while substantively addressing the latter. This is typically done in a way that is non-disruptive and involves essentially ratifying the status quo. In this sense, Justice Takeuchi’s concurrence in the 2009 Decision is noteworthy because it is unusual for the dilemma to be expressed so openly.

Furthermore, “what if we issue a ruling but everyone ignores us” is likely a dilemma for constitutional courts everywhere, but perhaps particularly so for Japanese courts. This is suggested by the fact that within a few weeks of the historic ruling having been issued, the Justice System Committee of the ruling Liberal Democratic Party (LDP) initially refused to amend the Civil Code to remove the discriminatory provision from Article 900(iv). They subsequently relented and by the time this article was ready for publication an amendment to the Civil Code excising the discriminatory provision had been passed and taken effect.

Nonetheless, conservative LDP committee members were apparently unconvinced by the Grand Bench’s arguments about changing times and international treaty obligations. Some expressed concern that

81 Id.
82 See supra note 64.
83 Jimin hōmu bukai minpō kaiseian no ryōshō miokuri [LDP Legal Working Group Defers Approval of Proposed Amendment], NHK NEWSWEB (Oct. 29, 2013), http://www3.nhk.or.jp/news/html/20131029/ k10015646411000.html (article has since been deleted by the news agency) (copy on file with author).
changing the law would destroy the “traditional family system.””85 One parliamentarian went so far as to assert “if we change the law in accordance with this absurd [hijōshiki] Supreme Court decision, there will be more and more children born out of wedlock and the family system will collapse.”86 Granted, some of this may have been mere posturing for conservative voters. Nonetheless, it is worth noting that over two decades passed before the provisions found unconstitutional in the Patricide Case were removed from the Penal Code.87

Whether the legislative branch respects the judgments of the judicial branch to the extent of reflecting them in statutes is a question that has obvious implications for the status of the Supreme Court and the judiciary as a whole. A similar question is raised by considering the possible effect on how the Court would be perceived if it issued a judgment that reopened countless disputes over inherited property that all the heirs involved thought had been settled. In a way, the issue of implementation and effect discussed by Justice Takeuchi in his concurrence in the 2009 Decision is one that goes to the heart of the Supreme Court’s judicial power.

iii. The Solution

In the Inheritance Case, the Grand Bench confronted the issue of implementation head on. It did so by declaring that its finding that Article

---

85 See, e.g., Don’t Undermine the Inheritance Bill, THE JAPAN TIMES (Nov. 6, 2013), http://www.japantimes.co.jp/opinion/2013/11/06/editorials/dont-undermine-inheritance-bill/#.Ut4_i7RUvIU (“Some lawmakers quoted in the media even suggested that they might defy the ruling by the nation’s top judicial authority if it appeared to conflict with their own values.”).

86 LDP Legal Working Group Defers Approval of Proposed Amendment, supra note 83. Having spent a significant amount of time talking to Japanese people in various walks of law about family law issues, the author can attest that a common theme in many of these discussions (particularly with people in leadership positions) is the assertion that some sort of “traditional family values” exist, though they rarely seem to date further back than the Tokyo Olympics of 1964, the golden age of Japanese history, which Japanese baby-boomers seem to use as the gold-standard. In reality, “traditional” family values were much more complicated. Among other things, those who complain about children being born out of wedlock ignore the important role they have played in the most central of Japanese political institutions: the imperial household. Among other things, both the Meiji and Taisho emperors were born to concubines.

87 During this period, the problem of subsequent constitutional challenges was avoided through the simple expedient of prosecutors never pressing charges under the offending provision. Regarding the legislative change to implement the Patricide Case, see SHIBUTANI, supra note 35, at 198-98.
900(iv) was void on constitutional grounds did not have any legal effect on any estates the settlement of which had already been conclusively settled during the period since P’s death. Structuring the effects of its judgments is a new thing for the Court. As noted in the concurrence of Justice Seishi Kanetsuki, there are no prior instances of the Court ruling in such a way regarding the binding nature of its own judgments. In principle a holding of unconstitutionality should have a general retroactive effect. 88

The Court has long had a practice of underlining what it considers to be the important parts of its rulings, presumably so lazy law students and annotators will be sure to remember and excerpt the correct parts. 89 In the Inheritance Case two sections are underlined in this manner: (i) the comparatively short sentence declaring Article 900(iv) to be void on Article 14(1) grounds, and (ii) the longer sentence restricting the impact of the holding to the estate of P and other estates the settlement of which has not been concluded. 90 A further indicator of the importance of the latter part of the ruling is suggested by the fact that two separate concurring opinions discussed its significance. 91

This latter aspect of the case may prove to be far more significant in the development of the Court’s jurisprudence than the unconstitutionality ruling itself. By essentially empowering itself to structure unconstitutionality rulings that have only limited effect, the Court may be laying the groundwork for playing a more assertive role. Somewhat paradoxically, in the Japanese context it is likely easier for the Court to be assertive if it can do so without being overly disruptive. The decision could thus come to be seen as a milestone on the Court’s path to achieving greater recognition and acceptance in the eyes of Japanese people.

Or perhaps it won’t. On that note let us turn now to the Registration Case, the judgment of which was rendered just a few weeks after that of the Inheritance Case.

IV. THE REGISTRATION CASE

F. Background

88 See Inheritance Case, supra note 1 (Kanetsuki, J. concurring).
89 Although on its English website the Supreme Court provides translations of some of its judgments, this underlining is not replicated in the English versions.
90 See id. (underlining is absent in English translation).
91 See id. (Kanetsuki, J. concurring); id. (Chiba, J. concurring).
As a judgment, the Registration Case is simpler and shorter. However, particularly for the non-Japanese reader the contextual background required to understand it may be more complex. Indeed, the issue that was the crux of the case – the requirement that parents indicate whether a child is legitimate or not when reporting the birth to family register authorities – may be difficult to understand for Western readers unfamiliar with Japan’s system of family law. Indeed, the need to “register” a family may itself seem unusual not only to non-Japanese people but to at least some Japanese people as well. The challenge in the Registration Case was, after all, brought by a Japanese family. Accordingly, before discussing the case itself this article will take a contextual detour through the family register system and the current and past system of family law upon which it is based.

iv. The Family Register and Family Law

In Japan the family is tied to two registration systems, the family register (koseki) and the residence register (jūminkihondaichō). Such registration systems have a long history in Japan, which had highly developed systems of household and tax registration as far back as the eighth century. Both systems were implicated in the Registration Case but the discussion that follows deal mainly with the family.

As the name suggests, the family register is a registry of family units. Shortly after the Meiji Restoration Japan’s national government introduced a national system of family registers modeled on earlier systems that had been used on a regional basis. It was based on the system of extended families that prevailed at the time. However, these structures may be best thought of as “households” rather than families. The traditional family unit that this system of registration system sought to

92 See generally KOSEKIHO [Family Register Act], Act No. 224 of 1947; JŪMIN KIHONDAICHŌHO [Basic Resident Register Act], Act No. 81 of 1967.
93 See CARL STEENSTRUP, A HISTORY OF LAW IN JAPAN UNTIL 1868 44 (1991) (noting the existence of household registers and tax registers in discussing the Taika Administrative reforms of that period).
95 See, e.g., STEENSTRUP, supra note 93, at 130-33 (discussing the ie system during the Tokugawa Period).
96 The “ko” in koseki originally meant “house” rather than “family” (“seki” means “registration” or “document evidencing registration”) and is still used in Japanese when counting houses.
reflect was the “ie”, a Japanese term that also means “house” but might also be translated “extended family” or again “household”.

The ieseido or “household system” was codified in the family law provisions of the Civil Code adopted in 1898, which defined the “house” as being comprised of such relatives of the head of the house as are in his house, and the husbands and wives of such relatives.97 A Family Register Act was passed at the same time in order to reflect the contents of this law.98 Although largely a system of record-keeping administration, the family register is inextricably tied to the Civil Code, which defines the types of relationships subject to registration.

The traditional “household” system was inherently feudal and patriarchal in that it organized families around a koshu, or head of household. “Head of household” was a legally-recognized status generally accorded to the senior legitimate male member of the household. By law the head had had significant powers over junior members and family property.99 For example, a junior member could not choose a residence,
marry, or enter into an adoptive relationship against the will of the head of the household.\textsuperscript{100} The head also had duties, including the duty to support other members of the household.\textsuperscript{101} The head of household was also a heritable status, one that was transmitted not only upon the death of an existing head, but upon their formal retirement or loss of Japanese nationality.\textsuperscript{102} The rules of succession relating to this status essentially favored the oldest legitimate son of the prior head.\textsuperscript{103}

Although these rules no longer applied in postwar Japan, for purposes of understanding the historical background to the Registration Case it should also be noted that the old Civil Code also had specific rules dealing with children born out of wedlock. If the father acknowledged paternity the child could enter the household as a \textit{shoshi} (an acknowledged illegitimate child whose status within the household was legally inferior to that of legitimate children), but only with the consent of the head.\textsuperscript{104} Otherwise such children entered the mother’s household.\textsuperscript{105}

It is important to understand that the \textit{ie} system was also part of a system of public administration, since it allowed the government to implement policy through the head of the household.\textsuperscript{106} The family register facilitated (and still facilitates) this governance system by both serving as a source of information about families and an instrument for administrative intervention in them.\textsuperscript{107} Under the \textit{ie} system the family register system would identify the head of a household and thus allow the government to know who was responsible for the household’s members and property.

The \textit{koseki} system initially established in 1872 was used to implement basic government functions such as taxation and conscription.\textsuperscript{108} Although the initial register system was public, its utility

\textsuperscript{100} Id. arts. 749-50.
\textsuperscript{101} Id. art. 747. \textit{See also id.} arts. 954-63 (setting forth more detailed rules as to the duties of support that existed within the household unit).
\textsuperscript{102} Id. arts. 964-85. \textit{See also id.} art. 752 (prohibiting the head of household from resigning this status unless he reached the age of sixty, at which point he could formally transfer the status to the next in line, typically the eldest legitimate son).
\textsuperscript{103} Id. art. 970.
\textsuperscript{104} Id. arts. 735, 827-36.
\textsuperscript{105} Id. art. 735.
\textsuperscript{106} OPPLER, \textit{supra} note 97, at 120.
\textsuperscript{108} See WADA, ISEIDO NO HAISHI, \textit{supra} note 107, at 418 (acknowledging the family register’s easily overlooked value as a source of statistical information
in commerce led to a person’s family register details being a matter of public record, since it could be used to confirm creditworthiness. Given the nature of the ie system, the head of the household or his eldest legitimate son would be far better credit risks than any other member since they would either have or could be expected to inherit the power to dispose of the household’s property. Its status as a public record remained a feature of the family register system until increased concerns over the protection of privacy led to 1976 amendments that limited access generally to members of the applicable family.109

While the above description is largely of historical interest, it is important to understand that from its inception in the system described above, the family register system in Japan still exists primarily to define a limited range of legally significant family relationships or statuses for purposes of interactions with the rest of society and the government. Though not a perfect analogy, it may be helpful for western readers to think of the family registry as something akin to a real estate title registry, which enables government agencies and potential purchasers or mortgagors to confirm the legal status of a particular piece of land.110 The family register is no longer a public document, but its role as part of a system of governance remains, even today. And although the ie system is also now a matter of historical interest, as we shall see it has cast a long shadow over both family attitudes and the way the family register system operates in 21st century Japan.

about families); Shūhei Ninomiya, Kojinjōhō no hogo to koseki kōkai gensoku no kentō [The Protection of Personal Information and the Public Family Register Principle], 304 RITSUMEI HÔGAKU 238, 240 (2006) (characterizing the first national family register system established in 1871 primarily as a means of implementing taxation, conscription and peacekeeping rather than a system of identification).

109 Id. at 239. But see KOSEKIHÔ [Family Register Act]. Act No. 224 of 1947, art. 10-2 (maintaining even today a wide range of exceptions to the privacy of family register information, including for lawyers and other licensed professionals requiring such information in connection with legal cases).

110 For example, under Articles 818 and 819 of the present Civil Code, parental authority is exercised (i) by both parents during marriage, (ii) by the mother if the child is born out of marriage and (iii) only by one parent after divorce, either by agreement or judicial determination. See MINPÔ [MNPÔ] [Civ. C.] arts. 818-19. Since marriage and divorce are reflected in the family register, who is entitled to exercise parental authority on behalf of a particular (Japanese) child can be ascertained merely by looking at the family register (or an official extract), obviating the need to submit custody decrees or separation agreements as is often the case in the United States, for example.
The story of the creation of the current Japanese Constitution and the complex demands, interactions and compromises between American occupiers and Japanese government actors has been told in great detail elsewhere.\textsuperscript{111} The part of the story relevant to this article is the American insistence on the inclusion of Article 24, which had profound implications on the system of family law just described. Article 24 reads:

Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.

With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.\textsuperscript{112}

Historical analysis of the process by which the Constitution was adopted suggests that when the Diet approved the Constitution containing this provision there were differing views as to what it meant for the ie system. Some legislators apparently believed the system could be retained, while others thought the new Constitution mandated abolition of the ie system.\textsuperscript{113} Additionally, some Japanese scholars in the drafting committee, such as Takeyoshi Kawashima, saw this as an opportunity to amend a system of family law they already considered outdated and moribund.\textsuperscript{114}

\textsuperscript{111} See, e.g., RAY A. MOORE & DONALD R. ROBINSON, PARTNERS FOR DEMOCRACY: CREATING THE NEW JAPANESE STATE UNDER MACARTHUR (2002).

\textsuperscript{112} NISHIKOKU KENPO [KENPO] [CONSTITUTION], art. 24. This is not the exact provision originally proposed by the American drafters. During the course of its drafting and approval by the Diet various changes were made to Article 24, but the Americans were insistent upon the inclusion of the concepts of gender equality and respect for individual freedom. See, e.g., Moore & Robinson, supra note 109 at 131.

\textsuperscript{113} The views of the various participants in the process of drafting and adopting Article 24 and revising the Civil Code are discussed in great detail in WADA, IESEIDO NO HAISHI, supra note 107, at 25-166.

\textsuperscript{114} WADA, IESEIDO NO HAISHI, supra note 107, at 25-166. Oppler similarly describes the old family system as “moribund even without the pressures accompanying the making of the Constitution: it would only have died a slower death.” OPPLER, supra note 97, at 115.
For their part, to the extent the Americans thought about family law their principal concerns were with gender equality and elimination of the "head of household." This institution was inconsistent with principles of equality and also was regarded as a component of the Japanese feudal system, the dismantling of which was a core objective of the occupation. Beyond elimination of the head of the household system, the Americans did not initially press for the elimination of the ie system itself, leaving the details of reform up to the Japanese, though free of course to veto anything they disliked.

Thus it fell to the Japanese scholars and officials charged with amending the Civil Code to ensure the Code’s consistency with the egalitarian new Constitution. Amendments to the Family Register Act would naturally spring from these changes, though this was complicated by a factor to be discussed shortly.

Some of the Japanese participants advocated the complete elimination of the ie system, while others insisted it be retained in some form even if only as a set of moral precepts. While some American officials expressed the “private” view that elimination was desirable, it was decided that completely eliminating the ie system from the Civil Code would likely trigger the veto powers implicitly retained by the occupiers over the drafting process. To assuage the conservative members of the Japanese committee, a minor form of conspiracy was proposed: the drafters would retain enough elements of the ie system in the new laws so that it could be revived after the occupation if desirable.

115 Id. at 94, 107, 131 (including on page 94 the full text of the Supreme Commander Allied Powers General Douglas MacArthur’s memo setting forth guidelines for the new Constitution, one of which was “the feudal system of Japan will cease.”); see also Oppler, supra note 97, at 116-17 (regarding family law reform).
116 Oppler, supra note 97, at 116-17 (“While we never urged the complete abolition of the house system, we watched with interest how the Japanese would adjust it to the principles of the [c]onstitution. They did a more thorough job than we had expected.”) (citation omitted).
117 Wada, Ieseido no Haishi, supra note 107, at 133-45.
118 Id.
119 This compromise is also reflected in Article 730 of the current Civil Code which contains a vague statement about relatives having to help each other. See Minpo [Minpo] [Civ. C.] art. 730. This provision is understood by scholars to have no legal effect, having been inserted as a sop to the people who objected to the elimination of the ie system and its defined duties of support among family members. See, e.g., Yoshiro Miyazaki, Dai 730 Jo [Article 730], in Hanrei Minpo 9 – Shinzoku [Civil Code Annotated with Precedents, Vol. 9 –
The primary vehicle for doing this was to be the Family Register Act, which was amended so that it was based not on individuals (which arguably would have been more consistent with Article 24 of the Constitution) but primarily on marriages and surnames.\textsuperscript{120}

The continuing significance of surnames in Japanese family law – Article 750 of the Civil Code still contains the anachronistic requirement that one spouse adopt the other’s surname upon marriage\textsuperscript{121} – can be understood in this context. Under the pre-war Civil Code, members of a household all bore the same family surname.\textsuperscript{122} The surname was thus considered a possible replacement, or a foundation on which to rebuild the \textit{ie} system, though that ultimately did not happen.\textsuperscript{123}

A surprising amount of debate thus went into the Family Register Act amendments that followed the Civil Code amendments, since it was in the latter act that some remnants of the \textit{ie} system could be preserved, even though the register system was originally intended as an administrative tool rather than a locus of substantive family law.\textsuperscript{124} Furthermore, the American participants in the process were quick to appreciate the intent behind the initial drafts. Having not insisted on eradicating the \textit{ie} system from the Civil Code, once the decision had been made to do so the Americans overseeing the process objected strongly to efforts to keep elements of it alive through the family register system.

For example, Oppler and his colleagues successfully blocked early draft amendments to the Family Register Act on the grounds that certain features, such as provisions that would allow three generations to be registered as a single family in certain circumstances, were reminiscent

\begin{flushright}
120 Note that some of the participants in the process advocated a registration system based solely on individuals. \textit{Wada, Ieiseido no Haishi, supra} note 107 at 292-297.
121 \textit{See Minpō [Minpō] [Civ. C.] art. 750.}
122 \textit{Old Civil Code, supra} note 97, art. 746.
123 \textit{Wada, supra} note 99, at 118-120.
124 This doubtless explains why Article 6 of the Family Register Act requires a family register to be organized around married couples and “children thereof with the same surname” or an unmarried parent and “children thereof with the same surname.” \textit{See Kosekihō [Family Register Act], Act No. 224 of 1947, art. 6.}
\end{flushright}
of the old *ie* system. The Americans also pushed the Japanese to consider a system of registration based on individuals rather than families. The Japanese succeeded in resisting this demand, in part by arguing about how much extra work and recordkeeping would be required to do so.

In fact, the accounts of the negotiations between the American and Japanese sides over the Family Register Act are an example of the clash of American-style individualism and the Japanese family-based collectivism. The resulting system that remains in force today is a compromise, a system of registering families based on a two-generation nuclear family that would have been familiar to Americans. Yet, at the same time, it was not a system based on *individuals*. For this reason, it is also a system in which the matter of whether a child is born in or out of wedlock is of fundamental importance. Children born to a married couple are registered in the new register created at the time of the marriage and share the couple’s surname. Children born out of wedlock are registered in a new family register created for the mother and share her surname.

The *ie* system was never revived, but the family register system, which reflected at least the hope that it might be, remains in place. And while many Japanese people themselves may find the system difficult to rationalize, it should be remembered that its original purpose was to be a means by which the government could gather information about the population and, particularly in the past, use as a means of control. More
prosaically, the family register – usually in the form of official documentary extracts that can be obtained from the local government administering it – is a basic form of identification in Japan.131 Whereas westerners are likely to prove identity and family status through a combination of documents that confirm specific events (births, marriages, divorces, custody decrees, deaths), in Japan an extract of a person’s family register provides a current (and thus more accurate) snapshot of a person’s family status (the legally-significant aspects of it, at least).

This is the historical and legal context in which the Registration Case arose. While it may appear to be a dispute over a seemingly anachronistic and pointless documentary requirement in a government form, it actually goes to the heart of a system of family law in which marriage and legitimacy are central to the entire design of the system, a design which itself reflects the remnants of a very different set of family traditions.

v. The Facts of the Registration Case

According to the recitation of the facts in the Supreme Court’s judgment, two of the appellants were a man and woman who began living together in 1999 in Tokyo.132 They were not legally married. In 2005, the woman gave birth to a child (also named as an appellant).133 The man had filed an acknowledgement of paternity before the birth.134 The case arose

---

131 Indeed, family registers are even proof of Japanese nationality, since only Japanese people have a family register. The treatment of a Japanese person who marries a foreign national is essentially the same as one who has a child out of wedlock; a new register is created for the Japanese person (unless they have already established their own register). See KOSEKIHÔ [Family Register Act], Act No. 224 of 1947, art. 16, para. 3. As a result, in addition to discriminating based on legitimacy almost out of necessity, at a basic level the Japanese system of family law also discriminates based on nationality.

132 Registration Case, supra note 3.

133 Id.

134 Id.
when he tried to register the birth with the family register authorities. The form used to report births requires several items of information that seem both incongruous and invasive of privacy. One is whether the child was born in or out of wedlock.

The father of the child sought to register the birth as required by law without filling in the “in/out of wedlock” part of the form. The registry authority rejected the filing as defective. Without the household registry filing being accepted, the parents were also unable to create a residence registry for the child. The two sides spent a number of years in an impasse, until 2010 when the Ministry of Justice (MOJ) sent a directive to registry authorities around the nation essentially directing them to seek a compromise with parents in this situation by asking them to file a notice of birth that, while not filling in the “in/out-of wedlock” part of the form, would allow the authorities to register the necessary details. If the parents did not respond then the authorities could confirm the necessary details themselves, since the marital status of the parents would already be apparent from their household registers.

G. The Case

135 See Registration Case, supra note 3. Although not mentioned in the case, another way in which the Family Register Act discriminates based on legitimacy is by requiring that notifications of births of children born out of wedlock be filed by the mother unless she is unable to do so, in which case the filing can be made by a cohabitant, attending doctor or midwife, or legal representative. See Kosekihō [Family Register Act], Act No. 224 of 1947, art. 52. Notifications of birth to a married couple may be filed by either the father or mother. See id. Accordingly, the father in the Registration Case was presumably able to file because he was cohabitating with the mother.

136 Registration Case, supra note 3; Kosekihō [Family Register Act], Act No. 224 of 1947, art. 49(2)(i).

137 Registration Case, supra note 3.

138 Id.

139 Id.

140 Id. One of the interesting things about Japanese family law is that a certain part of it is shaped not by court rulings, but by MOJ guidance and directives addressed to local registry authorities as to how to deal with the registration in situations where the law is unclear or special circumstances apply. This is authorized by provisions of the Family Registry Act. See Kosekihō [Family Register Act], Act No. 224 of 1947, art. 3. These provisions of the Family Register Act are also noteworthy because they essentially subjugate the democratically-elected heads of local governments to the instructions of unelected Ministry of Justice bureaucrats with respect to administration of the family register.
The parents brought suit in 2011 asserting two claims for damages under Article 1(1) of the State Redress Act. One was based on the alleged tortious legislative nonfeasance on the part of the national government for failing to eliminate the discriminatory provision of the Household Registration Act. The other asserted administrative nonfeasance on the part of the authorities administering the residence registration for failing to register the child in the residence registry.

Both claims were based on the argument that requiring a notation as to legitimacy was a form of unreasonable discrimination in violation of Article 14(1). Other relief had also been sought in the lower court proceedings (including a declaratory judgment to the effect that the municipal authorities were obligated to register the child in the residence registry).

---

141 Registration Case, supra note 3. The State Redress Act implements Article 17 of the Japanese Constitution under which the people are entitled to sue the state for redress. See KOKKA BAISHÔ HÔ [State Redress Act], Act No. 125 of 1947. Article 1(1) of the Act reads: “When a public officer who exercises the public authority of the State or of a public entity has, in the course of his/her duties, unlawfully inflicted damage on another person intentionally or negligently, the State or public entity shall assume the responsibility to compensate therefor.” Id. art. 1, para 1.

142 Registration Case, supra note 3. Although the Court did not directly address the claim, a brief explanation of “legislative nonfeasance” is probably necessary, since it is a claim that is not used as a basis for constitutional claims in the United States. As the term suggests, a claim based on legislative nonfeasance involves an assertion that the legislature has a constitutional obligation to enact or amend laws necessary to address a constitutional deficiency in an existing program or give effect to one or more provisions of the Constitution (some of which, such as the Article 13 right to the pursuit of happiness or the Article 25 right to a minimum standard of cultured living, are considered to be so abstract as to be non-justiciable without further legislative definition). Since the Supreme Court defers greatly to the discretion of the Diet such claims are rarely successful. However, the concept of legislative nonfeasance did play a role in the reasoning of the Court in the 2005 Overseas Voting Case, in which the Grand Bench found that the failure of the Diet to make adequate provisions enabling equal participation by overseas voters in Diet elections was unconstitutional. Saikô Saibansho [Sup. Ct.] (Grand Bench) Sep. 14, 2005, 2001 (Gyo tsu) no. 82, 59 SAIBANSHO MINJI HANREISHU [MINSHU] 2087, available at http://www.courts.go.jp/english/judgments/text/2005.09.14-2001.-Gyo-Tsu-.No..82%2C.2001.-Gyo-Hi-.No..76%2C.2001.-Gyo-Tsu-.No..83%2C.2001.-Gyo-Hi-.No..77.html (English translation).

143 Registration Case, supra note 3.

144 Id.
registry), but these had been retracted by the time of the appeal to the Supreme Court.\textsuperscript{145}

The Court rejected the Article 14 argument, noting that the registration of the birth and notation of legitimacy did not result in a legal distinction between children born in and out of wedlock; these were established by the Civil Code.\textsuperscript{146} The Court then explained how the family structures established by the Civil Code were founded in legal (registered) marriage, with children necessarily being treated differently depending upon whether their parents are married, including whose surname they bear,\textsuperscript{147} and how they are registered in the first place.\textsuperscript{148} Accordingly, it could not be said that the information requirements of the birth registration form alone resulted in discriminatory treatment of children born out of wedlock.

The Court acknowledged that the registration authorities could use the information already in their possession to confirm whether a child was born in or out of wedlock, but accepted that requiring parents to fill in the information nonetheless served the rational goal of furthering administrative convenience.\textsuperscript{149} As to any concerns about privacy, the Court asserted that the reported information about birth status was subject to strict privacy protections and could not be easily accessed by third parties, implying that birth status was unlikely to be a source of discrimination from other parties.\textsuperscript{150} Finally, the Court refused to entertain the argument that the notation “out of wedlock” (\textit{chakushutsu de nai ko}) as used in the reporting document was itself discriminatory, since it was

\begin{quote}
\textsuperscript{145} \textit{Id.} Among other things, after reminders from the authorities had no effect, the authorities made the necessary registrations without the cooperation of the parents, as was permitted under Articles 24 and 44 of the Family Register Act. \textit{Id.; see also Kosekihō [Family Register Act], Act No. 224 of 1947, arts. 24, 44.}
\textsuperscript{146} \textit{Registration Case, supra} note 3.
\textsuperscript{147} \textit{Id.} Article 790 of the Civil Code states:
(1) A child in wedlock shall take the surname of his/her parents; provided that if the parents divorce before the child is born, the child shall take the surname of his/her parents at the time of divorce.
(2) A child out of wedlock shall take the surname of his/her mother.
\textit{Minpō [Minpō] [Civ. C.] art. 790.}
\textsuperscript{148} \textit{Registration Case, supra} note 3. \textit{See Kosekihō [Family Register Act], Act No. 224 of 1947, arts. 6, 18 (detailing how children are to be registered).}
\textsuperscript{149} \textit{Registration Case, supra} note 3.
\textsuperscript{150} \textit{Id.}
\end{quote}
used in the Civil Code, the Family Register Act and other laws and regulations.\textsuperscript{151}

This was the final claim addressed by the Court before it rejected the Article 14(1) argument. The Court found that Article 49(2) of the Family Register Act, which required notation of legitimacy in birth reports, did not establish unreasonable discrimination between legitimate and illegitimate children.\textsuperscript{152} The only part of the judgment that is underlined is the statement that “the Provision cannot be regarded as setting down discriminatory treatment against a child born out of wedlock as compared to a child born in wedlock and therefore it is not in violation of Article 14 paragraph (1) of the Constitution.”\textsuperscript{153} The Court declined to address the appellants’ other unspecified constitutional claims.\textsuperscript{154}

In a short concurring opinion, Justice Sakurai Ryūko agreed with the conclusions of the Court but made a point of criticizing a system that had allowed a Japanese child to go for over seven years without being recorded in either a family register or a residence register, thereby possibly suffering various disadvantages through no fault of his or her own.\textsuperscript{155} She questioned whether it was really necessary to impose such disadvantages on children, given that the registry officials could make the necessary notations relevant to legitimacy based on the information available without self-reporting by parents.\textsuperscript{156}

\textit{H. So Much for Social Change}

Although the Registration Case was heard by a Petty Bench, all of the judges who participated had also been part of the same Grand Bench

\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} See id. (Sakurai, J. concurring). One of the disappointing aspects of both the Inheritance Case and the Registration Case is how little the interests of children – as opposed to the doctrinal purity of Japan’s marriage-centric system of law – seem to factor into the respective conclusions. As already noted, Japan is a party to the UN Convention on the Rights of the Child, Article 3 of which mandates that \textit{inter alia} that “best interests of the child shall be a primary consideration” in “all actions concerning children” by courts and other government institutions. UN Convention on the Rights of the Child, \textit{supra} note 48, art. 3. While the Inheritance Case references the UN Convention on the Rights of the Child, \textit{supra} note 48, art. 3. While the Inheritance Case references the UN Convention on the Rights of the Child, it seems to do so more as a source of ammunition to support its conclusion rather than as part of a reasoned consideration of how different conclusions would affect children in the real world.

\textsuperscript{156} Registration Case, \textit{supra} note 3.
that decided the Inheritance Case just three weeks previously. Had there been more time between the two cases, the language of the Inheritance Case would likely have featured in the appellant’s briefs in the Registration Case. And yet none of the social change, new attitudes about marriage, increasing family diversity, international treaties proscribing discrimination based on birth status, or legislative initiatives that had seemed so important to the Court in the Inheritance Case merited any comment whatsoever in the Registration Case. While the Inheritance Case was specifically about inheritance, there was nothing about the Court’s rationale that inherently limited it to that area of law. Indeed, the Court addressed the case primarily within the context of supposedly greatly changed attitudes about marriage and family.

V. SYNTHESIS AND CONCLUSION

How could the same court arrive at such seemingly incongruous results in the same month? Unlike the historic Inheritance Case, the holding in the Registration Case seems like business as usual for Japan’s “conservative” Supreme Court. Yet viewed from the standpoint of the Court acting in an institutionally rational manner in the exercise and development of the judicial power, the two cases may not be as inconsistent as they seem.

The Inheritance Case was based on a strong sentiment that existed within the Court regarding the discrimination in Article 900(iv), a sentiment already evident in the 1995 Decision through the five justices who dissented. This view was probably strengthened as much by criticism of constitutional scholars and subsequent concurrences and dissents as it was by “social change.” Furthermore, once the Court dealt with the implementation problem by limiting the scope of its ruling, it could naturally expect that lower courts hearing any new inheritance disputes between legitimate and illegitimate heirs would follow its interpretation in ignoring the discrimination in 900(iv), even if the Diet failed to amend the Civil Code in response to its ruling.

In contrast, if the Court had declared the legitimacy designation at issue in the Registration Case unconstitutional, the Court would by implication call into question the entire foundation of Japanese family law.

157 See Law, supra note 18, at 1375 (describing the Japanese Supreme Court’s jurisprudence as conservative).
reflected in a number of provisions of the Civil Code, not just a discrete rule of inheritance.

Furthermore, if the Court had declared the registration requirement void, it would be interfering with a system administered by the Ministry of Justice, which might have been more significant than Article 900(iv). As noted in the Court’s discussion of legislative history, the MOJ had long been involved in unsuccessful efforts to amend the provision referenced in the Inheritance Case, meaning the ruling would not likely conflict with MOJ initiatives.

As for the registration requirement, it merits note that apparently spurred by the refutation of legitimacy-based discrimination in the Inheritance Case, on October 1, 2013 Akashi City in Hyogo introduced a birth report form that did not require parents to indicate such status. They were immediately struck down by both MOJ officials and Sadakazu Taniguchi, the Minister of Justice himself, who reportedly asserted that the law did not permit local governments to create their own forms. It would be the MOJ, not elected local governments or even the Supreme

159 Here it is worth bearing in mind just some of the countless institutional connections between the MOJ and the judiciary. Before the current Constitution was implemented, the entire judiciary was essentially subordinated to the MOJ, which exercised control over judicial personnel. Certain seats on the Supreme Court are informally reserved for former prosecutors, the elite members of the legal profession who control the MOJ. See Lawrence Repeta, Reserved Seats on Japan’s Supreme Court, 88 Wash. U. L. Rev. 1713, 1724-25, 1743 (2011). The MOJ and the judiciary have personnel exchanges which see judges participating in administering the MOJ, particularly in areas relevant to civil law. Id.

160 Hyōgoken Akashishi ga chakushutushi no kisai sakuju shussetodoke de zenkoku hatsu [Akashi city in Hyogo Prefecture is first in nation with birth report without indication of legitimacy], KYOTO SHINBUN, (Oct. 1, 2013), http://www.kyoto-np.co.jp/country/article/20131001000146. Apparently, therefore, the “administrative convenience” referenced by the Registration Case Court in justifying its decision was not so great as to prevent local family register officials from trying to eliminate the requirement.


162 And the Diet, of course. At the same time amendments to the Civil Code to bring it into line with the Inheritance Case were passed in the Diet, a proposed amendment to eliminate the legitimacy designation in the Family Register was rejected. See Kongaishi kitei sakujo wo kaketsu shuin hōmuti kosekihō kaisei de ha irei no jikō bunretsu [House of Representatives Legal Affairs Committee
Court exercising the judicial power, that would decide how the family register system would be administered.

Given the context of the Inheritance Case, the Supreme Court’s expansion of the judicial power in that case would likely be acceptable to most stakeholders (including the general public). The Registration Case showed the same Court being equally pragmatic. Even if the Justices had secretly wished to invalidate the registration requirement, doing so would have only drawn attention to the discriminatory foundations of the nation’s family law but done nothing to remedy them. This would have also disrupted the governance of a nationwide registration system administered by a Ministry having a particularly complex relationship with the judiciary. The Court trumpeted social change and changing attitudes in the first case, while ignoring these considerations in the second. This suggests a certain cynicism involved in the resolution of both cases, although this conclusion could just be a reflection of the author’s own cynicism.

In any case, the Court’s use of the Inheritance Case to hone its power of constitutional review into a more precise tool may ultimately make it possible for the Court to turn to some of the other inequalities that remain deeply rooted in Japanese family law. That in turn would surely further enhance the Court’s own legitimacy in the eyes of the Japanese people.

---