

[English Translation by Lawyers for LGBT and Allies Network (LLAN: llanjapan.org).

Original Japanese judgment available at [URL]

Judgment delivered on May 30, 2023, original received on the same day - Court Clerk XXX

5 Case No. (*Wa*) 597 of 2019, Claims for Damages against the State

Date of conclusion of oral argument: December 2, 2022

Judgment

10 Parties: As indicated in Exhibit 1 (List of Parties).

Main text of Judgment

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

Facts and reasons

I. Plaintiffs' Claim

20 The Plaintiffs request that the Defendant pay each of the Plaintiffs 1,000,000 yen and interest thereon at the rate of 5% per annum for the period from March 6, 2019, until the completion of payment.

II. Summary of the Facts

25 **1** In this case, the Plaintiffs, who are same-sex couples, allege that they are not allowed to marry because the Defendant has not taken necessary legislative measures, despite that provisions of the Civil Code and the Family Register Act, which do not permit marriage between individuals of the same sex, are in a violation of Article 24 and Article 14, Paragraph 1 of the Constitution. Based on Article 1, Paragraph 1 of the State Redress Act, the Plaintiffs seek from the Defendant, compensation for non-pecuniary
30 damages of 1,000,000 yen each and delay damages thereon at the rate of 5% per annum as provided by the Civil Code prior to the revision by Act No.44 of 2017 from March 6, 2019, the date of service of the complaint, until the completion of payment.

35 **2 Undisputed facts (the facts that are not in dispute between the parties, or the facts that are readily recognizable from the evidence listed below (references to**

evidence numbers includes all sub-sections unless otherwise specified and the same shall apply hereinafter) and the overall import of the oral arguments)

(1) Sexual Orientation and Gender Identity

Sexual orientation is a term that refers to a person's attraction to another person in a sensual, emotional, or sexual manner. Sexual orientation in favor of a person of the other sex is called heterosexuality, while sexual orientation in favor of a person of the same sex is called homosexuality (hereinafter "**heterosexual person**" means a person who has heterosexual orientation, and "**homosexual person**" means a person who has homosexual orientation). In contrast, gender identity refers to each individual's intrinsic sensation of a person's sex and is sometimes referred to as SOGI in conjunction with sexual orientation. When gender identity differs from the sex assigned at birth, the person is called transgender. Such persons are sometimes referred to as LGBT in conjunction with homosexual women (Lesbian), homosexual men (Gay) and those who are homosexual and heterosexual at the same time (Bisexual). In addition, LGBT is sometimes referred to as LGBTI in conjunction with Inter Sex, a term used to describe certain characteristics of sexual differentiation in the body (hereinafter, minorities in sexual orientation and gender identity such as LGBTI, etc. are collectively referred to as "**sexual minority**") (*Undisputed facts, Plaintiffs' Evidence A2, 5, 114, the entire import of the argument*).

The size of the LGBT population in Japan is not necessarily clear. However, a survey conducted in April 2015 by private corporations etc. targeting 20- to 59-year-olds found that 7.6% out of the 70,000 people surveyed were LGBT; a survey conducted in May 2016 found that approximately 5.9% out of the approximately 100,000 people surveyed were LGBT; and a survey conducted in June 2016 found that 4.9% out of the approximately 1,000 people surveyed were LGBT (*Plaintiffs' Evidence A237*).

(2) The Plaintiffs

The Plaintiffs are both male and homosexual persons (the overall import of the argument).

The Plaintiffs [redacted in the Japanese original] prepared a notarial instrument of a marriage contract for the purpose that both parties establish the relationship equivalent to a marriage under socially accepted ideas, and a notarial instrument of a voluntary guardianship contract (*Plaintiffs' Evidence B 1, 2*).

On February 3, 2019, the Plaintiffs submitted a notification of marriage, under which the two persons were parties of marriage, at their place of residence. On February 7,

2019 however, the notification of marriage was not accepted on the ground that the notification of marriage, under which two men were the parties of marriage, was not legal (*Plaintiffs' Evidence B3*).

3 Provisions Concerning the Marriage System

(1) Provisions of the Civil Code and the Family Register Act

Part IV, Chapter 2, Section 1 of the Civil Code provides that a marriage shall become effective by notification as provided by the Family Register Act (Article 739, Paragraph 1), and also provides the requirements of a marriage. The Family Register Act provides that, in light of Article 739, Paragraph 1 of the Civil Code, persons who wish to marry shall notify the surname that the husband and wife will use (Article 74, Item 1 of the Family Register Act) (hereinafter, with regard to the provisions of the Civil Code, the portion of family law of the Civil Code revised by Act No. 222 of 1947 may be collectively referred to as the “**Current Civil Code**”; the provisions of the portion of family law before the said revision are referred to as the “**Meiji Civil Code**”; and the said revision shall be referred to as the “**Amendment to the Civil Code of 1947**”).

Concerning the effect of marriage, the Civil Code contains provisions for the important effects of a marriage, such as the unification of surnames (Article 750), the obligation of living together, cooperation and assistance of a husband and wife (Article 752) in relation to the legal effect of marriage, the sharing of expenses of marriage (Article 760) in relation to the property of the husband and wife, the division of property (Article 768) in relation to divorce, the presumption of a child in wedlock of a husband and wife (Article 772, Paragraph 1) and parental authority (Article 818, Paragraph 3) in relation to relationship between parents and children, and the spousal right of inheritance (Article 890) in relation to inheritance. In addition, under the Family Register Act, a new family register shall be created for a husband and wife upon notification of marriage (main text of Article 16, Paragraph 1). The said family register shall describe the husband and wife as husband or wife (Article 13, Item 6). If a child is born, a notification must be submitted (Article 49, Paragraph 1), and the child shall enter the family register of the parent (Article 18). The original of the family register shall be kept at the city office, etc., and notarized (Article 8, Paragraph 2).

(2) Interpretation of Marriage between Individuals of the Same Sex

The provisions of the Civil Code and the Family Register Act do not explicitly prohibit

marriage between individuals of the same sex, but it is construed that marriage between individuals of the same sex is not permitted in current practice because the Civil Code and the Family Register Act refer to couples who marry as “husband and wife” and the parties as “husband” or “wife” (hereinafter the provisions of the Civil Code and the Family Register Act that do not permit marriage between the individuals of the same sex are referred to as the “**Provisions**”).

4 Issues and the Parties’ Assertions

The points at issue in this case are as follows, and the assertions of the parties concerning this are as shown in Exhibit 2.

(1) Whether the Provisions violate Article 24 and Article 14, Paragraph 1 of the Constitution (“**Issue 1**”).

(2) Whether it is illegal under the State Redress Act not to amend or abolish the Provisions (“**Issue 2**”).

(3) The damages incurred by the Plaintiffs and the amount thereof (“**Issue 3**”).

III. The Court’s Judgment

1 Findings of Fact

The following facts can be found in light of the evidence and the overall import of the oral arguments mentioned below.

(1) Perception of sexual orientation

(i) The current perception

The causes of sexual orientation or of homosexuality have not been found. However, majority of professional associations involved in mental health believe that sexual orientation is, in most cases, determined in the early years of life or before birth and not chosen by individuals. In the field of psychology, it is largely understood that it is not possible to change a sexual orientation at will. The field of psychiatry has also largely come to the conclusion that while some homosexual people may be able to alter their sexual behavior, this does not mean a change in sexual orientation itself, and that sexual orientation will not change according to an individual’s own will or with psychiatric therapy. (*Plaintiffs’ Evidence A2, 3, 7, 242, 244*)

(ii) Changing Perceptions in Europe and the USA

(a) Perception up to around the Middle of the 20th century

In the West, the view that homosexuality is a psychological pathology was asserted in the field of psychiatry around the end of the 19th century, and the American Psychiatric Association considered “homosexuality” as a form of “sexual deviations” in “the first edition of the Diagnostic and Statistical Manual for Mental Disorders (DSM-I)” published in 1952, and, from its second edition (DSM-II) published in 1968, came to treat homosexuality as an individual diagnosis. The World Health Organization (“WHO”)’s “ninth edition of the International Statistical Classification of Diseases and Related Health Problems (ICD-9)” published in 1975 also listed the diagnosis of “homosexuality” in the section of “Sexual deviations and disorders” (*Plaintiffs’ Evidence A24, 27, 29, 48, 273*).

(b) Perception since around the Middle of the 20th century

In contrast, in the field of sexual science and psychology, the view that homosexuality is a psychological pathology came to be questioned around the middle of the 20th century. The American Psychiatric Association adopted a resolution in 1973 not to treat homosexuality itself as a psychiatric disorder and to newly establish a section of “sexual orientation disturbance” for homosexual individuals who “are either disturbed by, in conflict with, or wish to change their own sexual orientation” in lieu of the diagnosis of “homosexuality” in DSM-II. Thereafter, the diagnosis was amended to “ego-dystonic homosexuality” in DSM-III and has come to be eliminated in DSM-III-R published in 1987. Major associations related to mental health such as the American Psychological Association and the Association for Advancement of Behavior Therapy in America also endorsed the same resolution since 1975. In addition, WHO adopted the classification of “ego-dystonic sexual orientation” in lieu of “homosexuality” in ICD-10 published in 1992 and clarified that the sexual orientation itself should not be considered as a disorder (*Plaintiffs’ Evidence A1, 24, 27 to 30, 48*).

(iii) Changing perceptions in Japan

(a) Perception since around 1887

From 1887, the perception in the West that homosexuality is a psychological pathology was introduced in Japan. In 1906, the view that regards homosexuality as either a form of sexual perversion or congenital disease, somewhere between being healthy and psychotic was introduced, and in the Taisho era, the view that homosexuality is a form of “perverted sexual desire” and is a kind of infectious disease was also introduced. Even in 1993, homosexuality was categorized as a “sexual abnormality” in major

psychiatric textbooks. (*Plaintiffs' Evidence A24, 266, 279, Defendant' Evidence 24 to 26*)

In addition, in 1936, homosexuality in adolescence was considered to not cause any concern as long as it remained within certain limits, but that a deepening affection between persons of the same sex would lead to impure homosexuality and should therefore be treated with extreme caution and should be completely prohibited. Moreover, in 1979, the “Basic Material on Problematic Behavior of Students” published by Japan’s Ministry of Education considered that homosexuality is generally likely to impede the development of healthy heterosexual love and is not acceptable because it is socially contrary to sound social morality and is likely to result in sexual disorders (*Plaintiffs' Evidence A26, Defendant's Evidence 27*).

(b) Perception since around 1995

The Japanese Society of Psychiatry and Neurology released in 1995 a view that sexual orientation to same-sex itself is not regarded as a mental disorder in accordance with the ICD-10 in response to a request from a citizen group (*Plaintiffs' Evidence A48, 279*).

(2) Marriage Systems

(i) Traditional Understanding of the Marriage Systems

Mankind has preserved itself through relationships between men and women, and marriage was devised as a system to regulate said relationships by norms. In any society, legal norms affirm relationships typical to that society and strive to maintain them. Although the forms of such legal norms vary across the ages and regions depending on the economic and political conditions or moral philosophy of the society, they have existed as an acknowledgement of the legitimate relationships between men and women. Traditionally, such legal norm recognize not simple sexual relationships between men and women, but rather, what forms the core of the family as a community of a man and a woman through functions such as protecting and nurturing children born therebetween and maintaining cohabitation by division of labor (*Plaintiffs' Evidence A247, Defendant's Evidence 1, 2, 21, 22*).

(ii) Marriage System under the Meiji Civil Code

(a) History of Enactment of the Meiji Civil Code

Before the Meiji Period, Japan had certain customs on marriage while any unified legal systems did not exist. Accordingly, Act No. 98 of 1890 (hereinafter referred to as the

“Old Civil Code”) was promulgated in 1890. Although the Old Civil Code was not enforced afterwards, after partial amendments, the Meiji Civil Code was enforced in 1898 as the law to supplement harmful matters and ambiguous matters while keeping existing customs. Under the Meiji Civil Code, marriage was regarded as a legal relationship between one man and one woman for the purpose of cohabitation for life (Plaintiffs’ Evidence A173, 178, 180, 181, Defendant’s Evidence 3).

(b) Discussions in the Enactment Phase

In the drafting phase of the first draft of the Old Civil Code, since marriage is a connection of men and women, it was naturally regarded that marriage between individuals of the same sex should be invalid, and it is unnecessary to dare to include it as a ground for invalidity of marriage. The Meiji Civil Code also kept this position (Plaintiffs’ Evidence A165, 166).

Furthermore, in the first draft of the Old Civil Code, marriage was characterized by the union of the two minds and the ability of reproduction is not an indispensable requirement for marriage, thus the inability to reproduce due to old age or other reasons was not listed as a ground for impediment to marriage. The Meiji Civil Code adopted the same position as well and did not list the inability of reproduction as a ground of invalidation or revocation of marriage or as a ground of divorce (Plaintiffs’ Evidence A 172, 173, 178, 179).

(c) Details of the Marriage System under the Meiji Civil Code

Under the Meiji Civil Code, based on the concept of the family system (*kazoku shugi*), which centers around the household (*ie*), the head of the household (*koshu*) was given the power to control the household (*koshu-ken*), and based on the idea that marriage is for the benefit of the household, the consent of the head of the household or parents was required for marriage of a child under a certain age (30 years old for males and 25 years old for females). In addition, based on the feudal *samurai* morality with respect for male and male line, dominance of a husband over a wife was accepted in the marriage relationship, and even regarding inheritance, succession to a family by a sole male was considered to be primary and female was placed in a subordinate position to male in the inheritance order (Plaintiffs’ Evidence A19, 142, 179, 180, 181).

(iii) Enactment of the Constitution of Japan

(a) Process of Enactment of the Constitution of Japan

The Constitution of the Empire of Japan did not stipulate any provisions concerning marriage and family. In February 1946, the General Headquarters of Supreme Commander for the Allied Powers (the “GHQ”) proposed to the government Article 23 of the MacArthur draft, which stated that “Family is the basis of human society and its tradition is rooted in nations for good or bad. Marriage stands on the undisputed legal and social equality of both sexes, it is based on the mutual agreement instead of enforcement by parents, it is maintained by mutual cooperation instead of dominance by the man. Any laws that contradict these principles should be abolished and, with regard to choice of spouse, property rights, inheritance, domicile, divorce and other matters pertaining to marriage and the family, alternative laws shall be enacted based on respect for the individual and the inherent equality of the sexes.” (*Plaintiffs’ Evidence A144, 146 to 148, overall import of the argument*).

In response to Article 23 of the MacArthur Draft, in March 2 [AMT: Using a database of court precedents, we added the date although the date is not shown in the word file of the Japanese version.]1946, the Japanese government prepared a draft amendment, which stated that “Marriage shall come into effect only based on the mutual consent between man and woman, and it shall be maintained through mutual cooperation on the basis that husband and wife have equal rights”, and on March 5 [1946?], a draft was prepared which was composed of Paragraph 1 of the same draft and an added Paragraph 2 which stated that “With regard to the choice of spouse, property rights, inheritance, domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted based in respect of the individual and inherent equality of the sexes”. The draft was changed into a colloquial form in April 1946, and after deliberation in the Imperial Diet and revisions based thereon, Article 24 of the Constitution was enacted in November 1946 (*Plaintiffs’ Evidence A 146 to 148, 151, entire import of the argument*).

(b) Discussions arising from the enactment process

In the process of enacting Article 24 of the Constitution, the issue before the Imperial Diet was whether the traditional family system would be maintained. Concerning the point that paragraph 1 of the same Article provides that "marriage shall be based only on the mutual consent of both sexes", the Minister of Justice explained that the object of the Meiji Civil Code was to eliminate marriages of children who had not reached a certain age through the consent of the head of their family or their parents, and to only permit marriages based on the mutual consent of both sexes. There does not appear to

be any evidence that marriage between people of the same sex was discussed. (*Plaintiffs' Evidence A146, 152, entirety of Plaintiffs' submissions*)

(iv) Marriage system under the current Civil Code

(a) Amendment to the Civil Code in 1947

In the amendment to the Civil Code in 1947, the provisions concerning the rights of heads of households and the household system were abolished, and the provisions concerning the right heads of households and parents to consent to a marriage were abolished. The consent of parents was only required for the marriage of minors. In addition, husbands and wives were each granted the ability to manage property, and spouses (wives) were granted the right of inheritance as a matter of course. (*Plaintiffs' Evidence A19, 180, 181*)

(b) Discussions in the amendment process

In the explanation for the proposal for the amendment to the Meiji Civil Code, it was pointed out that there were many provisions in the Meiji Civil Code, especially the sections concerning the family and succession, which conflicted with the basic principles of Articles 13, 14, and 24 of the Constitution, and it was therefore necessary to amend them. Amendments were focused on the provisions of the Civil Code that conflicted with the Constitution of Japan, and the provisions that did not conflict with them were maintained as they were. In the course of that process, there does not appear to be any evidence that marriage between people of the same sex was debated. (*Plaintiffs' Evidence A180, 181, Defendant's Evidence 7, 8, entirety of Plaintiffs' submissions*)

(3) Trends in International Organizations Concerning the Protection of the Rights of Sexual Minorities

(i) Trends in UN Treaty Organizations

(a) Relief based on the individual reporting system

In 1994, the Committee on the International Covenant on Civil and Political Rights (the "ICCPR") determined that laws punishing sexual behavior between men violated Article 17 of the ICCPR, which secures the "right to respect for private life", and that the prohibition on discrimination on the basis of "sex" referred to in Article 2(1) and Article 26 of the ICCPR includes discrimination on the basis of sexual orientation, and such laws therefore violated Article 2(1) of the ICCPR. In 2003, the Committee

determined that the failure to grant a same-sex partner a survivor's pension, on the basis that they are the same sex as their partner, violated Article 26 of the ICCPR. (*Plaintiffs' Evidence A31, 32, 49*)

5 **(b) Interpretation of the Covenant**

In 2009, the Committee on the International Covenant on Economic, Social and Cultural Rights (the "ICESCR") revealed in its general opinion on the interpretation of the ICESCR that prohibition on discrimination on the basis of "other status" stipulated by Article 2(2) of the ICESCR includes discrimination on the basis of sexual
10 orientation, and that sexual orientation was not an obstacle to the realization of rights under the ICESCR, such as the right to receive survivor's pensions (*Plaintiffs' Evidence A50, 216*).

15 **(c) Recommendations in relation to Japan**

In October 2008, the Committee on the ICCPR recommended that the Government of Japan consider revising laws such as the Public Housing Act and the Act on the Prevention of Spousal Violence and the Protection of Victims (hereinafter referred to as the "DV Prevention Act") on the basis that same-sex couples were excluded from their operation. In August 2014, the Committee made recommendations including the
20 enactment of a comprehensive anti-discrimination law prohibiting discrimination on all grounds, including sexual orientation and gender identity (*Plaintiffs' Evidence A38, 95, 96, 192*).

25 **(ii) Trends in the United Nations Human Rights Council**

30 **(a) Adoption of the SOGI Resolution**

In 2011, with the agreement of 23 countries including Japan, the United Nations Human Rights Council adopted the SOGI Resolution (Human Rights, Sexual Orientation and Gender Identity), whereby it expressed grave concerns about violence and discrimination on the grounds of sexual orientation and gender identity in various
30 parts of the world and requested that reports on the status of human rights be submitted by the United Nations High Commissioner for Human Rights. In 2014, it again adopted a resolution to the same effect with the agreement of 25 countries, including Japan. In the report submitted by the United Nations High Commissioner for Human Rights in 2015, it was recommended that same-sex couples and their children be
35 legally recognized and that benefits which were granted to married partners, such as

financial benefits, pensions, taxation and inheritance, should also be given to same-sex couples and their children without discrimination. (*Plaintiffs' Evidence A31, 34, 199, 208*)

5 **(b) Recommendations in relation to Japan**

Pursuant to the Universal Periodic Review (“UPR”) regime by the United Nations Human Rights Council, in the process of the first review in 2008 and the second review in 2012, the UNHCR recommended that several countries (including Japan) take measures to eliminate discrimination on the basis of sexual orientation and gender identity. In the process of the third review in 2017, it recommended that Switzerland and Canada take actions such as expanding the official recognition of same-sex marriage nationally, and that local governments and private companies take action to promote efforts to eliminate discrimination on the basis of sexual orientation and gender identity. (*Plaintiffs' Evidence A 38, 192, 193, 196 through 198*)

15 **(iii) Other trends**

In 2006, at a meeting of international experts on international human rights law as well as sexual orientation and gender identity, the “Principles Related to the Application of International Human Rights Law on Sexual Orientation and Gender Identity” (the “Yogyakarta Principles”) was adopted. The Yogyakarta Principles are not official documents of the United Nations or an intergovernmental agreement, and therefore do not form part of the norms of international human rights law. However, all 29 principles embody the right not to be discriminated against on the basis of sexual orientation or gender identity based on existing human rights treaties. Among those, it is clear that there is the right to form families, regardless of sexual orientation or gender. (*Plaintiffs' Evidence A31, 33, 192*)

20 **(4) Trends in Other Countries Concerning the Protection of Same-sex Couples**

25 **(i) Protection by way of registered partnership system**

30 **(a) Countries that have introduced registered partnership systems**

In 1989, Denmark introduced the world’s first registered partnership system (together with the system described in (ii) below, hereinafter referred to as the “**Registered Partnership System, Etc.**”), a framework to legally protect the relationship between same-sex couples. Although there were differences in the names and details of systems, various countries followed suit, with Norway in 1993, Sweden in 1994,

Iceland in 1996, the Netherlands in 1998, Finland and Germany in 2001, Luxembourg, the United Kingdom, Switzerland and New Zealand in 2004, Austria in 2009, Ireland in 2010 and Malta in 2014, respectively introduced similar systems. (*Plaintiffs' Evidence A98, 140, 141, 249 through 251*)

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(b) Details of the systems

Except for countries such as the Netherlands and Luxembourg, many countries that adopted such a registered partnership system provided the system only for same-sex couples. Generally speaking, these systems granted same-sex couples largely the same legal effects as marriage, and in the foreign countries mentioned in (a) above, inheritance, social security, and tax incentives were granted to same-sex couples who enter into a registered partnership. (*Plaintiffs' Evidence A98, 140, 141*)

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On the other hand, with regard to the adoption system, in countries such as Austria, the United Kingdom and Sweden, adoption by same-sex couples was permitted very similarly to opposite-sex couples, while in Germany, although several amendments were made to the law, same-sex partners were not permitted to both adopt the child of a third party. In countries such as Ireland and Norway, adoption by same-sex couples was not permitted. Furthermore, in New Zealand, adoption was only permitted by the “spouses” under the Adoption Act 1955, so registered partnership couples were not granted the right to use the adoption in the first place. In addition, the Status of Children Act 1969 limited the application of the legitimacy provisions to married women, and therefore, the presumption of legitimacy was not extended to children born to couples in a registered partnership. (*Plaintiffs' Evidence A98, 140, 141*)

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Further, in some countries there were differences between heterosexual and homosexual marriages. For example, in the United Kingdom, marriage is a sexual and religious system, whereas the registered partnership system is a non-sexual and secular system, so adultery did not constitute a reason for divorce. In Denmark, registered partners are unable to choose to have a religious wedding. (*Plaintiffs' Evidence A98, 140, 141*)

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(ii) Protection by way of legal cohabitation and PACS

(a) Legal cohabitation

The registered partnership system provides for a package of broad legal rights and obligations, including those under property law, personal status law, social security law, and tax law. However, for couples who do not want something with such mandatory

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legal effect, Belgium and Sweden have introduced a system called legal cohabitation, primarily to confer a legal effect under property law. This system is not limited to same-sex couples but also available to opposite-sex couples. In Belgium, it was also available to siblings, and inheritance rights and adoption were also allowed under the system. (*Plaintiffs' Evidence A98, 140, 141, 249*)

(b) PACS

In France, a system called PACS has been introduced. PACS allows two people to be recognized as a couple by the country and other parties, by setting their rights and obligations in a contract and registering such contract with the public authorities. The system can be used not only by same-sex couples but also by opposite sex couples. The registration and publication under PACS provides a couple full rights under not only the civil code, but also the labor law, tax law, and social security law. On the other hand, there is no right of inheritance between a PACS couple, and there is no right of adoption or right to assisted reproductive technology offered to PACS couples. Moreover, children born between a PACS couple shall be treated as illegitimate children. (*Plaintiffs' Evidence A98, 140, 141, 249*)

(c) Civil union and de facto communal living

In Italy, the Constitutional Court stated in 2014 that “marriage” refers only to the union between individuals of the opposite sex, and that the union between individuals of the same sex cannot be regarded as comparable to marriage. At the same time, the Constitutional Court stated that “it is unconstitutional that there is not “a different form (ultra forma) of marriage,” and that legally protected couples are not allowed to maintain their relationships. In response, in 2016, the Regulations on Civil Union between the Same Sexes and Regulations on Communal Living was enacted. In the rules on civil union, there are differences from marriage such as the absence of a duty of fidelity and the absence of provisions on adoption, but they basically follow the rules on marriage. In the rules on de facto communal living, certain rights are recognized regarding the treatment of partners, assistance in the event of illness or hospitalization, and the continuation of residence in shared housing. (*Plaintiffs' Evidence A98, 140, 141*)

(iii) Protection by way of marriage

(a) Countries that allow same-sex marriage

The Netherlands introduced the world's first same-sex marriage system in 2000; Belgium in 2003; Spain and Canada in 2005, South Africa in 2006; Norway in 2008; Sweden in 2009; Portugal, Iceland and Argentina in 2010; Denmark in 2012; France, Uruguay, New Zealand, Brazil and the United Kingdom (England and Wales) in 2013; Luxembourg and Ireland in 2015; Colombia in 2016; Finland, Malta, Germany and Australia in 2017; Taiwan, Austria and Ecuador in 2019; Costa Rica in 2020 introduced same-sex marriage (*Plaintiffs' Evidence A98 135 to 138, 140, 141, 249 through 251*). In the United States, the Supreme Court ruled in *Obergefell v. Hodges* in 2015 that the failure to issue a marriage certificate to same-sex couples and the failure to recognize same-sex marriage violated the Fourteenth Amendment to the Constitution. As a result, all states accepted same-sex marriage without distinction from opposite-sex couples, and all states are obligated to recognize marriage lawfully established in other states (*Plaintiffs' Evidence A98, 99, 141*).

(b) Nature of same-sex marriage

In the countries mentioned in (a) above, although there is little difference between same-sex marriage and opposite-sex marriage, the legislations differ in some places. For example, the presumption of legitimacy does not apply in the case of same-sex couples in Spain or male couples in the Netherlands. In addition, assisted reproductive technology is not available to same-sex couples in France and male couples in Spain. Furthermore, countries such as Canada, South Africa, Norway, and Denmark recognize the rights of religious entities to refuse to marry same-sex couples on the basis of religious considerations. Moreover, the Netherlands, Belgium, and Portugal originally did not allow same-sex couples to adopt children, but subsequently recognized such right after amendments to laws. (*Plaintiffs' Evidence A98, 140, 141*)

(5) Trends in Japan Toward the Protection of the Rights of Sexual Minorities

(i) National policy

(a) Measures to eliminate bias and discrimination based on sexual orientation

The Government has adopted the Basic Plan for Human Rights Education and Human Rights Awareness during the Third Basic Plan for Gender Equality and the Fourth Basic Plan for Gender Equality, in December 2010 and December 2015, respectively. These basic plans call for awareness-raising activities aimed at eliminating discrimination and prejudice on the grounds of sexual orientation. Treating this as one of the major human rights topics, the Human Rights Bureau of the Ministry of Justice

has conducted awareness-raising activities. (*Plaintiffs' Evidence A57 to 59, 211, 212, 514 through 516, entire import of arguments*)

(b) Enactment of Act on Special Measures Concerning Gender Identity Disorder

5 In July 2004, the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (“Act on Special Measures Concerning Gender Identity Disorder”; Act No. 111 of 2003) came into force, and persons with gender identity disorders who meet certain conditions are allowed to change their gender in their family registers. In June 2008, one of such conditions for changing one’s gender was relaxed from “the absence of a child at present” to “the absence of an underage child
10 at present,” through the amendment to Article 3, Paragraph 1, Item 3 of the Act (Act No. 70 of 2008).

(c) Revision of the Public Housing Act and Domestic Violence Prevention Act

15 Article 23, Paragraph 1, Item 1 of the Public Housing Act prior to the revision by Act No. 37 of 2011 required tenants of public housings to have relatives who they currently live with or intend to live together with (including persons who have not submitted notification of marriage but are in a de facto marital relationship or fiancés). The revision deleted the said Item. However, some commented that the deletion was
20 inadvertent due to the decentralization reforms. (*Plaintiffs' Evidence A192*)

In addition, Article 1, Paragraph 3 of the Domestic Violence Prevention Act provided that “a spouse” subject to protection includes “a person who has not filed a notification of marriage but is in a de facto marital relationship.” In accordance with the amendment by Act No. 72 of 2013, the law applies mutatis mutandis to violence by a person who
25 is in a “relationship that shares the base of living (excluding those who do not live together in a way similar to living together in a marriage relationship” (Article 28-2). However, there are opinions that whether the law applies to same-sex couples should be carefully examined (*Plaintiffs' Evidence A40*).

(ii) Efforts of political parties

30 In June 2019, the members of the Constitutional Democratic Party, the Japan Communist Party, and the Social Democratic Party submitted to the House of Representatives the “Outline of a Bill for the Partial Amendment to the Civil Code,” which proposed to change Article 739, Paragraph 1 of the Civil Code to “a marriage
35 shall become effective when two persons of the opposite or same sex notify of the

marriage pursuant to the provisions of the Family Register Act.” (*Plaintiffs’ Evidence A115, 116, and 509*),.

(iii) Measures taken by local municipalities

(a) Enactment of plans and guidance

In November 2000, the Tokyo Metropolitan Government announced the Guidelines for the Promotion of Human Rights Policies, which pointed out the necessity of further discussing the resolutions of human rights issues concerning persons with gender identity disorder and homosexual persons. Subsequently, several local municipalities have established plans/guidelines regarding sexual orientation and sexual recognition (*Plaintiffs’ Evidence A66, 67*).

(b) Enactment of ordinances

Several local governments have enacted ordinances that stipulate respect for sexual orientation or prohibition of discrimination and in April 2015, a registered partnership system was established in the Shibuya ward of Tokyo. Similar systems were later established by other local governments and as of January 2022, 147 local governments had a registered partnership system. Some local governments that have introduced a registered partnership system are adopting measures to allow the mutual use of their respective partnership registrations (*Petitioners’ evidence A67 to 91, 303 to 355, 395 to 436, 477*).

Since April 1, 2020, the Setagaya ward of Tokyo is letting ward civil servants with a partner of the same sex benefit from the same benefits as those with a partner of the other sex, such as marriage leave, maternity support leave, nursing leave, etc. Similar efforts have been made in Tottori Prefecture. In June of the same year, Setagaya ward announced that it would apply the special measures for national health adopted in response to COVID-19 by paying a sickness and injury allowance to the bereaved family of a same-sex partner in the event of the death of the insured person (*Petitioners’ evidence A356 to 358*).

(c) Requests to the State

In July 2018, the Association of the Mayors of Designated Cities made a request to the Cabinet Office to issue a policy to reinforce the promotion of an understanding of sexual minorities, in order to realize a society in which diversity is recognized and to take into account the examples and opinions of local governments, in particular by

reinforcing state efforts through the establishment of a centralized organization and by adjusting comprehensively measures adopted by each administration with regard to sexual minorities. In December 2020, the Yamato-Koriyama City Assembly and the Kiyose City Assembly of Tokyo submitted written opinions requesting the Speaker of the House of Representatives, the Prime Minister, and the Minister of Justice to promote discussions on same-sex marriage legislation (Petitioners' evidence A92, 93, 359, 360).

(iv) Suggestions and initiatives from other organizations

(a) Private companies

On May 16, 2017, the Japan Business Federation for the first time put the focus on how the business community is dealing with LGBT persons to realize diversity and inclusion in society. The Federation reported on the situation of each company's efforts, made suggestions on how to address this issue and presented a number of initiatives by leading Japanese companies to expand welfare programs to same-sex couples by applying condolence leave and family allowance to same sex couples. Further, the CSR Enterprise General Survey published by Toyo Keizai Inc. reports that the number of companies with a basic LGBT policy (respect for rights, prohibition of discrimination, etc.) increased from 173 (out of a total of 1325 surveyed, i.e., approximately 13%) as of January 4, 2016 to 364 (out of 1593 surveyed, i.e., approximately 22.8%) as of December 3, 2019 (Petitioners' evidence A94, 291, 292).

(b) Bar associations

In July 2018, the Hokkaido Federation of Bar Associations adopted a resolution that demands the government and the Diet to develop a legal system that permits marriage between individuals of same sex. In February 2019, the Japan In-House Lawyers Association proposed that same-sex couples should be granted the right to marriage. In July 2019, the Japan Federation of Bar Associations also proposed to the Minister of Justice, the Prime Minister, and the Speaker of the House of Representatives and the House of Councilors to promptly amend relevant laws and regulations to allow same-sex marriage. Since March 2021, multiple bar associations have issued statements from their chairmen calling for immediate legislation to allow marriage between individuals of same sex (Petitioners' evidence A 113, 134, 153, 154, 383 through 393).

(c) Foreign organizations in Japan

In September 2018, the American Chamber of Commerce in Japan issued a proposal to the government that obstacles to recruitment and retention of human resources could be removed and diverse employees could be fairly treated if LGBT couples were granted the right to marry. The Australian and New Zealand Chamber of Commerce in Japan, the British Chamber of Commerce in Japan, the Canadian Chamber of Commerce in Japan, and the Ireland Japan Chamber of Commerce, as well as the Danish Chamber of Commerce in Japan supported this proposal (Petitioners' evidence A112, 131 through 133).

(d) Science Council of Japan

In September 2017, the Committee on Law of the Science Council of Japan, issued a recommendation that amending the Civil Code to make marriage neutral from a sexual point of view was essential in light of the remarkable diversification of families in Japan and the trends in Western countries (Petitioners' evidence A114).

(6) Surveys on same-sex marriage

(i) Surveys targeting the entire population

(a) Surveys until 2017

An opinion poll conducted by the Japan Association for Public Opinion Research in 2014 found that 42.3% of the respondents were in favor of same-sex marriage being legally recognized (in favor or somewhat in favor; the same hereinafter) and 52.4% of the respondents against (against or somewhat against; the same hereinafter). In a survey conducted by the Mainichi Newspapers Co., Ltd. in 2015, 44% were in favor and 39% against. In a survey conducted by Professor Kazuya Kawaguchi of Hiroshima Shudo University and others in the same year, 51.2% were in favor and 41.3% against. Further, in a survey conducted by NHK in 2017, 50.9% were in favor and 40.7% against and in a survey conducted by the Asahi Shimbun Company in the same year, 49% were in favor and 39% against (Petitioners' evidence A104 through 109).

(b) Surveys since 2018

In a survey conducted by Dentsu Inc. in 2018 on awareness toward the legal recognition of same-sex marriage among non-LGBT men and women in their 20s to 50s across Japan, 69.2% of men and 87.9% of women were in favor. In a survey conducted by Professor Kawaguchi and others in 2019, 64.8% were in favor and 30.0% against; in a survey conducted by the Asahi Shimbun and Professor Masaki Taniguchi's

Research Laboratory at the University of Tokyo in 2020, 46% were in favor and 23% against; and in a survey conducted by NHK in 2021, 56.7% were in favor and 36.6% against (Petitioners' evidence A110, 368, 441, 479).

5 **(ii) Surveys targeting sexual minorities**

(a) Survey in 2015

In a survey targeting sexual minorities conducted by NHK in 2015, NHK asked the respondents if they wanted to apply for partnership registration (including if they would like to do so once having a partner), 82.4% answered yes and 17.6% no. More than
10 half the respondents answered that they wanted to apply because "we want to be recognized as a family in the future and it could be the first step in that direction". In addition, 65.4% of the respondents agreed with the legal recognition of same-sex marriage, and 25.3% answered that they would like the government to introduce a registered partnership system rather than same-sex marriage (Petitioners' evidence
15 A103).

(b) Survey in 2019

In a survey targeting sexual minorities conducted in 2019 by Professor Yasuharu Hidaka of Takarazuka University School of Nursing, 60.4% of the respondents said
20 that they want the same legal marriage as heterosexual marriage to apply to same sex relationships, and 16.2% answered that there is no need to have a public system but that they want social understanding to become more widespread. The remaining respondents generally answered that they want the registered partnership system to be established at the national or municipal level (Petitioners' evidence A369).

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(7) Surveys on opinion and statistics towards marriage

(i) Surveys on opinion towards marriage

(a) Surveys on opinion conducted by the Cabinet Office

In the 2005 White Paper on National Lifestyle issued by the Cabinet Office, the most
30 common response on the benefits of marriage was having a family and children (63.5% of married respondents and 58.2% of unmarried respondents), followed by emotional stability (response chosen by 61.9% of married respondents) and being with a loved person (response chosen by 57.7% of unmarried respondents). On the value of "family" most strongly felt when married, married respondents indicated first (68.3%) "a place
35 for family gatherings" and second (57.3%) "a place for rest and comfort". Unmarried

respondents indicated first (55.4%) "a place for rest and comfort", and second (54.9%) "a place for family gatherings" (Plaintiffs' Evidence A232).

In the Survey on Marriage and Family Formation published by the Cabinet Office in 2011, on the question on why people marry, 61.0% responded that it is to be together with a loved person, 44.2% to have a family, and 32.5% to have children. Further, in the 2015 survey report, 70.0% of unmarried persons who were asked why they may want to get married in the future responded that they want to have a family and children, and 68.9% responded that they wanted to marry a loved person (Plaintiffs' Evidences A 233, 234).

(b) Surveys on opinion conducted by the Ministry of Health, Labor and Welfare

In the Annual Health, Labor and Welfare Report, the number of persons who agreed with the idea that because marriage is a personal choice, both marrying and not marrying are fine, increased from 62.7 % in 1992 to 70.9 % in 2009, while those who disagreed decreased from 31.0 % to 28.0 % (Plaintiffs' Evidence A 223).

(c) NHK's attitudes survey

In the Japanese People Attitudes Survey conducted by NHK, the number of persons who responded that it is normal to get married decreased from 45% in 1993 to 27% in 2018, while those who responded that it is not necessary to get married increased from 51% to 68%. The number of persons who responded that it is normal for a married opposite-sex couple to have a child declined from 54% in 1993 to 33% in 2018, while the number of persons who responded that it was not necessary for a married opposite-sex couple to have a child rose from 40% in 1993 to 60% in 2018 (Petitioners' evidence A228).

(d) Attitudes survey conducted by the National Institute of Population and Social Security Research

In the National Survey on Family conducted by the National Institute of Population and Social Security Research ("IPSS"), the number of married women in favor of the idea that a married couple becomes socially recognized only when it bears a child decreased from 35.8% in 2008 to 24.7% in 2018, while the number of married women against the idea decreased from 64.2% to 75.4% in the same period. (Petitioners' evidence A229).

In the survey conducted by IPSS in 2015, 85.7% of unmarried men and 89.3% of

unmarried women (in each case aged 18 to 34; the same applies hereinafter) answered that they intended to marry in due course; 64.7% of men and 58.2% of women were in favor of the idea that remaining single for life is not a desirable way of living and 32.8% of men and 40.2% of women disagreed. In addition, the general trend since 1987 has been that around 60% to 70% of unmarried men and around 70% to 80% of unmarried women feel that there are advantages to being married. As of 2015, the top response on the specific advantage of marriage among both men and women (35.8% of males and 49.8% of females) was to have their own children or families, and the second response (31.1% of males and 28.1% of females) was that it provides a place for mental comfort. Asked for the reason why people have children, 48.4 % of unmarried men and 39.0% of unmarried women responded that getting married and having children are just natural. Further, 75.4% of unmarried men, 67.4% of unmarried women and 66.6% of married women responded that those who get married should have children (Petitioners' evidence A 226, 230).

(ii) Statistics on marriage

(a) Number of marriages and marriage rate

A survey of the Ministry of Health, Labor and Welfare showed that the number of marriages reached 620,531 in 2008 although the number has been declining since a peak of 1.1 million marriage was reached in 1972. The marriage rate (calculated by dividing the total number of marriages by the total population and multiplied by 1000) still exceeded the rates in European countries (excluding Russia and Sweden), although it decreased from approximately 12% in 1947 to 5% in 2016. Statistical data (1920 to 2017) showed that the percentage of children born out of wedlock to the total annual number of births in Japan was at its peak (8.25%) in 1919, at its lowest (0.78%) in 1976 and was 2.23% in 2017 (Petitioners' evidence A224, 227-3).

The percentage of persons having reached the age of 50 without ever having married was 23.4% for male and 14.1% for female in 2015 (Petitioners' evidence A226).

(b) Status of households

A survey by the Ministry of Health, Labor and Welfare showed that the proportion of single households in the total number of all households rose from 18.2% in 1986 to 27.7% in 2018 and that the share of households with a married couple living without children also rose from 14.4% in 1986 to 24.1% in 2018. On the other hand, the share of households with a married couple living with unmarried children decreased from

41.4% in 1986 to 29.1% in 2018 (Petitioners' evidence A225).

2 Whether the provisions violate Article 24, and Article 14.1 of the Constitution (Issue 1)

5 **(1)** The Petitioners argue that Article 24.1 of the Constitution guarantees the freedom of marriage, i.e., the freedom to marry only by consent of the two persons who wish to marry, without interference from the state or a third party and that said freedom of marriage assumes the existence of a legal marriage system which provides protection, approval and public authentication by stipulating legal requirements and effects to perpetual cohabitation based on intimate relationship with another person. The Petitioners argue that such freedom of marriage should be extended to same-sex couples, and the provisions which do not permit marriage between individuals of the same sex impair their personal dignity. Because such impairment of personal dignity cannot be found reasonable or necessary, the provisions also violate Article 24.2 of the

10 Constitution. The Petitioners further argue that, even if the right and interest to seek marriage between individuals of the same sex is not guaranteed by said articles, the right to enjoy the legal benefits arising from marriage is a significant legal interest which cannot be unreasonably discriminated due to sexual orientation or gender without this violating Article 14.1 of the Constitution.

15 On February 3, 2019, the Petitioners submitted a marriage notification which was refused on the 7th (Undisputed Fact (2)) but the Petitioners have also presented facts on the increase in social demand to admit same-sex marriage which take place after said date and said facts are interpreted as an argument on the illegality of the present situation where same-sex marriage is not recognized. The Petitioners can re-submit a marriage notification but it should be assumed that in the present situation said submission would not be accepted. Therefore, considering that an appeal trial is also a trial on facts, it is appropriate to render a judgment on the constitutionality of the provisions based on circumstances up to the conclusion of the oral proceedings in this case.

20 **(2) Whether the provisions violate Article 24.1 of the Constitution**

25 **(i)** Article 24.1 of the Constitution provides that "marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis". This article is interpreted as a clarification that the decision to marry and the decision when and whom to marry

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should be made freely and equally by the parties. The freedom of marriage, as mentioned above, deserves full respect in light of the purposes of Article 24.1 of the Constitution, considering that marital status grants important legal effects, such as spousal inheritance rights (Article 890 of the Civil Code) and the legitimation of children of spouses (Article 772.1, et al.), and that respect for legal marriage is widespread among Japanese nationals, even though public awareness toward families has diversified in recent years. Article 24.2 provides that "with regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes". Matters concerning marriage and family should be determined by making judgments that comprehensively take into account various social factors, including national traditions and public sentiment, and should focus on the overall rules of marital and parental relationships in each period. It is therefore for details to be decided by law rather than being defined uniformly by the Constitution. From this point of view, Article 24.2 delegates the establishment of specific institutions on matters regarding marriage and family first to the reasonable legislative discretion of the Diet but said Article, based on the premises of Article 24.1, also sets out limits to said discretion by stipulating guidelines and the requirement of the dignity of individuals and the essential equality of the two sexes (See Case No. (O)1079 of 2013, judgment of the Grand Bench of the Supreme Court of December 16, 2015, Minshu Vol. 69, No. 8, at 2427 ("Remarriage Prohibition Period Grand Bench Judgment"), Case No. (O) 1023 of 2014, judgment of the Grand Bench of the Supreme Court of December 16, 2015, Minshu Vol. 6, No. 8, at 2586 ("Married Couples Last Name System Grand Bench Judgment").).

Consequently, "marriage" used in Paragraph 1 of the same article should be embodied in the marriage system under the Civil Code, the Family Register Act and other laws through Paragraph 2 of the same article, and it is appropriate to examine whether or not the freedom to marry also extends to same-sex couples from the perspective that the legal marriage system that is embodied by law is required to extend to same-sex couples in light of the purpose of Paragraph 1 of the same article. The Plaintiffs are not disputing the substance of the existing legal marriage system that is embodied by law, but they are rather disputing the applicable scope of the legal marriage system, namely, the applicability of the system to same-sex couples.

(ii) In this respect, Article 24, Paragraph 1 of the Constitution provides that marriage shall

be based only on the mutual consent of “both sexes” and refers to a married couple as “husband and wife,” and the term “both sexes” is also used in Paragraph 2 of the same article. Further, the terms “both sexes” and “husband and wife” are usually used to refer to both men and women, and there are no cases, either in the Constitution or in other laws and regulations, in which these terms are used to also include same-sex couples. In addition, marriage was created as a system to regulate unions between men and women in order to preserve the species. The marriage system has been traditionally regarded as existing to recognize a legitimate union between a man and a woman (*Findings of Fact (2)(i)*). In Japan, a uniform legal marriage system was enforced for the first time under the Meiji Civil Code, under which marriage was regarded as a legal union of a man and a woman for the purpose of life-long cohabitation (*Findings of Fact (2)(ii)(a)*), and marriage of same-sex couples was viewed as invalid as a matter of course (*Findings of Fact (2)(ii)(b)*). Further, there is no indication that, during the drafting process of Article 24 of the Constitution, there was any discussion on whether marriage covers a union of same-sex individuals (*Findings of Fact (2)(iii)(b)*). The term “both sexes” was used in the GHQ’s draft, and the term “both man and woman” was also used in Japan’s draft (*Findings of Fact (2)(iii)(a)*). There is also no indication that, during the process of amending the Civil Code in 1947 to meet the requirements of Article 24 of the Constitution, there was a discussion on whether a union of same-sex individuals is covered by marriage (*Findings of Fact (2)(iv)(b)*).

According to the abovementioned wording of Article 24 of the Constitution and the history of its enactment, and having regard to the purpose of Paragraph 1, it is difficult to conclude that the legal marriage system (as embodied in the Civil Code, Family Register Act and other laws) required application to same-sex couples, at least as at the time Article 24 was enacted.

(iii) In response, the Plaintiffs allege that, in light of the purpose of Article 24, Paragraph 1 of the Constitution, even if (at the time Article 24 was enacted) the legal marriage system (as embodied in laws such as the Civil Code and Family Register Act) did not require application be extended to same-sex couples, a social consciousness that a union of same sex individuals is also covered by “marriage” has been created as a result of subsequent changes in the social situation, and that it is now requested to extend the legal marriage system to same-sex couples.

Certainly, Article 23 of the GHQ’s draft provides that “[m]arriage is ... founded upon mutual consent instead of parental coercion, and maintained through cooperation

instead of male domination. Laws contrary to these principles shall be abolished...” (*Findings of Fact (2)(iii)(a)*), and Article 24, Paragraph 1 of the Constitution provides that “marriage shall be based only on the mutual consent of both sexes.” In these respects, as the Imperial Diet explained during review and discussion that it intended that marriage be solely based on the mutual consent of both sexes, eliminating the requirement of the consent of the head of the household (*koshu*) or an individual’s parents for marriage of a child under a certain age under the Meiji Civil Code (*Findings of Fact (2)(iii)(b)*), it is concluded that this Article was incorporated mainly because the dignity of individuals and the essential equality of the sexes, which are the basic principles of democracy, particularly needed to be established with respect to family life such as marriage, including changing the feudal family system (*ie seido*) and abolishing the right of refusal of the head of household. Further, considering the fact that there is no indication that there was a discussion on whether a union of same-sex couples is covered by “marriage” (*Findings of Fact (2)(iii)(b)*), it cannot be construed to prohibit extension of the existing legal marriage system to same-sex couples in light of the purpose of Article 24, Paragraph 1.

Considering that foreign countries have recently adopted same-sex marriage systems (*Findings of Fact (4)(iii)(a)*), that local governments in Japan have also introduced registered partnership systems (*Findings of Fact (5)(iii)(b)*), and that there are calls for the legislation of same-sex marriage from various organizations (*Findings of Fact (5)(iv)*), it is still necessary to examine whether the understanding at the time of enactment is still regarded as appropriate.

(iv) However, as mentioned in (i) above, matters concerning marriage and family should be judged and determined in a comprehensive manner with due consideration of various social factors such as national traditions and public sentiment, and the overall disciplines that govern marital and parent-child relationships in each historical era. Therefore, “marriage” in Article 24, Paragraph 1 must be examined based on the fact that it is a legal marriage system embodied by law through Paragraph 2 of the same article.

(v) As mentioned in (ii) above, marriage was born as a system that regulates unions between men and women to preserve the species. Marriage has traditionally been regarded as existing to recognize a legitimate union between a man and a woman, but the form of marriage system has varied from time to time and from region to region

depending on the economic, political or moral philosophy of society. It has been regarded as forming, as a living community of a man and a woman, the core of the family through the protection and nurturing of children born between them, and the maintenance of a living community based on a division of labor (*Findings of Fact (2)(i)*).

According to statistical data (1920-2017), the ratio of illegitimate children to the total annual births in Japan was at its highest at 8.25% in 1919, at its lowest at 0.78% in 1976, and at 2.23% even in 2017 (*Findings of Fact (7)(ii)(a)*). Considering this, it is difficult to deny the fact that the legal marriage system, functioning as the core of the family referred to above, has played an important and indispensable role in Japanese society, in which men and women live together, and leave descendants by giving birth to and raising children. Further, though it is pointed out that public awareness for families and the like has diversified in recent years, even in 2015, 70% of respondents answered that they wanted to get married to have a child, and more than 60% said that those who have gotten married should have a child (*Findings of Fact (7)(i)(a)(d)*), which shows that there are still a not insignificant number of people who find the meaning of marriage in giving birth to and raising children.

As described above, marriage has played an important and indispensable role in the lives of a man and a woman who live together and leave descendants by giving birth to and raising children. In light of the fact that there are still a not insignificant number of people who find the meaning of marriage in giving birth to and raising children, it is difficult to see that the marriage system has completely separated from the capacity for natural reproduction, though it is a fact that same-sex marriage systems have been introduced in other countries and that there is also a growing demand for legislation of same-sex marriage in Japan.

- (vi) In addition, according to several opinion surveys conducted by news media and other organizations since 2018, while the majority have been in favor of legally recognizing same-sex marriage, some 20% to 30% were still against the idea (*Findings of Fact (6)(i)(b)*). This indicates that a not insignificant number of people still have objections. In the past, there was a considerable period of time when homosexuality was considered to be a mental disorder by psychologists (*Findings of Fact (1)(ii)(a)* and (*1)(iii)(a)*), and even after this was revised (*Findings of Fact (1)(ii)(b)* and (*1)(iii)(b)*), such thinking may remain to some extent among some people, which affects the formation of the opinions referred to above. However, it is also surmised that these

survey results reflect the traditional view of family that a man and a woman live together and leave descendants by giving birth to and raising children. It cannot be ignored that there are a certain number of those who oppose same-sex marriage.

- 5 **(vii)** Next, looking at the rules of the existing legal marriage system as embodied by law, the Civil Code sets rules about establishment and dissolution of familial relationships to give rise to various rights and obligations associated with marriage, providing: that a marriage becomes valid when applying for marriage registration pursuant to the Family Register Act (Article 739, Paragraph 1); with respect to the legal effect of marriage, the use of the same surname (Article 750) and obligations to live together, cooperate and provide assistance (Article 752); with respect to joint property, the sharing of living expenses (Article 760) and presumption of co-ownership (Article 762, Paragraph 2); with respect to the dissolution of marriage, a divorce system such as division of property (Article 768) and judicial divorce (Article 770); with respect to the parent-child relationship, a presumption of a child's legitimacy (Article 772, Paragraph 1), parental authority (Article 818, Paragraph 3), adoption of a minor by a spouse (Article 795) and joint adoption by a married couple through a special adoption (Article 817-3); with respect to relatives, affinity of up to the third degree (Article 725, Item 3) and a duty of support between relatives of such affinity (Article 877, Paragraph 2); and with respect to inheritance between spouses, a right of inheritance (Article 890), intestate shares (Article 900), a right of residence (Article 1028), a right of short-term residence (Article 1037) and statutory reserved shares (Article 1042). The Family Register Act legitimizes familial relationships, providing: the creation of a new family register upon notification of marriage (Article 16); entry of a child or a adopted child into his/her parents' or adopted parents' family register (Article 18); statement in a family register that a person is another's husband or wife (Article 13, Item 6); statement in a family register of the names of a child's birth or adopted parents and his/her relationship with those parents (Items 4 and 5 of the same article); retention of originals and duplicate copies of family registers by city offices, legal affairs bureaus and the like (Article 8); and procedure for applying for a transcript of a family register or a certificate of registered matters (Article 10 and thereafter). The legal effects of marriage include, in addition to those prescribed in the Civil Code referred to above, many other effects granted based on various social policy decisions, such as tax- and social security-related systems.

These provisions include the presumption of a child's legitimacy (Article 772 of the Civil Code), and the Civil Code established a system for quickly determining the relationship between a father and a child who is born between a man and a woman in a marital relationship, so as to stabilize family life. It does this by, for instance, restricting the means of rebutting the presumption that a child is legitimate (Article 775), restricting the statutory limitation period (Article 777), and setting a period during which remarriage is prohibited (Article 733). Given the existence of these provisions in establishing the legal marriage system, it is considered that at least one of the Civil Code's purposes is to stabilize the union between a man and a woman with reproduction of descendants and family relationships based thereon. Further, the provisions prohibiting remarriage for a set period (Articles 733 and 746) were amended after a 2015 judgment of the Grand Bench of the Supreme Court ruling them to be unconstitutional. In making that judgment, however, the Court presupposed the existence of a set of provisions concerning the presumption of a child's legitimacy, meaning that such provisions have therefore yet to lose their value. It is also noted that, in Japan, since the days of the former Civil Code, the inability to reproduce has never been considered as a cause for impediment to marriage, and should not be regarded as an obstacle to the above evaluation. That is to say, according to professional opinions given in the course of drafting the former Civil Code, the reason why an inability to reproduce was not such an impediment was simply that the ability to reproduce was not considered to be an absolutely essential condition for marriage (*Findings of Fact (2)(ii)(b)*), notwithstanding that one of the purposes of marriage includes reproduction. In addition, also under other provisions, various legal effects of marriage are expected to be brought about in an integrated fashion, which include not only those bringing about rights and obligations formed only between the parties, such as the duty to live together, cooperate and provide assistance, but also those affecting the status, rights and obligations of third parties, such as rules of parent-child relationships including the adoption system and the occurrence of kinship, as well as matters related to rights and obligations granted by various social policy decisions. If this is so, then to expand the scope of personal unions currently covered by the legal marriage system is not simply a question of how to regulate issues between the married parties themselves; it would further concern the third parties directly affected by this and potentially be an opportunity to reconsider the entire system altogether, which has until now been built upon the premise that marriage is between persons of the opposite sex. This would

have wide-ranging effects on society and an inevitable impact on the framework of the entire existing legal marriage system.

5 **(viii)** Further, opening up the existing legal marriage system is not necessarily the only way to establish an appropriate system of protection for same-sex couples incapable of natural reproduction. It would be possible, as a matter of legislative policy, to separately establish special rules for such couples.

10 For example, even in countries in which same-sex marriage is accepted, there are cases where a partnership system or similar is first introduced, which then either changes into a same-sex marriage system later or continues to co-exist with the same-sex marriage system (*Findings of Fact (4)(iii)(b)*). In Italy, the marriage system does not currently apply to same-sex couples, and “rules providing for a civil union between same-sex couples and the regulation of their cohabitation” were instead established to offer protection in a form other than marriage (*Findings of Fact (4)(ii)(c)*). In countries
15 where same-sex marriage is accepted, there are examples of legislation which treats same-sex and opposite-sex couples differently with respect to the presumption of a child’s legitimacy and assisted reproduction technologies (Spain, Netherlands and France). There are also examples of legislation giving religious figures the right to refuse wedding services to same-sex couples (Denmark, Canada, South Africa,
20 Norway, among others), and legislation imposing a staged process for adopting a child (Netherlands, Belgium and Portugal) (*Findings of Fact (4)(iii)(b)*). The details of the marriage system may vary depending on each country’s traditions and religious background, and the legislative examples of other countries are not always immediately applicable to the marriage system in Japan. However, the various
25 legislative measures taken in each country support the fact that expanding the existing legal marriage system to same-sex couples is not the only way to offer protection.

30 **(ix)** It can certainly be said that public awareness is shifting to support for same-sex marriage, and that it is not prohibited to extend the existing legal marriage system to same-sex couples in light of the purpose of Article 24, Paragraph 1 of the Constitution. However, as detailed in (v) and (vii) above, the marriage system has traditionally been based on unions between men and women, and in understanding the purpose of the marriage system, the system cannot still be said to be completely separated from the capacity for natural reproduction (see (v) above). Further, there is still a certain
35 percentage of people who emphasize the traditional system and values (see (vi) above),

and expanding the applicable scope of the existing legal marriage system embodied by law may have an impact on people other than couples who are party to the marriage and those otherwise subject to the existing marriage system (see (vii) above). It is therefore difficult to say that, despite these circumstances, the Constitution now primarily demands that the existing legal marriage system extend to same-sex couples and excludes the possibility of some other method for protecting such couples.

(x) The Plaintiffs allege that Article 24, Paragraph 1 of the Constitution does not intend to offer a separate form of protection, since as a result of establishing special rules separately from the existing legal marriage system to protect a union between same-sex individuals, same-sex couples and opposite-sex couples would be treated differently.

However, putting aside the individual characteristics of each person, it is difficult to deny that the ability to naturally reproduce is a point of distinction between the general categories of same-sex and opposite-sex couples. As mentioned in (v) above, it cannot be ignored that in Japan, marriage has played an important and indispensable role in the lives of men and women who live together and who leave descendants by giving birth to and raising children, and that there are still a not insignificant number of people who find this to be the meaning of marriage. It cannot therefore be concluded that the Constitution absolutely prohibits distinction on this basis such that extending the legal marriage system to same-sex couples is the only option. One would expect there are still issues worth examining, such as whether to make the existing legal marriage system fully coincide with the resulting effect, whether to establish special separate rules and allow for differences upon scrutinizing each effect generated, and what the system should be called where some difference is allowed (whether it is referred to as marriage or not). Even if special rules are established by law, the social situation as well as the awareness of the entire people including same-sex couples will change over time depending on the outcome thereof and thereafter, and a law once enacted should not necessarily be regarded as the only absolute one; it should be continuously examined and might be expected to be considered with a view to future amendments.

(xi) Accordingly, it is still difficult at this point to conclude that extending the existing legal marriage system to same-sex couples is required in light of the purpose of Article 24, Paragraph 1 of the Constitution. Therefore, the freedom of marriage is not deemed to extend to same-sex couples, and the Provisions, which do not allow same-sex marriage,

cannot be said to violate Article 24, Paragraph 1.

(3) Whether the Provisions violate Article 24, Paragraph 2 of the Constitution

(i) As described in (2) above, in light of the purpose of Article 24, Paragraph 1 of the Constitution, it is neither prohibited nor required to extend the existing legal marriage system to same-sex couples. Paragraph 2 can be viewed as a provision entrusting the implementation of this legal marriage system to the Diet's reasonable legislative discretion on the basis of Paragraph 1, and providing the requirements and guidelines for achieving this. It is therefore consistent with Paragraph 1 to conclude that Paragraph 2 does not require that the existing legal marriage system apply to same-sex couples, and that the Provisions do not violate Paragraph 2 by refusing to allow such application.

(ii) By the way, the Plaintiffs argue that the right to enjoy various legal interests arising from marriage is a serious legal interest, even if the rights and interests to seek marriage between the individuals of the same sex are not within the scope guaranteed by Article 24 of the Constitution, and that this is a violation of Article 14, Paragraph 1 of the Constitution if they are unreasonably discriminated against due to sexual orientation or gender. The court understands that the Plaintiffs argue it is a violation of grave legal interests that they are not guaranteed the right to enjoy various legal interests arising from marriage, and that it does not mean to deny that this should be considered in relation to Article 24 of the Constitution. In particular, in cases where the equality of the legal system concerning families is a problem, even if how to understand the relationship between Article 14, Paragraph 1 and Article 24, Paragraph 2 of the Constitution is a matter of divergent views, it cannot be denied that there is a overlap between the legal interests that the two clauses attempted to protect, and therefore the unconstitutionality of the inability to enjoy the grave legal interests claimed by the Plaintiffs can also be a problem under Article 24, Paragraph 2 of the Constitution.

The outline of the current legal marriage system embodied by the law is as shown in (2)(vii) above, which establishes the status relationship between the parties and their relatives, notarizes the status relationship by the family register system, and creates various rights and obligations between the parties and other third parties by law under the Civil Code and other laws. In addition, marriage is not limited to such legal effects, but as factual effects, the use of the marriage system produces not only social effects such as the formation of social trust and the gaining of confidence, but also the psychological effects of being in such a position. Opposite-sex couples can enjoy,

under the legal marriage system, a variety of legal and factual effects together, by meeting the prescribed requirements.

On the other hand, because the Provisions do not allow same-sex couples to use the legal marriage system and there are no other laws or provisions that allow same-sex couples to use the legal marriage system, same-sex couples are unable to enjoy various legal and factual effects under the legal system, and there is a significant divergence between same-sex couples and opposite-sex couples. Other than having no possibility of natural reproduction, same-sex couples have no difference from opposite-sex couples in that they can live together with a lasting relationship based on intimacy (*the Plaintiffs themselves, the entire import of oral arguments*), and according to the knowledge of the current medical psychology, it is said that sexual orientation and gender identity are determined in most cases in the early stage of life or before birth and cannot be changed by their own intention or psychiatric therapy (*Findings of fact (I)(i)*) and it is necessary to examine whether the fact that same-sex couples are placed in the above-mentioned state is constitutionally endorsed or not.

In addition to marriage, Article 24, Paragraph 2 of the Constitution calls for the enactment of legislative based on individual dignity and the essential equality of the sexes with regard to “families.” The concept of family is neither defined in the Constitution nor in the Civil Code, and its outer edge is not clear, and it is ambiguous in terms of socially accepted ideas. As mentioned above, even in same-sex couples, since it is no different from the opposite-sex couples in that they can form a living community with a lasting nature based on close relationships, it should be sufficiently possible to consider the relationship between same-sex couples as a matter of family. The said paragraph uses the phrase “the essential equality of the sexes” However, with regard to the issue of the family, for example, if the pros and cons of the revival of the system of inheritance of the head of the family are taken into consideration, equality not only between the two sexes but also between two of the same sex can be a problem, and it can be construed that the said paragraph can be understood to be regulated, including the issue of the family in which both sexes are not necessarily involved, without the need to read the words as “both parties.”

In the following, the Court will examine whether the fact that same-sex couples are in the above-mentioned state violates Article 24, Paragraph 2 of the Constitution as a matter regarding “family.”

(iii) As seen in (2)(i) above, Article 24, Paragraph 2 of the Constitution stipulates that “with

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

As matters concerning marriage and family are embodied in the relevant legal systems,
5 the designing of such legal system has important implications. In this context, it can be said that Article 24, Paragraph 2 of the Constitution primarily entrusts the Diet with the reasonable legislative discretion to establish a specific system and defines the limitation of its discretion with a demand and provides guidelines that the legislation should be based on individual dignity and the essential equality of the sexes, based on Paragraph
10 1 of the same article.

Furthermore, in light of the fact that Article 24 of the Constitution clearly and intentionally states the legislative demand and guidelines for legislative action to be carried out by considering various elements in substance, the requirements and guidelines do not merely require that legislation should not infringe on the personal
15 rights guaranteed as constitutional rights, and it is not sufficient that legislation that secures the formal equality of both sexes is enacted. Therefore, that article calls for the enactment of legislation with due consideration to respect personal interests, which may not be directly guaranteed under the Constitution, to ensure the substantial equality of both sexes, and to avoid factual unreasonable prohibition of marriage due
20 to structure of the marriage system. In this respect, the guidelines provided to the legislature are limited.

On the other hand, matters concerning marriage and family should be determined by a comprehensive judgement of the overall norms of the marital and parent-child relationship in each historical era, taking into account various factors in society,
25 including national traditions and national sentiments. In particular, personal interests and substantial equality that cannot be considered to be directly guaranteed under the Constitution can be diverse in their content, and their realization should be determined in relation to social circumstances, the living conditions of people and the circumstances surrounding family life at the relevant times.

In such case, as discussed above, considering that the decision and determination of
30 what legislative measures should be established, responding to the demand and guideline of Article 24 of the Constitution, are entrusted to the consideration and judgement of the Diet, whether or not the provisions of the law which provide for the legal system concerning marriage and family conform with Article 24 of the
35 Constitution, and whether or not the provisions are unreasonable in light of the

requirements of individual dignity and essential equality of the sexes and are beyond the scope of the Diet's legislative discretion, should be judged from the viewpoint of examining the purpose of the legal system and the impact of adopting the system (*Grand Bench Judgment on the Same Last Name System of Husband and Wife*).

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(iv) As mentioned in (iii) above, Article 24, Paragraph 2 of the Constitution calls for the enactment of legislation with due consideration to respect also such personal interests that cannot be deemed as rights directly guaranteed under the Constitution as well.

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As mentioned in (2)(i) above, Paragraph 1 of the said article is interpreted as a clarification that the decision on whether to marry, when to marry, and whom to marry should be left to the parties who will be married and based on the principles of free will and equality, and freedom to marry in this way deserves full respect in the light of the intent of the said paragraph. (See *the Grand Bench Judgment on the Period of Prohibition of Remarriage*.)

15

The freedom to marry as mentioned above is construed to be the freedom to use the legal marriage system embodied by the law through Paragraph 2 of Article 24. The reason why the freedom to use such system should be fully respected is that the essence of marriage is that in which both parties live a communal life with a sincere intention of lasting mental and physical union, and the legal marriage system recognizes this essence as important value, and attempted to embody, realize and protect this essential value. This essential human activity is thought to have arisen spontaneously in history even before the legal marriage system was established. Therefore, it can be said that the value, based on which the freedom to use the legal marriage system is construed to deserve full respect, is derived from human dignity and is an important personal interest.

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As described above, the legal marriage system, which was institutionalized to realize such important personal interest, creates a family relationship between the parties to the marriage, publicly certifies such relationship, and grants a variety of legal benefits suitable to protect it on the condition that parties are in such relationship, and also confers various factual benefits. In light of the fact that human beings are social beings and social approval is indispensable for their personal survival, it is especially important among the above-mentioned various benefits and indispensable that the relationship being approved socially as legitimate in order for the parties to live a stable and lasting communal life. That should be the reason that the legal marriage system is tied to a system that publicly approves, notifies and certifies the family relationship, as well as it has a function to grants various benefits.

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If this is the case, it can be construed that, in order to realize the important personal interest of living together with a sincere intention of lasting mental and physical union, the interest to be provided with the framework in which the relationship is publicly certified as legitimate and the parties are able to receive benefits suitable for protecting their relationship is extremely important, and merely not preventing the parties from living together should be considered insufficient. Such social approval can be given by various means, and there were various forms and customs in history. In light of the fact that in Japan, the nationally unified and uniform family register system has been long in place at national level, and that there is still a widespread sense of respect for legal marriage among the public, it can be understood that public certification through a unified system run by the State is an effective means to obtain social approval as a legitimate relationship.

It is construed that the interest to be provided with the framework in which the relationship between the parties are publicly certified by a national system and the suitable benefits to protect their relationship is granted is an important personal interest to be respected pursuant to Article 24, Paragraph 2 of the Constitution.

However, same-sex couples do not enjoy such important personal interest under the current the system.

(v) As mentioned in (iii) above, in order to examine the conformity with Article 24 of the Constitution, it is necessary to examine the import of the current legal system on “family” embodied in the Provisions.

As we have seen, the family has historically been regarded to play a central role in protecting and nurturing children born between men and women through their joint relationship (marriage). Even at the time of the enactment of the Provisions, this traditional view of the family was dominant. In light of the social situation that followed, the possibility of natural reproduction is still not completely separated from the understanding of the marriage system. Considering that a certain proportion of the people put an emphasis on the traditional view of the family, it is rational to establish a framework for notarizing and protecting a community of life of men and women by a legal marriage system.

However, it can be construed that the essence of marriage is to live a communal life with sincere intention of permanent mental and physical union. Even in the drafting process of the Old Civil Code when the traditional view of the family was dominant, it had been understood that the harmony of the minds was the nature of marriage, and

the inability to reproduce was not listed as an obstacle to marriage (*Findings of fact (2)(ii)(b)*). As such, it was understood that the significance of marriage was not merely in reproduction and the protection and nurturing of children, but to establish a permanent community based on intimate relationships had an extremely important significance for fulfillment of life. And it should be possible for same-sex couples to form such a community on the basis of such close relationships.

In recent years, the diversification of families has been pointed out. The ratio of single households in the total number of households rose from 18.2% in 1986 to 27.7% as of the end of 1998. The ratio of couple-only households also rose from 14.4% in 1986 to 24.1%. On the other hand, the share of households with married couples with unmarried child(ren) declined from 41.4% in 1986 to 29.1% (*Findings of fact (7)(ii)(b)*), indicating that the traditional view of the family to protect and nurture children born from unions between men and women is no longer absolute.

In addition, it is acknowledged that the view that homosexuality is a psychopathology was denied in the latter half of the 20th century, and that the view that sexual orientation itself is not a disorder was established (*Findings of fact (1)(ii)(b)*).

Furthermore, according to the *Findings of fact (3)* above, various international organizations have been engaged in activities to protect the rights of sexual minorities since the latter half of the 20th century. Among these activities were to confer the right to receive the survivor's benefits granted to opposite-sex couples to same-sex couples (*Findings of fact (3)(i)(a) and (b)*), as well as recommendations to legally recognize same-sex couples and their children and to grant legal interests accorded to same-sex couples without discrimination (*Findings of fact (3)(ii)(a)*), and declaration that they have the right to form a family regardless of sexual orientation and gender identity (*Findings of fact (3)(iii)*).

In addition, after the introduction of the Registered Partnership System by Denmark in 1989, a system to notarize same-sex couples (Registered Partnership System, Etc.) was introduced in various countries around the world (*Findings of fact (4)(a)(b)*), and in 2000, the Netherlands introduced the same-sex marriage system for the first time in the world, and 28 countries have introduced the same-sex marriage system as far as can be confirmed by evidence (*Findings of fact (4)(iii)*).

In Japan, too, the need to solve human rights issues related to homosexual people has been pointed out since around 2000 (*Findings of fact (5)(iii)(a)*). In April 2015, a registered partnership system was introduced for the first time by a local government. As of January 2022, 147 municipalities had introduced this system, and since April

2020, some local governments have begun to make efforts to grant marriage leave to ward officials with same-sex partners (*Findings of fact (5)(iii)(b)*).

In addition, at the national level, following recommendations received from convention bodies of the United Nations since 2008 (*Findings of Fact (3)(i)(c) and (ii)(b)*), since 2002¹, awareness campaigns aimed at abolishing prejudice against sexual minorities were undertaken (*Findings of Fact (5)(i)(a)*) and a law allowing a change in gender status in the family register for persons with gender identity disorder was enacted (*Findings of Fact (5)(i)(b)*). Furthermore, in 2017, recommendations were made by certain foreign countries regarding the expansion of the official recognition of same-sex marriage to the national level and other measures (*Findings of Fact (3)(ii)(b)*), and since then, local governments and various organizations have issued statements calling for marriage between same-sex individuals (*Findings of Fact (5)(iii)(c) and (iv)(d)*).

As mentioned above, efforts towards the legal protection of same-sex couples have increased worldwide, and in our country, in addition to the establishment of a Registered Partnership System by many local governments and rising calls for the enactment of legislation at the national level, some private companies have also undertaken efforts to provide same-sex couples with family allowances, etc. (*Findings of Fact (5)(iv)(a)*). Furthermore, since 2018, public surveys on the legal acceptance of same-sex marriage have shown that the number of those in favor exceeded those in opposition, including survey results where those in favor reached approximately 65% and, in a survey targeting a relatively young generation in their 20s through 50s, where 70% of male respondents and just under 90% of female respondents were among those in favor (*Findings of Fact (6)(i)(b)*).

Based on the foregoing, the traditional view of the family with the personal union between a man and a woman at its core is no longer the single absolute view as a form of a family, and along with the rejection of the perception that homosexuality is a psychopathological condition, the establishment of concrete protections for same-sex couples has been realized on a global scale and, even in our country, it can be said that the understanding of same-sex couples has progressed and the trend towards approval thereof has accelerated. Accordingly, even if the current legal marriage system under the existing legal framework regarding families may, by itself, appear reasonable, as a

¹ **Translator's note:** We have preserved the substance of the original Japanese, although this “平成 14 年以降” is likely to be a typo or misplaced (as it is not consistent with the lead-in, “2008 年以降”).

result of the change in understanding of values which must be emphasized in connection therewith, there exist doubts that those who are able to enjoy its benefit has become limited in scope and as a result, it must be noted that the large disparity caused by the removal of homosexual persons from the legal marriage system and the lack of any measures addressing this disparity has called such reasonableness into question, and we view this situation as one that can no longer be ignored.

(vi) As mentioned in (iii) above, in order to examine the compliance with Article 24 of the Constitution, it is also necessary to examine the effect of the adoption of the current legal marriage system embodied in the Provisions.

Compared to opposite-sex couples, homosexual couples face disparities due to the lack of access to a framework in which the relationship of the individuals is certified by a national system and which affords appropriate benefits to protect that relationship. Further, the value of being able to use such a framework is not only derived from the value conferred by law, but also from the material moral interest based on human dignity. For same-sex couples seeking to live communally with an honest intention of a permanent mental and physical union, the disadvantage suffered as a result of not being conferred the individual legal effects associated with marriage and the lack of access to a framework in which their relationship is certified by a national system and which affords appropriate benefits to protect that relationship is significant. This is supported by survey results showing that, among sexual minorities who were asked why they wished to apply for a marriage-equivalent certificate, more than half of all respondents responded “as a first step to be legally recognized as a family” (*Findings of Fact (6)(ii)(a)*).

It is true that, even for same-sex couples, as in the case of the Plaintiffs, it is possible to obtain, to a certain degree, the same effect as in the case of opposite-sex couples through legal acts such as a contract or will, including entering into a formal marriage contract. However, this does not sufficiently cover everything, and while the conferring of individual legal effects is important, access to a framework in which the relationship between same-sex couples is certified by a national system and which affords appropriate benefits to protect that relationship is above all important, and therefore this cannot resolve such disadvantage.

Although the size of the LGBT population in Japan is not necessarily clear, studies conducted in 2015 and 2016 indicated 4.9% to 7.6% (*Undisputed Fact (1)*), and can be estimated to be at least in the millions of people. According to medical psychological

findings, sexual orientation is determined in most cases at the beginning of life or before birth and does not change based on one's own choice or psychiatric therapy (*Undisputed Fact (1)(i)*). Given that sexual orientation is thought to be an inherent characteristic and does not change depending on the environment, and that there are no findings available that the size of the LGBT population has actually increased drastically in recent years, it can be surmised that the LGBT population was of a considerable size even at the time of the establishment of the current legal marriage system, and while this was prior to advances in medical psychological findings and changes in social awareness, the above framework of protections was not made available to a not small number of same-sex couples for an extended period of 70 years or more.

Viewing the disadvantages suffered by same-sex couples in this way, they are disallowed the benefit of material moral interests and, moreover, the overall extent and length is significant. Therefore, the effect of the current legal marriage system being adopted while same-sex couples enjoy no protection is severe.

(vii) On the other hand, as mentioned in (iii) above, matters concerning marriage and the family should be determined holistically based on the overall discipline of spousal and parent-child relationships under social conditions (including national customs and public sentiment).

However, even if same-sex couples are certified by a national system, it is difficult to imagine any specific disadvantage suffered by the public at large. In fact, there has been a steady increase in the number of local governments introducing a Registered Partnership System since the initial establishment of the Registered Partnership System (*Findings of Fact (5)(iii)(b)*), but there is no evidence that this has caused any harm, and this can in turn be seen as evidence that there is a growing momentum among the public to approve same-sex couples. While there are a certain number of people who value the traditional view of the family in which the marriage system is at the core of the union between a man and a woman and plays a role in protecting and nurturing children born between them and this position should be respected, certifying same-sex couples under a national system would not result in immediately rejecting this position and it must be possible to export a path to coexistence.

In addition, although the current legal marriage system has a wide range of effects, even with respect to the essential effects that should be granted to a communal unit based on an intimate relationship (such as co-habitation, the obligation of cooperation

and assistance, and the need for a divorce proceeding upon the dissolution of a relationship), there are few that are basically contained between the parties, and it is difficult to conceive of any specific harms that may arise if such legal effects were granted to same-sex couples.

5 Also, the fact that the effects conferred by marriage can be realized to a certain extent through legal acts (such as a contract or will) can be understood to mean that the law does not recognize any harm in granting such effects to same-sex couples.

To be sure, among the effects that should be granted to marriage, there are matters affecting the rights and obligations of third parties as well as matters relating to the rights and obligations conferred due to various social policy decisions. Some of these effects, if conferred on same-sex couples, may directly affect third parties or affect existing heterosexual marriages and therefore, whether such effects should be conferred on same-sex couples should be carefully deliberated in the democratic process, and as we have seen, the legislative background and legislative contents of foreign countries are not uniform.

15 However, even if an effect of such a nature is included, it should not be denied that a certified relationship should be given the framework for granting such effects as are appropriate for protecting the relationship.

Then, it can be construed that there is a difference in the scope of legislative discretion between ensuring that same-sex couples do not have a framework for certifying their relationship through a national system and being afforded appropriate benefits to protect that relationship, and considering and deciding what effects should be granted while recognizing their existence and reconciling with various positions and other interests.

25 **(viii)** According to the above, the Provisions establish the current legal marriage system only between those of the opposite sex, and by so limiting its scope, are denying to those of the same sex a framework in which the relationship of the individuals is certified by a national system and which affords appropriate benefits to protect that relationship. However, with changes in public awareness regarding the essence of the marriage system, questions are being raised regarding the complete exclusion of same-sex couples from enjoying the material moral interests afforded under the legal marriage system. Given that it is difficult to sufficiently conceive any specific opposing interests that would justify such state of total denial despite the fact that, cumulatively, a large number of same-sex couples have been prevented from enjoying such material moral

interests over a long period of time, even if the determination as to what benefits should be provided to protect same-sex couple relationships should ultimately be delegated to the Diet's discretion based holistically on the overall discipline of the spousal and parent-child relationship under social conditions (including national customs and public sentiment), to continue to leave the above state as is can no longer be said to be reasonable in light of the requirements of an individual's dignity and should be regarded as going beyond the scope of the Diet's legislative discretion.

Therefore, to the extent that the Provisions do not provide a framework for same-sex couples in which their relationship is certified by a national system and which affords appropriate benefits to protect their relationship, the Provisions violate Article 24, Paragraph 2 of the Constitution.

(4) Whether Article 14, Paragraph 1 of the Constitution is violated

(i) Article 14, Paragraph 1 of the Constitution provides for equality under the law, and this provision should be construed to prohibit legal discriminatory treatment unless it is on reasonable grounds in accordance with the nature of the matter (*case number 1962 (O) 1472, Supreme Court Grand Bench judgement of May 27, 1964, Minshu Vol. 18, No. 4, p. 676, case number 1970 (A) 1310, Supreme Court Grand Bench judgement of April 4, 1973, Keishu Vol. 27, No. 3, p. 265, etc.*).

Further, as mentioned in (2)(i) and (3)(iii) above, Article 24, Paragraph 1 of the Constitution has been interpreted to make clear the intent that whether to marry and when and whom to marry should be left to the free and equal decision of the individual parties, and in light of the intent of this provision, such freedom of marriage should be fully respected, while Article 24, Paragraph 2 delegates the establishment of a specific system regarding marriage and the family to the reasonable legislative discretion of the Diet 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 (*see Grand Bench Judgement on the Period of Prohibition of Remarriage, Grand Bench Judgement on the Same Last Name System of Husband and Wife*).

Therefore, with respect to the 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, Paragraph 1 of the Constitution if there are no reasonable grounds for such treatment (*see case number 2012 (Ku) 984 and 985, Supreme Court Grand Bench of September*

4, 2013, *Minshu Vol. 67, No. 6, p. 1320*).²

(ii) The Plaintiffs argue that, by allowing the marriage of individuals who wish to marry the opposite sex (heterosexual couples) and disallowing the marriage of individuals who wish to marry the same sex (homosexual couples), the Provisions result in differential treatment of those that wish to marry based on their sexual orientation. The Defendant argues that the Provisions are not intended to create a distinction focusing on sexual orientation per se, but rather is neutral with respect to sexual orientation, and that the differential treatment argued by the Plaintiffs is only a de facto or indirect consequence arising from the application of the Provision.

In this respect, the Provisions do not treat differently in the sense that both heterosexual and homosexual individuals can marry a person of the opposite sex, however, given that the essence of marriage is for both individuals to live communally with an honest intention of a permanent mental and physical union, it can be regarded as a marriage in the true sense only if the marriage is between individuals with compatible sexual orientation. Therefore, even if marriage between individuals with incompatible sexual orientation is recognized, in the case of homosexual persons this would be synonymous with the marriage not being recognized (similarly, there would be no meaning if heterosexual persons are only permitted to marry persons of the same sex), and for homosexual persons the fact that marriage with persons of the same sex is not permitted means nothing other than differential treatment based on sexual orientation. Accordingly, the Plaintiffs' argument can be accepted, and the Defendant's opposing argument is denied.

Consequently, as a legislation relating to marriage and the family, the Provisions impose a direct restriction on marriage based on sexual orientation, which in most cases is an inherent characteristic over which a person has no choice to select or modify, and it is necessary to consider the existence or absence of reasonable grounds for such restriction by fully taking into account the nature of the matters mentioned above.

(iii) In light of the nature of such matters, on the issue of whether or not the scope of the Diet's legislative discretion should be regarded as having been exceeded, as already considered, to the extent that the Provisions deny to same-sex couples a framework in which the relationship of the individuals is certified by a national system and which

² **Translator's note to reviewer:** This paragraph is the same as the corresponding language in the Tokyo decision and we have conformed the translation accordingly.

affords appropriate benefits to protect that relationship, it can be said this would apply here, and to that extent the Provisions must be said to violate both Article 24, Paragraph 2 of the Constitution and Article 14, Paragraph 1 of the Constitution.

5 **3 Whether the failure to amend or repeal the Provisions is illegal under the State Redress Act (Issue 2)**

10 **(1)** Article 1, Paragraph 1 of the State Redress Act provides that the national government or a public entity shall be liable for any damage incurred as a result of a public official exercising the public authority of the national government or of a public entity in violation of a legal obligation in the course of his/her duties owed to an individual citizen. Whether legislation or omission by a member of the Diet is illegal in the application of this clause is a question of whether or not action taken by a member of the Diet during the legislative process has violated the legal obligations owed to individual citizens, and should be distinguished from the issue of the constitutionality of the legislation. In principle, the evaluation of the above-mentioned actions should be left to the political judgement of the people, and even if the contents of the legislation violate the provisions of the Constitution, legislative acts or legislative omissions of Diet members are not immediately deemed to be illegal for the purpose of applying Article 1, Paragraph 1 of the State Redress Act.³

15 However, in cases where the Diet fails to enact legislative measures, such as revision or abolishment, for a long period of time without justification, despite the fact that it is clear that the provisions of the law are unconstitutional in that it restricts the rights and interests guaranteed or protected under the Constitution without reasonable grounds, such legislative omission is an exception because the Diet members' actions in the legislative process violated the above- mentioned legal obligation in the performance of their duties, and such legislative omission is subject to Article 1, Paragraph 1 of the State Redress Act (*see case number 1978 (O) No. 1240, Supreme Court, First Petty Bench of judgement of November 21, 1985, Minshu Vol. 39, No. 7, p. 1512, case numbers 2001 (Gyo-Tsu) No. 82 and 83 and 2001 (Gyo-Hi) 76 and 77, Supreme Court, Grand Bench judgment of September 14, 2005, Minshu, Vol. 59, No. 7, p. 2087, Grand Bench Judgment on the Period of Prohibition of Remarriage*).⁴

³ **Translator's note to reviewer:** This paragraph is the same as the corresponding language in the Tokyo decision and we have conformed the translation accordingly.

⁴ **Translator's note to reviewer:** This paragraph is the same as the corresponding language in the Tokyo

As mentioned in 2 above, to the extent that the Provisions do not provide a framework for same-sex couples in which their relationship is certified by a national system and which affords appropriate benefits to protect their relationship, the Provisions violate Article 24, Paragraph 2 and Article 14, Paragraph 1 of the Constitution. Accordingly, we consider below whether, despite the Provisions violating the Constitution to such extent, the failure of Diet members to take legislative measures such as amending or repealing the State Redress Act constitutes, as an exception to the general rule, a violation of the application of the provisions of Article 1, Paragraph 1 of the State Redress Act.

(2) In this respect, viewing the trends of international organizations, although in 1994 the Human Rights Committee issued a decision to the effect that legislation punishing sexual intercourse between men violated the ICCPR (*Findings of Fact (3)(1)(a)*), the first time it was made clear that a framework to publicly certify same-sex couples and provide certain benefits arising therefrom were necessary was when the Yogyakarta Principles were adopted in November 2006 pursuant to which the right to form a family, irrespective of sexual orientation and sexual identity, was declared (*Findings of Fact (3)(iii)*). Although in 2008, specific recommendations regarding human rights issues of sexual minorities had been made by the Human Rights Committee and the UPR, these merely pointed out issues such as the exclusion of same-sex couples and sought measures to eliminate discrimination on the basis of sexual orientation and gender identity from the Public Housing Act and the Act on the Prevention of Spousal Violence and the Protection of Victims (*Findings of Fact (3)(i)*), and the first time the above framework was recommended as being necessary was in 2017, during the course of the third cycle of UPR, when Switzerland, Canada and others indicated that it was necessary that the above framework extends official recognition of same-sex marriage etc. to the national level (*Findings of Fact (3)(b)*).

In addition, although Denmark established a Registered Partnership System in 1989, it can be recognized that it was only since around 2000 when Registered Partnership Systems and Other Systems and same-sex marriage systems spread globally (*Findings of Fact (4)(i)(a) and (iii)(a)*), and in Japan, a Registered Partnership System was established for the first time by a local government in April 2015 (*Findings of Fact (5)(iii)(b)*). It was not until around 2016 and thereafter that local governments, private

decision and we have conformed the translation accordingly.

companies and various organizations made recommendations to the national government that a framework for the public certification of same-sex couples and the provision of legal benefits thereunder were necessary (*Findings of Fact (5)(iii) and (iv)*), and it was only in June 2019 that a specific bill was submitted to the Diet (*Findings of Fact (5)(ii)*).

(3) According to (2) above, it is relatively recent that the necessity of notarization for same-sex couples and the framework for granting the effect based on it has come to be recognized specifically in our country. Regarding the matters related to marriage and family, the establishment of a specific system is primarily left to the reasonable legislative discretion of the Diet. However, there is a traditional view that the male-female bonding relationship is responsible for protecting and fostering children born between them, and this view has not been lost even today. In light of the fact that the 2020 opinion poll demonstrated that there are a certain number of opponents same-sex marriage, it is not possible to conclude that the Diet has neglected the legislative measures such as revision and abolition of legislation, for a long period without justifiable reasons even though that the Provisions clearly violate Articles 24, Paragraph 2, and Article 14, Paragraph 1 of the Constitution.

(4) Therefore, the failure to revise or abolish the Provision cannot be deemed that the actions of Diet members in the legislative process are a violation of the legal obligation and is not deemed to be illegal for the application of Article 1, Paragraph 1 of the State Redress Act.

IV. Conclusion

Therefore, the Plaintiffs' claims are groundless without making a determination on the other points at this case, and therefore, the judgment is rendered to dismiss the Plaintiffs' claims in the form of the main text.

Eighth Civil Department, Nagoya District Court

Presiding Judge Justice Osamu Nishimura

Judge Kouhei Fujine

Judge Masanari Hayagawa is unable to sign and seal due to his transfer.

5

Presiding Judge Justice Osamu Nishimura

Exhibit 1

List of parties

[Japanese original redacted]

5 Plaintiff [Japanese original redacted]

The same place

Plaintiff [Japanese original redacted]

Attorney representing the aforesaid two parties

Akiko Yazaki

Same as above

Tetsushi Horie

10 Same as above

Asato Yamada

Sub-agent attorney

Kazuki Shindo

Same as above

Kaoru Sunahara

Same as above

Yoko Mizutani

Same as above

Ayumi Sato

15 Same as above

Kohei Ishikawa

1-1 Kasumigaseki 1-chome, Chiyoda-ku, Tokyo

Defendant

The Country of Japan

The representative, the Minister of Justice

Ken Saito

Appointed agent

Naoki Okabe

20 Same as above

Tomohisa Miyagi

Same as above

Haruka Mizutani

Same as above

Gaku Murakami

Same as above

Kohei Iju

Same as above

Yumi Nakamura

25 Same as above

Tsunehisa Saito

Same as above

Tomomi Ono

Exhibit 2

Parties' assertions

1 **Issue 1 (whether the Provisions violate Article 24, and Article 14, Paragraph 1 of**
5 **the Constitution)**

(1) **Claims of the Plaintiffs**

(i) Plaintiffs primarily claim that the Provisions violate Article 24 and Article 14,
Paragraph 1 of the Constitution because the Provisions do not provide for marriage that
can be used between people of the same sex. The Plaintiffs' secondary claim is that the
10 Provisions are in violation of the Article as an impediment to marriage between people
of the same sex.

It should be construed that there is no limitation due to sexual orientation or gender of
the parties on the subject of the freedom to marry guaranteed under Article 24,
Paragraph 1 of the Constitution, and that marriage with a person of the same sex is
15 also included in the freedom of marriage guaranteed under the same paragraph.
Paragraph 2 of the said article provides that the law concerning the choice of spouse
shall be based on the dignity of individuals and the intrinsic equality of both sexes. This
provision also puts no limitation due to sexual orientation or gender. Therefore, it
should be construed that the individual dignity of a person who chooses a spouse of the
20 same sex under law shall be respected, or the legislative body is obligated to establish
a legal system based on the essential equality of both sexes, where it is not prejudiced
that "A person marries a woman (man) because the person is a man (woman)". And
even if the right to seek marriage between individuals of the same sex is not guaranteed
by the same article, the right to enjoy various legal interests arising from marriage is a
25 serious legal interest, and if this is subject to unreasonable discrimination due to sexual
orientation or gender, it should be regarded as a violation of Article 14, Paragraph 1 of
the Constitution.

(ii) **Violation of Article 24, Paragraph 1 of the Constitution**

30 Article 24, Paragraph 1 of the Constitution premises the existence of a system under
which legislation, by setting requirements and consequences, provides protection to
and approves and certifies a permanent community life based on an intimate
relationship between a person and a person (legal marriage), and guarantees with
respect to such legal marriage the freedom to marry a desired partner autonomously on
35 the basis of their mutual intention to marry without interference by a national or a third

party(freedom of marriage). This is because the freedom of marriage constitutes an important element of the right to self-determination guaranteed by Article 13 of the Constitution and is an essential foundation for ensuring building a pluralistic fair and democratic society. Freedom of marriage means freedom from the old status system and communal restraint, and is an essential attribute of modern marriage. This is evident from the process of enactment of Article 24 of the Constitution.

Furthermore, since the bases for the enhanced freedom of marriage through to constitutional rights are equally applicable to same-sex couples, Paragraph 1 of the said article should be construed to also guarantee the freedom of marriage between individuals of the same sex.

In this respect, the same paragraph uses the phrase “both sexes,” but it is intended to deny the right of consent to marriage by the head of the household within the family system under the Meiji Civil Code, and it does not deny marriage between individuals of the same sex. Even if same-sex marriage was not envisaged at the time of enactment of the Constitution, inseparable connection between marriage and reproduction has been lost due to diversification of forms of marriages and families, the social recognition of sexual orientation and gender identity has fundamentally changed, and it is now universal knowledge in the international community that discrimination on the grounds of sexual orientation and recognition of sexual identity is prohibited and limitations on human rights for such reasons is not tolerated. There are many foreign countries that have enacted legislation that permit marriage between individuals of the same sex. Even in our country, many local governments have introduced a Registered Partnership System to certify same-sex partnership, various organizations are urging to legalize same-sex marriage, and in various opinion polls the majority have expressed their approval for same-sex marriage. In light of these changes in the social situation, it can be said that the social consciousness that same-sex marriage is also included in “marriage” has been established, and therefore, it is obvious that this provision guarantees same-sex marriage.

However, since the Provisions do not permit same-sex marriage and unjustly infringe upon the freedom of marriage between individuals of the same sex, it is unconstitutional and void to that extent.

(iii) Violation of Article 24, Paragraph 2 of the Constitution

Article 24, Paragraph 2 of the Constitution limits the legislative discretion of the State concerning “choice of spouse... and other matters pertaining to marriage and the family”

by the request of “individual dignity and the essential equality of both sexes.” For same-sex couples to be excluded from the marriage system despite the fact that they lead a married life which does not differ from that of the opposite-sex couples in reality violates this essential equality of both sexes. In addition, because such breach of equality imposes a direct restriction on the freedom of marriage guaranteed under Paragraph 1 of the said Article, and because sexual orientation and gender identity constitute the basis of an individual’s identity and cannot be changed through their own will or efforts, whether the said violation of equality is permissible should be examined in a strict manner.

In this respect, in light of the fact that decision-making concerning marriage is carried out in the same way as other decision in life and affects the existence of the entire human being, and that there is no difference from the opposite-sex couples, denial of marriage of same-sex couples impairs their “dignity”. Furthermore, it is impossible to find sufficient reasons or the necessity to permit such impairment of dignity, and on this basis, the denial of marriage between individuals of the same sex violates Paragraph 2 of the said Article.

It should be noted that even if the Diet, on the basis of Paragraph 1 of the said Article, may give preferential treatment to marriage compared to other relationships, the disadvantages arising from such treatment must be based on reasonable grounds from the viewpoint of Paragraph 2 of the said Article or Article 14, Paragraph 1 of the Constitution. Even if it is determined that such treatment does not violate Article 24, Paragraph 1 of the Constitution, it is not exempt from examining the conformity with Paragraph 2 of the said Article or Article 14, Paragraph 1 of the Constitution.

(iv) Violation of Article 14, Paragraph 1 of the Constitution

The Provisions stipulate that persons who wish to marry opposite-sex individuals (opposite-sex couples) shall be allowed to marry while persons who wish to marry the same-sex individuals (same-sex couples) shall not be allowed to marry and this creates a difference in treatment based on the sexual orientation of persons who wish to marry. Due to this treatment, homosexual individuals are not entitled to the freedom of marriage guaranteed under Article 14, Paragraph 1 of the Constitution, but are also unable to receive a social recognition as a formal couple and suffer from serious disadvantages as they cannot receive any legal, economic, social or de facto benefits that shall be received by married parties. Furthermore, in light of the fact that the above difference in treatment based on sexual orientation is based on “social status” and

“gender” set forth in the second sentence of Article 14, Paragraph 1 of the Constitution, and that sexual orientation cannot be changed by one’s own will and efforts, and that homosexual individuals constitute a minority group in society making it difficult to obtain redress in the democratic process, whether such difference in treatment is reasonable must be examined in a strict manner.

In this regard, as a result of the diversification of marriage and family types, the indivisible connection between marriage and reproduction has been lost, and the meaning of marriage has come to be found in the stabilization of personal relationships with partners. The necessity for such stabilization is equally appropriate for same-sex couples, and there is no theoretical basis for excluding same-sex couples from receiving the rights and benefits arising from marriage. In addition, not approving marriage by homosexual couples stigmatizes them on bring in “socially unacceptable relationships” and damages their dignity. For the reasons stated above, there is no reasonable ground for such difference in treatment, and the Provisions are in violation of the said paragraph.

In the past, heterosexuality was considered as “normal” and other sexuality including homosexuality as “abnormal.” However, the view that homosexuality is a psychopathology has been repudiated in the field of psychiatry, and it is now universally recognized in the international community that discrimination against homosexuality is not permitted. As mentioned in (ii) above, in light of the fact that a social consciousness has been established that marriage between individuals of the same sex is also included in “marriage,” it is obvious that the heterosexual norm is no longer accepted, and the difference in treatment is no longer permissible.

(2) The Defendant’s claims

(i) Concerning the alleged violation of Article 24, Paragraph 1 of the Constitution

Article 24, Paragraph 1 of the Constitution provides that marriage shall be established solely on the basis of the consent of “both sexes,” and does not encompass a marriage between “the same sex.” In addition, considering the legislative history of the said paragraph, it is assumed that marriage is a relationship between men and women as a matter of course, and that is still the general understanding at present. Therefore, it cannot be said that the societal consensus that same-sex marriage is also included in “marriage” has been established.

Furthermore, marriage is premised on the existence of a certain legal system, and the said paragraph does not guarantee freedom to marry as an innate and natural right

independent of the legal system. The claims of the Plaintiffs require the establishment of a legal system beyond the scope of the current legal system, which allows for choosing a person of the same sex as a marital partner. Such rights are not based on Article 13 of the Constitution, nor does Article 24, Paragraph 1 of the Constitution
5 require the nation to provide such legislation.

Consequently, it cannot be said that the freedom to marry is guaranteed for same-sex couples, and the various statutory provisions discussed in this case do not violate the said paragraph.

10 **(ii) Regarding claims of violation of Article 24, Paragraph 2 of the Constitution**

As mentioned in (i) above, Article 24, Paragraph 1 of the Constitution does not guarantee freedom of marriage with respect to same-sex couples. Paragraph 2 of Article 24, on the premise that marriage is intended only for joint, heterosexual human relationships, requests the legislature to establish a concrete system to materialize the
15 same, and cannot be construed to require the legislature to take legislative measures to allow marriage with respect to joint, homosexual human relationships. Therefore, the Provisions in the present case, which do not permit marriage between individuals of the same sex, do not violate the said paragraph.

20 **(iii) Regarding claims of violation of Article 14, Paragraph 1 of the Constitution**

Since Article 24 of the Constitution assumes only marriage between members of the opposite sex, it is only natural that a difference arises in that only legal marriage between members of the opposite sex is systematized, and legal marriage between members of the same sex is not systematized. This difference is expected and permitted
25 by the Constitution itself, and therefore one cannot argue that conformity with Article 14, Paragraph 1 of the Constitution is problematic.

Even if one could argue that conformity with said paragraph is problematic, such conformity must be based on the premise of legislative discretion for the establishment of a legal system concerning marriage and family. Matters concerning marriage and family should be determined comprehensively by taking into account various social
30 factors, including national traditions and public sentiment, as well as factors that reflect the changing times. In particular, the details regarding interests and matters of substantive equality that are not directly guaranteed under the Constitution are diverse, and their realization should be determined by taking into account social conditions, the living conditions of the people, family circumstances, etc. The Constitution itself does
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not prescribe the details of such rights and interests. Rather, it is appropriate that they be realized in the law. Article 24, Paragraph 2 of the Constitution requires that the establishment of a concrete system concerning marriage and family matters be entrusted to the reasonable discretion of the legislature in the first instance. Such legislation should be based on Paragraph 1 of the same article and at the same time, it can be said that the guidance provided by references to individual dignity and the essential equality of the sexes act as limits on such legislative discretion. Therefore, when determining whether marital and family matters violate Article 14 of the Constitution, it is necessary to reach a determination that is consistent with Article 24 of the Constitution. In addition, since Article 24 of the Constitution does not presuppose the establishment of a marriage system which covers same-sex relations, and since the Provisions do not create a distinction that focus on sexual orientation itself, but are neutral in respect of sexual orientation, such that the differing treatment that the Plaintiffs allege is merely a de facto or indirect effect arising from the application of the Provisions, and since the freedom to enjoy the legal effect of marriage is not guaranteed by the Constitution as an inherent right or an interest which is a part of the legal system, then a determination that the Provisions are in violation of Article 14, Paragraph 1 of the Constitution can only be reached if the legislative purpose of the Provisions that have given rise to a difference between homosexual persons and heterosexual persons in terms of whether or not the legal effects of marriage can be enjoyed or not have no reasonable basis or where the legislative process is extremely unreasonable in light of the legislative purpose, and it is clear that there has been an abuse of the broad discretion given to the legislature.

In this respect, the purpose of the Provisions is that, in view of the fact that there is a historical social recognition that marriage is a union of a man and a woman for the purpose of procreation and child rearing, and that the tradition and customs of our country have been so institutionalized, it is particularly reasonable to give legal protection to such joint relationships between men and women. Regarding the fact that the Provisions allow marriage regardless of the actual natural procreation possibility, it is reasonable in relation to the legislative purpose to provide for marriage on the basis of the biological natural reproductive potential. It is also reasonable in relation to the legislative purpose, given that Article 24 of the Constitution does not presuppose marriage targeting joint homosexual human relationships, and that there is no social recognition that joint homosexual human relationships can be regarded as being the same as that between members of the opposite sex, and that the establishment of joint

human relationship similar to marriage in the same-sex couple is not restricted, and that the disadvantages caused by the inability to use the marriage system are substantially eliminated or reduced by using other systems under the Civil Code.

Therefore, since the legislative purposes of the Provisions have reasonable grounds, and specifying marriage only for joint human heterosexual relationships, and not for joint human homosexual relationships is reasonable in relation to such legislative purposes, this is not a situation where the legislative discretion was obviously deviated or abused, and even though the Provisions result in differing treatment as claimed by the plaintiffs, they do not violate Article 14 of the Constitution.

2 Issue 2 (Whether it is illegal under the State Redress Act not to amend or abolish the Provisions)

(1) The Plaintiffs' Claims

In cases where the Diet fails to enact a legislative measure such as a revision or an abolishment for a prolonged period of time without justification, despite the fact that it is clear that the provisions of the law are in violation of the provisions of the Constitution as restricting the rights and interests guaranteed or protected under the Constitution without reasonable grounds, the legislative omission may be regarded exceptionally as unlawful in the application of Article 1, Paragraph 1 of the State Redress Act on the grounds that the Diet members' actions in respect of the legislative process violated their legal obligations in the course of their duties.

The Diet should have clearly recognized that the Provisions are unconstitutional if it can recognize that ① the legal norm has been established that discrimination based on sexual orientation or gender identity is not permitted from the viewpoint of the respect of individuals, and ② marriage is one form of self-determination that is indispensable for the respect of individuals. In this regard, No. ② above was already clear in 1947 when the Constitution of Japan was enacted. Therefore, once it became possible to recognize No. ① above, it would have been recognizable to the Diet that the Provisions in this case were unconstitutional. There are several possible points at which the recognition of ① above became possible. However, in light of the fact that Japan has received recommendations from the United Nations Convention Organizations on the protection of human rights concerning sexual orientation and gender identity since 2008, and has been actively engaged in domestic and overseas activities on the premise that discrimination based on sexual orientation and sexual recognition is not permitted, it shall not be later than the same year.

Considering that the legislative measures to enable marriage between individuals of the same sex do not involve legislative and technical difficulties, the Diet should be deemed to have failed to amend or abolish the Rules for a prolonged period time from 2008 until the time of [*original Japanese redacted*] when the Plaintiffs prepared the notarial deed of the marriage contract, and such legislative omission shall be regarded as illegal for the purpose of applying Article 1, Paragraph 1 of the State Redress Act.

(2) The Defendant's Claims

As stated in 1(2) (Defendant's claim), the Provisions do not violate Article 24 or Article 14, Paragraph 1 of the Constitution. Therefore, the Diet member shall not be deemed to be in violation of the law for the purpose of Article 1, Paragraph 1 of the State Redress Act as violating the legal obligations in the duties imposed on the individual citizens.

3 Issue 3 (Amount of Damages to Plaintiffs)

(1) The Plaintiffs' Claim

The Plaintiffs suffered a serious infringement of their freedom to marry, which is guaranteed under the Constitution, in so much as they could not obtain any legal, economic, social or de facto benefits that are allowed to marrying parties. In addition, plaintiffs suffered a stigma that "their relationship is not approved by society" and their dignity as an individual was injured. If such mental distress is evaluated in monetary terms, it shall not be less than one million yen per Plaintiff.

(2) The Defendant's Claim

The occurrence of damages and the amount thereof shall be denied and contested.

[End]