Judgment delivered on June 8, 2023, original received on the same day – Court clerk
Case No. (Wa) 2827 of 2021 (the first case), Case No. (Wa) 447 of 2021 (the second case)
The "Freedom of Marriage for All" lawsuit
Date of conclusion of oral argument: December 8, 2022

Judgment

The list of parties is contained in Appendix 1.
(The terms defined in Appendix 1 are also used in the main text.)

Main Text of Judgment

1. The Plaintiffs' claims are dismissed.
2. The costs of the litigation shall be borne by the Plaintiffs.

Facts and Reasons

I Plaintiffs' Claims

1. The Plaintiffs request that the Defendant pay to Plaintiff 1 and Plaintiff 2 1,000,000 yen each, and interest thereon at the rate of 5% per annum from October 9, 2019 until the completion of payment.
2. The Plaintiffs also request that the Defendant pay 1,000,000 yen each to Plaintiff 3, Plaintiff 4, Plaintiff 5, and Plaintiff 6, and interest thereon at the rate of 5% per annum from March 8, 2021 until the completion of payment.
3. The Plaintiffs further request that the costs of the litigation be borne by the Defendant.
4. The Plaintiffs request a declaration of provisional execution.

II Summary of the Facts

In this case, the Plaintiffs, who filed a marriage notification together with a person of the same sex and had it rejected, argue that the provisions of the Civil Code and the Family Register Act which do not permit marriage between persons of the same sex create a legal situation where same-sex marriage is not allowed and which violates Article 13, Article 14(1), and Article 24 of the Constitution, and that the failure of the Defendant to take necessary legislative measures is unlawful under Article 1(1) of the State Redress Act. The Plaintiffs claim 1,000,000 yen each in compensation for non-pecuniary loss, together with interest thereon at the rate of 5% per annum as provided for by the Civil Code (before amendment by Law No. 44 of 2017) for the period from the date of service of the respective complaints (October 9, 2019 for Plaintiffs 1 and 2, and March 8, 2021 for Plaintiffs 3 to 6) to the date of payment thereof.

1 Undisputed Facts (the facts which are not in dispute amongst the parties and those facts which are readily recognized by the evidence set forth below and the entire

import of oral arguments)

(1) Sexual orientation

Sexual orientation is a concept that refers to which sexes a person's feeling of love and sexual attraction are directed toward, and includes heterosexuality, where feelings of love and sexual attraction are directed toward the opposite sex, homosexuality, where feelings of love and sexual attraction are directed toward the same sex, and bisexuality, where feelings of love and sexual attraction are directed toward both sexes (hereinafter, a person whose sexual orientation is heterosexual shall be referred to as a "**heterosexual person**" and a person whose sexual orientation is homosexual shall be referred to as a "**homosexual person**"). Gender identity is a concept that indicates how one recognizes their own gender and what gender identity a person identifies with, and those whose physical sex does not match their gender identity are referred to as transgender.

(2)

(i) Plaintiffs 1 and 2 are both male homosexual persons, and live together at their place of residence. In June 2018, Plaintiffs 1 and 2 swore under oath that they are in a partnership relationship using the "Partnership Oath System" which Fukuoka City had implemented, and received a partnership certificate (*Plaintiffs' Evidence B1, 2-1 and 2*).

On July 5, 2019, Plaintiffs 1 and 2 filed a marriage notification at their place of residence, but the notification was rejected on the ground that they are of the same sex (*Plaintiffs' Evidence B3*).

(ii) Plaintiffs 3 and 4 are both male homosexual persons, and live together at their place of residence. In March 2020, Plaintiffs 3 and 4 swore under oath that they are in a partnership relationship using the "Partnership Oath System" that Kumamoto City had implemented, and received a partnership certificate (*Plaintiffs' Evidence C1*).

On March 4, 2020, Plaintiffs 3 and 4 filed a marriage notification at their place of residence, but the notification was rejected on the ground that they are of the same sex (*Plaintiffs' Evidence C2*).

(iii) Plaintiffs 5 and 6 are both female homosexual persons, and live together at their place of residence. In March 2020, Plaintiffs 5 and 6 swore under oath that they are in a partnership relationship using the "Partnership Oath System" that Fukuoka City had implemented, and received a partnership certificate (*Plaintiffs' Evidence D4*).

On August 12 of the same year, Plaintiff 5 and Plaintiff 6 filed a marriage notification at their place of residence, but the notification was rejected on the ground that they are of the same sex (*Plaintiffs' Evidence D5*).

(3) Provisions of Law

The Civil Code provides that for a marriage notification to be accepted, it must meet the substantive requirements for marriage (*Articles 731-736*) and must not violate the provisions of Article 739(2) of the Civil Code or other laws and regulations (such as the Family Register Act and the Enforcement Regulations of the Family Register Act). The Civil Code and the Family Register Act contain no explicit provision that the parties to a marriage must be of the opposite sex.

On the other hand, notification of a marriage between persons of the same sex is considered unlawful under the current marriage system, in light of Article 739(1) of the Civil Code, which provides that a marriage shall take effect upon notification in accordance with the Family Register Act, and Article 74(1) of the Family Register Act, which provides that persons who intend to marry must notify the surname they will use as husband and wife.

(The provisions of the Civil Code and the Family Register Act that make same-sex marriage unlawful are hereinafter collectively referred to as the "**Provisions.**")

2 Issues and Summary of the Parties' Claims with respect to the Issues

The issues in this case are as follows, and a summary of the parties' claims with respect to these issues is attached hereto as Appendix 2. The terms defined in Appendix 2 are also used in the main text.

(1) Whether the Provisions are in violation of Article 13, Article 14(1), or Article 24 of the Constitution;

(2) Whether the failure to amend or repeal the Provisions is illegal in light of the application of Article 1(1) of the State Redress Act;

(3) The incurrence and amount of damages by the Plaintiffs; and

(4) In relation to Plaintiff 6, whether there is a mutual guarantee under Article 6 of the State Redress Act.

III. The Court's Judgment

1 Findings of Fact by the Court

The Court accepts the following facts based on the undisputed facts as well as the evidence set forth below and the entire import of oral arguments.

(1) Knowledge on sexual orientation and homosexuality, etc.

(i) Current knowledge on sexual orientation

Although the causes of sexual orientation formation are unclear, mental health experts believe that in most cases sexual orientation is determined early in life or before birth

and that it is not a choice. It is also believed that mental illness and sexual orientation are unrelated and that sexual orientation does not change by one's own volition or through psychiatric treatment. (*Plaintiffs' Evidence A2, 3, 466-1 and 2, 542; entire import of oral arguments*)

(ii) Evolution of knowledge on homosexuality

(a) In the West, under Christian values, there was a view that condemned homosexual relationships, and when people who considered themselves homosexuals came forth in the latter half of the 19th century, they were punished or considered ill and subjected to medical treatment. Around this time, German psychiatrists wrote a book advocating the pathologization of homosexuality. (*Plaintiffs' Evidence A358, pp. 78-84*)

The Diagnostic and Statistical Manual of Mental Disorders ("DSM") was published by the American Psychiatric Association. Among such manuals, DSM-I, published in 1952, categorized "homosexuality" as one of the diagnostic names for "sexual deviance" and classified it under the broad category of "sociopathic personality disorders." DSM-II, published in 1968, included a subcategory of "sexual deviance" under the broad category of "personality disorders and other non-psychotic mental disorders," and "homosexuality" was classified under such subcategory. The ninth edition of the International Classification of Diseases ("ICD") published by the World Health Organization ("WHO") in 1975 (ICD-9) listed the classification name "homosexuality" as one of the categories under the section of "sexual deviations and disorders." *(Plaintiffs' Evidence A377*)

(b) Since the early 1970s, doubts stemming from empirical studies of the pathologization of homosexuality and movements by homosexual people based on these doubts have led to the depathologization of homosexuality. In 1973, the American Psychiatric Association decided to delete the category of "homosexuality" from the DSM. However, DSM-II included a new diagnostic name of "sexual orientation disorder," and DSM-III (published in 1980) revised the term "sexual orientation disorder" to a limited concept known as "ego-dystonic homosexuality". DSM-III-R, published in 1987, deleted the term "ego-dystonic homosexuality", and the American Psychiatric Association began to take the view that homosexuality is a "difference within the normal range". In 1992, the WHO deleted the classification name "homosexuality" from ICD-10 and its updated versions, instead using the classification name "ego-dystonic sexual orientation", and clearly stated that "sexual orientation itself should not be considered as a disorder".

Today, the view that homosexuality itself is not an illness is the prevailing view among psychiatric and psychological experts.

(*For the above, Plaintiffs' Evidence A359, 377, 379-1 and 2, 382-1 and 2, 383-1 and 2, 384, 385-1 and 2*)

(iii) Knowledge on homosexuality in Japan

(a) Before the Meiji Era

In Japan, there have been sexual relations between men, known as *nanshoku* or *shudo*, since before the Meiji era. During the Edo period, prostitution by young boys became widespread, and the shogunate of the time regulated *nanshoku*, but unlike in the West, the purpose was not to criminalize sexual contact between men (*Plaintiffs' Evidence A358, pp. 94-96*).

(b) Early Meiji Era

After the Meiji Restoration, the Meiji government worked to reform society under the banner of *"bunmeikaika"* ("civilization and enlightenment"), and defined the sexual values appropriate to civilization. These values did not immediately take hold, but in 1872, the Japanese government enacted the Sodomy Ordinance to prohibit the practice of sodomy (sexual intercourse between men) which was in practice since the Middle Ages, and banned it by law the following year because it was considered an unnatural sin in the West (the law making sodomy a crime was repealed in 1882, based on the opinion that it should be judged through custom rather than as a criminal penalty. (*Plaintiffs' Evidence A205, p. 5, 358, pp. 97-99*)

In 1891, a translation of a German psychologist's work advocating the pathologization of homosexuality ((ii)(a) above) began to be serialized in the "Journal of the Society of Trial Medicine," and in 1894, a translated book with the title "*Shikijo-kyo Hen*" (Compilation of Aphrodisiomania) was published based on this serialization (*Plaintiffs' Evidence A360, 361*). Also, in 1906, "*Shinsen Seishinbyo-gaku*" (New Selection of Mental Illness Studies) was published, in which homosexuality was regarded as a mental illness (*Plaintiffs' Evidence A362*). In these works, homosexuality was introduced as a pathological sexual passion, and its treatment methods included hypnosis, administration of bromine, physical labor, cold water bathing, and change of circumstances (*Plaintiffs' Evidence A361, 362*).

(c) The Taisho Era to the Heisei Era

In the Taisho era (1912-1926), Western sexual science became widespread through translated books, and books on sexual desire studies began to be written. In 1913, "*Shikijo-kyo Hen*" was published for the general public under the title of "*Hentai Seiyoku Shinri*" (Psychology of Perverted Sexual Desire), which became very influential in Japan, and many sex magazines were published that regarded homosexuality as a perverted sexual desire and as a mental illness. (*Plaintiffs' Evidence A205*)

The view that homosexuality is a perverted sexual desire took root in Japan, and the *Kojien* dictionary, from the second edition published in 1969 to the third edition published in 1983, described homosexuality as "a type of abnormal sexual desire that loves the same sex and feels sexual desire for the same sex" (*Plaintiffs' Evidence A358, pp. 105, 307-1*).

(d) Heisei Era and after

Following the movement in the West to depathologize homosexuality ((ii)(b) above), the then Ministry of Health and Welfare adopted the WHO's ICD-10 in 1995, which states that sexual orientation alone shall not be considered a disorder ((i)(b) above). In response, the Japanese Society of Psychiatry and Neurology also announced its adoption of ICD-10 in the same year. (*Plaintiffs' Evidence A205, pp. 46, 385-1 and 2*)

(2) Changes in the marriage system and examination of same-sex marriage

(i) The marriage system was born out of the desire to control by means of norms the preservation of the species through a sexual union between a man and a woman. Each era and society had its own marriage system to fulfill its needs.

The Western marriage system was premised on the biblical view of marriage, and the church had monopolized marriage as sacrament since the 10th century. However, with the Protestant Reformation and the establishment of an absolute monarchy, the idea of civil marriage, in which the state controls the formation of marriage, emerged, and civil marriage became the core form of marriage ever since. In modern civil society, all people are entitled to equal status, and human social relations have become contractual relationships between free-willed parties. While marriage too requires the parties' consent as a condition for the formation of the contract, it persists as a system with its content predetermined by the law.

(*For the above, Defendant's Evidence 2*)

(ii) The marriage system in Japan and its requirements

(a) Before the enactment of the Civil Code

Around the beginning of the Meiji era, the substantive requirements for marriage were left to custom and no uniform substantive law existed. The Personal Status Part of Law No. 98 of 1890, which was promulgated as the first civil code of Japan (the "Old Civil Code"), provided for such requirements for the first time. The Old Civil Code was not enacted, but it was succeeded by Law No. 9 of 1898 (the "Meiji Civil Code"). At the drafting stage of the Personal Status Part of the Old Civil Code, there was an opinion to follow the Italian Civil Code and add "physical incapacity" as a cause of invalidity of

marriage due to not being able to result in the production of offspring, which is the purpose of marriage. Nevertheless, such opinion was not followed in the end. (*Plaintiffs' Evidence A209, Defendant's Evidence 1*)

In addition, there were academic theories at the time that the purpose of marriage was the harmonization of minds and the communal life of husband and wife, and not necessarily to bear children (*Plaintiffs' Evidence A211, 213*).

(b) At the time of enactment of the Meiji Civil Code

The Meiji Civil Code, "Part 4: Relatives," went into effect on July 16, 1898 (*Plaintiffs' Evidence A209*).

Marriage under the Meiji Civil Code was intended to follow Japan's traditional customs while correcting their harmful and unclear aspects by law (*Defendant's Evidence 3*). The Meiji government abolished the concubine system and the feudal status system to modernize the marriage system, but established the family register system, which is a means of tracking and controlling the populace, structuring them into family units under the Civil Code. The government maintained control through the family units by requiring the consent of the head of the household and parents for marriage (*Plaintiffs' Evidence A214*). Marriage in such cases was assumed to be between a man and a woman (*Defendant's Evidence 4, 5*).

There were academic theories at the time that the purpose of marriage was for the communal life of husband and wife, and not necessarily for the procreation of children (*Defendant's Evidence 4*). In addition, although "childlessness" was considered one of the grounds for desertion in divorce laws since the time of the *Ritsuryo* system, in the Meiji Civil Code, a lack of reproductive capacity or failure to reproduce was not stipulated as a reason to nullify marriage, or as grounds for annulment or invalidation of marriage, or grounds for divorce (*Plaintiffs' Evidence A209, 210, 553*).

(c) At the time of the enactment of the Constitution of Japan (enacted on May 3, 1947)

The Constitution of the Empire of Japan, enacted in 1890, had no provision on marriage, but the current Constitution (the Constitution of Japan), which was enacted as an amendment to the Constitution of the Empire of Japan, included Article 24 on marriage in order to establish individual dignity (freedom) and equality in family relations by dismantling the "household" system, which was regarded as a hotbed of Japanese militarism (*Plaintiffs' Evidence A136*).

In the process of drafting Article 24 of the Constitution, Beate Sirota Gordon of the Civil Affairs Division of the General Headquarters of the Allied Forces (GHQ) drafted

detailed text for the improvement of women's status and the protection of families. The draft stated that "...marriage and family shall be based on the idea that both sexes are legally and socially equal, based on mutual consent, not on parental coercion, and on cooperation, not on male domination." The Japanese government was reluctant to include provisions on family relations in the Constitution, and once tried to limit the provisions to those on marriage, but the clause that corresponds to Article 24(2) of the current Constitution was eventually restored (*Plaintiffs' Evidence A136*). In the subsequent amendment process, the provision went from the Japanese wording of "Marriage shall be solemnized on the basis of mutual consent between a man and a woman", to the wording in Article 22 of the proposed amendment to the Constitution of the Empire of Japan: "Marriage shall be solely based on the consent of both sexes and shall be maintained through mutual cooperation on the basis that the spouses shall have equal rights. In matters of spousal choice, property rights, inheritance, choice of residence, divorce and other matters relating to the family, laws shall be enacted on the basis of individual dignity and the essential equality of the two sexes." After debate in the Imperial Diet, the provision was enacted as Article 24 of the present Constitution.

The purpose of the said amendment is said to be to ensure freedom of marriage and equality in marital relations, and there is no indication that same-sex marriage was discussed in any way during the drafting process or in the deliberations in the Imperial Diet.

(*In addition to the foregoing evidence, Plaintiffs' Evidence A137, 214, Defendant's Evidence 21, and the import of the overall arguments*)

(d) At the time of the Civil Code amendment of 1947

With the enactment of the Constitution of Japan, the Meiji Civil Code was completely amended in 1947 (Law No. 222 of 1947). The reason for this amendment was that with the enactment of Articles 13, 14, and 24 of the Constitution of Japan, it became necessary to amend the Meiji Civil Code, especially the Family Law and Inheritance sections, which contained numerous provisions in conflict with the said basic principles. The amendment abolished the family head system, etc., which violated the above basic principles. There is no evidence that same-sex marriage was mentioned during the deliberations of the Diet concerning the said amendment. (*Defendant's Evidence 6, 7*)

In addition, according to the academic theories at the time, the intention to marry meant the intention to form a cohabitation that is recognized as marriage in the common sense of the society, and there was a view that the intention toward same-sex marriage did not constitute the intention to marry, and thus same-sex marriage was invalid. (*Defendant's Evidence 9, 10*)

(3) Status of Same-Sex Marriage, etc. in Other Countries and Regions

(i) Various Systems concerning Personal Union Relationships between Persons of the Same Sex (*Plaintiffs' Evidence A10*)

(a) Registered partnership system

As described in (1) above, in the West as well, homosexuality itself was denied based on Christian values and medical knowledge, but changes in knowledge have led to changes in the system. In 1989, the registered partnership system was established in Denmark, and similar legal systems for the legal protection of same-sex couples (hereinafter collectively referred to as "**Registered Partnership Systems**", although the name and specifics vary from country to country) have spread across European countries and beyond.

In general, the Registered Partnership System provides same-sex couples with almost the same legal effects as marriage, but it is considered to be different from marriage, and while some countries allow opposite-sex couples to use the system, most countries allow only same-sex couples to use it. The system can be classified into three categories: those with independent provisions, those to which the provisions of marriage are applied *mutatis mutandis*, and those in between. The scope of protection of the system with independent provisions is more limited than that of marriage, and the scope of protection differs from country to country.

(b) Legal Cohabitation, PACS, etc.

Marriage and Registered Partnership Systems offer a package of extensive legal rights and obligations, including pursuant to property law, personal status law, social security law, and tax law. Some countries have legal systems for couples who do not wish to have such strong legal effects, such as legal cohabitation (Belgium, Sweden), which gives legal effects mainly in property law to certain cohabitation relationships, and PACS (France), which allows couples to assert their status as a couple against third parties and the state by establishing rights and obligations by contract of the parties and registering them with a public authority. These systems can be used by either opposite-sex couples or same-sex couples.

(c) Same-Sex Marriage

Marriage was traditionally performed between individuals of opposite sexes, but since the Netherlands recognized same-sex marriage in 2000, the number of countries that recognize same-sex marriage has been steadily increasing. However, in some countries, same-sex couples are treated differently from opposite-sex couples, mainly in terms of whether or not the presumption of illegitimacy applies, whether or not a child can be adopted, and whether or not assisted reproductive technology can be used.

(ii) National and Regional Responses to Same-Sex Personal Unions, Especially Same-Sex Marriage

(a) The following countries and regions introduced systems recognizing same-sex marriage in the years listed below (unless otherwise stated, the year of enactment of the law or the year in which the court determined to uphold it). As of October 2022, the percentage of the global population who lives in countries that recognize same-sex marriage was approximately 17%, and the percentage of countries that recognize same-sex marriage constitute approximately 52% of global GDP. (*Plaintiffs' Evidence A10-13, 109, 300, 453-455, 557-559*)

2000 the Netherlands
2003 Belgium
2005 Spain and Canada
2006 Sweden
2008 Norway
2009 Sweden
2010 Portugal, Iceland and Argentina
2012 Denmark
2013 Uruguay, New Zealand, France, Brazil and the United Kingdom (England and Wales)
2014 Luxembourg
2015 the United States, Ireland and Finland
2016 Colombia (effective year)
2017 Malta, Germany, Austria and Australia
2018 Costa Rica
2019 the United Kingdom (Northern Ireland) and Ecuador (effective year), Taiwan
2021 Switzerland, Chile
2022 Slovenia and Cuba

(b) Judicial decisions, etc., were rendered by the judicial bodies that are equivalents to the supreme court in the following countries and regions, holding the provisions of laws recognizing same-sex marriage to be constitutional or laws and regulations that did not recognize same-sex marriage to be unconstitutional.

In Canada (2004) and Spain (2012), judicial decisions etc., found that the provisions of laws recognizing same-sex marriage are constitutional (*Plaintiffs' Evidence A11*).

Judicial decisions etc., have been rendered in South Africa (2006), the United States (2015), Colombia (2016), Austria (2017), Taiwan (2017), Costa Rica (2018), and Slovenia (2022), declaring laws that do not recognize same-sex marriage to be

unconstitutional. (*Plaintiffs' Evidence A11, 12, 14, 16-1 and 2, 327, 558*)

(c) On the other hand, in Russia, the criminal code was amended to exclude homosexual acts from the scope of punishment in 1993, but in 2013, the " Act on Amendments to Article 5 of the Federal Law ‘On the Protection of Children from Information Harmful to Their Health and Development and to Certain Legislative Acts of the Russian Federation with the Aim of Protecting Children from Information that Promotes the Denial of Traditional Family Values" was passed as a federal-level regulation, which prohibits the promotion of homosexuality to minors. In 2014, the Russian Constitutional Court ruled that the prohibition of the promotion of non-traditional sexual relations does not violate the Constitution.

In Vietnam, a revised Marriage and Family Law was passed in 2014 which excluded same-sex marriage from the prohibitions on marriage, but also clearly stated that "the state shall not recognize marriage between persons of the same sex."

In Italy, while the Constitutional Court ruled in 2010 that the provisions of the Civil Code that do not recognize same-sex marriage do not violate the Constitution, it ruled in 2014 that the absence of another form of marriage in the country that properly sets out the rights and obligations between same-sex parties is unconstitutional. The European Court of Human Rights also held that the failure to provide a legal framework for the recognition and protection of same-sex couples constituted a violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the “**European Convention on Human Rights**”). In response to these judgments, the registered partnership system was legalized in Italy in 2016. The legal rights and obligations resulting from the use of such a system basically determined by application mutatis mutandis of the provisions related to marriage, but there are some differences, such as whether a fidelity obligation exists and whether there are provisions regarding adoption.

In South Korea, in 2016, the Seoul Western District Court ruled that the issue of whether or not same-sex marriage is permissible should be resolved by a legislative decision of the National Assembly following the collection of public opinion, etc., and not through a new or analogous interpretation of the law by the judiciary.

(*For the above, Plaintiffs' Evidence A10*)

(iii) Actions by the United Nations, etc. (*Plaintiffs’ Evidence A467*)

After the European Court of Human Rights ruled in 1981 that Northern Ireland’s sodomy law (a law prohibiting as a criminal offence sexual intercourse between homosexual

persons) was in violation of the right to respect for private life under Article 8 of the European Convention on Human Rights, the court established a precedent that such sodomy laws violated Article 8 of the Convention. In 1994, the UN Human Rights Committee of the Covenant on Civil and Political Rights, in determining the conformity of the sodomy law to the Covenant on Civil and Political Rights (the "**ICCPR**"), ruled that the concept of sexual orientation is included in "sex" or "other status" in the nondiscriminatory classification in Article 2(1) (enjoyment of rights without distinction) and Article 26 (equality under the law) of the Covenant, and found in 2003 and 2007 that failure to provide at least the same level of guarantee as de facto marriage to same-sex partnerships constitutes discrimination based on sexual orientation.

In 2011, the UN Human Rights Council adopted a resolution on "human rights, sexual orientation and gender identity" in response to this interpretation of the European Convention on Human Rights, subsequent standardization of the content of homosexual rights by international human rights experts and joint statements on homosexuality as a human rights issue by various countries (*Plaintiffs' Evidence A392-1 and 2*). The resolution expressed serious concern about violence and discrimination on the basis of sexual orientation and gender identity in all regions of the world, and requested the High Commissioner for Human Rights to conduct a global investigation by December of the same year into discriminatory laws and their administration, and violence against individuals on the basis of sexual orientation and gender identity, and clearly stated that the UN Human Rights Council would convene a panel to receive and discuss reports on the investigation referred to above and would continue to address this issue.

(4) Treatment of homosexual persons in Japan

(i) Responses of the government and local government entities

(a) Responses of the government

In 2000, the Act on the Promotion of Human Rights Education and Human Rights Awareness-Raising was enacted, and the elimination of prejudice and discrimination on the basis of sexual orientation was set forth in the basic plans based on the same Act and the issues to be emphasized in awareness-raising activities (*Plaintiffs' Evidence A17 and 18*). Since then, the government has promoted understanding of, and prohibition of discrimination based on, sexual orientation and gender identity, in the basic plans based on the Basic Act for Gender Equal Society (2010, 2015 and 2020), the Overview for Comprehensive Measures to Prevent Suicide based on the Basic Act on Suicide Prevention (2012, 2017 and 2022), notices on education issued by the Ministry of Education, Culture, Sports, Science and Technology (2015 and 2016), guidelines based on the Act on Equal Opportunity and Treatment between Men and Women in Employment (2016) and notices based on the Act on Comprehensively Advancing Labor Measures, and Stabilizing the Employment of Workers and Enriching Workers'

Vocational Lives (2020) (*Plaintiffs' Evidence A184, 395, 397, 398, 400 and 555; the entire import of oral arguments*). In addition, in 2011, the government endorsed the resolution on "human rights, sexual orientation and gender identity" referred to in (3)(iii) above (*Plaintiffs' Evidence A392-1 and 2*).

(b) Responses of local governments

In response to trends in other countries, voices calling for the acceptance of same-sex marriage have been rising within local governments, and a partnership recognition system (collectively, the "**Partnership System**" for all similar systems introduced by local governments in Japan, though there are various differences among them) was first introduced in Shibuya Ward in Tokyo in 2015, and thereafter in other local municipalities. The Partnership Systems introduced in municipalities differ from each other in their purposes, effects and forms; however, they are systems to officially recognize same-sex couples for the main purposes of respecting human rights and dignity of individuals, accepting diverse ways of life, and creating societies and communities where people can live in peace and security. Unlike the Registered Partnership System, the Partnership System does not give rise to any legal effects. In some municipalities, inter-municipal use of the system is permitted, kinship certificates covering children of same-sex partners are provided, and same-sex couples using the system are eligible for some government services, such as to apply for municipal housing (*Plaintiffs' Evidence A10, 164, 393, 394, 601, 602, 604*).

The total number of local governments that have introduced Partnership Systems was 242 as of November 1, 2022, and the percentage of the total population of Japan covered by Partnership Systems was 62.1% (*the entire import of oral arguments*).

In 2018, the Mayors Association of Designated Cities, a group of mayors from 20 designated cities in Japan, adopted a request to urge the government to provide support to promote understanding of sexual minorities, including the Partnership Systems, and to encourage efforts by local governments , considering the growing prevalence of the Partnership Systems in municipalities (*Plaintiffs' Evidence A44, 45*).

(c) Discussions in the Diet

Questions were raised at the Justice Committee of the House of Representatives in 2009 on the issuance of certificates by the Ministry of Justice enabling same-sex marriage in foreign countries (*Plaintiffs' Evidence A55*), and inquiries were made regarding the status of residence of same-sex partners in 2013 (*Plaintiffs' Evidence A56*). Additionally, questions were raised at the plenary session of the House of Councillors in 2015 concerning the relationship between same-sex marriage and the Constitution (*Plaintiffs' Evidence A57*). In response to the question in 2015, the then prime minister replied that

Article 24 of the Constitution provides that marriage shall be based only on the mutual consent of both sexes and therefore, it is not envisioned under the current Constitution to allow same-sex couples to be legally married, and that whether or not a constitutional amendment should be considered to allow same-sex marriage is a matter that affects the fundamental basis of the family in Japan and requires extremely careful consideration (*Plaintiffs' Evidence A57*).

On June 3, 2019, the opposition parties submitted a bill to the Diet to amend part of the Civil Code in order to develop legal systems necessary to allow same-sex marriage and realize equality in marriage; however, the bill was abandoned without deliberation on October 14, 2021 upon the dissolution of the House of Representatives. Though since then, questions concerning same-sex marriage and the legal protection of same-sex couples have been raised in the Diet committees and plenary sessions, the government's responses in general have not changed from that as set out above (*Plaintiffs' Evidence A58-63, 69-71, 83-88, 110-112, 267-291, 405, 424-426, 636, 637, 639-653*).

(ii) Surveys of opinions on same-sex marriage

(a) 2015

According to a survey conducted by a group led by Professor Kazuya Kawaguchi of Hiroshima Shudo University ("**Professor Kawaguchi**") of men and women aged 20 to 79 nationwide (1,259 valid respondents), 14.8% were in favor of "legal recognition of same-sex marriage" and 36.4% were somewhat in favor, while 25.3% were somewhat against, 16.0% were against, and 7.5% did not answer. 72.3% of the respondents in their 20s and 30s and 55.1% in their 40s and 50s were in favor or somewhat in favor, while 32.3% in their 60s and 70s were in favor or somewhat in favor and 56.2% were against or somewhat against (*Plaintiffs' Evidence A74, pp.152 and 155*).

In a public opinion poll of voters conducted by The Mainichi Newspaper Co., Ltd. (1,018 valid respondents), 44% supported "same-sex marriage," 39% opposed it, and 17% did not answer (*Plaintiffs' Evidence A75*).

In a public opinion poll conducted by The Asahi Shimbun Company, 41% answered "yes" to the question, "Do you think marriage between men and between women should be legally recognized?" and 37% answered "no" (*Plaintiffs' Evidence A266*).

(b) 2017

According to a public opinion poll conducted by the Japan Broadcasting Corporation (2,643 valid respondents) of citizens aged 18 or older, 50.9% "agreed" with the statement, "Marriage between men and between women should be recognized," while 40.7% "disagreed", and 8.4% responded "I don't know. No answer." (*Plaintiffs' Evidence A76,*

77).

According to a public opinion poll of voters conducted by The Asahi Shimbun Company, 49% responded that same-sex marriage should be legally recognized, while 39% responded that it should not be legally recognized. More than 70% of the respondents aged 18-29 and in their 30s were in favor of the "recognition of same-sex marriage," while those in their 60s who were "in favor" and "against" constituted an even split at 42% each, and 24% of those aged 70 were "in favor" and 63% were "against" (*Plaintiffs' Evidence A78, 79*).

(c) 2018

Based on the National Survey on Family conducted among married women by the National Institute of Population and Social Security Research (6,142 valid respondents), 20.3% of the respondents "completely agreed" that "marriage between men and between women (same-sex marriage) should be legally recognized," 49.2% "somewhat agreed," while 22.2% "somewhat opposed" and 8.3% "completely opposed" it (*Plaintiffs' Evidence A104, p.72*).

(d) 2019

According to a survey conducted by a group led by Professor Kawaguchi (2,632 valid respondents) of men and women aged 20 to 79 nationwide, 25.8% were in favor of "legal recognition of same-sex marriage" (the same question as in (a)) and 39.0% were somewhat in favor, while 19.4% were somewhat against, 10.6% were against, and 5.2% did not answer. 81% of the respondents in their 20s and 30s and 74% of those in their 40s and 50s were in favor or somewhat in favor, while 47.2% of those in their 60s and 70s were in favor or somewhat in favor, and 43.4% were against or somewhat against (*Plaintiffs' Evidence A170*).

According to an online survey of sexual minorities conducted by Professor Yasuharu Hidaka, School of Nursing, Takarazuka University (10,769 valid respondents), 60.4% of the respondents wanted the same legal marriage to be open to same-sex couples as to opposite-sex couples (*Plaintiffs' Evidence A172*).

According to a survey conducted by the "Survey on Coexistence and Diversity of Work and Life" research team on Osaka citizens aged 18-59 (4,285 valid respondents), 51.5% were "in favor" of a "system that allows same-sex couples to legally marry" and 31.3% were "somewhat in favor," while 8.9% were "somewhat against" and 6.8% were "against" (*Plaintiffs' Evidence A105, p. 54*).

(e) 2020

According to a survey of voters nationwide conducted by The Asahi Shimbun Company (2,053 valid respondents), 46% "supported" or "somewhat supported" same-sex marriage, while 31% answered "I don't know", and 23% "opposed" or "somewhat opposed" it. This showed that positive opinion had increased by 14% compared with the 2005 survey of voters. Even among supporters of the ruling Liberal Democratic Party, 41% were "in favor" or "somewhat in favor," while 29% "opposed" or "somewhat opposed" it. (*Plaintiffs' Evidence A171*)

(f) 2021

In a public opinion poll of voters nationwide conducted by the Asahi Shimbun Company (1,564 valid respondents), 65% answered "yes," while 22% answered "no" to the question of "whether marriage between men and between women should be legally recognized" (the same question as in (a) above), of which more than 80% of the respondents aged 18-29 and in their 30s answered "yes," while 66% of those in their 60s answered "yes," and 37% and 41% of those aged 70 and older answered "yes" and "no," respectively (*Plaintiffs' Evidence A266, 409*). According to a nationwide public opinion poll conducted by the Japan Broadcasting Corporation (1,508 valid respondents) of the citizens aged 18 or older, 27.9% were "in favor" of the opinion that marriage between men and between women should also be recognized and 8.8% were "somewhat in favor," while 18.6% were "somewhat opposed" and 18% were "opposed" to it (*Plaintiffs' Evidence A624-1 and 2*).

(g) 2022

According to a public opinion poll of voters nationwide conducted by The Mainichi Newspaper Co., Ltd. (1,315 valid respondents), 46% answered "yes", 37% answered "I don't know", and 16% answered "no" to the question of whether same-sex marriage should be legally recognized (*Plaintiffs' Evidence A625-1 and 2*).

(iii) Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder

Article 3(1) of the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (Act No. 111 of 2003, effective July 16, 2004) requires that a person with gender identity disorder be "not currently married" (Item 2 of the same paragraph) in order to be eligible for a ruling of a change in the recognition of their gender status. The Supreme Court held that said provision is not unreasonable because it is based on considerations that allowing a change in the recognition of the gender status of a person who is currently married may cause confusion in the current order in marriage, which is only recognized between individuals of the opposite sex, and therefore it cannot be said to be beyond the scope of the discretion of the Diet nor does it violate Article 13, Article 14(1), or Article 24 of the Constitution (*decision of the*

Second Petty Bench of the Supreme Court, March 11, 2020 (Ku) No. 791).

(iv) Survey on Attitudes toward Marriage

(a) According to the 2005 edition of the White Paper on the National Lifestyle by the Cabinet Office, among the unmarried respondents aged 18-40, more than 90% answered that they "intend to get married someday" to the question "Which of the following do you think describes your views on marriage in your lifetime?" in every survey year from 1982 through 2002. In the same survey, the percentage of respondents who answered "yes" to the question "Do you think your friends who are married seem happy?" exceeded 50% in all age groups (*Plaintiffs' Evidence A301, p.16*).

(b) According to the Ministry of Health, Labour and Welfare's 2013 White Paper on Health, Labour and Welfare, the percentage of respondents who answered that "it is natural for people to get married" in public opinion surveys was about 35% in 2008, down about 10% from 1991. While the percentage of respondents who agreed with the idea that "people do not necessarily need to get married" has increased, the percentage of unmarried respondents who answered that they "intend to get married someday" exceeded 90% in every survey year from 1982 through 2002 (*Plaintiffs' Evidence A303, pp.59, 66*).

(c) According to the Cabinet Office's 2014 Survey on Attitudes toward Marriage and Family Formation, when asked "What are your thoughts on marriage?" of unmarried and married men and women aged 20-39, 14% responded "I should definitely get married," 54.1% responded "I should get married if possible," 29.3% respond "I don't have to," 1.7% responded "I don't need to," and 0.9% gave "no response" (*Plaintiffs' Evidence A304, p.35*).

Among the unmarried persons who wanted to get married, 70.0% "wanted to have a family" and "wanted to have children," 68.9% "wanted to be with the person they love," 49.3% "did not want to be alone in old age," and 49% "wanted to reassure their parents and relatives" (*Plaintiffs' Evidence A304, p.43*).

(d) According to the National Institute of Population and Social Security Research's 2015 Basic Survey on Social Security and Population Issues (National Survey on Marriage and Childbearing), regarding the question asked to unmarried respondents aged 18-34, "Which of the following do you think describes your views on marriage in your lifetime?", 85.7% of male and 89.3% of female respondents answered that they "intend to get married someday". Also, 64.3% of

male and 77.8% of female respondents answered that "there are merits to being married." Among such merits, "to be able to have one's own children and family" was the most popular, with 35.8% of male and 49.8% of female respondents giving this answer (*Plaintiffs' Evidence A305*).

(v) 2019 Marriage Statistics

According to government surveys and data from the National Institute of Population and Social Security Research, the following facts are known about the state of marriage in Japan as of 2019:

(a) There were 599,007 marriages, meaning the marriage rate (the annual number of marriages divided by the total population and multiplied by 1,000) was 4.8%, indicating a downward trend after peaking in 1972 when there were over 1 million marriages and the marriage rate was over 10% (*Plaintiffs Evidence A306, 309-4*).

(b) The total fertility rate (the sum of age-specific fertility rates for women aged 15-49) was 1.36%, declining from 2.14% in 1973 (*Plaintiffs' Evidence A308*). Households with children accounted for 21.7% of all households, decreasing year-by-year from 46.2% in 1986 (*Plaintiffs' Evidence A307, p.7*).

The percentage of children born out of wedlock was approximately 2.3% (*Plaintiffs' Evidence A309-3*).

(vi) Trends in Countries and Organizations

(a) In October 2008, May 2013, August 2014, and November 2022, the United Nations Human Rights Committee and Committee on Economic, Social and Cultural Rights issued summary findings to Japan, expressing concerns about the human rights situation of same-sex couples and requesting specific measures to guarantee their rights. Among them, the Human Rights Committee, in its summary findings issued in November 2022, was concerned about reports that lesbian, gay, bisexual, and transgender persons faced discriminatory treatment, particularly in public housing, change of gender on family registers, access to legal marriage, and treatment in correctional institutions (Articles 2 and 26 of the ICCPR) and that one of the things that member states should do is to ensure that same-sex couples enjoy all the rights provided for in the ICCPR in all of their territories, including access to public housing and same-sex marriage (*Plaintiffs' Evidence A80-1 to 82-2, 560-1 and 2*).

(b) In September 2018, the American Chamber of Commerce in Japan recommended

that the Japanese government recognize the right to marry for same-sex couples. This opinion has been endorsed by the Australian and New Zealand Chamber of Commerce in Japan, the British Chamber of Commerce in Japan, the Canadian Chamber of Commerce in Japan, the Danish Chamber of Commerce in Japan, the Irish Chamber of Commerce in Japan, the Belgian-Luxembourg Chamber of Commerce in Japan, the European Business Council in Japan, and many Japanese companies and law firms as of November 2022 (*Plaintiffs' Evidence A53, 54, 614*).

(c) In 2022, the Japan Federation of Bar Associations compiled a written opinion stating that the government should recognize same-sex marriage and promptly amend related laws and regulations, and submitted it to the Speaker of the House of Representatives, the Speaker of the House of Councillors, the Prime Minister, and the Minister of Justice (*Plaintiffs' Evidence A48, 49*). By November 2022, five federations of bar associations and 15 bar associations in various regions issued opinion letters, presidential statements, declarations, and other documents requesting the realization of same-sex marriage. (*Plaintiffs' Evidence A46, 47, 103, 226-232, 292-296, 450-452, 541, 621, 622*)

2 Issue (1) (Whether the Provisions are in violation of Article 13, Article 14(1), or Article 24 of the Constitution)

(1) The essence of marriage lies in both parties entering into a shared life with the sincere intention to establish a permanent mental and physical union (*see the Supreme Court Decision Case No. (O) 260 of 1986 on September 2, 1987, Minshu Vol.41, No.6, at p.1423*). [1] Marriage takes effect upon the filing of a notification in accordance with the Family Registration Act by both parties entering into a shared life with the aforementioned intention (Article 739(1) of the Civil Code). [2] The Civil Code confers rights and obligations between husband and wife, such as relatives (Article 725), joint parental authorities (Article 818), the right to inheritance including statutory reserved share of a spouse (Article 890, Article 900, Items 1 to 3 and Article 1042), division of property upon divorce (Article 768), the right of spousal residence (Article 1028), the principle to share the same surname (Article 750), the duty to live together, cooperate and provide assistance to each other (Article 752), the right to rescind contracts between husband and wife (Article 754), property relations between husband and wife (Article 755), the requirements for the perfection of prenuptial property agreements (Article 756), sharing of living expenses (Article 760), joint and several liability for debts incurred for household necessities (Article 761), and ownership of property between husband and wife (Article 762). [3] Marriage also provides official recognition of family relations through the family register system (Article 6 of the Family Registration Act), based on which [4] various rights including benefits such as spousal deductions for income and

residence taxes (Article 2, Article 83, Article 83-2 of the Income Tax Act, Article 34 of the Local Tax Act), reduction of inheritance tax (Article 19-2 of the Inheritance Tax Act), status of residence as spouses (Article 2(2) of the Immigration Control and Refugee Recognition Act), granting of survivor's pension (National Pension Act, Article 37; Employees' Pension Insurance Act, Article 59), provision of survivor's benefits under the crime victims aid system (Article 5(1)(i) of the Act on Measures Incidental to Criminal Proceedings for Protecting the Rights and Interests of Crime Victims), protection under the Act on the Prevention of Spousal Violence and the Protection of Victims, and the privilege of refusing to testify in court proceedings (Article 196 of the Code of Civil Procedure; Article 147 of the Code of Criminal Procedure).

According to the above, under the current law, marriage is a system whereby, through the parties' notification to the mayor of the municipality of their sincere intention to live together for the purpose of permanent mental and physical union ([1] above), and the mayor's acceptance of the notification, a status with various legal rights and obligations between the parties is created ([2] above), publicly certified ([3] above), and afforded public protection ([4] above).

(2) Whether the Provisions violate Article 24(1) of the Constitution

(i) The Plaintiffs argue that, in light of today's changing social conditions and the intent of Article 24(1) of the Constitution, the freedom of homosexual persons to marry is also guaranteed, and therefore, the Provisions which deny marriage to same-sex couples infringe the freedom of marriage and violate Article 24(1) of the Constitution.

Whether to marry and when and with whom to marry must be left to the free and equal decision of the individual parties, and in light of the significant legal effects conferred through marriage and the public's sentiments etc. towards the respect for legal marriage, it is recognized that this is an interest that should be respected in light of the intent of Article 24(1) of the Constitution (*see Case No. 2013 (O) 1079, Supreme Court Grand Bench judgment of December 16, 2015, Minshu Vol.69, No.8, p. 2427*).

In examining whether Article 24(1) of the Constitution can be said to guarantee the freedom of marriage between homosexual persons, it must be understood from the words "both sexes" and "husband and wife" in Article 24(1) of the Constitution that this Article assumes marriage between a man and a woman. Even taking the legislative process into consideration, as stated in 1(2) above, the main purpose of Article 24 of the Constitution at the time of enactment was to realize freedom and equality in family matters, in particular the improvement of the status of women and protection of the family by abolishing the household system, and same-sex marriage was not discussed. Given the foregoing and the fact that the words "man and woman" and "both sexes" were used, as

well as the lack of any evidence of references to same-sex marriage in the Diet's deliberations at the time of the subsequent amendment of the Civil Code in 1947, it can be recognized that same-sex marriage was not contemplated at the time of the enactment of Article 24(1) of the Constitution, and while this Article is not intended to preclude same-sex marriage, it is fair to conclude that "marriage" as used in this Article refers to marriage between a man and a woman and does not include same-sex marriage. Further, as stated above, marriage is the nation's certification of the cohabitation between two persons who choose to be bound by a permanent mental and physical union ([1] above), and as stated in [2] to [4] above, it is a legal system in which its requirements are prescribed by various laws based on the will of the individuals and rights and obligations arise uniformly when these requirements are met, and not something in which its requirements and effects can be determined solely by the will of the individuals. Therefore, even if the freedom of marriage is an interest that should be respected under the Constitution, it is difficult to go further to say that it constitutes a right under the Constitution.

(ii) The Plaintiffs argue that "marriage" in Article 24(1) of the Constitution should be interpreted to include same-sex marriage under an expanded interpretation or application by analogy of such Article.

It is true that social norms, public awareness and values regarding marriage can change, and if, based on these changes in social norms etc., same-sex marriage and heterosexual marriage become no different as a matter of fact and from the perspective of the public's social acceptance, then there is room to interpret same-sex marriage as being included in "marriage". According to the above Findings of Fact, there are a considerable number of foreign countries that have legalized same-sex marriage, and in our country, it can be recognized that there is a movement to afford same-sex marriage the same legal protection as heterosexual marriage and to eliminate prejudice against homosexuality, such as the introduction of partnership systems in many local governments. However, according to the results of public surveys etc. in Japan, those opposed to the introduction of same-sex marriage are in close competition with those in favor among respondents aged 60 or over, and there are still a considerable number of people overall who are opposed, indicating there is still a conflict of values regarding same-sex marriage. While it can be said that social norms and values regarding marriage are changing, some of these opposing opinions can be ascribed to the traditional view that marriage is a personal union between a man and a woman, and it is difficult to recognize that same-sex marriage has gained the same level of social acceptance as heterosexual marriage.

Therefore, it is difficult at least at this time to interpret "marriage" under Article 24(1) of the Constitution to include same-sex marriage, and the Plaintiffs' above argument

cannot be accepted.

(iii) Based on the above, even taking into consideration the fact that perceptions, public awareness and social conditions regarding homosexual persons have changed in comparison to when the Constitution was enacted (1(1), (3) and (4) above), it cannot be said that Article 24(1) of the Constitution goes beyond the above literal interpretation and guarantees the freedom of homosexual persons to marry.

Therefore, the Provisions cannot be said to violate Article 24(1) of the Constitution.

(3) Do the Provisions violate Article 13(1) of the Constitution?

The Plaintiffs argue that the Provisions, which do not allow same-sex couples to marry, violate the freedom of marriage of same-sex couples, infringe on their right of personal autonomy to form a family, and violate Article 13 of the Constitution.

As stated above, marriage creates various rights and obligations that are effective as between oneself and the other individual or an administrative agency etc. ([2] and [4] above), and being married or not and whether the marriage system is available or not have an impact on an individual's rights and obligations. In addition, marriage is the nation's certification ([3] above) of the cohabitation between oneself and another whom one chooses to be bound with by a permanent mental and physical union ([1] above), and under the current law, there is no system other than the marriage system under which one chooses another with whom to form a permanent mental and physical union and is certified as a family. In Japan, various systems have been established with the family as the basic unit of life, and there are many systems beyond those mentioned in [2] and [4] above with respect to public rights and matters that provide various benefits in private matters by certifying the family status (for example, explanation and consent rights with respect to family members in connection with medical care, purchase of real estate, confirmation of family status in connection with the review of various contracts such as real estate leases or insurance, designation of family members as joint owners or beneficiaries of insurance and other benefits, consideration of family status in workplace transfers, and participation in ceremonial functions such as being able to use the same gravesite (*Plaintiffs' Evidence A554 and the Plaintiffs themselves*)). These kinds of benefits are not conferred publicly but nonetheless arise uniformly as a result of certification ([3] above), and therefore not being able to marry, which is the basic unit for giving rise to such benefits, and not being able to cause these benefits to arise at one's own will is recognized as an impermissible disadvantage (the various benefits in social life that one can receive from certification, which is the effect of marriage, are hereinafter collectively referred to as the "Benefits of Certification"). In light of the above, the ability to use the marriage system is a matter that affects an individual

throughout their lifetime, and given the importance of marriage in the public's mind (1(4)(iv) above), it is recognized that deciding whether to marry and when and with whom to marry at one's own will is a personal moral interest that should be respected for homosexual persons as well.

However, as described in [2] through [4] above, marriage is a legal system whereby requirements are prescribed by various laws based on the will of the individuals and rights and obligations arise uniformly when these requirements are met, and not something in which its requirements and effects can be determined solely by the will of the individuals. Similarly, the formation of a family based on marriage is not something for which the requirements and effects can be determined solely by the will of the individuals. The reason why the requirements regarding marriage are set out by law is because it is a natural consequence of the fact that marriage itself is a system under which the nation confers rights and obligations to a certain relationship, and a homosexual person's freedom of marriage and their right of personal autonomy to form a family through marriage cannot go as far as being interpreted to be a constitutional right guaranteed by Article 13 of the Constitution. Therefore, the Provisions do not violate Article 13 of the Constitution.

(4) Do the Provisions violate Article 14(1) of the Constitution?

(i) Article 14(1) of the Constitution provides for equality under the law, and this provision should be construed to prohibit discriminatory legal treatment unless it is based on reasonable grounds in accordance with the nature of the matter (*see Case No. 1962 (O) 1472, Supreme Court Grand Bench judgment of May 27, 1964, Minshu Vol. 18, No. 4, p. 676, Case No. 1970 (A) 1310, Supreme Court Grand Bench judgment of April 4, 1973, Keishu Vol. 27, No. 3, p. 265, and Case No. 2013 (O) 1079, Supreme Court Grand Bench judgment of December 16, 2015, Minshu Vol. 69, No.8, p.2427*).

Further, Article 24(2) of the Constitution delegates the establishment of a specific system regarding matters concerning marriage and the family to the Diet's reasonable legislative discretion in the first instance, and at the same time requires and provides guidance that such laws must be enacted from the standpoint of individual dignity and the essential equality of the sexes, thereby placing a clear limitation on such discretion. Therefore, with respect to differential treatment on matters concerning marriage and the family, even in light of the above discretionary power granted to the legislative branch, it can be said that such differential treatment is in violation of Article 14(1) of the Constitution if there are no reasonable grounds for such treatment (*see Case No. 2013 (O) 1079, Supreme Court Grand Bench judgment, December 16, 2015, Minshu Vol. 69, No.8, p.2427*).

(ii) Existence of differential treatment under the Provisions

As stated in II 1(3) above, since same-sex marriage is not recognized under the Provisions and homosexual persons therefore cannot use the marriage system, it is understood that the Provisions result in differential treatment between homosexual and heterosexual persons based on sexual orientation.

The Plaintiffs also argue that the Provisions constitute differential treatment based on gender. However, under the Provisions, both men and women can each marry persons of the opposite sex and cannot marry persons of the same sex, and there is no differential treatment between men and women based on gender. Therefore, the above argument by the Plaintiffs cannot be accepted.

The Defendant argues that there is no differential treatment under the Provisions since homosexual persons are also able to marry persons of the opposite sex, that the Provisions are neutral with respect to sexual orientation, and that even if a difference arises between homosexual and heterosexual persons based on sexual orientation it is only a de facto or indirect consequence and thus cannot be considered to be differential treatment. However, as stated above, the essence of marriage is for both individuals to live communally with an honest intention of a permanent mental and physical union, whereas sexual orientation relates to the object of a person's love and sexual affection and determines the object of the aforementioned mental and physical union, and therefore, even if homosexual persons could marry persons of the opposite sex, such marriage would not possess the essence of marriage, and homosexual persons would not be able to use the marriage system as long as their love and sexual affection is not directed toward those of the opposite sex. Therefore, since the Provisions do not recognize marriage between persons of the same sex, there is differential treatment in that homosexual persons cannot use the marriage system, and since sexual orientation is linked to the essence of marriage, this consequence cannot be said to be de facto or indirect, and accordingly the above arguments by the Defendant cannot be accepted.

As mentioned above, while the Provisions result in differential treatment based on sexual orientation, as stated in II 1(1) and III 1(1) above, in most cases sexual orientation is determined early in life or before birth regardless of the will of the individual, and it is medically evident that it is difficult to change one's sexual orientation by one's own will or through psychiatric therapy. Therefore, it is necessary to carefully consider whether there are reasonable grounds for there to be differentiation with respect to the requirements for marriage on the basis of a matter that is not within the individual's choice or ability to modify.

(iii) Whether the differential treatment under the Provisions is reasonable

(a) As a result of the Plaintiffs not being able to marry under the Provisions, they are unable to create the various rights and obligations that are effective throughout their lifetime as between oneself and the other individual or an administrative agency etc. ([2] and [4] above), and they are unable to obtain the Benefits of Certification even as to private matters ([3] above), which effects can only be realized through marriage. In light of the importance of marriage in the public's mind (1(4)(iv) above), it can be said that the Plaintiffs have suffered a serious disadvantage by not having access to the marriage system and not having the opportunity to enjoy it.

The Defendant argues that the above disadvantages can be mitigated or avoided. It is true that [2] above can be mitigated to a certain extent by stipulating each individual's rights and obligations or by contract etc. regarding property division in the event of divorce or regarding inheritance. However, the economic burden of conducting various procedures and possible claims for infringement of intestate rights at the time of inheritance etc. remain. In addition, as stated in 1(4)(i) above, although many local governments have introduced partnership systems, unlike Registered Partnership Systems in foreign countries, these systems do not have legal effects and do not replace the functions of marriage set out in [2] and [4] above. Although these partnership systems could be expected to serve the role described in [3] above as a certification by the local government, given that there are currently few concrete examples of such use and their effects are varied depending on the local government and circumstances (*Plaintiffs' Evidence A202 and the Plaintiffs themselves*), it is difficult to say that they can replace the function described in [3] above. Further, although homosexual persons are not prevented from living communally with an honest intention of a permanent mental and physical union even if they do not marry ([1] above), the creation of rights and obligations ([2] and [4] above) and the benefit of having their communal life certified by a national system ([3] above) are important for their social life, as mentioned above, and this is not resolved by a communal life without marriage, and therefore cannot be said to be mitigating or exempting the above disadvantages (in the case of de facto marriage between persons of the opposite sex, the parties have voluntarily waived the Benefits of Certification etc. of marriage, so the disadvantages of same-sex couples not being able to marry cannot be understood in the same way as in the case of de facto marriage). The Defendant's argument above cannot be accepted.

(b) However, as stated above, "marriage" in Article 24(1) of the Constitution refers to marriage between persons of the opposite sex, and it is understood that the freedom to marry between persons of the opposite sex should be respected, and it is understood that Article 24(2) of the Constitution requests legislation for marriage between persons of the opposite sex. As stated in 1(2) above, the current system of marriage, including the Provisions, is based on the system of marriage first established in the Meiji Civil Code,

and has been amended to abolish the head of household system, etc., in response to the request of Article 24 of the Constitution. However, in light of the academic understanding from the Old Civil Code to the time of the enactment of the current Civil Code (see 1(2)(ii) above) and the existence of regulations pertaining to the presumption of illegitimacy and the parent-child relationship in the current Civil Code, the purpose of the marriage system at that time, which needed to be clarified in relation to the legal effects of marriage and the family registration system, was for the state to protect the reproduction between a man and woman (husband and wife) and the upbringing of their children by limiting the scope to that of a union where biological reproduction was possible. It is recognized that this purpose of protecting reproduction and the upbringing of the child is still important today, and the socially accepted notion at that time that marriage was between a man and a woman is changing, but as stated above, it cannot be said that this notion has been already lost today. In this light, it can be said that the Provisions, which were established in accordance with the legislative requirement of heterosexual marriage under Article 24(2) of the Constitution, are based on such a requirement of the Constitution, and therefore, there is a rational basis for the differential treatment under the Provisions.

Therefore, even if it is true that the situation where the Provisions recognize only heterosexual marriage and not same-sex marriage constitutes distinctive treatment based on sexual orientation and it requires careful judgment to decide whether it is reasonable, it cannot be said that the Provisions exceed the scope of legislative discretion which would amount to violation of Article 14(1) of the Constitution.

(c) The Plaintiffs argue that the differential treatment under the Provisions is based on the grounds enumerated in the second sentence of Article 14(1) of the Constitution ("sex" or "social status"), and that whether the above different treatment has a rational basis should be strictly examined. In light of the fact that the disadvantages to homosexual people are enormous and that the purpose of the institution of marriage is to protect communal life, it is clear that there is no rational basis for the above differential treatment.

However, as stated above, "marriage" in Article 24(1) of the Constitution refers to heterosexual marriage, and Article 24(2) of the Constitution requires the establishment of a legal marriage system for heterosexual marriage, while it is understood that the protection under Article 24(1) of the Constitution does not extend to same-sex marriage and the same protection as heterosexual marriage is not provided. Therefore, even in light of the degree of disadvantage to homosexual individuals and the fact that one of the purposes of the marriage system is considered to be the protection of communal life, it is difficult to say that the Provisions, which limit marriage to heterosexual marriage

and do not recognize same-sex marriage, exceed the scope of legislative discretion and violate Article 14(1) of the Constitution.

The above argument of the Plaintiffs cannot be adopted.

(5) Are the Provisions contrary to Article 24(2) of the Constitution?

(i) As stated above, Article 24(2) of the Constitution leaves the establishment of a specific system of marriage and family to the reasonable legislative discretion of the Diet in the first instance, and, in legislating on such matters, it sets forth the limits of that discretion by requiring and guiding the Diet to base its legislation on the dignity of the individual and the essential equality of the two sexes. Accordingly, whether or not the Provisions can be approved as being in conformity with Article 24(2) of the Constitution must be determined by examining the purpose of the Provisions and the effects of adopting a system pertaining to the Provisions, and by considering whether or not the Provisions lack rationality in light of the dignity of the individual and the essential equality of the two sexes, and whether or not they are beyond the legislative discretion of the Diet.

As stated in 2(1) above, although matters concerning the personal union of same-sex couples are not recognized as freedom of marriage under Article 24(1) of the Constitution, they fall under the category of "other matters concerning marriage and family" under Article 24(2) of the Constitution since they are the questions on how to treat the will to live together with a sincere intention for permanent mental and physical union between same-sex persons in light of various provisions concerning marriage and family. As stated in the drafting process described in 1(2) above, one of the underlying principles of Article 24 of the Constitution is the dignity of the individual, which should be respected regardless of whether a person is heterosexual or homosexual. Therefore, it should be construed that matters concerning same-sex couples are defined by the limits of discretion under Article 24(2) of the Constitution at the same time are left to the legal discretion of the Diet.

In response, the Defendant argues that Article 24(2) of the Constitution, as with Article 24(1), contains the word "both sexes" and should be construed as requesting the legislature to establish a system to realize marriage between opposite-sex couples on the premise that marriage is a personal union of these couples. However, same-sex couples are in the same relationship of personal union as opposite-sex couples. Further, even if it is understood that "marriage" is limited to heterosexual marriage as stated above, "other matters concerning the family" are covered along with marriage. Also, even though the concept of "family" is considered to be centered on the whole union of husband and wife and their children, given the process of enactment of Article 24 of the Constitution, this does not now have to be so limited when the forms of marriage and

family are diversifying, and public awareness of the nature of marriage and family is diversifying accordingly, and the inclusion of same-sex couples in "marriage and other matters relating to the family" is a natural reading of this Article. Moreover, "dignity of individuals" is mentioned together with "intrinsic equality of both sexes" as the limitation of discretion in Article 24(2) of the above Constitution, and as for dignity of individuals, homosexual persons should be respected the same as heterosexuals. The above argument by the Defendant cannot be accepted.

(ii) Matters related to marriage and family should be determined based on a comprehensive judgment, taking into consideration various factors in social situations, including national traditions and public sentiment, and with an eye to the overall discipline of the relationship between husband and wife and between parents and children in each era. In particular, personal interests and substantive equality, which are not directly guaranteed rights under the Constitution, can have various contents, and the way to realize them should be determined in relation to social conditions, the state of daily lives of the people, the way that family works, etc. at the time (*See Supreme Court Decision No. 1023 of 2014, December 16, 2015, Vol. 69, No. 8, p. 2586 of the Civil Code*).

Under the provisions, the Plaintiffs have suffered serious disadvantages by not being able to use the system of marriage, not having the opportunity to enjoy the rights and benefits brought about by the system, and not being legally recognized as a family, and such disadvantages cannot be overlooked as an infringement of personal interests in light of the dignity of individuals. Such disadvantage is an unforgivable violation of the dignity of individuals and a violation of their personal interests. In other words, marriage is one of the family units, and as mentioned above, the only system to select and certify a permanent partner in a mental and physical union is the system of marriage under the current law. The fact that same-sex couples do not have access to the system of marriage and cannot benefit from certification means that same-sex couples are not legally recognized as family. And, as stated above, whether the system of marriage are available or not is a matter that affects a person throughout their lives, and in light of the importance of marriage in the public consciousness (1(4)(iv) above), it is in the personal interest of homosexual persons to decide whether or not to get married and with whom to get married to form a family, and this decision should be respected. Although the disadvantage of not being able to use the system of marriage does not necessarily violate Article 13 of the Constitution as stated above, it can be said that the above-mentioned personal interests are being violated.

In addition, there is an understanding existed within the Old Civil Code, on which the Provisions are based, and the academic theories at the time of enactment of the Meiji Civil Code that the purpose of marriage was not necessarily to obtain children. As a

result of discussions during the drafting the Meiji Civil Code, a lack of reproductive capacity was not considered as a barrier to marriage (see 1(2)(i) above). Considering these facts, it is recognized that the purpose of the marriage system, including the Provisions, was also to protect the communal life of the married partners. In addition, as stated in 1(4)(iv) above, in a 2014 survey of attitudes of unmarried persons who wanted to get married, the reason for using the marriage system was to be with one's partner and to become a family, as much or more than having children, which means, as the purpose of the marriage system, the aspect of the protection of one's communal life with one's partner has become more important. In addition, the number of marriages, the marriage rate, the total fertility rate, and the percentage of households with children are significantly lower today than when these Provisions were enacted (see 1(4)(v) above), and marriage is not something that all people do, but rather, it has become more important to respect and protect each person's self-determination that each person chooses a partner to spend his/her life with and create a family that is recognized by the law. It can be said that the public awareness of the reality of marriage and the family and the state they should be has been changing.

As mentioned above, the socially accepted idea that marriage is between a man and a woman has not been lost, but is changing today. For instance, as described in 1(1)-(3) above, the circumstances in other countries that influenced the legislative process of the Provisions are changing. In the West, homosexuality itself had been rejected because of Christian values and medical knowledge, but due to changes in the state of the family and medical knowledge, there has been a movement toward national recognition of homosexuality, and the number of countries that have implemented a system of same-sex marriage has been increasing since 2000. In addition, as mentioned in the previous section (1), it is now clear that the view that homosexual people should be pathologized as a mental illness, which had an impact on Japan, was mistaken. In 2011, the United Nations, on the basis of the ICCPR adopted in 1996 as the UN Human Rights Code and the International Code on Economic, Social and Cultural Rights adopted in 1996, resolved that discrimination based on sexual orientation is prohibited (see 1(3)(iii) above). And as described in 1(4)(vi) above, since 2008, the United Nations Human Rights Committee and the Committee on Social Rights have frequently expressed their concerns and recommendations to Japan regarding the rights of same-sex couples. These can be evaluated as a global trend that same-sex couples can have the same intention to marry as opposite-sex couples (see (i) above) and should be given the same rights as opposite-sex couples.

In Japan, the government has declared measures to prohibit discrimination based on sexual orientation in various fields since 2010, and local governments have begun to introduce Partnership Systems since 2015 for the purpose of guaranteeing human rights,

respecting diversity, and creating a society where people can live in peace. As of November 2022, the population coverage rate of local governments that have introduced the Partnership Systems is 62.1%, and the Diet has frequently received debated the possibility of same-sex marriage since 2015 (see 1(4)(i) above). In terms of public awareness, as of 2015, the number of those in favor of same-sex marriage was around 50%, slightly higher than those opposed, but the percentage of those in favor increased year by year, reaching over 60% in 2008, and has continued to increase since then (see 1(4)(ii) above). The number of business organizations and bar associations who are expressing support for the realization of same-sex marriage continues to increase (see 1(4)(vi) above). These facts indicate that the socially accepted idea that marriage is limited to heterosexual marriage has been questioned in Japan, and that public understanding of same-sex marriage has been penetrated to a considerable extent.

As set forth above, the same-sex couple Plaintiffs are at a serious disadvantage in not being legally recognized as a families under the Provisions, as they cannot enjoy any of the benefits afforded by the marriage system. Although the marriage system is based on the premise of heterosexual marriage, the actual situation is changing. The fact of the matter is that, even if society has not yet fully accepted same-sex marriage, public opinion as to same-sex marriage has changed considerably. In light of the foregoing, it must be said that the legislative facts underlying the Provisions have significantly changed, and that in refusing same-sex couples the benefits of the marriage system and the means to legally form a family with the partner of their choice, the Provisions are in a state of violation of Article 24(2) of the Constitution, which is based on the dignity of the individual.

(iii) As mentioned above, however, although it is a matter of personal interests to be respected for same-sex couples to decide whether or not to marry and with whom, this is not a right directly guaranteed by the Constitution, and its realization is determined in relation to social conditions, the circumstances of the lifestyles of Japanese citizens, and the nature of the family, together with other factors. Article 24(2) of the Constitution allows for a reasonable scope of legislative discretion in "other matters relating to marriage and family", and various factors must be taken into consideration in making changes to the legal system to rectify the serious disadvantages accruing to same-sex couples, as well as to respect their capacity for self-determination. As for legal systems that meet the characteristics of marriage described in [1] through [4] above, there are same-sex relationship arrangements other than marriage that have been implemented in other countries as described in 1(3)(i) above. The Registered Partnership System, which gives almost the same legal status as marriage to same-sex couples and confers legal rights and obligations, including the benefit of certification, on non-marriage partnerships between persons of the same sex, could, depending on its content, be an

alternative to the marriage system. It is appropriate to leave to the discussion of the legislature the issue of whether to establish such a system, separate from the marriage system, for same-sex partnerships. In addition, in same-sex relationships, biological parents and children do not coincide in the family register, and provisions addressing this issue are necessary. Therefore, it is possible that in any such alternative system the presumption of illegitimacy, adoption, and assisted reproductive technology may differ from the current marriage system. The design and framework of such a system must be left to legislative discretion for consideration and adjustment, taking into account various factors such as Japanese traditions, social conditions such as national sentiments, as well as the welfare of children.

In addition, as mentioned above, in Japan, it was not until 2015 that the Diet held a debate on same-sex marriage, local governments introduced the Partnership System for the first time, and various opinion surveys on same-sex marriage were carried out. It was only then that the issue of same-sex marriage began to be discussed in earnest in Japan. According to the recent surveys, while a majority of young people in their 20s and 30s have positive opinions about same-sex marriage or legal protection for same-sex couples, as mentioned above, positive and negative opinions are closely matched in people 60 years of age and older. Thus, it is only relatively recently that public opinion has become more positive toward legal protection for same-sex marriage or same-sex couples. Therefore, it is not unreasonable to leave the matter to the future consideration and response by the legislature.

Based on the above, the Court cannot find that the Provisions which do not recognize marriage between individuals of the same sex violate Article 24(2) of the Constitution as being outside the scope of legislative discretion of the Diet.

3 Regarding Issue (2) (Whether the failure to amend or repeal the Provisions is illegal in light of Article 1(1) of the State Redress Act)

(1) Article 1(1) of the State Redress Act provides for the liability of the national government and any public entity for any damage incurred as a result of the exercise of public authority by an official of either the national government or such public entity, as applicable, in violation of a legal obligation owed to an individual citizen in the course of such official's duty. Whether legislative actions or omissions by Diet members are illegal in light of this clause is determined by whether or not actions taken by such Diet members in the course of their duties during the legislative process have violated the legal obligations owed to individual citizens; thus it should be distinguished from the issue of the unconstitutionality of legislation.

In principle, the evaluation of the above-mentioned actions should be left to the political judgment of the people, and even if legislation violates the provisions of the Constitution, legislative acts or omissions of Diet members are not immediately deemed to be illegal for the purpose of applying Article 1(1) of the State Redress Act.

In cases where the Diet fails to take legislative measures, however, such as the revision or abolition of legal provisions, for a long period of time and without justification, despite the fact that it is clear that those legal provisions are unconstitutional by virtue of the unreasonable restriction of rights and benefits guaranteed or protected under the Constitution, such legislative omission may be deemed illegal in the context of the application of Article 1(1) of the State Redress Act, on the ground that the actions of Diet members in the legislative process constitute a breach of such legal obligations. (*See Case no. 1978 (O) 1240, Supreme Court, First Petty Bench decision of November 21, 1985, Minshu Vol. 39, No. 7, at 1512; 2001 (Gyo-Tsu) No. 82, No. 83, 2001 (Gyo-Hi) No. 76, No. 77, Supreme Court, Grand Bench decision of September 14, 2005, Minshu Vol. 59, No. 7, at 2087; 2020 (Gyo-Tsu) No. 255, 2020 (Gyo-Hi) No. 290, No. 291, and No. 292, Supreme Court Grand Bench decision of May 25, 2022, Minshu, Vol. 76, No. 4, at 711*)

(2) As to whether the failure to amend or repeal the Provisions can be held to be illegal pursuant to the application of Article 1(1) of the State Redress Act, as explained in 2 above, the Provisions do not violate Article 13, Article 14(1), or Article 24 of the Constitution, and the claims of the Plaintiffs are without merit.

As explained above, the Provisions, which do not allow same-sex couples to benefit in any way from the marriage system, are in violation of Article 24(2) of the Constitution. Although the Diet should initiate measures to rectify this situation, as stated above, there are many ways in which the necessary change may be effected; thus, the obligation to take legislative measures to enable marriage between individuals of the same sex, as claimed by the Plaintiffs, cannot be considered an immediate obligation.

Therefore, the fact that the Provisions have not been amended or repealed is not illegal pursuant to the application of Article 1(1) of the State Redress Act.

4 Conclusion

As stated above, the Plaintiff's claims are all groundless and there is no need to determine the remaining issues, and, therefore, the claims shall be dismissed as stated in the main text of the judgment.

Civil Department No. 6 of the Fukuoka District Court

Presiding Judge	Hiroyuki Ueda
Judge	Yoshinori Hashiguchi
Judge	Makiko Mawatari

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Appendix 2

Summary of the Parties' Claims with respect to the Issues

1 Regarding Issue (1) (Whether the Provisions are in violation of Articles 13, 14(1) or 24 of the Constitution)

(1) Summary of the Plaintiffs' Claims

(i) The freedom of marriage includes the freedom to decide whether or not to marry and the freedom to choose a partner in marriage, guaranteed respectively by Article 13 and Article 24(1) of the Constitution. The Provisions that do not allow marriage between individuals of the same sex violate Article 13 and Article 24(1) of the Constitution because they violate the freedom of marriage of the Plaintiffs, who are same-sex couples, without justifying circumstances, as described below.

(a) It is understood that individuals have the right to make their own decisions on certain personal matters without interference by public authorities. This is the so-called right to personal autonomy or self-determination, which is guaranteed in Article 13 of the Constitution as a component of the right of the pursuit of happiness. One such personal matter is "matters related to the formation and maintenance of the family". Family relations should be considered a matter of personal autonomy because they entail the personal values of individual self-realization and self-expression.

Legal marriage is the formation of a new family. The state respects an individual's self-determination to enter into a long-term relationship and recognizes the couple as the core of the family, which is itself the natural, fundamental social unit group. Legal marriage protects children and families and provides important legal protections to married couples. For the foregoing reasons, legal marriage is the individual self-determination essential to personal autonomy, and the freedom to marry, which is at the core of the self-determination, is guaranteed by Article 13(1) of the Constitution. Furthermore, because these supporting reasons do not differ if the partners in marriage are of the same sex, this guarantee extends to same sex marriage.

Moreover, the Provisions violate the individual dignity of the same-sex couple Plaintiffs. Because one's sexual orientation cannot be changed or chosen at will and it is an essential aspect of an individual's social life and interpersonal relationships, it is inseparable from the individual's personality. Therefore, any disadvantage on the grounds of sexual orientation violates the individual dignity of the members of same-sex couples. The Provisions that do not recognize same-sex marriage threaten the Plaintiffs in their daily lives and violate their dignity.

(b) According to the legislative history and stated purpose of Article 24(1) of the Constitution, marriage protects the relationship between a husband and wife living together and the family relations derived therefrom, and the freedom to marry is the freedom to decide "whether to marry" and "with whom to marry." Since the term "both sexes" was enacted without discussion as to the possible institutionalization of same-sex marriage, the same Article does not preclude same-sex marriage.

Furthermore, because matters related to the institution of the family and gender can change in response to changing social conditions relating to the treatment of gender and the understanding of the family system, such matters must be evaluated in light of the constitutional guarantees of individual dignity and equality before the law. The scientific and medical evidence for the classification of homosexuality as a mental illness, which was assumed at the time of the enactment of the Constitution of Japan, has been completely discredited. The attitude and behavior of the national and local governments, corporations, and the general public, have also changed drastically since that enactment.

As set forth above, Article 24(1) of the Constitution clearly does not exclude same-sex marriage, and in light of the importance of the freedom to marry, together with changes in social conditions, the freedom to marry between individuals of the same sex is also guaranteed through direct or analogical application on the basis of an expanded interpretation of the same paragraph.

(ii) The Provisions violate Article 14(1) and Article 24(2) of the Constitution, as follows:

(a) That two persons of the same sex, such as the Plaintiffs, cannot marry solely because they are of the same sex, constitutes differential treatment based on sex. In addition, the disparate treatment under the Provisions is a differential treatment on the basis of sexual orientation, because it provides a means for those whose with a heterosexual orientation to marry whom they wish, while it does not provide a means for those who are not heterosexual to do the same.

In light of the fact that same-sex couples constitute a sexual minority long subject to prejudice and discrimination, and in light of the United Nations Human Rights Committee's recent decision, discrimination against sexual minorities is discrimination on the basis of "sex", and therefore constitutes differential treatment on the basis of "gender". In addition, because sexual orientation is a characteristic that cannot be changed or chosen at will, and has been subject to social opprobrium such as prejudice, contempt, and lack of understanding, differential treatment on the basis of sexual orientation constitutes differential treatment on the basis of "social status". In light of

the foregoing, the above-mentioned differential treatment is prohibited on basis of the grounds enumerated in the latter part of Article 14(1) of the Constitution.

(b) Under the Provisions, same-sex couples cannot legally marry. The differential treatment under the Provisions directly infringes on same-sex couples' choice of partner, which is at the core of their freedom to marry (Article 13 and Article 24(1) of the Constitution), and thereby also restricts their decision to get married.

Marriage confers various legal and economic benefits on the parties, as well as *de facto* benefits such as provision of information of medical treatment and consent thereto, occupancy of private rental housing, purchase of housing, the ability to be the beneficiary of life insurance, and workplace benefits. Other psychological and social benefits of marriage include the stability of the couple's personal relationships, emotional satisfaction, and enhanced status in social life, and same-sex couples who cannot legally marry cannot enjoy these legal, economic, psychological, and social benefits.

In addition, the Provisions, which limit marriage to heterosexual couples, have contributed to the social acceptance and promotion of the discriminatory notion that homosexuals are abnormal and inferior to heterosexuals, thereby deeply offending the dignity of homosexuals.

(c) As stated above, the distinguishing treatment under the Provisions is based on the grounds enumerated in the second sentence of Article 14(1) of the Constitution, which cannot be freely changed at will, and therefore, the reasonableness of the treatment should be strictly examined.

In addition, the Plaintiffs are minorities who have been harmed by the legal system, and the broad legislative discretion under Article 24(2) of the Constitution does not apply to a violation of Article 14(1) of the Constitution; even if there is the legislative discretion, the exercise of such discretion should be strictly examined, considering the ground of the distinction and the infringed rights and interests.

Although the Provisions do not allow same-sex couples to marry, there is no purpose to justify this exclusion in itself. Based on the process of establishing the institution of marriage up to the current Civil Code, the purpose of marriage is to protect and regulate family relationships and the important functions they fulfill by protecting and regulating the most basic and important unit of the family, the "husband and wife," the relationship in which they live together as a family. At the time of the enactment of the Constitution and the Provisions, there was a socially accepted belief that homosexuality was a mental

illness, but this socially accepted belief has now been shown to be scientifically incorrect. In addition, same-sex couples can now have and raise children, which is in accordance with the purpose of marriage, which is to bear and nurture children.

In light of the above purposes of the Civil Code and the changes in the legislative facts, there is no rational basis for providing the institution of marriage for heterosexual couples but not for same-sex couples.

(d) As described above, the discriminatory treatment under the Provisions is based on gender and sexual orientation, and the Plaintiffs have suffered serious harm as their rights and interests have been seriously infringed by this treatment; on the other hand, however, there is no rational basis for this treatment, and therefore, it constitutes discriminatory treatment which is prohibited by Article 14(1) of the Constitution.

The purpose of Article 24(2) of the Constitution is to eliminate the requirement for consent of the head of the household, and to achieve marriage based "only on the mutual consent." Since there is no history of consideration of same-sex marriage, Article 24(2) cannot be recognized as a provision that permits the exclusion of same-sex marriage and, even if interpreted consistently with this exclusion, the issue of violation of Article 14(1) of the Constitution cannot be avoided. Rather, even if the legislature has a certain amount of discretion in matters concerning the family, Article 24(2) of the Constitution provides the grounds for controlling that discretion. So, unless legislation is based on "individual dignity" and "essential equality," it is a violation of this Article. As such, the Provisions violate Article 14(1) and Article 24(2) of the Constitution.

(2) Summary of Defendant's allegations

(i) The Provisions do not violate Article 13 and Article 24(1) of the Constitution

(a) In light of the origin, history, purpose, and objectives of the current marriage system, marriage has traditionally been understood in connection with reproduction and considered as a relationship established between a man and a woman. In Japan, marriage institutionalized under the Meiji Civil Code was based on the premise of a union between a man and a woman, and the existence of same-sex marriage was not assumed in that context. The enactment of the Meiji Civil Code was before the recognition of homosexuality as a mental disorder spread in Japan, and was not enacted on the premise of such recognition. Even when the Civil Code was completely revised with the enactment of the Constitution of Japan and the current Civil Code was enacted, in light of the wording of the current Civil Code, the reasons for the proposal of the amendment, and the deliberations in the Diet at the time of the amendment, the assumption that the parties to a marriage were a man and a woman was unchanged at the time of enactment of the current Civil Code. Even today, it is generally understood that the parties to

marriage are a man and a woman.

In addition, it is clear that "both sexes" and "husband and wife" referred to in Article 24(1) of the Constitution, by their wording, represent a man and a woman, and the Constitution does not contemplate the establishment of marriage when both parties have the same sex. Even in paragraph (2) of the same Article, which is based on this assumption, there is no request for the establishment of an institution through legislation other than marriage as a relationship between two opposite sexes. This assumption that marriage is between a man and a woman is also based on academic theories, the process of enactment of Article 24 of the Constitution, and the fact that the social debate on same-sex marriage is still in progress. Therefore, it is reasonable to conclude that "freedom to marry" in the sense that the parties concerned are free to decide "whether to contract marriage and when and with whom to marry," and are not prevented from doing so, is guaranteed only for marriage involving personal unions between persons of the opposite sex, and that the Provisions are not in violation of Article 24(1) of the Constitution.

(b) Since it is understood that the specific content of matters concerning marriage and family shall be regulated by law in accordance with Article 24(2) of the Constitution, the content of the rights and interests, etc., concerning marriage and family shall be specifically determined only based on the system to be established by law, taking into consideration the purpose of the Constitution; therefore, it cannot be interpreted as being constitutionally guaranteed as an innate and natural right of freedom apart from the legal system, and the Plaintiffs' argument regarding the "freedom to marry" as an issue of infringement of the right of freedom guaranteed by Article 13 of the Constitution lacks any premise.

The essence of the Plaintiffs' claim is nothing other than a demand to the state to create a legal system that allows the same positive protection and legal interests to be provided to same-sex personal relationships as to opposite-sex personal relationships, and such rights and interests cannot be interpreted as a constituent of the right to the pursuit of happiness as provided in Article 13 of the Constitution.

(ii) The Provisions do not violate Article 14(1) and Article 24(2) of the Constitution.

(a) In interpreting a particular constitutional provision, it is necessary to consider its consistency with other relevant provisions of the Constitution. Since Article 24(2) of the Constitution clearly only provides for marriage between persons of the opposite sex and calls for the establishment of a legal system, it is naturally expected and permitted that the Provisions provide for marriage as a personal union between persons of the opposite sex and not as a personal union between persons of the same sex. Accordingly, persons

of the same sex cannot marry based on the Provisions, which do not violate Article 14(1) or Article 24(2) of the Constitution.

(b)

a Even if the question arises as to whether matters relating to marriage and family could violate Article 14(1) of the Constitution, it should be determined based on the discretion entrusted to the legislature by Article 24(2) of the Constitution, taking into consideration various factors in social conditions, including national traditions and public sentiment, as well as by making an overall judgment regarding the overall regulation of the relationships between husband and wife, and parent and child, in each era.

Marriage is not a personal matter, but is an institution which forms the family, which is the natural and fundamental unit that constitutes and supports Japanese society as its core. This institution has been approved of by Japanese society's approval, which has historically taken shape. As such, the question of what kind of personal relationship should be the subject of a marriage also is an extremely important issue that affects the nature of the family in Japan and the very foundations of Japanese society. Therefore, the scope of marriage and its requirements should be determined by giving due consideration to social conditions, including national traditions and public sentiment, as well as to what kind of society our country will be led to in the future. As such, they are matters that should be determined through the democratic process, in the sense that a broad national debate over a period of time is essential. Therefore, in light of the fact that the Constitution does not envision the establishment of a marriage system that covers the personal bond between persons of the same sex, it is reasonable to conclude that the legislature has wide discretion in determining whether to establish a legal system related to marriage and family that covers the personal bond between persons of the same sex, including issues such as whether to establish same-sex marriage and whether to establish a new legal system similar to marriage that covers the personal bond between persons of the same sex, compared to matters related to marriage and family relationships between persons of the opposite sex.

Under the Provisions, while both men and women can marry persons of the opposite sex, neither sex is allowed to marry persons of the same sex, and therefore, the Provisions cannot be evaluated as causing differential treatment on the basis of gender. In addition, the Provisions provide for marriage between one man and one woman, and their language does not require the parties to have a particular sexual orientation as a requirement for marriage or prohibit marriage on the basis of a party's having a particular sexual orientation. The purpose, content, and manner of the Provisions themselves are not such that the application of the marriage system can be denied on the basis of sexual orientation. Therefore, they are neutral provisions regarding sexual

orientation and they cannot be interpreted as making a distinction based on sexual orientation. Even if the Provisions create a difference between homosexuals and heterosexuals based on sexual orientation, it is only a *de facto* result or indirect effect, and it is understood that the legislature has a wider discretion in making such a distinction than when a direct distinction is made by a legal provision.

Also, as stated above, the specific content of marriage and family matters shall be regulated by law in accordance with Article 24(2) of the Constitution, and the freedom to marry in the sense that the parties concerned are free to decide "whether to marry, when and with whom to marry," and not be prevented from doing so, is a freedom that is granted to individuals only by or based on the legal institution of marriage provided for in the Constitution, and cannot be considered an innate natural right or interest, or a right or interest that people should naturally enjoy. The Provisions do not restrict the act of establishing and maintaining a personal relationship similar to marriage or leading a joint life between persons of the same sex, and the disadvantages claimed by the Plaintiffs due to the Provisions can be eliminated or alleviated to a considerable extent by using the Civil Code or other legal systems.

The essential issue in this case is the compatibility with the Constitution of not establishing a legal system that recognizes same-sex marriage in addition to the existing marriage system, and in light of the above, even if there is room to discuss whether the Provisions violate Article 14 of the Constitution, the case should be limited to circumstances in which the Provisions do not have a rational basis for their legislative purpose or the specific content of their means and methods are extremely unreasonable in relation to the legislative purpose, and it is clear that the Provisions are out of the scope of the broad discretion given to the legislature and are abusive.

b In light of the legislative history of the Provisions and the content of the provisions of the Civil Code and other laws, as mentioned in (i)(a) above, it is reasonable to conclude that the purpose of the Provisions is to provide legal protection specifically for the relationship between a man and a woman who live together while bearing and raising children, and that there is a rational basis for this purpose.

The Provisions define the scope of couples who can marry by taking an abstract and formulaic view of the legislative purpose based on biological natural reproductivity. Given the provision of Article 24(1) of the Constitution, which presupposes marriage between opposite-sex couples, and the fact that, in Japan, there is a social reality that the human bond between a man and a woman forms the core of the family, which is the natural and fundamental unit that constitutes and supports Japanese society, while giving birth to and nurturing the next generation that will support the future society, and that

there is social recognition that has been historically formed for this institution, and given that natural reproduction is not possible in personal unions between persons of the same sex and the recognition of such relationships is still under discussion in society, not providing for same-sex marriage is reasonable in relation to the legislative purpose of the Provisions.

Therefore, there is no room to conclude that the Provisions violate Article 14(1) and Article 24(2) of the Constitution.

2 Issue (2) (Whether the failure to amend or repeal the Provisions is illegal in light of Article 1(1) of the State Redress Act)

(1) Summary of the Plaintiffs' Claims

(a) The unconstitutionality of the Provisions was clear

As we have mentioned, the Provisions violate Article 13 and Article 24(1) of the Constitution by violating the freedom to marry, and Article 14(1) and Article 24(2) of the Constitution by refusing to recognize the marriage of same-sex couples without a rational basis.

In addition, it became clear to the Diet members and the Minister of Justice that the Provisions violate Articles 13, 14(1), and 24 of the Constitution at the latest, well before July 5, 2019, on which the Plaintiffs submitted their marriage certificates, due to: (1) the existence of various judicial decisions that call for consideration of homosexual persons; (2) the continuous increase of countries that allow same-sex marriage since 2000 and the global trend in judiciaries in foreign countries finding that the failure to recognize same-sex marriage is unconstitutional; (3) the Japanese government seeking to eliminate discrimination based on sexual orientation; (4) the increase of the number of local governments that have introduced partnership systems; (5) the fact that written opinions that call for recognition of same-sex marriage have been submitted; (6) the fact that the Diet has repeatedly discussed guarantees of same-sex marriage and same-sex partnerships; (7) the fact that all Diet members can clearly recognize the necessity of legalizing same-sex marriage; (8) the fact that public opinion polls show that the number of people in favor of same-sex marriage exceeds that of those opposed to it; and (9) the fact that the recommendations have repeatedly been given by the United Nations concerning the legal guarantee of same-sex partnerships.

(b) The Diet members have failed to take legislative measures for a prolonged period without just cause

In order to resolve the above unconstitutional situation, the Civil Code and other laws should be amended to recognize same-sex marriage, and there is no particular difficulty in doing so from a legislative procedural standpoint. As mentioned above, the Plaintiffs

and other parties have suffered tremendous damage due to the lack of legal recognition of their marriage, and while the members of the Diet should have taken prompt action to address this situation, they have failed to do so for a prolonged period of time without just cause.

(c) Inaction by the Minister of Justice

As stated above, the unconstitutional state of affairs described above was clear, and the Minister of Justice had a duty to plan and draft civil legislation to permit same-sex marriage well before the time that the Plaintiffs submitted their marriage registration notifications, and he failed to do so even though he was aware that he should have done so.

(d) Conclusion

In light of the circumstances described above, although it has been clear that the Provisions violate Articles 13, 14(1), and 24 of the Constitution from quite a long time ago, the Diet members have failed to legislate for a long period of time without just cause, and the Minister of Justice failed to do so even though he had a duty to legislate. Therefore, the Defendant is liable for damages under Article 1 of the State Redress Act for damages caused by the omissions of the Diet and of the Minister of Justice in failing to enact legislation recognizing same-sex marriage.

(2) Summary of the Defendant's Claims

As stated in (1) above, since the Provisions do not violate the Constitution, there is no room for this legislative omission to be considered to be illegal in application of the provisions of Article 1(1) of the State Redress Act as a violation of the legal duties owed by Diet members to individual citizens in the course of their duties.

The Plaintiffs' claim that the Minister of Justice has a duty to act and the basis for such claim are unclear. Even leaving this point aside, as stated above, since the omission of legislation by the Diet or the members of the Diet, who have the inherent authority to legislate, is not a violation of Article 1(1) of the State Redress Act, the omission by the Minister of Justice, who is only responsible for planning and drafting civil legislation, is also not a violation.

3 Issue (3) (The incurrence and amount of damages by the Plaintiffs)

(1) Summary of the Plaintiffs' Claims

The Plaintiffs have suffered serious damages due to the inaction by the above Diet members and the Minister of Justice, who have violated the constitutionally guaranteed right to freedom of marriage, prevented them from obtaining the psychological and social benefits, the legal and economic rights and benefits, and the other de facto benefits

associated with the social recognition of marriage, and their personal dignity has also been severely injured. The Plaintiffs have suffered significant emotional distress as a result of such injury. If such mental anguish were evaluated in monetary terms, it would be no less than one million yen for each of the Plaintiffs.

(2) Summary of the Defendant's allegations

The Defendant denies the Plaintiffs' claims.

4 Issue (4) (Whether there is a mutual guarantee under Article 6 of the State Redress Act with respect to Plaintiff 6)

(1) Summary of Plaintiffs' Claims

Although Plaintiff 6 is a foreign national, it should be understood that the "mutual guarantee" referred to in Article 6 of the State Redress Act is not a rule of right, and that the party receiving the claim must assert and prove its non-existence.

In addition, there is a mutual guarantee between Japan and ●●●, the country of Plaintiff 6's nationality, which has a law stipulating state liability and the state is liable to compensate private parties based on the torts of public officials or breach of duty incidental to control of property in accordance with the general law of torts.

In light of the above, the existence or non-existence of a mutual guarantee cannot be used as a reason to exclude state compensation for Plaintiff 6.

(2) Summary of Defendant's claims

Plaintiff 6 is not a Japanese national, and in light of the purpose of Article 6 of the State Redress Act, Plaintiff 6 has not claimed nor proved her claim regarding the fulfillment of the requirements for a mutual guarantee even though Plaintiff 6 is required to do so, and Plaintiff 6's claim should be dismissed.

This is an original.

June 8, 2023
Fukuoka District Court, 6th Civil Division
Court Clerk Katsuaki Ogata

[End]