Osaka District Court Judgment

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

I. JUDGMENT 148
A. Main Text of Judgment 148
B. Facts and Reasons 148
1. Plaintiffs' Claim 148
2. Summary of the Facts 148
A. Sexual Orientation 148
B. Relationships of the Plaintiffs 149
c. Relevant Provisions of the Civil Code and the Family Register Act 149
d. Issues and Summary of the Parties' Assertions 150
3. The Court's Judgment 150
a. Findings of Fact by the Court 150
b. Whether the Provisions Violate Article 24 or 13 of the Constitution (Related to Issue (1)) 163
c. Whether the Provisions are in Violation of Article 14, Paragraph 1 of the Constitution (Concerning Issue (1)) 176
d. Whether the Failure to Amend or Repeal the Provisions in Question is Illegal in Terms of the Application of Article 1, Paragraph 1 of the State Redress Act (Concerning Issue (2)) 178
C. Conclusion 179
II. APPENDIX 2 179
A. Summary of the Plaintiffs' Claims with Respect to the Issues 179
1. Regarding Issue (1) (Whether the Provisions Violate Articles 24, 13, and 14, Paragraph 1 of the Constitution) 179
2. Regarding Issue (2) (Whether it is Illegal Under Article 1, Paragraph 1 of the State Redress Act Not to Revise or Abolish the Provisions in this Case) 185
3. Regarding Issue (3) (Plaintiffs' Damages, Amount of Damages) 187
4. Regarding Issue (4) (Regarding Plaintiff 4, Whether There is a Mutual Guarantee Prescribed in Article 6 of the State

[*] Original Japanese judgment available at [http://llanjapan.org/llan17/cont/uploads/2022/08/Osaka-Decision-Translation-final29120911.1-revised.pdf]. The Journal received approval from LLAN to publish the English translations of the Japanese court decisions.

Redress Act) 187

Judgment delivered on June 20, 2022: receipt of the original on the same day Court clerk [stamp] Case No. (Wa) 1258 of 2019, Claim for Damages Case Date of conclusion of the oral argument: February 21, 2022

I. JUDGMENT

The list of parties is contained in Exhibit 1. The terms used in the judgment shall have the meanings defined in Exhibit 1.

A. *Main Text of Judgment*

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

B. *Facts and Reasons*

1. Plaintiffs' Claim

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 from March 4, 2019 until the completion of payment.

2. Summary of the Facts

The Plaintiffs, who filed marriage notifications which were rejected because they are of the same sex, argue that the Civil Code and the Family Register Act, which do not permit marriage between persons of the same sex, are a violation of Article 13, Article 14, Paragraph 1, and Article 24 of the Constitution, and that the failure of the State to take necessary legislative measures is unlawful under Article 1.1 of the State Redress Act, and claim payment from the State of 1,000,000 yen per Plaintiff for compensation of non-pecuniary damage, together with interest thereon at the rate of 5% per annum, the statutory rate of the Civil Code (prior to the amendment by Law No. 44 in 2017), from March 4, 2019, which is the date of the service of the complaint, until the completion of payment.

The facts which are not in dispute amongst the parties and those facts which are readily recognized by the evidence listed below (the evidence that does not reference a specific sub-section is meant to include all the sub-sections - the same shall apply hereinafter) and the overall import of oral arguments are as follows:

a. Sexual Orientation

Sexual orientation refers to the attraction that a person feels towards another person in a sensual, emotional or sexual sense. A person who has such feeling of love and sexual attraction towards a person of the opposite sex is heterosexual ("heterosexual person"), and a person who has such feeling of love and sexual attraction towards a person of the same sex is

homosexual ("homosexual person"). On the other hand, gender identity refers to how people recognize their own gender. Such gender identity can at times conform with one's biological sex, while for others it may not align with their biological sex. People whose sexual identity is not aligned with their biological sex are called transgender. Homosexual women (lesbian), homosexual men (gay), persons with both homosexual and heterosexual orientations (bisexual) and transgender persons are collectively referred to as LGBT.

The number of people with a non-heterosexual orientation in Japan is unclear, but there are survey results showing 7.6% of respondents identifying as LGBT in an April 2015 survey of approximately 70,000 persons between 20 to 59 years old, 5.9% of respondents in a May 2016 survey of approximately 100,000 persons of the same age groups and 8% of respondents in a June 2016 survey of approximately 1,000 employed persons between 20 and 59 years old nationwide.

b. Relationships of the Plaintiffs

(i) Plaintiff 1 and Plaintiff 2 are male and homosexual. Plaintiff 1 and Plaintiff 2 filed a marriage notification at their place of residence in February 2019. However, such notification was rejected because they are of the same sex.

(ii) Plaintiff 3 and Plaintiff 4 are female and homosexual. Plaintiff 4 is a national of the United States of America ("USA"), and Plaintiff 3 and Plaintiff 4 married in the State of Oregon, USA, in August 2015 (*Plaintiffs' Evidence C3*). Plaintiff 3 and Plaintiff 4 filed a marriage notification at their place of residence in January 2019 but such notification was rejected because they are of the same sex.

(iii) Plaintiff 5 and Plaintiff 6 are male and homosexual. Plaintiff 5 and Plaintiff 6 filed a marriage notification at their place of residence in February 2019. However, such notification was rejected because they are of the same sex.

c. Relevant Provisions of the Civil Code and the Family Register Act

(1) Article 739, Paragraph 1 of the Civil Code provides that marriage shall be effective upon notification pursuant to the Family Register Act, and Article 74, Item 1 of the Family Register Act provides that persons who intend to marry shall provide notification of the married surname of the husband and wife (hereinafter, with respect to the provisions of the Civil Code, the provisions of the Family Law Section of the Civil Code after the amendment by Law No. 222 of 1947 are collectively referred to as the Current Civil Code, the provisions of the Family Law Section of the Civil Code prior to the same amendment are collectively referred to as the Meiji Civil Code, and such amendment is referred to as the 1947 Amendment of

Civil Code. Also, the relevant provisions of Part IV, Chapter II of the Civil Code and the Family Register Act which, according to the claim of the Plaintiffs, do not recognize marriage between individuals of the same sex, are referred to as the "Provisions").

(2) Under the Family Register Act, when a marriage notification is filed, a new family register shall be created for the married couple (*Article 16, Item 1 of the Family Register Act*), and each person in the family register shall be described as husband or wife (*Article 13, Item 6 of the Family Register Act*). Further, the married couple shall file a notification upon the birth of a child (*Article 49, Item 1 of the same Act*) and the child shall be entered in the family register of the parents (*Article 18 of the Family Register Act*). The Family Register Act also stipulates that an original of the family register shall be kept at the city office (*Article 8, Item 2 of the Family Register Act*).

There is also a chapter called "marriage" in the Civil Code (*Article 731 et seq. of the Civil Code*), which contains provisions for the requirements of marriage, the effect of marriage, the unification of surname (*Article 750 of the Civil Code*), the obligation of husband and wife to live together, cooperate and support each other (*Article 752 of the Civil Code*), sharing expenses of marriage (*Article 760 of the Civil Code*) and about the ownership of property between husband and wife (*Article 762 of the Civil Code*), and the distribution of property in case of divorce (*Article 768 of the Civil Code*), etc. Provisions about important legal effects of marriage are located in other chapters, such as the presumption of legitimacy of children born to the couple (*Article 772, Paragraph 1 of the Civil Code*), the parental authority with respect to children (*Article 818 et seq. of the Civil Code*), and the right of inheritance of spouses (*Article 890 of the Civil Code*).

d. Issues and Summary of the Parties' Assertions

The issues in this case are as follows, and the outline of the parties' submissions on these issues are described in Exhibit 2. The terms used in the body of the judgment shall have the meanings defined in Exhibit 2.

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

(2) Whether the failure to amend or repeal the Provisions is unlawful for the purpose of Article 1, Paragraph 1 of the State Redress Act;

(3) The damages and the amount of the plaintiffs' damages; and

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

3. The Court's Judgment

a. Findings of Fact by the Court

The Court accepts the following facts based on the evidence

provided and overall import of the oral arguments:

(1) Perception of Sexual Orientation and Homosexuality

(i) Current Perception of Sexual Orientation and Homosexuality

While the causes of one's sexual orientation or of homosexuality have not been found, experts point to a combination of factors such as genetics and environment as possibly influencing one's sexual orientation. However, a majority of psychiatric professional associations has stated that in most cases, sexual orientation is determined before birth or in the early years of life, and that it is not a choice. The majority opinion among psychologists is also that sexual orientation cannot be chosen or changed at will. Although some homosexual persons may alter their sexual behavior, this does not mean that they have changed their sexual orientation beyond a mere change in behavior. Sexual orientation cannot be changed at will or by psychiatric therapy (*Undisputed Fact (1); Plaintiffs' Evidence A2, 7, 322, 324*).

(ii) Changing Perceptions of Homosexuality in Europe and the USA

(a) Perception from the Middle Ages to the End of the 19th Century

In the West, the rejection of homosexuality was established because of Christianity in the Middle Ages. However, as the existence of people who recognized themselves as homosexual individuals came to the surface, Germany, the USA and the UK started regulating sexual intercourse between same-sex individuals as an offense under criminal law. Also, homosexuality was subject to medical treatment as a psychological pathology during this time (*Plaintiffs' Evidence A24, 163*).

(b) Perception From the Early 20th Century to Around 1973

In the first edition of the Diagnostic and Statistical Manual for Mental Disorders (DSM-I) published by the American Psychiatric Association in 1952 and its second edition (DSM-II) published in 1968, homosexuality was considered a psychopathic personality accompanied by pathological sexuality or a personality disorder (*Plaintiffs' Evidence A48, 215*).

In addition, the World Health Organization's International Classification of Diseases (ICD) also categorized homosexuality under sexual deviations and sexual disorders up to and including the 9th edition (ICD-9) prior to the publication of the 10th edition (ICD-10) in 1992 (*Plaintiffs' Evidence A29*).

(c) Change of Perception Since Around 1973

The American Psychiatric Association adopted a resolution to

remove homosexuality from its list of mental disorders in 1973, and in 1975 the American Psychological Association endorsed the same resolution and adopted a resolution that homosexuality on its own did not imply the existence of a disability with respect to the person's judgement, stability, reliability, general social ability or occupational performance (*Plaintiffs' Evidence A1*).

The American Psychiatric Association, in its third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III) published in 1980, amended the description of homosexuality to the effect that it constituted a mental disorder only if a homosexual patient disliked a persistent pattern of homosexual excitement and claimed that it was a source of persistent distress, but this was also eliminated in the revised third edition (DSM-III-R) published in 1987 and homosexuality is no longer considered a mental disorder (*Plaintiffs' Evidence A27-1 to 28-2, 48, 215, 217*).

In 1992, the World Health Organization published the tenth edition of the International Classification of Diseases (ICD-10), which eliminated homosexuality from the classification of diseases. The World Health Organization also declared that homosexuality is not something that can be subject to treatment in any sense of the word (*Plaintiffs' Evidence A30-2, 48, 215, 217*).

(iii) Changes in Perception Concerning Homosexuality in Japan

(a) Before Modern Ages

In Japan, close relationships between same-sex individuals existed before the modern ages, but such relationships were not specifically denied or prohibited as the influence of Christianity was almost nil. In particular, such relationships between males were called "*Danshoku*" or "*Shudo*" and became the subject of various literary works (*Plaintiffs' Evidence A163, 365*).

(b) Perceptions of Homosexuality in the Meiji Era

In the Meiji era, homosexuality was regarded as a form of sexual perversion or congenital disease, somewhere between being healthy and psychotic, as western civilization was introduced and modernization moved forward. Major symptoms of sexual perversion included homosexual desires, men desiring young boys, men engaging in sodomy (sexual acts between men), and women loving women. These were regarded as the first signs of degeneration. Treatment for such sexual perversions included hypnotism, bromine drugs, physical work, cold water baths, and change of environment (*Plaintiffs' Evidence A187, 189*).

In addition, homosexuality in adolescence was considered to occur because of a very strong desire for affection. It was considered that this situation should 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 (*Defendant's Evidence A190*).

In addition, sexual intercourse between males was penalized under the code enacted in 1872 and the charge of sodomy was introduced in Article 266 of the Criminal Code in the following year, but these provisions were abolished when the former Criminal Code entered into effect in 1882 (*Publication No. 36 by the Grand Council of State in 1880*) in 1882 (*Plaintiffs' Evidence A24, 366*).

(c) Perceptions from the Early Post-War Period (around 1945) to around 1975

Even in the early days after the end of World War II, sodomy and sexual intercourse between women were considered to be forms of perverted sexual desire. In other words, sodomy and sexual intercourse between women were regarded as pathological sexual perversions akin to exhibitionism, and something commonly seen among the mentally disturbed.

In the field of psychology, homosexuality was considered to be an abnormal disposition that existed regardless of ethnic group or social rank. Homosexuality was considered to occur before a person matured into heterosexuality, when a person experiences homosexuality either mentally or physically and becomes fixated on the homosexual experience. It was believed that while most persons would later become heterosexual and lead a healthy married life, in some cases homosexuality could become pathologically entrenched due to external factors, and unlike normal healthy affection, this was considered as a kind of sexual maladjustment. It was believed that, if homosexuality became pathologically entrenched, psychological therapy consisting of essentially self-observation and investigation of the cause for the suppression of heterosexuality should be provided, and removal of the obstacle to heterosexuality was the fundamental treatment (*Plaintiffs' Evidence A147 to 151 for the foregoing*).

(d) Change of Perception from around 1975

a Starting around 1981, in response to the situation in Europe and the USA described in (ii)(c) that homosexuality should not be considered a psychiatric problem as long as the individual concerned is leading a normal social life, and that it should be sufficient to treat only those complaining of mental distress, the Japanese Society of Psychiatry and Neurology released in 1995 an opinion that "sexual orientation to same-sex is not regarded as a mental disorder in accordance with ICD-10" in response to a request from a citizen group, and since then homosexuality has not been regarded as a mental disorder in Japan (*Plaintiffs' Evidence A48, 162, 164*).

b In the field of education, the "Basic Material on Problematic Behavior of Students" published by Japan's Ministry of Education in January 1979 as guidance for junior and senior high school students

describes homosexuality as a perverted form of sexual delinquency and further indicates that aversion to the opposite sex may occur due to certain causes. It added that most would return to normal heterosexuality with maturation but for some homosexuality would continue into adulthood. The material also indicated that homosexuality is generally likely to impede the development of healthy heterosexual love, and is not acceptable even in modern society because it is contrary to sound social morality and is likely to result in sexual disorders (*Plaintiffs' Evidence A26*).

However, in the "Guidance with respect to Sexuality in Student Guidance" published by Japan's Ministry of Education in 1986, there was no reference to homosexuality (*Plaintiffs' Evidence A163, the overall import of oral arguments*).

(2) Marriage Systems

(i) Marriage Systems in the West

Historically, marriage was borne as a system when states and religions controlled the sexual relationship between men and women and was initially devised to preserve the species. In the Middle Ages in the West, religious marriage was mainly conducted under the control of churches, but legal marriage gained popularity gradually whereby a state stipulates requirements and then creates certain rights and obligations to the parties to the marriage under the law (civil code). In the 18th century, a modern marriage system where states approve the marriage between a man and a woman based on their mutual desires under certain requirements was adopted and established in many Western countries. In addition, since homosexuality was denied at the time, such marriage was naturally regarded as between a man and a woman. However, as set forth in (3) below, starting from The Netherlands, marriage between individuals of the same sex has been accepted in certain countries from 2000.

(ii) Marriage System in Japan

(a) Marriage System Under the Meiji Civil Code (effective from July 17, 1898)

a Drafting Phase

Even before the enactment of the Meiji Civil Code, Japan also had customs under which a man and a woman cohabited as a married couple after a certain ceremony, and marriage was considered an important life event. After the Meiji Restoration, the family law section of the Civil Code was drafted to establish such marriage custom as the modern legal marriage system. When the Meiji Civil Code was drafted, the drafters referred to foreign laws of eight countries, including the French Civil Code and the Italian Civil Code not to immediately abolish prior Japanese customs but to keep such customs while regulating though law harmful matters and clarifying ambiguous matters (*Defendant's Evidence 3*).

With respect to marriage between individuals of the same sex, while there were some foreign laws which expressly prohibited marriage between

individuals of the same sex, it was only natural that marriage was between a man and a woman under the Meiji Civil Code and it was "clear enough without saying" that marriage between same-sex individuals was not possible, and therefore, there was no provision prohibiting same-sex marriage *(Plaintiffs' Evidence A206, 214, Defendant's Evidence 11*).

Also, there were considerations and discussions since the time of the drafting of the Meiji Civil Code on whether a man and a woman who cannot reproduce could still be married. On the one hand, some people believed that the nature of marriage is for a man and woman to continue the family line and to live together sharing the hardships of life, and therefore a man and a woman who cannot reproduce will not be able to achieve the purpose of marriage and therefore will not meet the conditions for marriage and cannot be married. On the other hand, others were of the view that saying the purpose of marriage cannot be achieved if a man and a woman cannot have children is not in accordance with the purpose of the Meiji Civil Code, and therefore the ability of reproduction is not an indispensable condition of marriage. Through such discussions, the Meiji Civil Code established the view that marriage was for the joint life of a man and a woman as husband and wife, and was not necessarily for the purpose of procreation or for the purpose of having heirs. Therefore, marriage between elderly persons or those incapable of reproduction was also considered valid *(Plaintiffs' Evidence A213, 218, 219, Defendant's Evidence 4*).

b Marriage System under the Meiji Civil Code

Under the Meiji Civil Code, marriage was developed to be a legal marriage by notification to the state without any specific ceremony. However, it adhered to the concept of the family system (*kazoku shugi*), which centers around the household (*ie*), with the head of the household *(koshu)* having the power to control the household *(koshu-ken)*. Marriage was for the benefit of the household. Thus, marriage required the consent of the head of household or an individual's parents, and the mere agreement of the parties to the marriage was not sufficient. Further, the husband had dominance over his wife. In addition, marriage under the Meiji Civil Code was considered a bond between a man and a woman meeting the requirements of morals and customs and for the purpose of life-long cohabitation. It was also considered a bond between the opposite sexes for the purpose of living a life recognized by law. Consequently, under the Meiji Civil Code, it went without saying that marriage was between a man and a woman. Therefore, although there was no provision prohibiting same-sex marriage, marriage between individuals of the same sex was considered to be invalid because it was devoid of the intention to marry. In addition, there is no indication that at the time of legislation, legislative officials discussed the issue of whether homosexuality falls into psychological disorder

(*Plaintiffs' Evidence A19, 206, 207, 541, Defendant's Evidence 3~5*).

(b) Enactment of the Constitution (Constitution of Japan) (effective from May 3, 1947)

In 1947 after World War II, the current Constitution (Constitution of Japan) was enacted to amend the Constitution of the Empire of Japan (effective from 1890). In the Constitution of the Empire of Japan, there were no provisions regarding the family and the family system was delegated to other laws. On the other hand, under the newly enacted Constitution, Articles 13 and 14 make it clear that all citizens shall be respected as individuals and are equal under the law, and that there shall be no economic or social discrimination on the basis of sex or other factors. Article 24 of the Constitution declares that marriage shall be based solely on the mutual consent of both sexes, that it shall be maintained through mutual cooperation on the basis that husband and wife have equal rights, and that with regard to choice of spouse, property rights, inheritance, domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted based on respect for the individual and the inherent equality of the sexes.

In the drafting phase of Article 24, Paragraph 1 of the Constitution, the draft prepared by Beate Sirota Gordon of the Government Section of GHQ states as follows: "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." In the summary of the draft amendment to the Constitution, which the Japanese side adjusted based on the above, it is stated as follows: "Marriage shall come into effect only based on the mutual consent between man and woman."

Thereafter, as a result of reviewing the wording of each article, the language was revised and Article 22 of the draft amendment to the Constitution of the Empire of Japan then stated as follows: "Marriage shall be based solely on the mutual consent of both sexes, it shall be maintained through mutual cooperation on the basis that husband and wife have equal rights, and 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 on respect for the individual and the inherent equality of the sexes." Then, Article 24 of the current Constitution was enacted after review and discussion in the Imperial Diet. In addition, in the review and discussion in the Imperial Diet to enact this article, the maintenance of the traditional family system was discussed but there is no indication that marriage between individuals of the same sex was discussed (*Plaintiffs' Evidence A186, 187, 188, 190, 192, 228, the overall import of oral arguments*).

(c) Marriage System under the 1947 Amendment of the

Civil Code a Drafting Phase

In the Meiji Civil Code, under the concept of the family system (*kazoku shugi*) which centers around the household, the head of the household *(koshu)* had the power to control the household *(koshu-ken)*; marriage, being for the benefit of the household, required the consent of the head of the household or an individual's parents and the mere agreement of the parties to the marriage was not sufficient; and the husband had dominance over his wife (see (a) above). The 1947 Amendment of the Civil Code abolished the household system to reform the Meiji Civil Code in line with an individualistic view of family and therefore abolished rules about consent to marriage by parents, parents in law or lawful mother (*tekibo*)[1] except for minors, abolished the right of consent to marriage by the head of household and declared individual autonomy in marriage.

As such, the 1947 Amendment of the Civil Code focused on the provisions of the Meiji Civil Code that conflicted with the Constitution and the provisions of the Meiji Civil Code that did not conflict with the Constitution were unchanged, and there is no indication that marriage between individuals of the same sex was discussed at that time (*Plaintiffs' Evidence A19, 143, 182, 183, 185, 186, 192, Defendant's Evidence 6, 6, 7, 13, 17, overall import of oral arguments for the foregoing*)

b Marriage System at the Time of the 1947 Amendment of the Civil Code

At the time of the 1947 Amendment of the Civil Code, a marital relationship was considered to be a spiritual and physical union between a man and a woman, and the intention to marry was understood to mean the intention to grant the parties the status of husband and wife as determined by social norms, and to enable children born between the parties in the future to acquire the status of children as determined by social norms, or the intention to form a relationship that could be viewed as a marriage under the social norms of the time.

As such, even under the 1947 Amendment of the Civil Code, marriage was naturally considered to be only between a man and a woman. Marriage between individuals of the same sex was not considered a marital relationship and was not marriage in this sense. It was considered invalid because it was devoid of the intention to marry, following the same logic as that under the Meiji Civil Code (*Plaintiffs' Evidence A152, 153, Defendant's Evidence 8~10*).

(3) Status of Same-Sex Marriage Systems in Various Countries and

[1] The concept of *tekibo* no longer exists in the current Civil Code. It meant the lawful wife of a father to a child born of the father and another woman.

Regions

(i) Status of Legal Systems in Various Countries and Regions

(a) In Western countries, homosexuality itself was denied due to the influence of Christianity as mentioned above, and therefore, same-sex marriage was not taken into account in the Middle Ages. However, in 1989, as the perception of homosexuality changed, Denmark adopted a registration system that differed from marriage but officially recognized the relationship between two persons of the same sex and granted them a certain status (the details of which vary depending on the country introducing such a system; collectively, the "Registered Partnership System"). Germany and Finland adopted a Registered Partnership System in 2001, followed by Luxembourg in 2004, Austria in 2009, and Ireland in 2010 (*Plaintiffs' Evidence A181*).

(b) In addition, the following countries introduced a system recognizing same-sex marriage in the years listed below (unless otherwise stated, the year of enactment of the law or the year in which the court determined to uphold it). Among these countries, there is a considerable number of countries that already had the Registered Partnership System. As the same-sex marriage system was introduced, some of them abolished the Registered Partnership System while others maintain both systems (*Plaintiffs' Evidence A181, 355, 564*).

2000	Netherlands
2003	Belgium
2005	Spain and Canada
2006	South Africa
2008	Norway
2009	Sweden
2010	Portugal, Iceland and Argentina
2012	Denmark
2013	Uruguay, New Zealand, France, Brazil and the United Kingdom (England and Wales)
2014	Luxembourg
2015	Ireland and Finland
2017	Malta, Germany, Austria and Australia
2019	Ecuador (effective year)
2020	United Kingdom (Northern Ireland) and Costa Rica (effective year)

(c) In addition to the above-mentioned countries, in the United States, 36 states and Washington, District of Columbia and Guam more recently permitted same-sex marriage, however, there were [some] state laws that prohibited same-sex marriage, and in a case concerning the

constitutionality of such state laws (the so-called Obergefell case), the U.S. Supreme Court rendered a judgment on June 26, 2015 to the effect that a state law which limited marriage to couples of the opposite sex ("opposite-sex couples") and did not permit couples of the same sex ("same-sex couples") to marry was in violation of the Fourteenth Amendment to the U.S. Constitution providing for due process and equal protection (*Plaintiffs' Evidence A181, 195*).

Furthermore, in Taiwan in 2017, the Judicial Yuan, which corresponds to a constitutional court, ruled that the Civil Code of Taiwan, which did not permit same-sex marriage, violated the Constitution, and, in light of this judgment, the Civil Code was amended to permit same-sex marriage in 2019 (*Plaintiffs' Evidence A101, 139*).

(d) In Italy, on the other hand, the Constitutional Court ruled in 2010 that marriage referred to a union between individuals of the opposite sex. When the Constitutional Court rendered a similar ruling in 2014, however, it ruled that, the fact that there was no system other than marriage available under Italian law that appropriately provided for the rights and obligations of same-sex couples violated the Italian Constitution. Consequently, a law to establish a system called "Civil Union" as being similar to but different from marriage was enacted in 2016 (*Plaintiffs' Evidence A181*).

(e) In Russia, the criminal code was amended to exclude homosexual acts from the scope of punishment in 1993, but in 2013, a law prohibiting the promotion of homosexuality was enacted. In 2014, the Constitutional Court ruled that prohibition of the promotion of homosexuality did not violate provisions of the Constitution.

In Vietnam, its laws were amended in 2014 so that a wedding ceremony for same-sex couples was no longer a prohibited activity. However, at the same time, the amended laws stipulated that marriage was defined as being between a man and a woman, and that the laws would not provide legal approval or protection for same-sex marriages.

In the Republic of Korea, a district court ruled in 2016 that recognition of same-sex marriage should be decided by the legislature and not by judicial decision. According to a survey conducted in Korea in 2013, 67% of respondents was against legally recognizing same-sex marriage while 25% was in favor (*Plaintiffs' Evidence A181 for the foregoing*).

(ii) Trends in Foreign Organizations Located in Japan

In September 2018, the American Chamber of Commerce published its written opinion advocating freedom of marriage for LGBT couples, pointing out that same-sex marriage or Registered Partnership Systems have been recognized by all G7 member nations except for Japan, and noting that same-sex couples married in foreign countries are restricted in terms of the

activities they can pursue in this country because they are unable to obtain spouse visas here. The Australian and New Zealand Chambers 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 also expressed support for this opinion in the same month, and the Danish Chamber of Commerce in Japan subsequently expressed its support (*Plaintiffs' Evidence A112, 130, 131*).

(4) LGBT Rights in Japan

(i) In March of 2002, the "Basic Plan for Human Rights Education and Human Rights Awareness-Raising" was adopted by the Cabinet for the purpose of comprehensive and systematic advancement of various measures for human rights education and awareness-raising based on Article 7 of the Act on the Promotion of Human Rights Education and Human Rights Awareness-Raising. In December of each of 2010, 2015 and 2020, the Third, Fourth and Fifth Basic Plans for Gender Equality were respectively adopted by the Cabinet, all of which clearly stated that the government will engage in awareness-raising, consultation, investigation and relief activities in order to eliminate discrimination and prejudice on the grounds of sexual orientation (*Plaintiffs' Evidence* A57, *356-358*).

(ii) The Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder was enacted on July 16, 2003 and entered into force on July 16, 2004. Article 3, Paragraph 1, Item 2 of the Act provides that "such persons are not currently married" as a requirement for the family court to make any ruling to change the recognition of gender status based on the request of any persons with gender identity disorder. The Supreme Court has ruled that this provision is not in violation of Articles 13, 14, Paragraph 1, and Article 24 of the Constitution, stating that "based on consideration that if a person who is currently married were allowed to change the recognition of their gender status, it could bring chaos to the current order of marriage which is allowed only between the opposite sexes, and thus [the provision] cannot be concluded to be unreasonable" (*case no. 2019 (KU) 791, Supreme Court Small Petty Bench decision of March 11, 2019*).

(iii) Shibuya Ward, Tokyo first introduced a Registered Partnership System in October 2015, and then Setagaya Ward, Tokyo introduced its own in November of the same year. Since then, there has been an increase in the number of local authorities that have introduced such systems. As of today, over 130 local municipalities have introduced Registered Partnership Systems (*Plaintiffs' Evidence A75-91, 98, 553*).

(iv) According to a survey on the number of companies that have adopted basic policies on LGBT rights, such as policies to respect LGBT rights and to prohibit discrimination against people in the LGBT community, there were 173 companies with such policies in 2016, and 364 in 2019 (*Plaintiffs' Evidence A391, 392*).

(5) Statistics on Marriage

(i) Results of Surveys on Opinion Towards Marriage

(a) According to the 2005 White Papers on the National Lifestyle issued by the Cabinet Office, in all age groups from 15 to 49 years old, between 40 to 60% of the respondents answered "yes" to the question of whether it would be better to get married if an unmarried person is having a child, and fewer than 10% answered "no." In addition, in every annual survey from 1982 to 2002, more than 90% of the respondents answered that they wished to get married one day (*Plaintiffs' Evidence A332*).

(b) According to a 2009 survey referred to in the 2013 White Papers on Health, Labor and Welfare issued by the Ministry of Health, Labor and Welfare, 70% of respondents agreed or somewhat agreed with the idea that "marriage is an individual freedom" and that "anyone can choose to get married or not." However, according to a survey conducted in 2010 targeting people 20-49 years of age, 64.5% of the respondents answered either "everyone should get married" or "it is better to get married." This exceeded the ratio of respondents who answered the same in the U.S. (53.4%), France (33.6%), and Sweden (37.2%) (*Plaintiffs' Evidence A333*).

(c) The results of a 2015 survey conducted by the National Institute of Population and Social Security Research were as follows (*Plaintiffs' Evidence A239-52*):

a 64.3% of unmarried male respondents and 77.8% of unmarried female respondents answered that marriage has some benefits. The frequently cited reasons by those respondents are as follows (respondents were given multiple choices and could choose up to two options):

> "We can have children and families" (35.8% for men, 49.8% for women);
>
> "We will have a place for peace of mind" (31.1% for men, 28.1% for women);
>
> "We can meet the expectations of our parents and people around us" (15.9% for men,
>
> 21.9% for women);
>
> "We can live with loved ones" (13.3% for men, 14% for women); and
>
> "We will gain trust and equal standing" (12.2% for men, 7% for women).

b 64.7% of male respondents and 58.2% of female respondents agreed with the statement that "it is not desirable to be single throughout

life," and 74.8% of male respondents and 70.5% of female respondents agreed with the statement that "a man and a woman should marry if they live together."

(ii) Statistics on Marriage

(a) The results of the 2018 Vital Statistics Survey conducted by the Ministry of Health, Labor and Welfare were as follows (Plaintiffs' Evidence *A330*):

a Although the number of marriages in 2016 was about half the 1.1 million that took place in 1972 (when the number of marriages was the highest) and although the annual number of marriages is generally declining, there were still 620,531 marriages in 2016.

b The annual marriage rate in Japan (calculated by dividing the annual number of marriages by the total population and then multiplied by 1,000) has typically been declining year on year since 1972, although there have been fluctuations. In 2016, the marriage rate decreased to 5%, but still exceeded those in European countries such as Italy (3.2%), Germany (4.9%), France (3.6%), and the Netherlands (3.8%).

The percentage of children born out of wedlock was 2.3% in Japan, significantly lower than in other countries like the U.S. (40.3%), France (59.1%), Germany (35%), Italy (30%), and the UK (47.9%).

(b) According to surveys conducted by the Ministry of Health, Labor and Welfare from 1986 to 2018, the percentage of households with children among all households declined year by year from 46.2% in 1986 to 22.1% in 2018 (*Plaintiffs' Evidence A331*).

(6) Survey Statistics on Opinion Towards Same-Sex Marriage

(i) In a 2015 public opinion poll conducted by Mainichi Newspapers Co., Ltd., 44% of respondents supported "same-sex marriage" and 39% opposed it, which means there were more proponents than opponents, while 17% did not answer (*Plaintiffs' Evidence A105*).

(ii) In a 2015 nationwide survey of 2,600 people aged 20 to 79 in all 47 prefectures on their opinion toward sexual minorities conducted by a group led by Professor Kazuya Kawaguchi of Hiroshima Shudo University, there were 1,259 respondents, among which 44.8% of men and 56.7% of women supported or somewhat supported "legal recognition of same-sex marriage," while 50% of men and 33.8% of women opposed or somewhat opposed it, and 5.3% of men and 9.5% of women did not answer. Further, 72.3% of respondents in their 20s or 30s and 55.1% in their 40s or 50s supported or somewhat supported it. Only 32.3% of respondents in their 60s or 70s supported or somewhat supported it, while 56.2% in the same age group opposed or somewhat opposed it (*Plaintiffs' Evidence A104*).

A 2019 nationwide survey conducted by the same group found, among about 2,600 respondents, 59.3% of men and 69.6% of women supported or somewhat supported "legal recognition of same-sex marriage," while 37% of men and 23.9% of women opposed or somewhat opposed it.

Further, 81% of respondents in their 20s or 30s and 74% in their 40s or 50s supported or somewhat supported it. And 47.2% of respondents in their 60s or 70s supported or somewhat supported it, while 43.4% in the same age group opposed or somewhat opposed it. Approximately 10% did not answer (*Plaintiffs' Evidence A512*).

(iii) According to a 2017 public opinion poll conducted by the Japan Broadcasting Corporation, approximately 51% of respondents answered "yes," while approximately 41% answered "no," and approximately 8% answered "I don't know" to whether same-sex marriage should be recognized. In a survey conducted by the Asahi Shimbun Company in the same year, approximately 49% of respondents responded that "same-sex marriage" should be legally recognized, approximately 39% responded that it should not be recognized, and approximately 12% responded otherwise or did not answer (*Plaintiffs' Evidence A106, 109*).

(iv) In the 2018 National Survey on Family conducted by the National Institute of Population and Social Security Research, 75.1% of respondents completely or somewhat agreed that some kind of legal guarantee should be granted to same-sex couples. Further, 69.5% completely or somewhat agreed that "same-sex marriage" should be legally recognized (*Plaintiffs' Evidence A298*).

(v) On the other hand, according to a 2015 web survey of approximately 2,600 sexual minorities including members of the LGBT community conducted by the Japan Broadcasting Corporation, (a) 38.8% of respondents wanted to apply for a certificate equivalent to a marriage [certificate] if a local government had introduced a Registered Partnership System, and 43.6% of respondents wanted to apply for one once they had a partner; and (b) 65.4% wanted a law recognizing same-sex marriage, while 25.3% wanted the national government to establish a Registered Partnership System instead of granting them marriage rights (*Plaintiffs' Evidence A103*).

Further, in an SNS questionnaire of more than 10,000 sexual minorities conducted from September to December of 2019 by Professor Yasuharu Hidaka, School of Nursing, Takarazuka University, approximately 60% of respondents wanted the legality of marriage between opposite sexes to be applied to same-sex marriage. Approximately 16% responded that they wanted more understanding in society but did not feel any necessity for an official system. Most of the remaining 24% responded that they wanted a national or local government- level partnership system to be established (*Plaintiffs' Evidence A301*).

b. Whether the Provisions Violate Article 24 or 13 of the Constitution (Related to Issue (1))

(1) Interpretation of the Provisions Asserted by the Plaintiffs

The Plaintiffs argue that all provisions of Part IV, Chapter II of the

Civil Code and the Family Register Act, which limit "marriage" to that between opposite sexes, are unconstitutional. However, Article 739, Paragraph 1 of the Civil Code, which the Plaintiffs claim to be included in the Provisions, provides that marriage shall take effect upon notification pursuant to the provisions of the Family Register Act, and Article 74 of the Family Register Act merely provides that persons who wish to marry shall submit a written notification after entering the surname that the husband and wife will take. Furthermore, there are no explicit provisions that prohibit marriage between individuals of the same sex, and among the provisions concerning the substantive requirements of marriage in and after Article 731 of the Civil Code, none explicitly requires that the parties are "not of the same sex."

However, in addition to the fact that the phrase "husband and wife" is used in the Civil Code and other statutes, marriage between a man and woman has been construed as a natural premise since the Meiji Civil Code through the Current Civil Code, and that a relationship between individuals of the same sex cannot be treated as a marriage on the grounds that it "lacks the intention to marry" (*Findings of Fact (2)*). In fact, the Plaintiffs submitted their marriage notification to different local governments of Japan, but it was rejected because they are of the same sex (*Undisputed Facts (2)*). Considering these facts, it can be understood that the marriage system in Japan, including the Provisions, naturally assumes the spouse to be of the opposite sex, and therefore this is a requirement for marriage. In the following paragraphs (including the following paragraphs 3 and 4), we examine whether the Provisions violate the Constitution on the premise that they are interpreted as above.

(2) Whether the Provisions Violate Article 24 or 13 of the Constitution

(i) Whether the Provisions Violate Article 24, Paragraph 1 of the Constitution

(a) Article 24, Paragraph 1 of the Constitution provides that "[m]arriage 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 provision 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. Marriage confers important legal rights such as the right to inheritance of a surviving spouse (*Article 890 of the Civil Code*) and the legitimacy of children born in wedlock (*Article 772, Paragraph 1 et al. of the Civil Code*). Further, while the public has begun to accept diverse family relationships in recent years, respect for the legal institution of marriage still widely permeates the public's thinking. As such, the freedom to marry should be accorded proper respect in light of the purpose of Article 24, Paragraph 1 of the Constitution (*case number 2013 (O) 1079, Supreme Court Grand Bench judgment of*

December 16, 2015, Minshu Vol. 69, No. 8, p. 2427).

(b) The Plaintiffs argue that the Provision that excludes marriage between individuals of the same sex from the marriage system violates Article 24, Paragraph 1 of the Constitution, because the freedom to marry is guaranteed by the same paragraph not only between individuals of the opposite sex but also those of the same sex. Therefore, first, we examine whether the term "marriage" as used in the same paragraph includes that between individuals of the same sex.

Article 24, Paragraph 1 of the Constitution provides that marriage shall be established only based on "the mutual consent of both sexes," and the term "husband and wife" is used for the married parties, with the term "essential equality of both sexes" being used in Paragraph 2 of the same article. "Both sexes" and "husband and wife" are usually interpreted to mean that marriage is between a man and a woman, and there is no wording in these provisions to suggest that these terms include the concept of same-sex marriage. Nor can we find any instances in the Constitution or other laws where such wording is used in any manner that means or includes such concept.

In Japan, legal marriage was institutionalized for the first time in the Meiji Civil Code. In the drafting process of the code, conventional practice was followed when defining marriage to mean that it was considered as an official authorization by law of a bond between a man and a woman for the purpose of life-long cohabitation. Given that, the idea can be acknowledged that marriage was viewed as a practice for the opposite sexes as a matter of course, and thus it was not necessary to stipulate in the code that the same sexes cannot marry (*Findings of Fact (2)(ii)(a)*).

Furthermore, Article 24 of the Constitution, which was enacted in 1947, was provided in order to establish a marriage system based on the dignity of individuals and the essential equality of both sexes. Considering the fact that in the process of drafting this provision "both male and female sexes" and "men and women" were used as [Japanese] translation of [the English term] "both sexes," the court surmises that, even at that point, the idea that marriage is between a man and a woman was taken for granted (*Findings of Fact (2)(ii)(b)*). Even in the amendment of the Civil Code the same year, which was requested in the same article of the Constitution, there is no indication that same-sex marriage was discussed in the drafting process (*Findings of Fact (2)(ii)(c)*).

In light of the above-mentioned wording of Article 24 of the Constitution and the history of its enactment, it is reasonable to find that the term "marriage" as used in Paragraph 1 of the same article refers only to that between the opposite sexes and does not include that between the same sexes.

Consequently, since the Constitution does not provide for same-sex marriage, it can be construed that marriage as required to be established as a social system under Article 24 is only between the opposite sexes, and that the freedom to marry derived from Paragraph 1 extends only to such persons.

Therefore, the Provisions cannot be deemed to be in violation of Article 24, Paragraph 1 of the Constitution. (The Plaintiffs argue that, in light of recent changes in social awareness and social conditions regarding marriage and family, in addition to the purpose of the Constitution, the term "both sexes" as used therein means "both parties." However, even if there are such changes in social awareness, it cannot be construed that the Constitution requires the establishment of a marriage system between the same sexes only because such changes have occurred, given the above-mentioned literal interpretation and enactment history).

(c) However, it is construed that the purpose of Article 24, Paragraph 1 of the Constitution, which provides that marriage shall be based solely on the mutual consent of both sexes, was to repudiate the traditional feudal family system under the Meiji Civil Code, under which marriage required the consent of the head of the household *(koshu)*, and to clarify that from the viewpoint of respect for the individual, marriage should be left to the mutual consent of the parties who will be married based on the principles of free will and equality .

Accordingly, even if it cannot be denied that Article 24, Paragraph 1 of the Constitution provides for marriage between the opposite sexes because of the term "both sexes," this cannot be construed to immediately mean that this paragraph actively prohibits marriage between the same sexes. On the contrary, the fundamental essence of marriage is to live together with public recognition for the purpose of lasting spiritual and physical union, and that the choice of whom to marry is precisely a self-actualization of individuals. Considering such essence of marriage and the current medical recognition that homosexuality and heterosexuality are mere differences in sexual orientation (*Findings of Fact (1)*), the recognition of marriage or similar institutions for homosexual persons as well as heterosexual persons would not be in conflict, but would rather align with the principles of respect for individuality and the coexistence of diverse people, which is a universal value of the Constitution. In addition, the results of various surveys conducted in recent years suggest that the understanding of homosexuality has advanced in Japan and that a considerable number of the Japanese public believes that some kind of legal protection should be provided to homosexual couples (*Findings of Fact (6)*).

Based on the foregoing, even though Article 24, Paragraph 1 of the Constitution only provides for marriage between the opposite sexes, it should not be construed to prohibit the establishment of same-sex marriage or an equivalent institution. Therefore, even if the Provisions are not in violation of this provision of the Constitution, it is appropriate to examine

their conformity to Paragraph 2 of the same article based on the aforementioned interpretation (see paragraph (3) below).

(ii) Whether the Provisions violate Article 13 of the Constitution

The Plaintiffs argue that even if freedom of same-sex marriage is not provided for in Article 24, Paragraph 1 of the Constitution, the Provisions are in violation of Article 13 of the same on the grounds that such freedom is an important part of the right to self-determination and should be guaranteed as a constitutional right.

However, since the details of matters pertaining to marriage and family are to be embodied by law in accordance with Article 24, Paragraph 2 of the Constitution, the rights and benefits pertaining to marriage and family should not be unequivocally determined under the Constitution but should only be determined specifically based on the institution provided by law in light of the purpose of the Constitution. Consequently, the freedom of marriage cannot be regarded as an inherent or natural right or benefit, but as a freedom that is conferred upon or presupposed to be conferred upon individuals only by an institution based on a law that embodies marriage as provided by the Constitution.

Therefore, under the current law which only provides for the marriage system presupposing marriage between opposite sexes as stipulated in Article 24 of the Constitution, the freedom to marry between the same sexes cannot be regarded as a part of the rights of individuals guaranteed by Article 13 of the Constitution. Furthermore, it cannot be interpreted that the said article, which is a comprehensive human rights provision, guarantees the right to seek particular systems, including a system of marriage between the same sexes.

Therefore, the Provisions do not violate Article 13 of the Constitution.

(iii) Rights and Benefits to be Considered in Article 24, Paragraph 2 of the Constitution

As described above, the freedom to marry between the same sexes cannot be derived from Article 24, Paragraph 1 or Article 13 of the Constitution, and therefore the Provisions do not contradict these constitutional provisions.

However, marriage is inherently an institution under which legal recognition is given to the lasting and sincere spiritual and physical union of two parties, who enjoy various legal protections and other benefits in accordance with their status as a result of its legal effect. The benefits enjoyed by married parties include not only economic benefits such as inheritance and distribution of property, but also the benefit of being able to live together in society as an officially recognized couple based on public recognition and notarization of their personal union (hereinafter referred to

as the "Benefit of Public Recognition"). In particular, the Benefit of Public Recognition leads to the establishment of secure and stable cohabitation of the married parties into the future, and in light of the prevailing respect for legal marriage in Japan and the diversification of the values of marriage in recent years, it can be regarded as an important personal benefit related to personal dignity and a source of self-affirmation and happiness. The value of such personal benefits does not vary whether the person is heterosexual or homosexual.

Consequently, although it cannot be said that the Constitution guarantees freedom of same-sex marriage to homosexuals, the Benefit of Public Recognition regarding their personal union should be respected as an important personal benefit related to individual dignity. As explained in paragraph (3) below, this personal benefit should be taken into consideration when examining whether or not the Provisions are beyond the scope of legislative discretion allowed under Article 24, Paragraph 2 of the Constitution.

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

(i) Article 24, Paragraph 2 of the Constitution stipulates 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."

As matters concerning marriage and family are embodied in the relevant legal systems, 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 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 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, and to ensure the substantial equality of both sexes. 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, 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, considering that the decision and determination of 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 Constitution, should be judged from the viewpoint of examining the purpose of the legal system and the impact of adopting the system, 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 (*case number 2014 (O) 1023, Supreme Court Grand Bench judgment of December 16, 2015, Minshu Vol. 69, No. 8, p. 2586*).

(ii) From the above points of view, the conformity of the Provisions in this case to Article 24, Paragraph 2 of the Constitution should be examined in view of the intent and impact of the current marriage system which is embodied in the Provisions and covers only opposite- sex marriage.

(a) In the first place, historically and traditionally, men and women have been cohabitating from time immemorial, leaving descendants through natural reproduction, and passing on their assets to the next generation. In modern society, such a family composed of a bond between one man and one woman, and dependent children born between them has come to be recognized as a natural and fundamental unit that constitutes society. Such bond between men and women, which is a central part of the family, has come to be socially approved and protected particularly as a marital relationship (*Findings of Fact (2)(*ⅰ*)*).

Even in our country, a relationship between a man and a woman who built a community and formed their families has existed from before the Meiji era, and this relationship was recognized in society as a marital relationship by customary practice. Through the modernization of the legal system by the Meiji Civil Code, the above-mentioned customary practice was institutionalized as civil marriage. As such, under the Meiji Civil Code, marriage was between a man and a woman, and even in the current Civil Code, although necessary amendments were made from the viewpoint of the dignity of individuals as required by the Constitution, the concept that marriage was between a man and a woman was carried over without being

specifically discussed, and the current marriage system was so established (*Findings of Fact (2)(*ii*)*).

The current marriage system, which was established in this way, has provisions in the Civil Code that not only determine the rights and obligations of the married couple who are the parties to the marriage, but which also specifically determine the relationship between the married couple and the child born between them, such as the provisions determining parent- child relationships such as the presumption of legitimacy of child born in wedlock (*Article 772, et seq. of the Civil Code*) and the provisions in relation to parental authority (*Article 818, et seq. of the Civil Code*). The Family Register Act also provides for the notification of marriage of the married couple (*Article 74 of the Family Register Act*) as well as the notification of the birth of a child (*Article 49, Paragraph 1 of the Family Register Act*) and the entry of the child into the parents' family register (*Article 18 of the Family Register Act*).

Consequently, the reason why the Provisions cover only opposite-sex marriage is that they consider marriage not merely as a relationship between two persons, but as a relationship between a man and a woman who live together as a family and leave descendants by giving birth to and raising children in a stable relationship that lasts a lifetime. It is thought that the intent of the Provisions is to confer legal protection to such a relationship between a man and a woman, in which they live together and raise a child, by publicly identifying it as a natural and fundamental unit of society *(Findings of Fact (2)(ii), the entire import of oral arguments*). Thus, it can be said that, in Japan, marriage as described above has historically and traditionally been a fixture in society and has gained social approval.

As mentioned above, there is a rational basis for Provisions' creating a system in which only opposite-sex marriages are given specific protections.

In contrast, the Plaintiffs claim that the purpose of marriage is legal protection of the co- habitation of the married couple, that it has nothing to do with reproduction, and that there is no rational basis for the Provisions in this case, whose purpose is to protect a relationship for giving birth to and raising a child. Certainly, whether or not a married couple bears a child should be left to the determination of the individual, and the Civil Code does not distinguish between the legal status of married couples based on whether or not they have a child, or whether or not they have the intention to bear a child (in addition, as indicated in Findings of Fact (2)(ii)(a)a, even in the arguments in the enactment process of the Meiji Civil Code, it was recognized that the sole purpose of marriage was not necessarily to bear a child). Particularly in recent years, family structures and the nature of married couples have been diversifying, and there is a growing tendency for people to view marriage as something that contributes to individual self-realization and the pursuit of happiness, rather than for raising children.

However, even with such changes in values, the purpose of marriage to protect men and women raising a child born to them while living together in a stable relationship, has not lost any of its significance, and this purpose and marriage as a means of individual self-realization are not mutually exclusive. Consequently, it cannot be said that the above-mentioned purpose of the Provisions has lost historical and social significance.

(b) On the other hand, the Provisions that only provide a marriage system between the opposite sexes and do not provide for marriage between the same sexes create the serious implication that while a homosexual person cannot marry another person of the same sex as he/she desires, a heterosexual person is free to marry a person of the opposite sex.

However, the Provisions do not restrict the freedom of a homosexual person to establish or maintain a close relationship similar to marriage or live in a cohabitating relationship with a person of the same sex with whom they wish to get married. Furthermore, the legal effects of marriage can be equally available to a certain extent such as by using other systems under the Civil Code; for example, similar effects of the obligation of cohabitation, cooperation and assistance (*Article 752 of the Civil Code*) can be created by a contract; and it is possible to transfer the property of one party to the other upon death by a contract or intestacy (*Article 964 of the Civil Code*); or to obtain the rights and obligations equivalent to a legal heir by being designated as a "universal donee." (*Article 990 of the Civil Code*).

Nevertheless, a person cannot enjoy those benefits of such a method unless a will or contract is made in advance, and there are many legal benefits that are difficult to enjoy through contracts, such as preferential tax treatment, status of residence, and status of residence for public housing. Therefore, it is correct that the benefits enjoyed by a couple of the same sex do not extend to all of the legal benefits that a couple of the opposite sex can enjoy through marriage.

In addition, even if such disadvantages may be resolved through individual legislation and operational solutions, such individual legislation would not be able to provide public recognition as in marriage, which is necessary for the same-sex couple to be publicly recognized in society and to live in a stable cohabitating relationship with peace of mind, as described in (2)(c) above.

(c) As mentioned above, with respect to the fact that the Provisions only cover opposite-sex marriage, there is a rational basis for its purpose. Further, as to the effects, the difference in benefits between homosexual couples and heterosexual couples resulting from this can be mitigated to a certain extent by contract or other means. However, there is still a problem that homosexual couples cannot enjoy the important benefits that relate to individual dignity, such as the Benefit of Public Recognition.

However, the way to realize the Benefit of Public Recognition for homosexual couples is not limited to the inclusion of homosexual couples in the current marriage system (as mentioned in (2)(i)(c) above, Article 24, Paragraph 1 of the Constitution does not prohibit same-sex marriage), as this can be realized by establishing a new system of legal recognition similar to marriage (which could be named "registered partnership system" or "same-sex marriage"). Since the Provisions for the current marriage system merely provide for a system of opposite- sex marriage, it does not prevent the establishment of a system of public recognition similar to marriage for homosexual couples. In Japan, many local governments have already introduced a system of public recognition and partial protections for homosexual couples under a Registered Partnership System, and many homosexual couples use this system as a way to get public recognition. Although this is not a legal system, it has been recognized by the public as a social system.

Thus, although from the standpoint of individual dignity, it can be said that it is necessary to realize the Benefit of Public Recognition for homosexual couples, there are various ways to do so. What kind of system is appropriate among the various options should be decided in a democratic process, taking into consideration not only the marriage system under the current law but also other systems similar to marriage, as well as various societal factors, including the national tradition and public sentiment and the overall norms of marital and parent-child relationships in each historical era.

Taking the above points into consideration comprehensively, at the present stage, where discussions have not been exhausted as to what kind of system is appropriate to realize the Benefit of Public Recognition for homosexual couples under the circumstances mentioned above, it is not possible to immediately conclude that the Provisions lack a rational basis in light of the Constitution's demand for individual dignity. Therefore, it is not possible to conclude that the Provisions violate Article 24, Paragraph 1 of the Constitution because they exceed the scope of discretion granted to the legislature (although it goes without saying that, after public debate as mentioned above, the Diet may decide to amend or repeal the Provisions and establish a system for same-sex marriage, this is a different dimension from the review of constitutionality, i.e., whether or not the Provisions violate Article 24 of the Constitution).

(d) On the other hand, the Plaintiffs argue that the Provisions cannot be within the scope of discretion granted to the legislature because they directly restrict the freedom of marriage of homosexual individuals.

However, as explained in (2) above, since the freedom of marriage for homosexual couples cannot be regarded as a constitutional right, it cannot be concluded that the Provisions exceed the scope of discretion

granted under Article 24, Paragraph 2 of the Constitution merely because same-sex marriage is not permitted. While the interests of public recognition for homosexual couples should be respected as personal interests, the way to realize such personal interests concerning marriage and family, which cannot be regarded as constitutional rights, needs to be decided in relation to, among other points, the social circumstances, the living conditions of the people, and views of the family of the relevant time, as mentioned above. In particular, this is an issue for the entire nation as it pertains to the entire marriage system and requires multifaceted consideration and decision by the Diet. Thus, it is consistent with the purpose of the said Paragraph of the Constitution to conclude that the enactment, amendment, or repeal of the Provisions should be left to the discretion granted to the legislature.

(e) The Plaintiffs also argue that they are not seeking to establish a system equivalent to marriage but seeking access to the existing system of marriage as provided for in the Provisions, and argue that the establishment of a different system would encourage discrimination.

However, in the first place, the freedom of marriage is the freedom to decide when and with whom to marry. In the same manner that the marrying parties are not guaranteed the right to freely determine the benefits of the marriage system to avail themselves of, the parties cannot freely choose the system for realizing the Benefit of Public Recognition for same-sex couples. As already mentioned, it is necessary to discuss and determine in a democratic process, whether the current marriage system, a different system similar to and equivalent to marriage, or any other system is appropriate in order to realize the Benefit of Public Recognition.

On the contrary, the current marriage system relies, in material respects, on provisions such as those regarding presumption of legitimacy of child born in wedlock, which were made on the assumption that the husband and wife are able to reproduce naturally. Since the existence of the Provisions is considered to be closely linked to and inseparable from the entire marriage system, it should not be immediately concluded that it is appropriate to open up the current marriage system in the existing form of legal system to same-sex couples by finding that the Provisions are unconstitutional and invalid. Currently, various survey results show that a relatively large number of people are in favor of "marriage of two people of the same sex" or "same-sex marriage" (*Finding of Facts (6)*). However, since the content of "marriage of two people of the same sex" or "same-sex marriage" is not always unambiguously defined in these surveys, it cannot be denied that there is a possibility that some of the affirmative responses did not strictly distinguish between the "marriage" system under the current law and a new system similar to marriage. In addition, according to

questionnaires targeting homosexual persons and members of the LGBT community, there were various opinions on how legal protection should be provided (*Finding of Facts (6)*). Furthermore, even in other countries and regions where systems of legal recognition and protection for homosexual couples are said to exist, the methods of protection vary, as some countries have adopted a marriage system between persons of the same sex, while others adopt the Registered Partnership System, or use these two systems in combination, and the process of adoption is not necessarily uniform either (*Finding of Facts (3)*).

In addition, creation of a separate system does not necessarily encourage discrimination against homosexual persons as the Plaintiffs argue. In fact, in Japan, the number of local governments that have adopted the Registered Partnership System has been increasing in recent years, and as the Plaintiffs argue, such system helps to eliminate discrimination and prejudice against homosexual couples. It can be said that the true elimination of discrimination and prejudice can be realized through the establishment of a system upon holding open discussions in a democratic process.

For the reasons stated above, in order to realize the Benefit of Public Recognition for homosexual couples, not only should we consider the method of applying the marriage system under the current law, but also an extensive consideration should be made, including that of a system similar to marriage. In light of the fact that there are various opinions among homosexual persons, one cannot say that there is no room for considering the option of establishing a system similar to marriage, just because the Plaintiffs do not desire such a system.

(f) The Plaintiffs also argue that since homosexual individuals are part a minority group in society, it cannot be expected that the legislative process will establish a system for them, and in such case, the judicial system should proactively conduct a constitutional review from the perspective of the protection of minority rights and protect homosexual individuals by declaring the Provisions unconstitutional.

However, since it cannot be construed that the freedom to marry between homosexual individuals is guaranteed under the Constitution, it cannot be considered that not permitting same-sex marriage is equivalent to the situation where fundamental human rights of a minority group guaranteed under the Constitution are violated. In addition, since the realization of marriage of same-sex couples or another system similar to marriage is not mutually exclusive with the freedom to marry between opposite-sex couples, it cannot be necessarily said that the legislation for establishing a system of same-sex marriage cannot be expected to happen under the principle of majority rule.

In fact, a recent survey showed that the number of people who responded that a system of legal protection such as marriage should be

permitted for same-sex couples is increasing considerably. In light of the foregoing, as long as there can be discussions in the democratic process, it cannot be said that the judicial system should proactively declare the unconstitutionality of the Provisions at this point.

Certainly, in Japan, even though Article 24, Paragraph 1 of the Constitution does not prohibit the establishment of marriage or another similar system for same-sex couples, it has been shown that the movement for establishing not only marriage, but also other systems similar to marriage for homosexual individuals has not fully developed. However, discussion on same- sex marriage in the Diet has been held after 2015 (*Plaintiffs' Evidence A11, 12, 60~62, 312, 318*). In addition, even though same-sex marriage was mentioned before 2015, there is no evidence showing discussions thereon). There still exist many people who have negative views or moral beliefs against same-sex marriage or legal protection for same-sex couples (according to the survey conducted in 2015, while a majority of people in their 20s and 30s supported legal protections for same-sex couples, a majority of people over 60 years of age had a negative opinion in this regard. Further, a significant number of people across age groups stated that they had "no answer" in the survey. The survey in 2019 shows that positive opinion is increasing; however, while approximately 47% of persons 60 years of age or above have a positive opinion, approximately 43% have a negative opinion. Further, a significant number of persons stated that they had no response (*Findings of Fact (6)*). Furthermore, while surveys show that there are many positive opinions about "same-sex marriage" or "marriage between the same-sex" (*Findings of Fact (6)*), as mentioned above, it would be difficult to say that all respondents have the same opinion on the meaning of "same-sex marriage" in the surveys).

In light of the above circumstances, it can be said that understanding of homosexuality has developed in Japan and the momentum for supporting the position that legal protection equivalent to marriage should be given to homosexual individuals is growing; however, at least the discussions with respect to the measures therefor are still under way. Therefore, while statutory amendment or establishment of a new system has not been specifically considered at this point, it does not necessarily mean that the discussion regarding homosexual individuals' right to marry is lagging behind just because they are a minority group. In addition, it cannot be said that no further discussion in the Diet in future can be expected.

In light of the foregoing, while legislative inaction in not implementing any legal measures with respect to introducing a system of marriage between persons of the same-sex may violate Article 24, Paragraph 2 of the Constitution in the future and become unconstitutional

depending on changes in future social circumstances, it cannot be said that the Provisions exceed the legislative discretion delegated under such paragraph.

c. Whether the Provisions are in Violation of Article 14, Paragraph 1 of the Constitution (Concerning Issue (1))

(1) The Provisions only provide for marriage between the opposite sexes, and do not provide for marriage between homosexual persons. The Plaintiffs argue that this is in violation of Article 14, Paragraph 1 of the Constitution because the Provisions provide that heterosexual persons are allowed to marry, but homosexual persons are not allowed to marry, and there is a difference in treatment by which they are unable to enjoy the benefits of marriage (the "Differential Treatment").

Article 14, Paragraph 1 of the Constitution provides for equality under the law, and this provision should be construed to prohibit discriminatory legal treatment unless it is based on reasonable grounds in accordance with the nature of the matter (*case number 1962 (O) 1472, Supreme Court Grand Bench judgment of May 27, 1964, Minshu Vol. 18, No. 4, p. 676, case number 1970 (A) 1310, Supreme Court Grand Bench judgment of April 4, 1973, Keishu Vol. 27, No. 3, p. 265, case number 2013 (O) 1079, Supreme Court Grand Bench judgment of December 16, 2015, Minshu Vol. 69, No. 8, p. 2427, etc.*). As mentioned in 2(3)(i) above, Article 24, Paragraph 2 of the Constitution primarily entrusts the establishment of a specific system concerning marriage and family matters to the reasonable legislative discretion of the Diet, and defines the limits of the discretion by requiring and providing guidelines that the legislation shall be based on the dignity of the individual and the essential equality of the two sexes. As such, it would be reasonable to construe that differential treatment is in violation of Article 14, Paragraph 1 of the Constitution if the Provisions of the marriage system do not have reasonable grounds even taking into account the above discretionary powers granted to the Diet (*see case number 2012 (Ku) 984, 985 Supreme Court Grand Bench judgment of September 4, 2013, Minshu Vol. 67, No. 6, p. 1320*).

(2) From this Viewpoint, We Examine whether the Provisions are in Violation of Article 14, Paragraph 1 of the Constitution.

(i) In this respect, the Defendant argues that the Provisions do not distinguish the availability of the marriage system based on whether a person is objectively homosexual or heterosexual, and the fact that homosexual individuals are unable to marry a person who matches their sexual orientation is merely a de facto consequence of the Provisions, and as such, [the legislative discretion should be broader than the discretion granted for legal rights]. It is true that the Provisions do not require the parties to have a specific sexual orientation as a requirement for marriage, nor do they prohibit marriage because the parties have a specific sexual

orientation, and therefore, it cannot be said that the purpose, content, and nature of the Provisions themselves determine whether or not the marriage system is available based on sexual orientation. However, since the essence of marriage lies in the continuous voluntary association of two people living together permanently, even if a homosexual person was able to formally utilize the marriage system with the other sex, it is no longer accompanied by the essence of marriage; therefore, it is practically impossible for homosexual individuals to marry. Thus, the Provisions should be regarded as distinguishing whether or not a person can marry depending on whether he or she is homosexual or heterosexual, and this cannot be regarded as a mere de facto consequence.

Rather, as mentioned above, the Differential Treatment is a distinction as to whether the marriage system, which is related to the dignity of the individual, can be effectively used, and is based on sexual orientation, a matter that cannot be changed by the will or effort of the person himself/herself. Therefore, the constitutionality of the Differential Treatment needs to be examined more carefully considering the nature of the relevant matters.

(ii) In this regard, it is recognized that the Provisions were established in response to the demand of Article 24, Paragraph 2 of the Constitution to legislate a marriage system between persons of the opposite sex in explicit terms, and to create the marriage system between persons of the opposite sex in consideration of individual dignity and the essential equality of the two sexes. The purpose and objectives of the marriage system are as envisaged in the Constitution and are rational. Further, although the Differential Treatment arises because the Provisions do not provide for the marriage system between persons of the same sex, Article 24, Paragraph 1 of the Constitution clearly stipulates the freedom to marry between persons of the opposite sex. While it does not prohibit marriage between persons of the same sex, it does not stipulate anything about a same-sex marriage system, and as such, it cannot be said that Article 24, Paragraph 1 of the Constitution guarantees to same-sex couples the same marriage system that is granted to persons of the opposite sex. Accordingly, it cannot be said that the Provisions lack a rational basis in relation to the above-mentioned legislative purpose. Therefore, the fact that the Provisions do not provide for a marriage system between persons of the same sex itself cannot be found to violate Article 14, Paragraph 1 of the Constitution as being beyond the scope of legislative discretion.

(iii) It is true that homosexual persons do not have the same or a similar system of marriage as the one between heterosexual persons in Japan at the present time. Consequently, homosexual persons cannot avail themselves of the various legal protections available to heterosexual persons

by marriage, in particular including the Benefit of Public Recognition, and other important personal benefits, as mentioned above.

Therefore, careful consideration should be given to whether the degree of difference in the benefits that exist between homosexual persons and heterosexual persons in terms of the relationship with their desired person exceeds the scope of reasonable legislative discretion permitted by Article 14, Paragraph 1 of the Constitution.

However, as mentioned in 2(3)(b) above, marriage between persons of the opposite sex is a system that has been established historically and traditionally for the rational purpose of protecting the relationship between men and women in which they give birth to and raise children. On the other hand, discussions are ongoing as mentioned above regarding how to provide protection for the human connection between persons of the same sex. In addition, the freedom of homosexual persons to build close relationships with their desired partners is not limited, and other disadvantages are substantially eliminated or mitigated by the use of other systems under the Civil Code (contracts, wills, etc.). Furthermore, although it does not exist as a legal system, many local governments have begun to establish a Registered Partnership System for homosexual persons, and the above differences are mitigated to a certain extent, such as by increasing the understanding of the people. Judging from these facts (2(3)(b) above), it is difficult to conclude that the difference in the status exceeds the scope of the Diet's reasonable legislative discretion permitted by Article 14, Paragraph 1 of the Constitution.

Even if the differences cannot be assessed to be small, as mentioned above, it is possible to further mitigate the differences by enacting a system similar to marriage or other individual legislation even under the current provisions. Therefore, in light of the discretionary power granted to the Diet, it cannot be judged that there are no reasonable grounds for such distinction.

As discussed above, the Differential Treatment cannot be deemed to be in violation of Article 14, Paragraph 1 of the Constitution.

d. Whether the Failure to Amend or Repeal the Provisions in Question is Illegal in Terms of the Application of Article 1, Paragraph 1 of the State Redress Act (Concerning Issue (2))

(1) Article 1, Paragraph 1 of the State Redress Act provides that when public officials, in exercising public authority of the State or of a public entity, have breached a legal obligation they owe to an individual citizen and inflicted damage to that citizen, the State or the public entity shall be responsible for compensating that citizen. In determining whether the Diet members' legislative action or inaction is illegal in the context of this paragraph, the key question is whether the Diet members' conduct in the legislative process breached a legal obligation they owe to individual citizens, not whether the results of such legislation are constitutional.

Further, the evaluation of the legislative conduct above should, in principle, be left to the political judgment of the citizens. As such, even if a particular piece of legislation violated the Constitution, the legislative action or inaction of the Diet members should not be automatically deemed illegal in the context of this paragraph for that reason alone.

However, in cases where the Diet neglects, for a long time and without justifiable reasons, to take legislative measures such as revising or repealing provisions of a law even though it is clear that those provisions are in violation of the Constitution as they restrict rights and interests that are constitutionally guaranteed or protected, the legislative inaction of the Diet members should, as an exception to the general rule [of deference to the legislature], be deemed unlawful under Article 1, Paragraph 1 of the State Redress Act, as the actions of the Diet members in the legislative process constitute a breach of the legal obligations they bear under their duties stated above. (*See case number 1978 (O) No. 1240, Supreme Court, First Petty Bench of judgment of November 21, 1985, Minshu Vol. 39, No. 7, p. 1512, and case numbers 2001 (Gyo-Tsu) No. 82 and 83 and 2001 (Gyo-Hi) No. 76 and 77, Supreme Court, Grand Bench judgment of September 14, 2005, Minshu Vol. 59, No. 7, p. 2087, 2013 (O) No. 1079, Supreme Court, Grand Bench judgment of December 16, 2015, Minshu Vol. 69, No. 8, p. 2427*).

(2) In this case, as explained in Paragraphs 2 and 3 above, the provisions are within the reasonable legislative discretion of the Diet and are not in violation of the Constitution, and therefore, it cannot be construed that the fact that the Provisions have not been amended or repealed is an exceptional case as stated above. Therefore, the fact that the Provisions have not been amended or repealed should not be considered illegal under Article 1, Paragraph 1 of the State Redress Act.

C. *Conclusion*

As stated above, the Plaintiffs' claims are groundless without needing to judge other points [raised by the Plaintiffs], and therefore, the claims shall be dismissed as stated in the main text of the judgment.

II. APPENDIX 2

A. *Summary of the Plaintiffs' Claims with Respect to the Issues*

1. Regarding Issue (1) (Whether the Provisions Violate Articles 24, 13, and 14, Paragraph 1 of the Constitution)

(1) Summary of the Plaintiffs' Claims

a Even though the Provisions do not expressly prohibit marriage between members of the same sex by their terms, "husband and wife" in the

Civil Code and the Family Registry Law refers to a male husband and female wife, implying that marriage between members of the same sex would not be recognized and therefore they cannot utilize the marriage system. Accordingly, the Plaintiffs assert that the Provisions should be deemed unconstitutional.

While the Defendant alleges that the Plaintiffs' demands are nothing more than a demand for the creation of a legal system that actively protects the interpersonal relationship between members of the same sex including those who have chosen a member of the same sex as a marriage partner, the Plaintiffs seek access to the marriage system provided for in the Provisions, and are not seeking the creation of a new marriage-like system.

b The Provisions Violate Articles 24 and 13.

i. Article 24, Paragraph 1 guarantees freedom of marriage by eliminating the notion of marriage as contained in the Meiji Civil Code, which had placed the primacy of the family unit over the individual. [Article 24, Paragraph 1] guarantees that a marriage is only valid when freely consented to by the parties, without interference from the state or a third party, and this guarantee extends to same sex marriage. It is inappropriate to give undue weight to the term "both sexes" in the same Article, and interpret [the Article] as limited to marriage between heterosexual persons.

This is supported by Article 13, which guarantees [(with respect to matters that are deeply connected to an individual's personality)] an individual's right to decide to enter into a legal marriage without interference from a public authority (self-determination), including when and whom to marry, as these matters are indispensable to realizing the Constitution's essential respect for the individual and its guarantee of self-determination.

[In contravention of these guarantees], the Provisions do not recognize same sex marriage by directly restricting the "with whom to marry" aspect of the freedom to marry, and there being no reason to justify such restriction, the Provisions violate Article 24, Paragraph 1 and Article 13 of the Constitution.

ii. Regarding the "choice of spouse and other matters relating to marriage and family" in Article 24, Paragraph 2, it is established that laws [related thereto] must be enacted based on a "respect of the individual."

In addition to the "respect of the individual" guaranteed to all persons established in Article 13, the requirement in Article 24, Paragraph 2 of the Constitution that laws be enacted based on the "respect of the individual" is a deep reconsideration of the pre-War family system. Furthermore, the building of an intimate relationship that is publicly recognized with one's partner of choice is an important matter related to the core of an individual's identity.

The Provisions directly restrict the freedom to marry [by limiting whom one may take as a marriage partner], with such restriction being semi-

permanent and leaving no room for legislative discretion due to the fact that LGBT individuals are social minorities. There is a history of LGBT individuals being subject to prejudice and discrimination, and addressing discriminatory treatment of this group requires addressing violations that affect the rights of such minorities. It is difficult to correct these violations [of minority rights] through the democratic process, and allowing for legislative discretion in these matters effectively ignores these human rights violations.

Furthermore, the goal of the Provisions is to protect the common life of married couples regardless of whether they have children and regardless of whether they desire or have the ability to have children. The only difference between heterosexuality and homosexuality is the difference in sexual orientation, and even homosexuals can lead a life together and realize the essence of marriage.

Accordingly, the Provisions violate Article 24, Paragraph 2 of the Constitution. c The Provisions violate Article 14, Paragraph 1 as follows:

i. The Provisions recognize the use of the marriage system only by members of the opposite sex, and deny the use of the marriage system by members of the same sex, resulting in a disparate treatment based on sexual orientation that lacks a rational basis.

Because one's sexual orientation cannot be changed by one's will or effort, the disparate treatment resulting from one's ability to marry based on one's sexual orientation should be viewed as discrimination based on one's social status or gender as defined in the latter clause of Article 14, Paragraph 1 of the Constitution, and the reasonableness of this disparate treatment should be subject to strict scrutiny review. Furthermore, the right that is restricted by this disparate treatment is the freedom of homosexuals to marry under the Constitution. As such right is indispensable to an individual's self-actualization, and because the restriction here is directed at homosexuals, a social minority, this disparate treatment cannot be corrected via the democratic system. The reasonableness of this disparate treatment therefore should be subject to strict scrutiny review.

ii. The Defendant claims that the purpose of the marriage system, which is for a male and a female to produce a child, is a reasonable basis for this disparate treatment. However, the societal importance of marriage as a system for raising children has decreased along with the loss of the indivisibility of marriage and reproduction due to the diversity of family models accompanying societal changes, and considering that marriage is currently thought to primarily protect the individual benefits of the parties, the purpose of the marriage system is to officially recognize the permanence of the parties' psychological connection, to protect it under law, and to stabilize this connection. Therefore, stating that the purpose of marriage is

reproduction and entirely excluding homosexuals from the marriage system is unreasonable and violates Article 14, Paragraph 1 of the Constitution.

iii. As a result of this disparate treatment, there are various rights and benefits that cannot be enjoyed by homosexual couples and there is no reasonable basis for denying them these rights and benefits. There is widespread respect for legal marriage in Japan, whereby a legally married couple enjoys societal acceptance as a formal couple and there is social meaning and necessity in making that relationship status public. However, because there is no marital system for same sex couples in Japan, there is no legal recognition available to them and they therefore do not enjoy that same social recognition and acceptance. In addition to the various legal rights and benefits that accompany marriage, couples of the opposite sex also enjoy other related benefits such as the right to consent to medical procedures for their partner, which are denied to same-sex couples.

When the Constitution and the Provisions were enacted, homosexuality was considered a mental illness and also unethical, however it has since been made clear that homosexuality as a sexual orientation is not a mental illness, and, while there is still debate as to the basis for sexual orientation, it is at least clear that it is not something one determines of one's own volition. There is therefore no reasonable basis for the social acceptance conferred by marriage and its accompanying rights and benefits to be granted only to couples of the opposite sex and denied to same sex couples.

Therefore, as described above and in light of the legislative purpose of the Provisions, the disparate treatment which excludes LGBT individuals from the marriage system has no reasonable basis, and violates Article 14, Paragraph 1 of the Constitution.

(2) Summary of the Defendant's Claims

a The Provisions Do Not Violate Articles 24 and 13 of the Constitution.

i. Article 24, Paragraph 1 uses the words "both sexes" and "husband and wife" based on the assumption that a marriage takes place between different sexes and does not assume the possibility of a same sex marriage. Therefore, this Article does not guarantee same sex marriage to the same level as marriage between members of the opposite sex.

It is not clear whether and to what extent Article 13 guarantees the right of self-determination. Even assuming there may be some right of self-determination regarding marriage, the freedom to marry is granted to individuals through a legal system that embodies marriage as defined by the Constitution, and cannot be considered an innate or natural right or interest of individuals. The Provisions only provide the particulars of marriage as interpersonal relationships between members of the opposite sex in order to address the demands of Article 24. Ultimately, the substantial nature of the rights or interests that Plaintiffs argue as being infringed by the Provisions is not something other than a request for a legal system that permits

proactive protection of or provision of legal interest to an interpersonal relationship between members of the same sex. This is not something guaranteed by the Constitution as an innate or natural right or interest that is separate from legal systems, and therefore have no basis in the right of self- determination.

Accordingly, the Provisions do not violate Articles 24, Paragraph 1 or Article 13 of the Constitution.

ii. Given that Article 24, Paragraph 1 does not assume that members of the same sex may be legally married, Article 24, Paragraph 2 also does not require a legal system for marriage other than for marriages between members of the opposite sex.

Also, the Provisions have a reasonable basis considering the purpose of the marriage system under the Civil Code, which is to provide legal protection to the relationship between a husband and wife who give birth to their children and raise them while living together. Under the basic family system, such purpose may need to be captured conceptually and the standards for how the system should operate needs to be clear. In order to achieve this purpose, it is reasonable to conceptually determine the subject of the marriage system to be a connection between "members of the opposite sex" who may give birth to a child.

Accordingly, the Provisions are reasonable in light of the demands for individual dignity and essential equality of the sexes, and do not exceed the scope of legislative discretion of the Diet, and therefore do not violate Article 24, Paragraph 2 of the Constitution.

b The Provisions Do Not Violate Article 14, Paragraph 1 of the Constitution for the Following Reasons.

i. Because Article 24 defers the construction of a legal system for marriage to legislation that establishes marriage as that between members of the opposite sex, the disparate treatment in the Provisions do not violate Article 14, Paragraph 1, as this result is expected and permitted by the Constitution.

ii. Also, because the Provisions are neutral provisions that do not provide for the applicability of the marriage system based on sexual orientation, the differences between marriage by homosexuals and marriage by heterosexuals are merely the actual result or indirect effect of the Provisions; the applicability of Article 14, Paragraph 1 regarding marriage and family should be considered to be consistent with Article 24, Paragraph 2; and it cannot be said that the right and interest to same sex marriage is guaranteed by the Constitution. Therefore, the permissibility of same sex marriage is a matter for which the legislature has extensive discretion.

An argument that the Provisions violate Article 14, Paragraph 1 can only be made where there are no reasonable grounds for the legislative

purpose of the Provisions that limit access to marriage on the basis of sexual orientation of heterosexuals and homosexuals, where the specific method or means of the limitation are materially unreasonable in relation to the legislative purpose, or where the legislature clearly exceeds or abuses its extensive discretion.

However, as described below, the Provisions have reasonable grounds when considering the legislative purpose and the disparate treatment in the present case cannot be said to be materially unreasonable in relation to the legislative purpose. Accordingly, the Provisions do not violate Article 14, Paragraph 1.

iii. A marriage system based on the Provisions is realized in the legislative system based on (among all other relationships that may develop in the course of human social life) the interpersonal relationship between a male, a female and their child, by affording various rights including those based on the status of husband and wife and the accompanying obligations in order to efficiently operate and maintain their long-term relationship. Thus, the particular purpose of the Provisions is to protect the relationship between a male and a female who live together while giving birth to and raising a child.

Further, the Provisions were created in response to Article 24, which assumes a marriage taking place between members of the opposite sex. It is accepted in Japan that interpersonal relationships between a male and a female play a central role in forming a family which is a natural and fundamental group unit to form and support Japanese society by giving birth to and raising children who support future generations. Considering that there is a historically formed approval by society of this role, the legislative purpose has a reasonable basis.

iv. With regard to the basic family system (including marriage), its purpose must be expressed conceptually while the standards utilizing such system must be clear. Therefore, it is reasonable to conceptually define the scope of who can be married as husband and wife on the basis of natural biological fertility regardless of the actual possibility of natural fertility.

Furthermore, whether the Constitution envisages that the Provisions provide for a marriage system between members of the opposite sex and does not assume a system that allows same sex marriage, and how the Constitution treats an interpersonal relationship between members of the same sex in relation to the marriage situation in Japan, are matters that are under discussion in society and it is hard to say that there is agreement that the interpersonal relationship between members of the same sex is equal to the interpersonal relationship between members of the opposite sex. A situation where same sex marriage is not permitted only means that there is no particular legal protection provided to the interpersonal relationship between members of the same sex and does not limit the freedom of members of the same sex to form and maintain an interpersonal relationship

similar to marriage, to form a family or to live together. The right and interest to enjoy the legal effect of marriage are not guaranteed for interpersonal relationships between members of the same sex under the Constitution or a particular legal system, and the substantial disadvantage of same sex marriages not being permitted would be substantially resolved or mitigated by use of the civil law system and other legal means (such as contracts or wills). As stated above, the Provisions are reasonable in relation to the legislative purpose.

2. Regarding Issue (2) (Whether it is Illegal Under Article 1, Paragraph 1 of the State Redress Act Not to Revise or Abolish the Provisions in this Case)

(1) Summary of Plaintiffs' Claims

a Where the Diet neglects to take legislative action [(such as revision or abolition of a law)], for a long period of time without justifiable reason for matters where it is otherwise obvious that certain legal provisions clearly violate the Constitution and unreasonably restrict constitutionally guaranteed or protected rights and interests, the legislative omission or inaction shall be deemed illegal under the provisions of Article 1, Paragraph 1 of the State Redress Act as such inaction by the members of the Diet in the course of legislative action violates their professional legal obligations.

The "obviousness" here of the unconstitutionality of the legislature's inaction has a meaning that is more moderate than the general usage of the term "it is obvious" (i.e., when there is no objection) and all circumstances, including changes in the social situation until the conclusion of oral arguments, are the basis for that determination.

b The Provisions in this case relate to marriage, where the construction of a specific system was initially left to the reasonable legislative discretion of the Diet, but as various matters and factors that should be considered in the legislative context of the marriage system change over time, the reasonableness of the Provisions must be examined and considered consistently in light of the Constitution, which guarantees the dignity of the individual and equality under the law. In addition, because the Provisions in this case result in disparate treatment based on sexual orientation, the members of the Diet must give careful consideration to sexual minorities including homosexuals in the course of performing their duties and they are required to fully defend the rights and interests of homosexuals. Accordingly, the legal obligation that the members of the Diet owe to individual citizens in relation to the Provisions in this case is not just passive [(i.e., where it is sufficient to take legislative measures when the unconstitutionality of the Provisions is confirmed)], but also includes an active obligation to proactively examine and consider the reasonableness of

the Provisions consistently in light of the Constitution, which guarantees the dignity of the individual and equality under the law, by investigating the reasonableness of various matters.

However, at a time long before January 4, 2019, when Plaintiff 3 and Plaintiff 4 submitted their marriage notification (who were the earliest among the Plaintiffs to do so), the reasonable grounds for the Provisions no longer existed, even when taking into account the discretionary rights of the legislature. The Provisions in this case violate Article 24, Paragraphs 1 and 2, Article 13, and Paragraph 14, Paragraph 1 of the Constitution, because they infringe upon the freedom of marriage of the Plaintiffs, and they also result in the disparate treatment of marriage of same-sex couples without reasonable grounds by infringing upon the right and interest of same-sex couples to receive the same treatment vis-à-vis marriage as heterosexual couples.

Therefore, the unconstitutionality of the Provisions in this case should have been obvious to the Diet long before the Plaintiffs submitted their marriage notification. For a long time, the Diet neglected to take legislative action to revise or abolish the Provisions without legitimate reason, meaning that such failure by the Diet to revise or abolish the Provisions should be illegal under Article 1, Paragraph 1 of the State Redress Act.

(2) Summary of Defendant's Claims

a The term "illegal" in Article 1, Paragraph 1 of the State Redress Act means that a public servant, who exercises the public power of a national or public body, violates a legal obligation when executing his or her public duties to an individual citizen. Whether a legislative act or omission of the member of the Diet is illegal under the application of Article 1, Paragraph 1 of the State Redress Act depends on whether or not the actions of the member of the Diet in the legislative process violate their legal obligation to execute their duties in respect of an individual citizen and should be distinguished from the issue of unconstitutionality of the underlying legislation. In addition, the evaluation of the actions mentioned above is a matter that should be entrusted to the political judgment of the nation in principle, even if the content of the legislation violates the provisions of the Constitution, and the legislative act or omission of a member of the Diet does not immediately result in an assessment of illegality under Article 1, Paragraph 1 of the State Redress Act.

Even where it is obvious that provisions of a certain law violate the Constitution because they limit the rights and interests that are guaranteed or protected by the Constitution without reasonable grounds, if the Diet neglects to take legislative action such as the revision or abolition without justification, it is reasonable that such legislative failure would be subject to an exceptional assessment of illegality under Article 1, Paragraph 1 of the State Redress Act since the [in]action of Diet members would violate their

legal obligation to execute their public duties as noted above.

b Since the Provisions in this case do not violate Article 24, Paragraphs 1 and 2, Article 13, and Article 14, Paragraph 1 of the Constitution, the need to assess illegality under Article 1, Paragraph 1 of the State Redress Act is moot.

3. Regarding Issue (3) (Plaintiffs' Damages, Amount of Damages)

(1) Summary of Plaintiffs' Claims

Because of Defendant's failure to revise or abolish the Provisions in this case, the Plaintiffs have suffered serious damage due to the infringement on their freedom to marry as guaranteed by the Constitution and they therefore cannot receive psychological and social benefits, legal and economic rights and interests, and de facto benefits associated with the social approval that is associated with marriage, while their dignity is tarnished by the stigma of engaging in a relationship that is not approved by society. The Plaintiffs suffer significant psychological distress as a result.

The amount of consolation fee sufficient to compensate for such mental distress is at least one million yen for each Plaintiff.

(2) Summary of Defendant's Claims

The Plaintiffs' damages claims are rejected.

4. Regarding Issue (4) (Regarding Plaintiff 4, Whether There is a Mutual Guarantee Prescribed in Article 6 of the State Redress Act)

(1) Summary of Plaintiffs' Claims

Article 17 of the Constitution, which prescribes the right to claim compensation from the state, states that "anyone can [make a claim]." The subject of Article 1, Paragraph 1 of the State Redress Act is not limited to Japanese citizens or to those foreign nationals who have nationality in a country that has a mutual guarantee [with Japan], while Article 6 of the State Redress Act provides that a mutual guarantee analysis between the foreign person's country of nationality and Japan is relevant only in cases where the claimant is a foreign national. In light of the structure of the Constitution and the State Redress Act, even if a claim for damages is made by a foreign national based on the State Redress Act, it would be sufficient to demonstrate his or her standing under Article 1, Paragraph 1 of the State Redress Act as the basis of the claim, and the lack of mutual guarantee between the country of nationality of the foreign claimant and Japan would not bar the claim.

However, as of 2002, there were mutual guarantees between the United States and Japan regarding state compensation, and there have been no subsequent changes to date. Therefore, for Plaintiff 4, the mutual guarantee prescribed in Article 6 of the State Redress Act exists and there is no need for further analysis [under Article 1, Paragraph 1 of the State

Redress Act].

(2) Summary of Defendant's Claims

Because Article 6 of the State Redress Act adopts the mutual guarantee principle, this Article has granted foreign nationals the right to make a claim under the State Redress Act on the condition that there is a mutual guarantee [between Japan and the foreign claimant's country of nationality], and this Article should therefore be the basis for conferring a right to foreign nationals to make a claim under the State Redress Act and satisfaction of the mutual guarantee requirements is necessary to bring a claim for damages under Article 1, Paragraph 1 of the State Redress Act.

It cannot be said that a mutual guarantee prescribed in Article 6 of the State Redress Act in relation to Plaintiff 4 has been substantiated.

Case No. (*Wa*) 1258 of 2019

[Judgement Outline]

This Court reached the following conclusions.

1 Article 24, Paragraph 1 and Article 13 of the Constitution do not guarantee the freedom of marriage between persons of the same sex and therefore, the provisions of the Civil Code and the Family Register Act (the "Provisions"), which do not permit same-sex marriage, do not violate Article 24, Paragraph 1 and Article 13 of the Constitution.

2 From the perspective of the dignity of the individual, the realization of the benefits and interests (interest in official recognition) relating to being officially approved and recognized and thereby accepted as couples and capable of living together in society, should also extend to same-sex couples; however, the Court does not find that the Provisions violate Article 24, Paragraph 2 of the Constitution by deviating from the legislative discretion at this stage when there have not been thorough national discussions about what system [i.e., legal recourse] is appropriate to realize such benefits and interests.

3 The difference [in the treatment of same-sex couples] arising from the Provisions is the result of the Provisions complying with Article 24, Paragraph 1 of the Constitution, and cannot be said to have exceeded the permissible scope under Article 14, Paragraph 1 of the same and therefore, the Provisions do not violate Article 14, Paragraph 1 of the Constitution.

4 The Provisions do not violate the relevant provisions of the Constitution, and therefore, the legislative inaction in not having amended or repealed the Provisions does not violate the application of Article 1, Paragraph 1 of the State Redress Act.

Eleventh Civil Division, Osaka District Court

Chief Judge Fumi Doi

Judge Yoshihide Kamiya

Judge Takahiro Seki

Case No. (*Wa*) 1258 of 2019, Claim for Damages Case
[Summary of Facts and Main Issues]

The Plaintiffs whose marriage notifications have been rejected because they are of the same sex argue that the relevant provisions of the Civil Code and the Family Register Act (the "Provisions"), which do not permit marriage between persons of the same sex, violate Article 24, Article 13, and Article 14, Paragraph 1 of the Constitution, and that the failure of the Defendant to take necessary legislative measures is a violation of Article 1, Paragraph 1 of the State Redress Act. The Plaintiffs seek payment for non-pecuniary damages.

The main issues in the present case are: (1) whether or not the Provisions violate Article 24, Article 13, and Article 14, Paragraph 1 of the Constitution; and (2) whether or not the legislative inaction in not having amended or repealed the Provisions should be considered illegal in the application of Article 1, Paragraph 1 of the State Redress Act.
[Decision]

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

[Summary of Judgement]
1. Whether or Not the Relevant Provisions of the Civil Code and the Family Register Act (the "Provisions") Which Do Not Permit Marriage Between Persons of the Same Sex ("same-sex marriage") Violate Article 24, Paragraph 1 and Article 13 of the Constitution
(1) Whether or Not There is a Violation of Article 24, Paragraph 1 of the Constitution

The Constitution uses the terms "the mutual consent of both sexes" and "husband and wife" in Article 24, Paragraph 1 and "essential equality of both sexes" in Paragraph 2 with respect to marriage. A literal construction of these terms would generally mean that marriage consists of a union of a man and a woman. Further, when the Meiji Civil Code was drafted, marriage was considered as a matter of course between persons of the opposite sex; the legislators based on this assumption considered it unnecessary to include specific provisions to disallow same-sex marriage in the Meiji Civil Code. Also, "both sexes" and similar terms were used during the drafting phase of Article 24 of the Constitution. Furthermore, no evidence of discussion around same-sex marriage was raised when the Civil Code underwent amendments to reflect Article 24 of the Constitution. In light of the literal construction and the background to the enactment of Article 24 of the Constitution, it is reasonable to construe that "marriage" under Paragraph 1 of the same Article means only marriage between persons of the opposite sex ("opposite-sex marriage") and does not include same-sex marriage.

Accordingly, since the freedom of marriage derived from Article 24, Paragraph 1 of the Constitution is construed to extend only to opposite-sex couples, this Court does not find that the Provisions violate Article 24, Paragraph 1 of the Constitution.

However, Article 24, Paragraph 1 of the Constitution was intended to repudiate the old feudal family system that existed under the Meiji Civil Code, emphasizing individual dignity and clarifying that marriage shall be based solely on the mutual consent of the parties through the principles of free will and equality. Making the decision on whom to marry is self-actualization of the individual itself, and allowing homosexual persons to enjoy the same marriage system used by heterosexual persons or other similar systems complies, and is not in conflict, with the universal values enshrined in the Constitution in the principles of the dignity of the individual and the coexistence of a diversity of people. Thus, Article 24, Paragraph 1 of the Constitution should not be construed to prohibit the establishment of same-sex marriage or a similar system just because this provision only applies to opposite-sex marriage. Consequently, we need to examine the constitutionality of the Provisions under Paragraph 2 of the same Article based on the interpretation referred to above.

(2) Whether or Not There is a Violation of Article 13 of the Constitution

The freedom of marriage is only given to individuals through the operation of applicable laws that are rooted in the specific marriage in the Constitution, or is based on such an assumption, and is not an inherent natural right or interest. Under existing laws that only recognize the opposite-sex marriage system, the freedom of same-sex marriage cannot be one of the personal rights guaranteed by Article 13 of the Constitution. Therefore, this Court does not find that the Provisions violate Article 13 of the Constitution.

(3) Rights and Interests Under Article 24, Paragraph 2 of the Constitution that Should be Taken into Consideration

As explained above, the freedom of same-sex marriage cannot be derived from Article 24, Paragraph 1 or Article 13 of the Constitution.

However, the benefits enjoyed through marriage include not only economic interests related to inheritance or distribution of property but also include the interest (interest in official recognition) of the couple of being officially approved and recognized for their union as a couple and capable of living together in society. The benefits and interests relating to this recognition lead to a stable and secure life in the union of the couple going forward. Such benefits and interests are essential personal interests as they are the source of self-esteem and happiness, to which not only heterosexual persons but also homosexual persons are entitled. Further, we understand that such personal interests (interests in official recognition) should be taken into consideration in deciding whether or not the Provisions exceed the scope of the legislative discretion allowed by Article 24, Paragraph 2 of the

Constitution.

2. Whether or not the Provisions Violate Article 24, Paragraph 2 of the Constitution

(1) Although it can be said that Article 24, Paragraph 2 of the Constitution primarily leaves the establishment of specific systems for marriage to the reasonable legislative discretion of the Diet and sets limitations on such discretion by requesting and providing guidance that the legislation should be based on the standpoint of the dignity of the individual and the essential equality of both sexes, it requires the legislation to give most meticulous consideration to the factors that such direction and guidance shall not unjustly infringe on the personal rights guaranteed as constitutional rights, as well as that the personal interests, which cannot be deemed as rights guaranteed under the Constitution, also should be respected.

From the foregoing, in determining the constitutionality of the Provisions under Article 24, Paragraph 2 of the Constitution, based on examination of the purposes of the current marriage system under the Provisions and the effects arising out of adopting such system, whether the Provisions lack reasonableness with respect to the dignity of the individuals and whether the Provisions have exceeded the scope of the legislative discretion of the Diet should be addressed.

(2) (i) Humans have a long history and tradition where a man and a woman form a union to produce offsprings through natural reproduction and continue the cycle to the next generation. The marriage system provides identification and notice of these fundamental unions naturally arising from society and gives legal protection to such cohabitating relationship. The current Civil Code inherits the purpose of the marriage system described as above from the Meiji Civil Code, which first legally stipulated marriage in Japan. Historically and traditionally, this marriage system has taken root in society and has been accepted socially. Therefore, there is rationality in the purpose of the marriage system.

On the other hand, in contrast to the freedom of marriage enjoyed by heterosexual persons, the Provisions significantly affect homosexual persons since they cannot marry persons of the same sex as desired. Even though the Provisions do not restrict the freedom of homosexual couples to establish and maintain unions similar to marriage and live jointly, and homosexual couples enjoy equal legal benefits as those attained from marriage to a certain degree through alternative methods under the Civil Code, such as through contracts or wills, these measures described above are no match to the legal benefits of marriage enjoyed by heterosexual couples. Further, such measures do not address the issue relating to the interest in official recognition, which is a personal interest for same-sex

couples to be officially recognized in society and to lead a stable and secure life as a union.

(ii) However, the realization of such benefits associated with official recognition for same-sex couples is not limited only to the adoption of the current marriage system for same-sex couples, but is also possible through the establishment of a new legal recognition system that resembles marriage for the unions between homosexual persons. Furthermore, since the Provisions merely stipulate the system of marriage between persons of the opposite sex, they do not preclude the establishment of a new marriage-like system that will provide legal recognitions to same-sex couples. Based on the foregoing, from the perspective of the dignity of the individual, the realization of the benefits of official recognition should also extend to homosexual couples. However, there are various ways to achieve this goal. In determining the appropriate method, in addition to the current marriage system under existing law, considerations shall be given to new marriage-like systems, the decision should be made through the democratic process, in due consideration of various social factors such as national traditions and public sentiments, and the overall disciplines that govern marital and parent-child relationships of the relevant era. Although there is a growing public opinion in favor of granting legal protection to homosexual persons, the opinion may well have failed to distinguish between whether such legal protection shall come in the form of being recognized under the current marriage system or through the establishment of a new marriage-like system.

Based on the foregoing, notwithstanding the possibility that the Provisions may be ruled as unconstitutional for the legislative inaction and the failure to introduce a marriage system for homosexual couples as social values change in the future, since there have not been enough discussions on how legal protection should be given to the unions between individuals of the same sex at the present stage, this Court finds the Provisions cannot be directly regarded as violating Article 14, Paragraph 1 of the Constitution for being in excess of the legislative discretion.

3. Whether or not the Provisions Violate Article 24, Paragraph 1 of the Constitution

(1) The Provisions create a difference in the entitlement to the legal benefits of marriage because heterosexual couples can marry and homosexual couples cannot. As such, the Provisions result in disparate treatment between homosexual persons and heterosexual persons on the basis of sexual orientation, which cannot be changed by willpower or effort of the person, through marriage, a system affecting the dignity of the individual. Therefore, in determining the constitutionality of the Provisions under Article 24, Paragraph 1 of the Constitution, further deliberate examination is required with due consideration of the nature of such matters.

(2) Nevertheless, as Article 24, Paragraph 1 of the Constitution only stipulates matters concerning opposite-sex marriage and does not prohibit

same-sex marriage, it cannot be construed that this Paragraph guarantees in respect of same-sex marriage the level of protection to the same extent as opposite-sex marriage. Therefore, in view of the foregoing, the Provisions, which only allow opposite-sex marriage, abide by the Constitution.

Further, opposite-sex marriage is the system that has been established and fully taken root historically and traditionally in society for the reasonable purpose of having society protect the relationship of men and women bearing and raising children. In contrast, however, our society is still in the process of discussing the appropriate level of protection to be granted to union between persons of the same sex. In addition, the gap in benefits between those available to same-sex couples and heterosexual couples has been considerably reduced or mitigated. In view of the foregoing, this Court is unable to find that the current disparate treatment directly exceeds the scope of the legislative discretion permitted by Article 14, Paragraph 1 of the Constitution.

Even if the degree of such difference is not small, it can be mitigated even further under the Provisions by the adoption of a marriage-like system or other individual legislative recourses, as discussed above. Therefore, in view of the discretionary power given to the Diet, this Court is unable to find such disparate treatment is directly unreasonable.

Therefore, in any event, the Provisions cannot be deemed to be in violation of Article 1, Paragraph 1 of the Constitution.

4. Whether or not Legislative Inaction Violates Article 1, Paragraph 1 of the State Redress

The Provisions do not violate the provisions of the Constitution, therefore, the legislative inaction of the Diet in not having amended or repealed the Provisions does not violate the application of Article 1, Paragraph 1 of the State Redress Act.

Eleventh Civil Division, Osaka District Court

Chief Judge Fumi Doi

Judge Yoshihide Kamiya

Judge Takahiro Seki