Tokyo District Court Judgment

English Translation by Lawyers for LGBT and Allies Network (LLAN: llanjapan.org)[1*]

[*] Original Japanese judgment available at [https://www.call4.jp/file/pdf/202211/4a8629d74409d0e9f4a874008c629f9d.pdf]. The Journal received approval from LLAN to publish the English translations of the Japanese court decisions.

Judgment delivered on November 30, 2022, original received on the same day - Court Clerk Case No. (Wa) 3465 of 2019, Claim for Damages Against the State. Date of conclusion of oral argument: May 30, 2022.

I. JUDGMENT

The list of parties is contained in the appendix. The terms used in the judgment shall have the meanings ascribed to them in the appendix.

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 pays each of the Plaintiffs 1,000,000 yen and interest thereon at a rate of 5% per annum from March 4, 2019, until payment is made in full.

2. Summary of the Facts

In this case, the Plaintiffs, who wish to marry a person of the same sex, argue that the relevant provisions of the Civil Code and the Family Register Act, which limit marriage to opposite-sex couples and do not permit marriage between persons of the same sex, violate Paragraph 1 of Article 14, and Paragraphs 1 and 2 of Article 24 of the Constitution, and that the failure of the Diet to take legislative measures to enable marriage as provided by the Civil Code and the Family Registration Law between persons of the same sex (despite having the obligation to do so) is unlawful under Article 1.1 of the State Redress Act. The Plaintiffs each claim 1,000,000 yen in compensation for non-pecuniary loss and delay damages at a rate of 5% per annum as provided for by the Civil Code before the amendment by Law No. 44 of 2017, for the period from February 28, 2019, which is the date of the service of the complaint, until payment has been made in full.

The facts which are not in dispute between the parties and the facts which are readily recognizable from the evidence are listed below (references to evidence numbers which do not specify a particular sub-section includes all sub-sections - the same shall apply hereinafter) and the overall import of oral arguments are as follows.

a. Sexual Orientation, Sexual Minorities

Sexual orientation refers to the attraction that a person feels towards another person in a sensual, emotional or sexual sense. Heterosexuality is where one has such feelings of love and sexual attraction towards a person of the opposite sex. Homosexuality (gay, lesbian) is where one has such feelings towards a person of the same sex. Bisexuality is where one has such

feelings towards both sexes (hereinafter, people with a heterosexual orientation are referred to as "heterosexual individuals," people with a homosexual orientation are referred to as "homosexual individuals," and homosexual individuals and people with a bisexual orientation are collectively referred to as "homosexual individuals, etc."). In addition, people whose gender identity is not aligned with their biological sex are transgender people (hereinafter, homosexual individuals, etc. and transgender people are collectively referred to as "sexual minorities").

b. Plaintiffs

[Redacted in the Japanese original]

c. Relevant Provisions of Law

The Civil Code in Part 4, Chapter 2, "Marriage," sets forth various provisions concerning marriage (Article 731 and onward), which provide the requirements for the establishment of marriage and the validity, etc. of marriage. These provisions state that marriage shall become effective through a marriage notification made pursuant to the provisions of the Family Register Act (Paragraph 1, Article 7-39), and the parties to a marriage shall be referred to as "husband and wife," with one party being the "husband" and the other being the "wife" (Articles 750, 767, etc.).

In addition, the Family Register Act requires that people who intend to marry must include in the marriage notification matters such as the surname that the husband and wife will use and submit the notification accordingly (Article 74). Upon the receipt of a marriage notification, a new family register shall be established for the husband and wife (main text of Paragraph 1, Article 16). The family register shall state for each person in the family register whether the person is the husband or wife (Paragraph 6, Article 13).

As such, while Part 4, Chapter 2 of the Civil Code and the relevant provisions of the Family Register Act concerning the institution of marriage (hereafter collectively referred to as the "Provisions") do not explicitly prohibit marriage between persons of the same sex, they provide that marriage is between a "husband" and a "wife" (i.e., between individuals of the opposite sex). In other words, marriage between individuals of the same sex is not permitted.

d. Issues

(1) Constitutionality of the Provisions that do not permit marriage between individuals of the same sex;

(2) Whether the failure of the Diet to take legislative measures to enable marriage between individuals of the same sex is assessed as illegal under Article 1, Paragraph 1 of the State Redress Act;

(3) Whether there has been any loss, and if so, the amount; and

(4) Whether there is a mutual guarantee under Article 6 of the

State Redress Act (in relation to Plaintiff [redacted]).

e. The Parties' Submissions

(1) Constitutionality of the Provisions that do not permit marriage between individuals of the same sex (Issue (1))

(Plaintiffs' Submissions)

(i) The Provisions are in Violation of Article 24, Paragraph 1 of the Constitution

(a) Living a communal life with a certain degree of permanence which is built on an intimate relationship, and forming a family, brings fulfillment to people's lives through the sharing of the joys and sadness of life. This process plays an important role in enabling a person to live their own life and achieve their own happiness. Marriage is a system in which the law stipulates the requirements and effects of the formation of such a family, approves and certifies it, recognizes it as a unit of the society, and grants rights and obligations. However, marriage is not only for fulfilling one's life, but also an opportunity to formally recognize the parties to a marriage as a unit of society through the granting of various rights and obligations and the accompanying social recognition under the legal system. Marriage is thus deeply intertwined with a person's life and personality, and indispensable to an individual's personal existence. Therefore, the right to determine whether or not to marry and whom to marry (hereinafter referred to as the "freedom of marriage") should be regarded as an important part of the right to self-determination, pursuant to the fundamental principle of the Constitution that all persons are respected as individuals (Article 13 of the Constitution).

Further, the legal intent of Article 24 of the Constitution, which is a provision concerning marriage and family system, is to deny the modality of the marriage system under the Civil Code before its amendment by Law No. 222 of 1947, in which the freedom of marriage was restricted by holding the "family" to be superior over the individual, and to order that, in light of the fact that marriage is an important aspect of the right to self-determination, it is necessary under the new marriage system to ensure that a marriage can only be made autonomously between partners by complying with the mutual intentions of the persons who wish to marry. Thus, on the premise of the existence of the legal system, Article 24, Paragraph 1 of the Constitution guarantees the freedom of marriage itself as a right for a person to marry their desired partner autonomously only when their intention to marry coincides with that of their partner.

(b) This freedom of marriage is premised on the existence of a legal system that provides for legal marriage. However, the system in which a society approves of persons seeking to live together under certain conditions and connects various interests and responsibilities to that situation, is a system that has been in place since before the existence of the State, and the legal system concerning marriage merely influences

the rules and order of marriage by law. Therefore, Article 24, Paragraph 1 of the Constitution should not be construed as guaranteeing the freedom of marriage only within the framework of the legal system concerning marriage, but as guaranteeing the freedom of marriage as a freedom directly derived from the dignity of individuals before the existence of the State. Therefore, if the legal system concerning marriage restricts without justification a core part of the marriage system which was assumed and postulated by the Constitution, then such law is unconstitutional.

Considering that Article 24, Paragraph 1 of the Constitution provides that marriage shall be effected by free and equal decision-making between the parties, provided that: (a) marriage shall be established only on the basis of the agreement of both sexes; (b) that Paragraph 2 of the same article requires that the choice of a spouse be based on the dignity of an individual and the essential equality of both sexes; and (c) that marriage is deeply related to the personal autonomy of an individual and has the most important meaning in the pursuit of individual happiness, it should be construed that the core part of the Constitution, which is assumed and postulated in relation to the marriage system, is that marriage shall be established only on the basis of the agreement between the parties concerned.

(c) Same-sex couples are able to live a communal life with the essence of marriage, in exactly the same manner as opposite-sex couples, and the Plaintiffs, exactly like opposite-sex couples, have built relationships based on trust with their partners. For homosexual persons, etc., it is indispensable for their personal survival to receive legal protection by marriage, which is nothing different than that required by heterosexual persons. This is evident from the fact that the Plaintiffs cannot obtain recognition as spouses from the people around them because they cannot marry their partners, and that they have suffered specific disadvantages as a result. Furthermore, guaranteeing the freedom of marriage to heterosexual persons while removing such a freedom from homosexual persons stigmatizes homosexual persons, etc. as inferior to heterosexual persons and excludes them from being formal members of society. This also leads to a weakening of the foundations of a democratic society.

Accordingly, the purpose of the Constitution guaranteeing the freedom of marriage is naturally appropriate to be extended to same-sex couples, and there are no constitutional grounds to treat them differently. Therefore, Article 24, Paragraph 1 of the Constitution should be construed to guarantee the freedom of marriage not only to heterosexual persons but also to homosexual persons etc., and the freedom of marriage in the same paragraph extends to marriage between individuals of the same sex.

(d) On the other hand, Article 24, Paragraph 1 of the Constitution uses the term "both sexes," and it can be seen that only marriage between the opposite sexes was assumed in its enactment.

However, it is not the case that in the constitutional process, the

restriction of the parties to a marriage to a "man" and a "woman" was discussed, nor that the wording "both sexes" was used for that purpose. The purpose of Article 24 of the Constitution is to exclude the restriction on the family system under the old Constitution from the legal system of marriage and family, and to eliminate that system which required the approval of the head of the household, etc. in order for a marriage to occur and instead to replace that approval with the free will of equal parties. The phrase "both sexes" in the said article was not used for the purpose of preventing marriage between individuals of the same sex.

Furthermore, Article 24 of the Constitution used the term "both sexes" because, when the Constitution was enacted, homosexuality was recognized as a mental disorder, and intimate relationships and the community life of individuals of same sex were not recognized as an object of legal protection. Subsequently, however, there has been empirical evidence in the field of psychiatry that there is no reasonable basis for considering homosexuality as a mental disorder, and it has long been established that homosexuality is not a psychiatric disorder. As a result, the recognition that restrictions on human rights based on sexual orientation are not permissible has spread internationally, and in many countries, the legalization of the marriage of same-sex couples has been realized, one country after another. In Japan, too, many local governments are introducing of partnership certification systems, which are systems for recognizing same-sex couples. In addition, about 60% of Japanese citizens agree that Japan should introduce a marriage system applicable to same-sex couples. Thus, there is a growing awareness that same-sex couples should be protected by the institution of marriage in the same manner as heterosexual couples.

As discussed above, in line with the principles of the Constitution and in light of changes in society, the agreement between the parties that the Constitution provides for is a core part of the requirement and assumption of the marriage system, and the interpretation of "Parties" in the case of marriage being effected to include persons of the same sex should be construed as appropriate for today's interpretation. There are many cases where rights not envisaged at the time of the enactment of the Constitution were later recognized as constitutional rights in response to subsequent social changes, and it is not unreasonable to think the same of the rights described above.

It is clear from this inquiry that the freedom of marriage is guaranteed as a constitutional right, and the ultimate ground is that it is indispensable for the dignity of an individual, which is the basic value set out in the Constitution. The importance of the legal and factual value of marriage, the choice whether or not to marry, and the fact that it is possible to decide who to marry autonomously does not differ in any way between heterosexual persons and homosexual persons, and an interpretation guaranteeing the freedom of marriage between members of the opposite

sex, but not for marriage between members of the same sex is clearly unreasonable.

Therefore, the term "both sexes" in Article 24, Paragraph 1 of the Constitution should be construed to mean "both parties." It should be concluded that the said paragraph guarantees the freedom of marriage to homosexual persons etc., as well as to heterosexual persons in equal terms.

(e) The Defendant argues that since the purpose of the provision is legal protection for reproduction and the rearing of children, the interpretation of the purpose of this legislative provision which entitles only heterosexual couples to marriage is reasonable. However, reproduction and the rearing of children are not the purposes of marriage, but only one function and role of marriage, as evidenced by the fact that fertility and willingness to procreate are not requirements for marriage under the Civil Code. On the other hand, to live a communal life while giving birth to and raising a child is possible for same-sex couples as well as for opposite sex couples. Accordingly, if legal protection for procreation and the rearing of children is raised as a purpose of marriage, then the need for protection of same-sex couples is even greater.

There are no grounds for justifying the exclusion of homosexual persons etc., from marriage. Rather, the legislative facts that served as the basis of the provisions, the idea that heterosexuality is itself the normal human condition, whereas homosexuality is not normal (i.e., heteronormativity), which was the legislative fact underlying the provisions in question, has now been lost. Therefore, the various provisions in this case, which do not recognize marriage between persons of the same sex, violate Article 24, Paragraph 1 of the Constitution.

(ii) The Provisions are in Violation of Article 24.2 of the Constitution

(a) Article 24.2 of the Constitution is a provision which provides guidance for the enactment of legislation concerning marriage and family, and at the same time, it is a provision having the effect of nullifying legislation that is against "the dignity of individuals and the essential equality of both sexes."

Incidentally, decisions on whether or not to marry, when and with whom to marry, and especially, decisions on the choice of spouse, i.e., with whom to marry, are deeply related to an individual's personality, and are one of the most important decisions among those that an individual makes in the pursuit of individual happiness. If marriage, especially the choice of spouse, cannot be freely made, it cannot be said that an individual has been respected as a dignified being. Therefore, the freedom of marriage, especially the freedom of choice of spouse, should be regarded as one of the most important aspects of "the dignity of the individuals and the essential equality of both sexes" as provided in Article 24, Paragraph 2 of the Constitution, and it can be construed that the reason why the said provision explicitly provides for "the choice of spouse" and Article 24,

Paragraph 1 specifically provides for freedom of marriage is to positively embody the above mentioned aspects in law. In light of the importance of the freedom of marriage, especially the freedom of choice of spouse, in cases where laws directly deny the freedom of marriage, especially the freedom of choice of spouse, or restrict the freedom of decision making by imposing conditions which deny the personality of an individual in the formation of marriage or selection of a spouse, it is necessary to closely examine whether there are truly unavoidable reasons for such restrictions, and unless such reasons are found to exist, such laws should be construed to be in violation of Article 24, Paragraph 2 of the Constitution.

The Defendant argues that Article 24, Paragraph 2 of the Constitution gives broad discretion to the legislature. However, since that Article directly restricts the legislature by providing that the laws on marriage and family must be enacted from the standpoint of "the individual dignity and the essential equality of both sexes," the legislature may not without justifiable reason enact laws which do not accord with the above restriction and therefore has is restricted in exercising its legislative discretion. The Defendant's argument is therefore not pertinent.

(b) The Provisions prohibit marriage between individuals of the same sex, and thereby make it impossible for homosexuals to marry the person they wish to marry. Therefore, the Provisions directly and severely restrict the freedom of marriage of homosexual persons. Marriage is a legal act where family relationships are publicly certified by the family register, where a set of various rights and duties arises, and where social recognition corresponding to such legal status is given. By virtue of marriage, cohabitation will be protected as a legal family and socially recognized. By not being able to marry, homosexuals incur significant handicaps such as not being able to enjoy such rights and duties as spouses, and not receiving social recognition as married couples.

In addition, sexual orientation is an important component of human sexuality. It is deeply rooted in the personal character, and it is difficult to change by one's own will. Having said so, imposing on homosexuals a marriage system that presupposes that marriage is between opposite sex individuals results in the exclusion of homosexual persons from important social systems based on their sexual orientation and gender identity, and it is their personalities which is denied.

Moreover, the existence of the Provisions in itself encourages social discrimination and prejudice against homosexual persons and is socially divisive.

For the reasons stated above, the Provisions are extremely and seriously damaging to the dignity of homosexual persons and cannot be construed as being based on "the dignity of individuals and the essential equality of both sexes." There are no grounds for justifying them.

Therefore, the Provisions contravene Article 24, Paragraph 2 of the

Constitution.

(c) Furthermore, even setting aside whether the guarantee of freedom of marriage under Article 24, Paragraph 1 of the Constitution extends to marriage between individuals of the same sex, the Provisions are against Article 24, Paragraph 2.

That is to say, Article 24, Paragraph 2 of the Constitution requires that legislation on marriage and family be based on "the dignity of the individual and the essential equality of both sexes" which not only means that such legislation should not unjustly infringe the personal rights which are guaranteed by the Constitution and that the formal equality of both sexes shall be maintained, but it also means that legislation should give sufficient consideration in particular to the respect of personal rights that are not directly guaranteed under the Constitution, to try to ensure that substantial equality of both sexes is maintained and that marriage is not in effect unjustly restricted by the marriage system. Therefore, even if the law does not directly restrict the freedom of marriage, if it in effect restricts the freedom of marriage, it is still against Article 24, Paragraph 2 of the Constitution.

Because there is no doubt that decisions on whether or not to marry and whom to marry are indispensable interests to an individual's existence, such personal interests should be respected when applying Article 24, Paragraph 2 of the Constitution. Furthermore, it is obvious that the Provisions violate the essential equality of same-sex couples and opposite-sex couples in that same-sex couples are excluded from the marriage system despite the fact that same-sex couples live together in a manner that does not differ from that of opposite-sex couples. The Provisions therefore constitute an unreasonable restriction on marriage for homosexual persons.

(d) In addition, and as mentioned above, the term "both sexes" in Article 24, Paragraph 1 of the Constitution does not deny or exclude marriage other than that between the opposite sexes. Furthermore, even if said paragraph presupposed marriage between opposite sexes at the time of enactment, Article 24, Paragraph 2 provides that the "choice of spouse" must be based on the "dignity of individuals" and does not limit marriage to one between a man and a woman. Rather, Article 24, Paragraph 1 stipulates those items which particularly important for the "dignity of individuals and essential equality of both sexes" stipulated in Article 24, Paragraph 2, and Article 24, Paragraph 2 cannot be construed as restricting Article 24, Paragraph 1. The interpretation that the scope of protection of the "marriage and other matters concerning family" of Article 24, Paragraph 2 does not extend to families other than opposite-sex couples does not stand.

(iii) The Provisions are in Violation of Article 14, Paragraph 1 of the Constitution

(a) Under the Provisions, while heterosexual persons can marry a partner of the opposite sex in accordance with their own sexual

orientation, homosexual persons cannot marry a partner of the same sex in accordance with their sexual orientation. This difference in treatment concerning the permissibility of marriage itself depends on whether sexual orientation is towards individuals of the opposite sex or same sex, namely sexual orientation. "Sexual orientation" is not listed in the requirements of marriage under the Provisions, however, if marriage is only for opposite-sex couples, naturally, it results in homosexual persons being excluded from marriage. Denying said difference because sexual orientation is not directly a marriage requirement is not permissible.

In addition, under the Provisions, a heterosexual couple can marry while a homosexual couple cannot. This means that the possibility of marriage is different depending on one's own gender or the gender of the person whom one wishes to marry.

(b) The above difference directly and entirely restricts the marriage of homosexual persons, and they are not only unable to obtain the important legal status of "spouse" under the Civil Code but are also unable to enjoy the wide variety of legal and de facto effects and benefits of marriage. They are also unable to obtain the same social approval as married opposite-sex couples. Therefore, their disadvantages are enormous, and this is obvious from the fact that the Plaintiffs have suffered a wide range of legal and de facto disadvantages due to the current situation where they are unable to get married. In addition, since such difference is based on a reason beyond an individual's own control, such as sexual orientation or sex, this is a discrimination based on social status or sex which is listed in the second sentence of Article 14, Paragraph 1 of the Constitution. Since the number of individuals with a sexual orientation other than heterosexuality is at most 10%, such difference cannot be expected to be relieved through the democratic process, which means that a close examination of the justifications for such treatment is required.

(c) As mentioned, it is clear that the difference in the permissibility of marriage between opposite-sex couples and same-sex couples cannot be justified. Considering that the above difference is based on grounds out of one's own control, the right violated and the disadvantages are serious and very significant as it is a legal and direct restriction on the freedom of marriage. Further there is no reason not to allow homosexual persons to marry given that the purpose of the marriage system is to protect intimate life led together, there is no theoretical basis for not granting to same-sex couples the same legal effects in light of the purpose of the individual legal effects associated with marriage, and the existence of the Provisions that exclude homosexual persons from marriage plays a role in maintaining and reproducing social prejudice against homosexual persons.

(d) The Defendant argues that the purpose of the marriage system is to protect reproduction. However, some opposite-sex couples do not intend or have the ability to reproduce in the first place, and

it is obvious that such couples are not generally regarded as incompatible with the marriage system's original purpose. The purpose of the marriage system is to protect intimate relationships (intimate lives led together), and it is appropriate that the protection of reproduction is positioned as one of the important functions or roles derived from it. Therefore, the above argument made by the Defendant lacks a reasonable basis.

(Defendant's Submissions)

(i) The Provisions Do Not Violate Article 24, Paragraph 1 of the Constitution

(a) In interpreting the Constitution, it is important to focus on the wording of the articles. Article 24, Paragraph 1 of the Constitution refers to "both sexes" and "husband and wife" and Article 24, Paragraph 2 refers to "the essential equality of both sexes." From the general meaning of these words, the words used in the Constitution in the process of its enactment, and the circumstances of discussions held during the constitutional deliberations, etc., it is clear that "both sexes" in Article 24, Paragraph 1 of the Constitution means a man and a woman, and that the Constitution does not envisage marriage between same sex individuals.

(b) In addition, behind marriage as the institutionalization of the human union between opposite sexes is the social reality that the human union between opposite sexes, one man and one woman, forming a family, a natural and fundamental group unit that constitutes and supports society while producing and raising the next generation of children who will support the future society. There is a social recognition that has historically been formed based on this. In contrast, personal unions between same sex individuals does not have the possibility of natural reproduction, and how to place the human union between same sex individuals in relation to a form of marriage is still under discussion by Japanese society. Thus, it is difficult to say that personal unions between same sex individuals is socially recognized in the same manner as that between opposite sex individuals. Therefore, it is appropriate to interpret that Article 24, Paragraph 1 of the Constitution still only protects marriage between opposite sex individuals.

(c) As marriage necessarily presupposes the existence of a certain legal system, even if the right to self-determination on marriage (freedom of marriage), as the Plaintiffs submit, can be assumed, the right to self- determination is only guaranteed within the framework of the legal system established in accordance with the requirements of the Constitution, and it is not guaranteed by the Constitution as an inherent or natural right or benefit apart from the legal system. Article 24, Paragraph 1 of the Constitution only covers unions between opposite sex individuals and does not envisage unions between same sex individuals. Therefore, the Plaintiffs' argument is nothing more than a request for the Diet to establish a legal system that allows the same positive protection and the provision of legal bases in the case of union between same sex individuals as in the case of

union between opposite sex individuals and cannot be construed to be based on the right of self-determination. This does not change even if the inclusion of unions between same sex individuals in marriage contributes to the pursuit of the happiness of the parties who intend to do so.

(d) In addition, the Plaintiffs argue that the recognition that homosexuality is a mental illness has been rejected. However, the marriage system stipulated by the Civil Code is merely a legislative enactment of the tradition and customs of Japan that marriage is a union between a man and a woman for the purpose of reproduction and child-rearing both before and after the amendment of the Civil Code by Act No. 222 of 1947 ("1947 Civil Code Amendment"), and in that process there is no evidence that the former recognition of homosexuality as a mental illness was actively reflected in the legislation. Therefore, the rejection of the conception of homosexuality as a mental illness does not affect the reasonableness of the Provisions.

(e) Article 24., Paragraph 1 of the Constitution guarantees the freedom of marriage only between opposite sex individuals, and the Provisions do not violate Article 24, Paragraph 1 of the Constitution since the Provisions merely embody the purport of said Article.

(ii) The Provisions Do Not Violate Article 24, Paragraph 2 of the Constitution

(a) Article 24, Paragraph 2 of the Constitution refers to matters concerning marriage and family, taking into account various factors in the social situation, including the traditions of the nation and the sentiment of the people. From the viewpoint that it should be determined by comprehensively making judgments with an eye on the overall management of the relationship between husbands and wives, parents and children, the establishment of a specific system shall be left primarily to the reasonable legislative discretion of the Diet, and in the enactment of such a system, the limitation of the discretion shall be defined by providing a guideline that the Diet should be based on the dignity of individuals and the intrinsic equality of both sexes.

As mentioned in (i) above, Article 24, Paragraph 1 of the Constitution guarantees the freedom of marriage only through personal connections between the opposite sexes. Paragraph 2 of said Article requests the legislature to develop a system to embody the state of marriage under this premise, and it cannot be construed as requesting the legislature to adopt legislative measures to allow marriage even for personal relations between the same sex.

The meaning of the "dignity of the individual" as referred to in the said paragraph should be construed in accordance with the modality of the said provision, but since the said provisions are nothing other than the result of legislation in accordance with the request mentioned above, there is no room to raise any problem of unconstitutionality.

Furthermore, the Diet has broad legislative discretion on whether

or not to enact legislation enabling marriage between the same sex beyond the scope of the requirement of Article 24, Paragraph 2 of the Constitution, but it cannot be said that there is a deviation from the legislative discretion granted to the Diet by not enacting legislation enabling marriage between individuals of the same sex.

(b) The Plaintiffs argue that the existence of the Provisions themselves seriously impair the "individual dignity" of homosexual persons, etc. on the grounds that the Provisions discriminate on the basis of gender identity and sexual orientation, and that the Provisions foster stigma toward homosexuals.

However, as the Provisions neither establish criteria for access to the marriage system that are framed in terms of the gender identity and sexual orientation of the specific and individual parties to marriage, nor provide for legal discriminatory treatment based on based on an individual's LGBT identity, it cannot be concluded that the Provisions constitute discrimination based on gender identity or sexual orientation.

Furthermore, as mentioned in (a) above, among a wide variety and diversity of interpersonal relationships, in which personal unions between individuals of the opposite sex have been institutionalized as marriage, there is a social reality that the relationship between a man and a woman, which is premised on the possibility of natural reproduction, forms a family unit that is the natural and fundamental group that underpins our nation's society. While social acceptance of this situation has developed historically over time, there is still no similar social acceptance with regard to personal unions between individuals of the same sex. Therefore, there is a reasonable basis for restricting the legal system of marriage to personal unions between individuals of the opposite sex. In addition, considering that, notwithstanding the existence of the Provisions, individuals of the same sex are not prevented from entering into personal unions which are similar to marriage, it is inappropriate to conclude that the Provisions fostering stigma toward LGBT people.

(c) For the reasons stated above, the Provisions do not violate Article 24, Paragraph 2 of the Constitution.

(iii) The Provisions Do Not Violate Article 14, Paragraph 1 of the Constitution

(a) The Plaintiffs argue that since the Provisions prevent homosexual persons, etc. from marrying a person who matches their sexual orientation, the Provisions institute differential treatment based on whether or not marriage is possible for a person in light of their sexual orientation.

However, whether or not a provision of law provides for differential treatment based on a specific reason should be objectively judged from the purpose, content, and underlying premise of the provision; it is not appropriate to make such a judgement from the actual or possible consequences arising from the existence of the provision. The Provisions merely stipulate the marriage between a man and a woman, but do not

require either person to have a particular sexual orientation as a requirement for marriage, nor do they prohibit marriage on the grounds that either person has a particular sexual orientation. Therefore, the Provisions do not determine the availability of marriage on the basis of sexual orientation. Similarly, even though homosexual persons, etc. are unable to marry persons who match their sexual orientation, which creates a difference in the possibility of marriage between homosexual persons, etc. and heterosexual persons, that is nothing more than a de facto consequence or indirect effect arising from the Provisions. The Provisions uniformly allow all persons to use the marriage system, and do not themselves give rise to formal inequality based on sexual orientation.

The Plaintiffs also argue that the Provisions provide for differential treatment based on gender. However, as both men and women are able to marry a person of the opposite sex under the Provisions, it cannot be said that the Provisions stipulate a difference in treatment based on gender.

(b) When examining whether or not the Provisions conform with Article 14, Paragraph 1 of the Constitution, it is appropriate to review the premise of the Diet's extensive legislative discretion. This is because, as the marriage system stipulated in the Provisions is a system established based on the requirement in Article 24, Paragraph 2 of the Constitution, the same paragraph of the Constitution primarily entrusts the establishment of a specific system to the reasonable legislative discretion of the Diet, on the basis that matters concerning marriage and family should be determined by a comprehensive judgment, taking into account various factors in society, including national traditions and sentiments.

As such, it is essential to consider the Diet's extensive legislative discretion granted by Article 24, Paragraph 2 of the Constitution when examining whether or not the Provisions conform with Article 14, Paragraph 1 of the Constitution. In addition to this, the Constitution guarantees the freedom of marriage only to personal unions between individuals of the opposite sex and does not guarantee the freedom of marriage to personal unions between individuals of the same sex. Given that there is no legislation allowing marriage between individuals of the same sex, and this does not prevent individuals of the same sex from forming and maintaining and interpersonal relationship similar to marriage or living together, an argument that the Provisions violate Article 14, Paragraph 1 of the Constitution can only be made where there are no reasonable grounds for the legislative purpose of the Provisions, or the contents of the Provisions are not a reasonable means or method of giving effect to the legislative purpose, and the legislature clearly exceeds or abuses its extensive discretion.

(c) On top of that, even before the personal union between individuals of the opposite sex was legislated as marriage, there had existed customs under which marriage was between a man and a woman. Therefore, given the provisions of the Civil Code concerning the effect

of marriage, in particular the presumption of legitimacy of children born to married couples (Article 772, Paragraph 1 of the Civil Code) and the use of the parents' surname by their child (Article 790 of the Civil Code), it is appropriate to construe that the purpose of the Provisions is to provide legal protection in particular to a relationship between a man and a woman who together raise a child and live a common life. Considering that, in Japan, the personal union between a man and a woman in which children are born and raised has functioned as a fundamental group unit which underpins our society, and social recognition of this has been fostered throughout history, it is obvious that the legislative purpose of the Provisions is reasonable.

Furthermore, there is no possibility of procreation in a same-sex personal union, and it cannot be said that there is social recognition in Japan that same-sex personal unions can be equated with heterosexual marriage. On the other hand, even if marriage between individuals of the same sex is not permitted, such individuals are not prevented in any way from establishing, maintaining, or living together in a close personal relationship similar to a same-sex marriage, and the practical disadvantages of not being married are substantially eliminated through the use of contracts, wills, etc. Given this, the exclusion of same-sex personal unions from the scope of marriage cannot be regarded as irrational in relation to the legislative purposes of the Provisions.

It should be noted that, under the Provisions, even men and women who have no intention or possibility (ability) to have children are permitted to marry. However, since the legislative purposes of the Provisions assume an abstract and typical pair of men and women as the target party, it is not irrational as a standard to allow marriage, whether or not the couple is actually fertile. In addition, there is no change in the social recognition of family relationships based on a union of husband and wife, even if there are no children between them, and even if there is no intention or possibility of having children. Therefore, it cannot be said that the Provisions, which allow marriage between men and women regardless of their intention or possibility (ability) to have children, lack rationality in light of the above legislative purposes.

(d) Considering the above, the Provisions do not violate Article 14, Paragraph 1 of the Constitution.

(2) Whether the failure of the Diet to take legislative measures to enable marriage between individuals of the same sex is assessed as illegal under Article 1, Paragraph 1 of the State Redress Act (Issue (2))

(Plaintiffs' Submissions)

(a) Where the Diet, for a long period of time without justifiable reason, fails to enact any legislative measures such as revising or abolishing legislative provisions that clearly restrict rights or interests guaranteed or protected under the Constitution, the Diet members' actions are regarded as having violated their legal obligations and such legislative omission may exceptionally be regarded as illegal under Article 1,

Paragraph 1 of the State Redress Act.

As described below, even though it became clear by 2008 at the latest that the Provisions violate Article 14, Paragraph 1 and Article 24, Paragraphs 1 and 2 of the Constitution, the Diet has failed to take legislative measures that allow marriage between individuals of the same sex as stipulated in the Provisions (hereinafter referred to as "legislative measures to enable marriage between individuals of the same sex") for a long period of time without justifiable reason. Therefore, such a failure to act is illegal under the State Redress Act.

(b) In the late 20th century, various fields including psychiatry and others began to reject the long-held belief that homosexuality was a mental disorder. In addition, in 1994, the United Nations Human Rights Committee determined that "sex" under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (hereinafter referred to as the "ICCPR") included "sexual orientation," and positioned homosexuality as a human rights issue for the first time. Subsequently, through the adoption in 2006 of the Yogyakarta Principles on the Application of International Human Rights Laws on Sexual Orientation and Gender Identity, the legal norms that prohibit restrictions on rights and interests based on sexual orientation and gender identity, as well as discrimination, became widespread internationally. By 2006, five countries had legalized same-sex marriage.

In Japan, the Act on the Promotion of Human Rights Education and Human Rights Awareness-Raising was enacted in 2000, and the recognition that discrimination based on sexual orientation and gender identity was a violation of human rights became gradually established. In May 2008, Japan received a recommendation from the United Nations Human Rights Council in the course of its regular review. Since then, it has received several recommendations from convention bodies on the protection of human rights related to sexual orientation and gender identity, and has repeatedly stated to the international community that discrimination based on sexual orientation and gender identity is not permitted.

In addition to the above, in light of various domestic and international trends toward eliminating discrimination based on sexual orientation and gender identity, it can be said that it was naturally recognizable to the Diet at the latest in 2008 that restrictions on rights and interests based on sexual orientation and gender identity, as well as discrimination, were not allowed in relation to marriage.

On the other hand, it is obvious from the time the Constitution was established that marriage is an essential form of self-determination, which is indispensable to respect for individuals. Naturally, this is also recognizable to the Diet.

Based on the above, it should be said that it became obvious to the Diet by 2008 at the latest that the provisions that do not permit marriage between individuals of the same sex are in violation of Article 14,

Paragraph 1 and Article 24, Paragraphs 1 and 2 of the Constitution.

(c) Since there are no legislative and technical difficulties in taking legislative measures to enable marriage between individuals of the same sex, Plaintiffs [redacted in the Japanese original] submit that by that time at the latest, a sufficient period of time had elapsed to conclude that the Diet had failed to take such legislative measures for a long time without justifiable reason. Furthermore, to date, the Diet has not taken any legislative measures to enable marriage between individuals of the same sex.

Therefore, as the Provisions are clearly in violation of Article 14, Paragraph 1, and Article 24, Paragraphs 1 and 2 of the Constitution, the failure of the Diet to take legislative measures to enable marriage between individuals of the same sex is illegal for the purpose of applying Article 1, Paragraph 1 of the State Redress Act.

(The Defendant's Submissions)

Legislative omissions shall be deemed to be illegal for the purpose of applying Article 1, Paragraph 1 of the State Redress Act only in exceptional cases where, even though it is clear that the provision of law shall violate the Constitution because it restricts the rights and interests guaranteed or protected by the Constitution without reasonable grounds, the Diet fails to take legislative measures such as revision or abolition for a long period of time without justifiable reason.

However, since it cannot be said that there is clearly a violation of Article 14, Paragraph 1, or Article 24, Paragraph 1 or 2 of the Constitution, there is no clear violation of the Constitution and therefore no room to consider that the Diet's failure to legalize same-sex marriage is illegal under Article 1, Paragraph 1 of the State Redress Act.

(3) Whether there has been any loss, and if so, the amount (Issue (3))

(The Plaintiffs' Submissions)

Due to the Defendant's legislative omission or inaction, the Plaintiffs' constitutionally guaranteed freedom of marriage has been infringed. They were unable to receive the psychological and social benefits that accompany the social approval granted to marriage, or the legal and economic rights, interests, and *de facto* benefits associated with marriage. Furthermore, in being unable to marry their partners, the Plaintiffs have been subjected to stigma, as if their relationship with their respective partners was a "relationship that is not approved by society," and their dignity has been severely tarnished.

The monetary valuation of the mental distress suffered by the Plaintiffs is at least one million yen per Plaintiff.

(The Defendant's Submissions)

The Defendant denies and disputes the Plaintiffs' submissions.

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

(Plaintiff (redacted)'s Submissions)

Article 17 of the Constitution provides for the right to claim compensation from the State, and Articles 1(1) and 2(1) of the State Redress Act directly found a right to claim compensation from the state. On their face, these provisions do not appear to limit the party entitled to the claim, and Article 6 of said Act only provides that a "mutual guarantee" is required where the party entitled to the claim is a foreign national. In light of the structure of such provisions, it is appropriate to conclude that the absence of a mutual guarantee would not bar the claim.

However, since the Defendant does not demonstrate or substantiate the absence of the mutual guarantee, Plaintiff (redacted) is entitled to make the claim against the Defendant on the grounds that they are unable to accept the absence of the mutual guarantee.

Setting this point aside, in (redacted), which is Plaintiff (redacted)'s country of nationality, the (redacted) Act and the Civil Code provide that the state or an organization must provide compensation for any damage caused to a third party due to a public official's wilful misconduct or negligence. Further, in a notice of the responsibility that the nation of (redacted) owes to Japanese citizens (dated (redacted)), it clearly states that where the victim is a Japanese citizen, there is a mutual guarantee as to the liability for compensation incurred by (redacted) under Japan's legislation; therefore, there exists a mutual guarantee between Japan and (redacted). Accordingly, Plaintiff (redacted) is entitled to make the claim, assuming that such mutual guarantee exists.

(The Defendant's Submissions)

Having regard to its purpose, Article 6 of the State Redress Act is interpreted as granting foreign nationals the right to claim compensation from the state, subject to the presence of a "mutual guarantee." Therefore, the presence of the mutual guarantee constitutes the basis of the claim for state compensation by a foreign national. Accordingly, Plaintiff (redacted) should demonstrate and substantiate the presence of the mutual guarantee.

3. The Court's Judgment

a. Findings of Fact by the Court

The Court accepts the following facts based on the undisputed facts referred to above, evidence referred to below and overall import of the oral arguments.

(1) Sexual Orientation, Knowledge of Sexual Minorities, etc.

(i) Knowledge of Determination of Sexual Orientation

Though the causes of determination of sexual orientation and homosexuality are not always well understood, mental health professionals consider that in most cases, sexual orientation is determined at an early stage of our lives or before birth and is not something we choose. There are no research findings available to demonstrate that a homosexual orientation is attributable to any family circumstances, sexual experiences, or any

particular environment in which one is brought up (*Plaintiffs' Evidence A2, 7 and 345 through 347*).

Further, psychiatric professionals consider that no psychiatric therapy would alter a person's sexual orientation (*Plaintiffs' Evidence A2*).

(ii) Changes in Knowledge of Homosexuality

(a) In Western countries, since the Middle Ages there have been those who denounced homosexuality due to the influence of Christianity. Even in the 19th century, sexual activities between individuals of the same sex were subject to punishment, and homosexuality was regarded as a psychiatric disorder requiring treatment.

In the Meiji era, in Japan, too, there was a widespread belief that homosexuality was a perverted sexual desire which ought to be treated, and there was a period of time when sexual activities between men were criminalized (*Plaintiffs' Evidence A24, 26, 48, 335 and 337 for the foregoing*).

(b) After World War II, the European Convention on Human Rights came into force, and whether or not the sodomy laws in Germany and Austria conformed to said Convention became a matter of dispute. Further, in *Toonen v. Australia*, whether or not sodomy laws in Tasmania, Australia conformed to the ICCPR also became a matter of dispute. The United Nations Human Rights Committee read “sex” and “other status” in Articles 2(1) and 26 of the ICCPR as including the concept of sexual orientation for the purposes of non-discrimination, and took the view that repeal of those sodomy laws was exactly the effective remedy. Thereafter, in Western countries, laws that punished sexual activities between individuals of the same sex were gradually abolished (*Plaintiffs' Evidence A24 and 31*).

(c) In its DSM (Diagnostic and Statistical Manual of Mental Disorders)-I published in 1952, the American Psychiatric Association recognized homosexuality as a type of sexual deviation, and classified the same into the large category of sociopathic personality disturbances. Thereafter, in DSM-II (1968), the association established homosexuality as an independent diagnosis, and classified the same into the small category of "sexual deviation" in the large category of “personality disturbance and other nonpsychotic mental disorders” (*Plaintiffs' Evidence A48 and 335*).

However, in 1973, the American Psychiatric Association decided to remove homosexuality from the DSM and announced that it would eliminate discrimination against homosexual persons and guarantee their rights. In DSM-III published in 1980, homosexuality was excluded from mental disorders and replaced by a more restrictive “ego-dystonic homosexuality” (roughly meaning cases where patients, who are homosexual but do not wish to feel arousal towards individuals of the same sex, complain of distress and desire to change). The association later also excluded this “ego-dystonic homosexuality” from its DSM-III-R published

in 1987 (*Plaintiffs' Evidence A7, 24, 27, 28, 48 and 335*).

The World Health Organization (WHO) defined homosexuality as a disease up until the publication of its ICD (International Classification of Diseases)-9 but stated in ICD-10 (1992) that homosexuality alone was not considered a disorder (*Plaintiffs' Evidence A29 and 30*).

In Japan, too, it was previously thought that homosexuality should be treated, but in 1995, in response to requests from a public interest group, the Japanese Society of Psychiatry and Neurology expressed its view that "sexual orientation towards a person of the same sex is not considered a mental disorder in accordance with ICD-10" (P*laintiffs' Evidence A48, 335 and 342*).

(d) Currently, the general view of psychiatric and psychological professionals is that homosexuality itself is not an illness (*Plaintiffs' Evidence A48, 335 and 343*).

(iii) Survey of the Situation of Sexual Minorities

(a) According to an epidemiological survey conducted in the United States in 2009, the percentage of men and women who considered themselves to be homosexual was 6.8% and 4.5%, respectively. Other surveys conducted in the United States, Canada and elsewhere revealed that the percentage of adults who identify as "lesbian" or "gay" was 0.7~2.5% (*Plaintiffs' Evidence A8 and 335*).

(b) According to a survey conducted by Nagoya City in 2018, 1.6% of people responded that they belonged to a sexual minority (*Plaintiffs' Evidence A9*).

(c) According to NHK's survey of sexual minorities in 2015, 82.4% of the respondents answered "I want to apply for partner certification systems offered by local governments" (including those who answered that they wanted to apply when they have partners), 65.4% answered "I want a law to recognize same-sex marriage," 25.3% answered "I want the government to establish a registration system for partner relationships rather than marriage," and 2.9% answered "I am happy with the status quo" (*Plaintiffs' Evidence A103*).

(d) According to a survey of more than 10,000 sexual minorities conducted in 2019 by Lifenet Insurance Company and Professor Yasuharu Hidaka of Takarazuka University, 60.4% of the respondents to the question "What do you think about a system that offers public recognition of same- sex relationships such as same-sex marriage and partnership?" answered "I want the legality of marriage between individuals of the opposite sex to be applied to same-sex marriage," 16.2% responded "I want greater understanding in society but do not feel any necessity for an official system," and most of the others answered either "I want a national partnership system to be established" or "I want a local government-level partnership system to be established" (*Plaintiffs' Evidence A320 and 321*).

b. Marriage System

(i) Modern Marriage Systems

Historically, the marriage system (legal marriage system) was born from the attempt to set norms for sexual relationships between men and women, so as to leave descendants and preserve the species. Although the types of unions recognized as marriages vary according to the society and time period, marriage exists as a social institution and a personal union recognized by society, not merely a union based on the parties' sexuality. In most societies, therefore, there are certain requirements for a valid marriage. Traditionally, marriage has been seen not as a mere sexual relationship between men and women, but as communal living between men and women, forming a key part of family life through custody and care of children and the maintenance of cohabitation through shared roles and the like.

In the Middle Ages in Europe, religious marriage was conducted under the control of churches, but with the transition to modern civil society after the French Revolution, modern marriage systems were gradually established whereby states gave approval to marriage based on the consent of both sexes under certain conditions. The modern marriage system was regarded as a departure from the control of the patriarchal family community in premodern society, and as marriage came to be viewed as a relationship of rights and obligations between equal and independent persons (*Plaintiffs' Evidence A221-25 and 27 through 29, and Defendant's Evidence 22 for the foregoing*).

(ii) Civil Code in the Meiji Era

(a) In the first year of Meiji era in Japan, the substantive requirements of marriage were left to custom, and there was no unified substantive law. The substantive requirements were first established in Act No. 98 of 1890 (the former Civil Code), but ultimately never took effect. Instead, they were passed on to the Civil Code (Act No. 9 of 1898) (which, until its amendment in 1947, we refer to as the “Meiji Civil Code”) (*Plaintiffs' Evidence A211-25 and 28*).

(b) In the Meiji Civil Code, marriage was a legal marriage by notification to the state. It was based on the conventional household system (*ie seido*) with the head of the household (*koshu*) having the power to control the household (*koshu-ken*). Marriage was for the benefit of the household, and therefore required the consent of the head of household or an individual's parents. Further, as the husband and wife had to share the household, one of them (normally the wife) was required to become a member of the family of the other (normally the husband) after marriage. The concubine system was abolished, but the husband had dominance over his wife, and was deemed to have the right to manage her property and to earn income from it.

Though some foreign laws at that time explicitly prohibited same-

sex marriage, the Meiji Civil Code had no explicit provision prohibiting the same, on the ground that it was obvious that individuals of the same sex could not marry as marriage was a relationship between a man and a woman. In scholarly thought, it was considered that one party to a marriage must be a man, and the other a woman, so no marriage could arise between individuals of the same sex even if they were to make a commitment to live together for life (*Plaintiffs' Evidence A211-18, 26, 28 and 38 for the foregoing*).

Moreover, marriage was not necessarily for the purpose of procreation under the Meiji Civil Code. In scholarly thought, marriage was for the joint life of husband and wife, and was not necessarily for the purpose of having heirs, and while it was generally understood that marital partners should be able to reproduce, reproductive incapacity was no barrier to marriage, nor grounds for divorce, annulment or invalidation (*Plaintiffs' Evidence A210, 211-18, 33 through 35, 38 and 41*).

(iii) Enactment of the Constitution (Constitution of Japan)

(a) Under the direction of the General Headquarters of the Allied Forces ("GHQ"), the Constitutional Problems Investigation Committee proceeded with amendments to the Constitution of the Empire of Japan.

Beate Sirota Gordon of the Government Section of GHQ was in charge of drafting the human rights provisions. As Sirota was aware of issues such as the low status of women during her stay in Japan, Article 18 of her draft, which corresponds to Article 24 of the current Constitution, provided: "… marriage and family stand on the undisputed legal and social equality of both sexes, it is based on mutual agreement instead of enforcement by parents, and it is maintained by mutual cooperation instead of dominance by the man … with regard to the choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted based on respect for the individual and the inherent equality of the sexes."

Article 23 of the GHQ's draft was prepared in February 1946 based on Sirota's draft. This draft went through multiple iterations before passing deliberation in the Imperial Diet and becoming Article 24 of the current Constitution. These iterations include: Article 37 of the "draft as of March 2" prepared by the Government of Japan based on the above GHQ's draft; Article 22 of the "draft as of March 5" prepared through negotiations with GHQ; Article 22 of the draft amendment to the Constitution of the Empire of Japan for conversion into colloquial Japanese; and Article 22 of the draft amendment to the Constitution of the Empire of Japan submitted to the Imperial Diet on June 20 of the same year. Article 23 of the GHQ's draft stated that "marriage stands on the undisputed legal and social equality of both sexes," and Article 37 of the "draft as of March 2" and Article 22 of the "draft as of May 5" stated that "marriage shall come into effect only based on the mutual consent between a man and a woman." However,

"mutual consent between a man and a woman" was eventually replaced with "mutual consent of both sexes." In addition, as the Government of Japan was reluctant to incorporate provisions on family relationships in the Constitution, Article 37 of the "draft as of March 2" was revised to correspond only to Article 24(1) of the current Constitution; however, a provision corresponding to Article 24(2) of the current Constitution was added to Article 22 of the "draft as of March 5."

Through these processes, family-related provisions, which did not exist in the Constitution of the Empire of Japan, were incorporated into the Constitution. (*Plaintiffs' Evidence A156 through 161, and 211-22, 23, 29, 241 and 427 for the foregoing*)

(b) At its 90th session, the Imperial Diet deliberated on a bill to amend the Constitution. The main issue was whether the existing household system should be maintained, but it became clear that it had to be rejected, in particular through deliberation in the House of Peers. Regarding the meaning of "only" in the provision that "marriage shall be based only on the mutual consent of both sexes" in Article 24, Paragraph 1 of the current Constitution, the then-Minister of Justice stated that the purpose of this "only" was to eliminate the restriction that marriage required the consent of the head of the household (*koshu*) or any person with parental authority, and to enact marriage solely by mutual consent of both sexes.

No evidence was found that there was any discussion of marriage between individuals of the same sex in this deliberation; rather, discussions were held on the premise that marriage is between a man and a woman, that "marriage is absolutely founded in a place where a man and a woman form a union and help each other." (*Plaintiffs' Evidence A156, 157, 159-161, 241, Defendant's Evidence 18*)

(c) Under Article 24 of the Constitution, the "Act Concerning Emergency Measures of the Civil Code upon Enforcement of the Constitution of Japan" (Law No. 74 of 1947) was enacted and application of the provisions concerning the household system under the Meiji Civil Code ceased. Thereafter, Parts IV and V of the Civil Code were wholly amended (the amendment of the Civil Code in 1947 – the Civil Code after the amendment is sometimes referred to as the "Current Civil Code") and enacted on January 1, 1948. (*Plaintiffs' Evidence A19, 211-28, 546*)

(iv) Amendment of the Civil Code in 1947

(a) With the amendment of the Civil Code in 1947, (i) the right of parents to consent to their children's marriage was limited to when those children are minors, (ii) the right of the head of the household to consent to marriage by their of-age children was abolished, and (iii) the prohibition of marriage for the head of the household or any person presumed under applicable law to succeed the household to enter into another family was abolished as well. Thus, the restrictions imposed by the household system were removed. Additionally, the inequality between husband and wife was resolved, such as by enabling mutual management of

their property. (*Plaintiffs' Evidence A16, 19, 211-21/28*)

In the Diet deliberations, it was explained that the reason to propose the amendment of the Civil Code was to amend the Meiji Civil Code since Part IV (Relatives) and Part V (Inheritance) in particular contained provisions that conflicted with the basic principles set forth in Articles 13, 14 and 24 of the Constitution. Therefore, the conflicting provisions were deleted while maintaining the remaining provisions. There is no evidence that there was any debate on marriage between individuals of the same sex. (*Plaintiffs' Evidence A16, 211-21*).

(b) After the amendment of the Civil Code in 1947, with regard to marriage as provided by the Current Civil Code, academics expressed their views that the purpose of marriage is to form a relationship that is regarded as being in accordance with socially accepted ideas of the time, and thus that "marriage" between individuals of the same sex is not marriage. (*Plaintiffs' Evidence A211-27 and 28*)

c. Legislation Concerning Personal Unions Between Individuals of the Same Sex in Other Countries

(i) Institutions Other Than Marriage Systems Concerning Personal Unions Between Individuals of the Same Sex

(a) In 1989, the registered partnership system was introduced in Denmark as a system that legally records the relationship between two persons of the same sex and confers a certain position and legal effects. Similar systems (with different names and specific system details, hereinafter collectively referred to as "Registered Partnership Systems" and together with the systems referred to in the following paragraph (b), "Registered Partnerships and Other Systems") were introduced mainly in Europe, including Norway (1993), the Netherlands (1998), Germany and Finland (2001), Luxembourg and New Zealand (2004), the United Kingdom (2004-2005), Austria (2009), and Ireland (2011). The Registered Partnership Systems in many of these countries cover not only personal unions between individuals of the same sex, but also those of the opposite sex (e.g., the Netherlands, Portugal). (*Plaintiffs' Evidence A98, 169, 205, 211-7/29, G8*)

(b) For couples who do not wish to be subject to such strong legal effects as those arising under Registered Partnership Systems, Belgium and Sweden have systems called legal cohabitation, which primarily gives legal effect related to property laws to certain cohabitation relationships, while France has a civil solidarity pact system (PACS), under which rights and obligations are established under the contracts of the parties and registered with public bodies to enable them to be treated as couples by third parties or the country itself. Both heterosexual and same-sex couples can use these systems. (*Plaintiffs' Evidence A98, 169, 205, 211-7/29*)

(c) In Italy, the Constitutional Court decided in 2010 that

marriage is restricted to unions of individuals of different sexes. In 2014, the Court affirmed its decision, but further decided that having no other form of personal union under Italian law that appropriately determines the rights and obligations of same-sex couples is a violation of the Constitution. In response, the "Regulations of Civil Unions between Persons of the Same Sex and Discipline of Cohabitation" were enacted in 2016. The civil union described therein is formed when both parties of the same sex mutually declare their union in the presence of witnesses and an identification administration officer.

As to the rights and obligations arising from these civil unions, the provisions concerning marriage shall be applied *mutatis mutandis*, except for those concerning the adoption of children. (*Plaintiffs' Evidence A98*)

(ii) Marriage Systems Between Individuals of the Same Sex

(a) In 2001, the Netherlands introduced its system for marriage between individuals of the same sex, becoming the first country in the world to legally recognize such marriages. Marriage systems permitting marriage between individuals of the same sex have since continued to be introduced worldwide: Belgium (2003); Spain and Canada (2005); South Africa (2006); Norway and Sweden (2009); Portugal, Iceland and Argentina (2010); Denmark (2012); Brazil, France, Uruguay and New Zealand (2013); the United Kingdom (excluding Northern Ireland) (2014); Luxembourg and Ireland (2015); Colombia (2016); Finland, Malta, Germany and Australia (2017); Austria, Taiwan and Ecuador (2019); Costa Rica and the United Kingdom (Northern Ireland) (2020); and Chile and Switzerland (2022) (all the year of enactment).

In many of these countries and regions, the systems for marriage between individuals of the same sex were introduced after the introduction of Registered Partnerships and Other Systems. It has been indicated that the introduction of Registered Partnerships and Other Systems advanced the social recognition of, and thereby made it possible to introduce, systems for marriage between individuals of the same sex. Some countries abolished their pre-existing Registered Partnerships and Other Systems when introducing their same-sex marriage systems, while other countries have maintained theirs. In some of the latter cases, the details of the Registered Partnerships and Other Systems have been revised repeatedly to include not only proprietary integration but also personal obligations, making them similar to conventional marriage systems.

(*For the foregoing, Plaintiffs' Evidence A98, 145-148, 169, 205, 210, 211-7·29, 319, 417, 533, 534, AG8*)

(b) In addition, judicial decisions have been made on the constitutionality of laws that permit marriage between individuals of the same sex, and on the unconstitutionality of laws that do not permit it, as follows:

a. On November 6, 2012, the Constitutional Court of Spain held that the provisions of the Civil Code providing for marriage between individuals

of the same sex do not violate the Spanish Constitution. (*Plaintiffs' Evidence A169*)

b. On June 26, 2015, the U.S. Supreme Court held in the Obergefell case that the provisions of the state laws of Ohio, Michigan, Kentucky and Tennessee, which did not permit marriage between individuals of the same sex, while limiting the requirements for marriage of opposite-sex couples, violate the due process and equal protection provisions of the U.S. Constitution. (*Plaintiffs' Evidence A98, 99, 164*)

c. On May 24, 2017, the Judicial Yuan of Taiwan (the equivalent to a constitutional court) ruled that the provisions of the Civil Code that did not allow marriage between individuals of the same sex violated the Taiwanese Constitution. (*Plaintiffs' Evidence A98, 101*)

d. On December 4, 2017, the Constitutional Court of Austria held that, with regard to the Registered Partnership System that had been introduced and amended as mentioned in section (3)(i)(a) above, even if the legal structure is the same as that of the conventional marriage system, distinguishing between opposite-sex and same- sex relationships by using two legal systems violates the principle of equality that prohibits discrimination on the grounds of individual attributes such as sexual orientation. (*Plaintiffs' Evidence A98*)

(c) Even in countries where marriage between individuals of the same sex is allowed, there are cases where such marriages are viewed as being different to those between opposite-sex couples (or where such differences existed upon introduction). The main reasons for such differences are whether or not (i) the presumption of legitimacy is applied, (ii) the adoption of children is allowed, and (iii) the use of assisted reproductive technology is available. (*Plaintiffs' Evidence A169, 211-29*)

(d) In 2016, a district court in the Republic of Korea held that marriage between individuals of the same sex should be resolved by legislative decision, and that it was not an issue that could be resolved by the judiciary. (*Plaintiffs' Evidence A98*)

d. The Situation Concerning Sexual Minorities in Japan

(i) State of Local Government Efforts

(a) In October 2015, Shibuya Ward, Tokyo, and in November of the same year, Setagaya Ward, Tokyo, respectively introduced partnership certification systems at the local government level, paving the way for more local governments to introduce similar systems that are already being used by many same-sex couples. In addition, some local governments have concluded agreements to allow the mutual recognition of partnership certification systems among themselves, and there are yet others that now allow the inclusion of children of same-sex partners in their family certification. According to a survey conducted in Shibuya Ward and other local governments, 209 local governments have introduced partnership certification systems as of April 1, 2022, covering roughly 52.1% of the

Japanese population. (*Plaintiffs' Evidence A75-91, 119-134, 266-302, 352-391, 445-519*)

The Shibuya Ward system is based on the "Shibuya City Ordinance to Promote a Society in which Members Respect Gender Equality and Diversity," with the Ward mayor certifying the partnerships. A 2017 survey conducted by the Ward of those who had obtained partnership certification found that they viewed the certificate as representing acceptance and recognition by society (*Plaintiffs' Evidence A75, 434*).

(b) In addition to the above, local governments are making efforts such as including partners of the same sex that have registered their partnership as recipients of benefits granted to bereaved families of crime victims and to allow employees who have a partner of the same sex to use marriage leave and parental leave (*Plaintiffs' Evidence A307-309, 392, 393*).

(ii) Current State of Efforts by Corporations

On May 16, 2017, the Japan Business Federation presented a proposal entitled "Toward the Realization of a Diverse and Inclusive Society" calling for the promotion of the understanding of and the elimination of discrimination against sexual minorities (*Plaintiffs' Evidence A94*).

In order to eliminate the difficulties that sexual minorities are facing, a large number of corporations are expanding the scope of their welfare packages to include same-sex couples and their children, such as the application of congratulatory and bereavement leave or family allowances to partners of the same sex and the introduction of a system by which children of partners of the same sex are treated as "children" in the corporations' internal systems (*Plaintiffs' Evidence A314, 315, 318, 399*).

In addition, some financial institutions are making efforts such as expanding the scope of housing loans to permit partners of the same sex to be joint borrowers, when previously this had been limited to opposite sex couples (*Plaintiffs' Evidence A312, 313*).

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

The Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (Act No. 111 of 2003) entered into force on July 16, 2004. Article 3, Paragraph 1 of that Act provides that only a person with gender identity disorder who "is not currently married" (Item 2) may be subject to a ruling to change the recognition of their gender status. The Supreme Court has ruled that this provision does not exceed the scope of the discretionary powers granted to the Diet and is not in violation of Article 13, Article 14, Paragraph 1 or Article 24 of the Constitution, stating that the provision is based on the consideration that if a person who is currently married were allowed to change the recognition of their gender status, it could bring confusion to the current order of marriage which is only allowed between individuals of opposite sex, and thus the provision cannot be

concluded to be unreasonable (*Case no. 2019 (KU) 791, Supreme Court Second Petty Bench decision of March 11, 2020*).

e. Public Surveys on Same-Sex Marriage and Legal Guarantees for Same-Sex Couples

(i) According to a 2014 survey conducted by the Japan Association for Public Opinion Research, 42.3% of respondents (35.4% of men and 48.7% of women) agreed (including "somewhat agree") and 52.4% opposed (including "somewhat oppose") the legal recognition of same-sex marriages (*Plaintiffs' Evidence A104*).

(ii) According to a 2015 nationwide survey of people aged 20 to 79 conducted by a group led by Professor Kazuya Kawaguchi of Hiroshima Shudo University,
51.2% of respondents (44.8% of men and 56.7% of women) supported (including "somewhat support") the legal recognition of same-sex marriage, while 41.3% (50.0% of men and 33.8% of women) opposed (including "somewhat oppose") it (*Plaintiffs' Evidence A104*).

(iii) According to a 2015 public opinion poll (of 1,018 respondents) conducted by the Mainichi Newspapers Co., Ltd., 44% of respondents (38% of men and 50% of women) supported same-sex marriage, and 39% (49% of men and 30% of women) opposed it (*Plaintiffs' Evidence A104, 105*).

(iv) According to a 2017 public opinion poll of citizens aged 18 or older (2643 valid responses) conducted by NHK, 50.9% of respondents answered "yes" whereas
40.7% answered "no" to the question of whether marriage between two men or two women should be recognized (*Plaintiffs' Evidence A106, 107*).

(v) According to a 2017 public opinion poll conducted by the Asahi Shimbun Company, 49% of respondents (44% of men and 54% of women) responded "yes" and 39% responded "no" to the question of whether same-sex marriage should be legally recognized. More than 70% of respondents from 18 to 29 and in their 30s responded "yes"; however, the percentage of responses of "yes" and "no" were almost equal in respondents aged in their 60s, and 63% of respondents aged in their 70s responded "no" (*Plaintiffs' Evidence A108, 109*).

(vi) According to a 2018 survey of 60,000 people aged 20 to 79 conducted by Dentsu Inc., the percentage of those who identify as a sexual minority was 8.9%. Out of the 6,229 respondents extracted from that 60,000, 78.4% of respondents responded "agree" or "somewhat agree" and 87.9% of women and 69.2% of men of the 5,640 respondents who did not identify as a sexual minority responded "agree" or "somewhat agree" with the legalization of same-sex marriage (*Plaintiffs' Evidence A 110, 57 of 211*).

(vii) According to the Sixth National Survey on the Family conducted by the National Institute of Population and Social Security Research in 2018, of the 6,142 married female respondents, (a) 69.5%

completely or somewhat agreed that marriage between men or women (same-sex marriage) should be legally recognized, while 30.5% completely or somewhat disagreed, (b) 75.1% completely or somewhat agreed that some kind of legal guarantee should be granted to male or female couples as well, while 25.0% completely or somewhat disagreed, and (c) 69.4% completely or somewhat agreed that same-sex couples have the ability to raise children as well as opposite-sex couples, while 30.6% completely or somewhat disagreed (*Plaintiffs' Evidence A149, 165, 166, 226*).

(viii) According to a survey of 2,053 voters nationwide conducted from March to April 2020 by Asahi Shimbun Company and Masaki Taniguchi of University of Tokyo, 46% of respondents responded that they "support" or "somewhat support" same-sex marriage, while 31% responded "I don't know," and 23% "oppose" or "somewhat oppose" it. Compared with a 2005 survey of voters, positive opinions on same-sex marriage increased by 14%. The percentage of positive opinions increased even among supporters of the Liberal Democratic Party to exceed the percentage of negative opinions (*Plaintiffs' Evidence A 224*).

f. Surveys on Marriage

(i) According to the Cabinet Office's 2005 White Paper on the National Lifestyle, with respect to a survey question on the pros/benefits of marriage, 63.5% of married individuals and 58.2% of single individuals responded "having a family and children," 61.9% of married individuals and 54.3% of single individuals responded "gaining psychological stability" and 58.0% of married individuals and 57.7% of single individuals responded "being with the person you like."

With respect to a survey question on the meaning of "home", 63.8% of married individuals and 54.9% of single individuals responded "a gathering place for family," 57.3% of married individuals and 55.4% of single individuals responded "a place to rest and relax," 50.6% of married individuals and 37.6% of single individuals responded "a place to strengthen family bonds" and 27.0% of married individuals and 19.5% of single individuals responded "a place to give birth to and raise children" (*Plaintiffs' Evidence A211-54*).

(ii) (a) According to the Cabinet Office's Survey on Marriage and Family Formation conducted between 2010 and 2011, among married individuals, 61.0% got married "to be with the person they like," 44.2% got married "to have a family" and 32.5% got married "to have children."

Among single individuals (who wish to marry in the future), 61.0% want to get married "to be with the person they like," 59.2% want to get married "to have a family" and 57.1% want to get married "to have children" (*Plaintiffs' Evidence A211-55-1*).

(b) According to the Cabinet Office's Survey on Marriage and Family Formation conducted between 2014 and 2015, among single

individuals (who wish to marry in the future), 70.0% want to get married "to have a family" and "to have children" and 68.9% want to get married "to be with the person they like" (*Plaintiffs' Evidence A211-55-2*).

(iii) The results of the 15th National Fertility Survey conducted in 2015 by the National Institute of Population and Social Security Research based on respondents between 18 and 34 who had never been married were as follows (*Plaintiffs' Evidence A211-52, 544*).

(a) 64.7% of men and 58.2% of women agreed that "it is not desirable to remain single for one's entire life."

(b) 85.7% of men and 89.3% of women responded that they "intend to marry someday," showing a slight downward trend while remaining at a high level.

(c) 64.3% of men and 77.8% of women responded that "marriage has some merits." Specifically, "having one's own children and family" was the most common reason among 35.8% of men and 49.8% of women, and "psychological relief" was the second most common reason among 31.1% of men and 28.1% of women.

(d) On the reason for having children, 66.5% of men and 73.3% of women responded that "life will be fun and rich with children" and 48.4% of men and 39.0% of women responded that "it is natural to marry and have children."

(iv) According to a national survey conducted by NHK in 2018 among 5,400 persons aged 16 or older (50.9% response rate), 68% responded that they "do not necessarily have to marry," an increase compared to the results of previous surveys. Conversely, 27% responded that "it is natural for people to marry," a decrease compared to the results of previous surveys. In addition, 60% of respondents answered that they "do not necessarily need to have children even if they get married," an increase compared to the results of previous surveys. 33% responded that they "naturally should have children if they get married," a decrease compared to the results of previous surveys (*Plaintiffs' Evidence A211-50*).

(v) According to the Sixth National Survey on Family conducted by the National Institute of Population and Social Security Research in 2018, with respect to a survey item on the statement that "married couples are socially accepted only after they have children," of 6,142 married women 24.7% responded that they "completely agree" or "somewhat agree" and 75.4% responded that they "completely disagree" or "somewhat disagree." Positive responses showed a decline as compared to 35.8% and 32.1% in the National Institute's surveys conducted in 2008 and 2013, respectively (*Plaintiffs' Evidence A211-51*).

4. Issue (1) (Constitutionality of the Provisions Which Disallow Same-Sex Marriage)

a. Compliance with Article 24, Paragraph 1 of the Constitution

(i) The Plaintiffs argue that Article 24, Paragraph 1 of the Constitution should be interpreted as guaranteeing the freedom of marriage, which is a freedom directly derived from the dignity of the individual (which must come before the country) and that such freedom of marriage extends to same-sex marriage, and that therefore the Provisions are in violation of Article 24, Paragraph 1 of the Constitution by restricting without justifiable grounds the core part of the marriage system required by and intended by the Constitution.

(ii) Article 24, Paragraph 1 of the Constitution provides that "Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis." This can be interpreted as making clear the intent that whether to marry and when and with whom to marry must be left to the free and equal decision of the individual parties. Marriage is considered to have significant legal effects, including a spouse's right of inheritance (Article 890 of the Civil Code) and a child born between husband and wife being a legitimate child (Article 772, Paragraph 1 of the Civil Code, etc.). Furthermore, while the public's views on family etc. has been said to have diversified in recent years, considering that the general public continues to place great importance on legal marriage, the freedom of marriage as noted above can be construed to deserve full respect in light of the intent of Article 24, Paragraph 1 of the Constitution.

Article 24, Paragraph 2 of the Constitution provides that "With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes." Matters concerning marriage and the family should be determined holistically based on the overall discipline of spousal and parent-child relationships under social conditions (including national customs and public sentiment). Accordingly, it is appropriate for the details of such matters to be specified pursuant to law, rather than primarily in the Constitution. From this perspective, Article 24, Paragraph 2 of the Constitution delegates the establishment of a specific system regarding matters concerning marriage and the family to the Diet's reasonable legislative discretion in the first instance, and at the same time requires, and provides guidance that, such laws must be enacted from the standpoint of individual dignity and the essential equality of the sexes, thereby placing a clear limitation on such discretion (*see Case number 2013 (O) 1079, Supreme Court Grand Bench judgment of December 16, 2015, Minshu Vol. 69, No. 8, p. 2427 (hereinafter referred to as the "2015 Saikon Kinshi Kikan Grand Bench Judgment"), and Case number 2014 (O) 1023, Supreme*

Court Grand Bench judgment of December 16, 2015, Minshu Vol. 69, No. 8, p. 2586 (hereinafter referred to as the "2015 Fufu Doushi-sei Grand Bench Judgment")).

According to the above, Article 24, Paragraph 2 of the Constitution delegates the establishment of a specific system regarding matters concerning marriage and the family to the Diet's reasonable legislative discretion, and at the same time requires, and provides guidance that, such laws must be enacted from the standpoint of individual dignity and the essential equality of the sexes, thereby placing a clear limitation on such discretion, and Article 24, Paragraph 1 of the Constitution requires that, among such matters, with respect to lawmaking regarding marriage and the establishment of a legal marriage system, the legislative branch defer to the free and equal decision of the individual parties whether, when and with whom to marry.

(iii) Based on the above understanding, we consider whether "marriage" under Article 24, Paragraph 1 of the Constitution, which requires the establishment of a legal marriage system, can be interpreted to include not only heterosexual marriage but also same-sex marriage.

First, Article 24, Paragraph 1 of the Constitution uses the words "both sexes" and "husband and wife" both of which indicate the male sex and female sex. In this regard, reviewing the legislative history of Article 24 of the Constitution, terms referring to both the male sex and female sex were consistently used. For example, Article 23 of the GHQ draft uses the term "both sexes," while Article 37 of the "March 2 Draft" and Article 22 of the "March 5 Draft" prepared by the Japanese-side in response to the GHQ draft use the term "both male and female." Based on this, it can be established that the wording "mutual agreement of both sexes" was ultimately used in lieu of "mutual agreement of a man and a woman" (*Findings of Fact (2)(iii) above*). Therefore, from such wordings, it is natural to construe that "marriage" as referred to in the Article refers to heterosexual marriage.

Furthermore, as noted in Findings of Fact (2)(iii) above, there is no evidence that there were any discussions on same-sex marriage during the process of deliberation in the Imperial Diet when the Constitution was enacted, and it can be surmised that it was assumed marriage referred to that between the opposite sex. The same can be said of the deliberation process of the current Civil Code, which was revised in accordance with the enactment of Article 24 of the Constitution, etc. (*Findings of Fact (2)(ii), (iv) above*).

Accordingly, it is appropriate to construe that "marriage" as referred to in Article 24 of the Constitution refers to marriage between the opposite sex and does not include same-sex marriage.

(iv) However, the Plaintiffs argue that even if the term "marriage" in Article 24 of the Constitution at the time of its enactment referred to marriage between the opposite sex, in light of the principle of the Constitution and subsequent societal changes, it should be construed

that same-sex marriage should be included in today's interpretation. We will therefore consider this issue.

(a) Based on the foregoing facts, as noted in Findings of Fact (2)(i) above, marriage has been construed as a relationship that can be viewed as a marriage under the social norms of the time (or a socially approved personal union) rather than an intimate personal union between two individuals and, as noted in (iii) above, it was assumed as a matter of fact at the time the Constitution was enacted that marriage was the union of a man and a woman, and whether same-sex marriage was included in the concept of marriage was not even discussed. In addition, as mentioned in Findings of Fact (2)(i) and (3)(ii) above, there were no laws approving same-sex marriage at that time, whether domestically or internationally. Therefore, it can be concluded that, at the time the Constitution was enacted, there were no social norms or social approval in this country to the effect that personal unions between couples of the same sex was considered marriage, and accordingly, it can be concluded that the Constitution which only recognizes personal unions between couples of the opposite sex as "marriage" was enacted as noted above pursuant to social norms recognizing marriage as that between a man and a woman.

While social norms and the public's mindset and values regarding marriage and family may change, in recent years, social acceptance towards sexual minorities (including homosexual persons) has advanced, and misconceptions that homosexuality is abnormal or a medical condition are being improved in many countries. We recognize that there are movements to overcome discrimination and prejudice against homosexuality, including, as noted above in Findings of Fact, the fact that the view that homosexuality is a disease has been rejected by mental health professionals (*Findings of Fact (1)(ii)(c) above*), the fact that progress is being made to repeal laws penalizing sexual intercourse between individuals of the same sex in countries that previously had such laws (*Findings of Fact (1)(ii)(b) above*), the fact that many countries have adopted Registered Partnership Systems that provide same-sex couples with a certain status as well as legal protections and certification (*Findings of Fact (3)(i) above*), that approximately 30 countries and regions have legalized same-sex marriage since 2001 (*Findings of Fact (3)(ii)(a), (b) above*) and the fact that there are movements in Japan to provide same-sex couples with certain legal protections, including the adoption of Registered Partnership Systems by many local governments (*Findings of Fact (4)(i) above*). It therefore follows that the Plaintiffs' argument that "marriage" under Article 24 of the Constitution should be interpreted to include same-sex marriage cannot be immediately denied given these major changes in social conditions surrounding homosexual persons etc.

(b) However, as discussed in Findings of Fact above, throughout history humans have procreated and preserved our species through the sexual union between a man and a woman. The marriage system

(the legal marriage system) was created in order to regulate such relations with common rules, and it can be said that marriage has traditionally been recognized as the core of a family by maintaining childbearing and cohabitation etc. communally between a man and a woman (*Findings of Fact (2)(i) above*). Until same-sex marriage laws were adopted in the Netherlands in 2001, such views of marriage were common across nations and marriage was considered as the union between a man and a woman (*Findings of Fact (2)(i), (3)(ii) above*). Based on these facts, it cannot be denied that the background and basis behind the fact that the personal union between a man and a woman has traditionally been given social approval as marriage is due to the important and fundamental societal function of a man and a woman becoming husband and wife, having and raising children, and living and cohabiting as a family connecting on to the next generation.

As discussed above, social norms and the public's mindset and values regarding marriage and family change over time. In Japan as well, views on marriage have become more diverse than before, and it goes without saying that the choice not to marry or the choice not to have children even if married is part of individual freedom. However, we recognize that there are survey results showing, for example, that responses that it is not desirable to remain single for one's entire life or that having children as the reason for getting married constituted a majority (*Findings of Fact (6) above*), and that therefore there remains a certain portion of the population that place great value on legal marriage or that connect marriage with having children.

In this regard, even despite the changes in social conditions surrounding homosexual persons and the importance of abolishing discrimination and prejudice against homosexuality, it needs to be considered further and carefully whether there exist social norms or social approval that same- sex couples who are clearly not capable of natural reproduction between themselves should, in addition to being granted certain legal protections with respect to their personal union, be treated as being in the same kind of "marriage" as that between individuals of the opposite sex that is the subject of the Provisions (note that this is not to deny that female same- sex couples can give birth to children through assisted reproductive technology etc., or that same-sex couples can raise children; rather, this is simply to say that the long-standing practice of a man and a woman living together and having and raising children does not apply to same- sex couples).

As noted in Findings of Fact (5) above, according to the results of public surveys in Japan, while the percentage of people who are opposed to the introduction of same-sex marriage is shown to be declining, there continues to be a certain percentage of people who are opposed and accordingly we recognize there are conflicting values that exist within society. Although most of such views are likely to be attributable to traditional values that view marriage as a personal union between a man and

a woman, given that such traditional values are based on the long- standing human practice of a man and a woman becoming husband and wife, having and raising children, and living and cohabiting as a family connecting on to the next generation, it is difficult to unilaterally reject such values.

(c) Based on the above, despite movements in Japan to overcome discrimination and prejudice against homosexuality and to grant certain legal protections for same-sex couples as previously discussed, we are unable to conclude that there currently exists social approval of treating the personal union between individuals of the same sex as the same "marriage" as that between a man and a woman.

Therefore, even in light of changes in social conditions since the enactment of the Constitution, we are unable to conclude at this time that the interpretation in (iii) above that "marriage" under Article 24 of the Constitution does not include same-sex marriage is unjust and that therefore such interpretation must be changed.

(v) The Plaintiffs further argue that the core part of the marriage system required by the Constitution is the freedom to marry the person of one's choice based solely upon the mutual agreement of both parties, and that therefore the freedom of marriage is also protected with respect to same-sex marriage.

The Plaintiffs are correct that at the time of the enactment of the Constitution, the abolition of the family system was discussed and it was decided that a marriage could be formed based solely upon the mutual agreement of both parties, without the need for approval of the head of household or others. However, this is based on the understanding that such marriage must mean a personal union that is socially approved by a given society as "marriage," and it cannot be said at this time that there exists social approval of same-sex marriage within society, as discussed above. Accordingly, the Plaintiffs' argument lacks any basis, and cannot be upheld.

(vi) Based on the foregoing, "marriage" under Article 24 of the Constitution cannot be interpreted to include marriage between same-sex couples, and Article 24, Paragraph 1 of the Constitution cannot be interpreted to require that legislation regarding marriage must defer to the free and equal decision of the individual parties.

Therefore, it cannot be said that the Provisions, which limit marriages to heterosexual ones and do not allow same-sex marriages are in violation of Article 24, Paragraph 1 of the Constitution.

b. Compliance with Article 14, Paragraph 1 of the Constitution

(i) 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 (*see 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, the 2015 Saikon Kinshi Kikan Grand Bench Judgment and the 2015 Fufu Doushi-sei Grand Bench Judgment).

Furthermore, as discussed above in (1)(ii), Article 24, Paragraph 2 of the Constitution delegates the establishment of a specific system regarding matters concerning marriage and the family to the Diet's reasonable legislative discretion in the first instance, and at the same time requires, and provides guidance that, such laws must be enacted from the standpoint of individual dignity and the essential equality of the sexes, thereby placing a clear limitation on such discretion. Therefore, with respect to differential treatment on matters concerning marriage and the family, even in light of the above discretionary power granted to the legislative branch, it can be said that such differential treatment is in violation of Article 14, Paragraph 1 of the Constitution if there are no reasonable grounds for such treatment (*see Case number 2012 (Ku) 984, 985, Supreme Court Grand Bench judgment of September 4, 2013, Minshu Vol. 67, No. 6, p. 1320*).

(ii) (a) The Plaintiffs argue that the Provisions employ differential treatment with respect to the availability of marriage based on sexual orientation.

The Provisions do not make heterosexual sexual orientation a requirement for marriage, but they effectively result in making same-sex marriage impossible by limiting marriage to that between members of the opposite sex, and therefore they can be said to constitute differential treatment based on sexual orientation.

(b) In contrast, the Defendant argues that as the Provisions merely define marriage as being between one man and one woman, and the wording of the Provisions do not make a particular sexual orientation a requirement for marriage, there is no formal inequality based on sexual orientation.

However, as the true essence of marriage is that in which the parties live a communal life with a sincere intention of a lasting mental and physical partnership, and since homosexual persons marrying the opposite sex cannot achieve this true essence of marriage - even if the system of marriage with the opposite sex can be used formally by homosexual persons - it is the equivalent of a situation where homosexual persons are unable to marry. Consequently, though the Provisions themselves do not set any requirements for sexual orientation and sexual orientation is treated in a neutral manner, it is practically impossible for homosexual persons to marry, and such effect can be regarded as a result of the fact that the Provisions limit marriage to that between members of the opposite sex. Therefore, it can be regarded as differential treatment based on sexual orientation. The Defendant’s argument on this point is without merit.

(iii) As described above, the Provisions treat the possibility of marriage differently based on sexual orientation, and as a result,

homosexual persons are placed in a situation where they cannot utilize the entire marriage (legal marriage) system, and unlike heterosexual persons, it can be said that such parties are disadvantaged by being unable to access the various legal effects of marriages.

However, as mentioned above, Article 24, Paragraph 1 of the Constitution should be construed as requiring legislation regarding legal marriage between the opposite sexes. Behind the socially accepted idea of marriage as being between those of the opposite sex is the concept in which a man and a woman become husband and wife, give birth to a child, raise the child, and live communally as a family, leading to the next generation. Consequently, the fact that the Provisions do not permit marriage between members of the same sex, limiting marriage to that between those of the opposite sex, is based on a necessity for the establishment of a legal marriage system set forth in Article 24, Paragraph 1 of the Constitution on the premise of the above-mentioned socially accepted idea. It can be regarded that there are reasonable grounds for the above differential treatment.

Therefore, it cannot be said that Article 14, Paragraph 1 of the Constitution limiting marriage to that between heterosexual persons and not recognizing marriage between homosexual persons exceeds the scope of the legislative discretion and constitutes discrimination based on sexual orientation.

(iv) On the other hand, the Plaintiffs argue that a rigorous examination should be conducted to determine whether reasonable grounds for the above-mentioned differential treatment can be found, arguing further that that it is obvious there are no reasonable grounds for the above differential treatment, given that the disadvantage to homosexual persons is enormous and that the purpose of the marriage system is to protect common living based on intimacy.

However, as mentioned above, "marriage" in Article 24 of the Constitution refers to marriage between two sexes, and Paragraph 1 of the same article requires the establishment of a legal marriage system for marriage between the two sexes. On the other hand, it cannot be construed that marriage between those of the same sex provides equal securities to marriage between members of the opposite sex. Even if the purpose of the marriage system is considered to be the protection of communal living of those in personal unions, it is difficult to say that the Provisions limiting marriage to that between heterosexual persons and not recognizing marriage between homosexual persons exceeds the scope of legislative discretion and are in violation of Article 14, Paragraph 1 of the Constitution.

(v) The Plaintiffs also argue that the Provisions demonstrate a discriminatory treatment based on gender. However, under the Provisions, both men and women can marry a member of the opposite sex, while neither men nor women can marry a member of the same sex, and neither men nor women are treated disadvantageously by reason of sex. Therefore, the

Provisions cannot be regarded as discriminating based on sex.

Therefore, the Plaintiffs' argument in this respect cannot be accepted.

c. Conformity to Article 24, Paragraph 2 of the Constitution

(i) (a) As mentioned above, if it is construed that "marriage" under Article 24 of the Constitution refers to marriage between members of the opposite sex, it cannot be said that the fact the Provisions do not allow marriage between members of the same sex is in violation of Article 24, Paragraph 1 and Article 14, Paragraph 1 of the Constitution.

(b) However, as mentioned above, Article 24, Paragraph 1 of the Constitution provides that with respect to the legislation of "marriage" between members of the opposite sex, the legislature should entrust the decision of whether or not to marry, and whom to marry, to the free and equal decision-making of the parties. It does not mention the inclusion of marriage between members of the same sex in the legal marriage system. Considering the discussions at the time of its enactment, it is acknowledged that the main purpose of the said article was to abolish the power of the head of the household attached to the family system under the Meiji Civil Code, and enable marriage based solely on the agreement of both parties. While the article assumes opposite-sex marriages, it does not proactively attempt to eliminate or prohibit same-sex marriages (Findings of Fact (2)(iii) above).

It is understood that the essence of marriage is for the parties concerned to live a communal life with the sincere intention of a lasting mental and physical union. However, such a purpose and intention to live a communal life is equally applicable to same-sex couples, and regardless of their sexual orientation, this is regarded as an important right for the personal survival of the individual.

Therefore, Article 24 of the Constitution provides for legislation that allows marriage between members of the same sex as provided in the Provisions, and it does not prohibit the establishment of a system for the personal union of same-sex couples that is akin to marriage. Such legislation does not violate Article 24 of the Constitution unless its content deviates from the scope of discretionary power granted to the legislature regarding the dignity of the individual and the intrinsic equality of both sexes.

(c) In accordance with the Provisions, homosexual individuals are unable to utilize the marriage system due to their sexual orientation, a reason that is beyond their personal intention. As mentioned in Findings of Fact (4)(i) above, several local governments have introduced partnership certification systems which socially recognizes same-sex couples as partners or families. However, this is an initiative by each local government, and such a system does not exist at the national government level. As a result, homosexual individuals are unable to receive legal protection and social recognition when living communally with their

partners.

Article 24, Paragraph 2 of the Constitution deals not only with matters concerning marriage but also matters concerning families, and indicates that legislation should be based on the dignity of individuals and the essential equality of both sexes. We examine the conformity of the Provisions with Article 24, Paragraph 2 of the Constitution, taking into consideration whether this situation lacks rationality in light of the dignity of individuals as set forth in Article 24, Paragraph 2 of the Constitution, and whether we have to deem it outside the scope of legislative discretion.

(ii) As mentioned in (1)(ii) above, Article 24, Paragraph 2 of the Constitution primarily entrusts the Diet with 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 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 regard, the Article also creates a limited requirement for legislative discretion and provides guidance for it.

On the other hand, matters concerning marriage and family should be determined by a comprehensive consideration of the overall norms of the familial 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, which 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. Under the circumstance that the provisions of the law which provide for the legal system concerning marriage and family conform with Article 14, paragraph 1 of the Constitution, whether or not such provisions of the law 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 (See the 2015 Grand Bench Judgment on the common surname system of husband and wife.)

(iii) (a) The system of (legal) marriage has been established

as a package of various laws, and a variety of legal effects arise from marrying. For example, the Civil Code stipulates the obligation of husband and wife to live together, cooperate and support each other (Article 752), to share the expenses of marriage (Article 760), the presumption of joint ownership of property (Article 762, Paragraph 2), the distribution of property in case of divorce (Article 768), the presumption of legitimate marriage (Article 817-3), the joint parental authority of husband and wife (Article 818), the right of inheritance of spouses (Article 890), the right of residence of spouses (Article 1028), the right of short-term residence of spouses (Article 1037), and the legally reserved portion (of inheritance) (Article 1042), etc. The Family Register Act stipulates when a marriage notification is filed, a new family register shall be created for the married couple (Article 16, Paragraph 1 (main text)) and, if a child is born, the child shall be entered in the family register of its parents (Article 18). In addition, in the fields of tax, social security, immigration control, etc., there are many cases in which marriage (being a spouse) is a requirement for individual laws and regulations to have legal effect. Many of these provisions are intended to legally protect the family relationship when husband and wife live a joint life and, in some cases, give birth to and raise a child.

Further to the legal effects of such provisions, marriage also has the effect of enabling the parties to be publicly recognized as a family in society and to thereby live a stable communal life.

(b) As such, marriage provides legal protection and social recognition to communal life built upon an intimate personal union. It can be said that establishing such an intimate personal union, leading a communal life with a certain degree of perpetuity, and forming a family are extremely significant factors in the enrichment of the lives of the persons concerned and one of the most important matters in their lives, and therefore, obtaining legal protection and social recognition of marriage can be regarded as having extremely high significance.

As mentioned in the Findings of Fact (6)(iii) above, approximately 60% of unmarried men and women answered that they agreed with the survey prompt “it is not desirable to remain single for one's entire life”, while nearly 90% responded that they agreed with the survey prompt “I intend to marry someday”. Amid the diversification of people’s attitudes and values concerning marriage and family, the pervasiveness of respect for legal marriage is evidence that the legal effect of social recognition through marriage is significant and valuable.

If this is the case, the benefit obtained through marriage, becoming a family with a partner, enjoying legal protection as a family living together, and receiving social recognition is an important personal benefit related to the dignity of individuals.

(c) According to the results of the examination of the Plaintiffs and the entire import of the oral argument, homosexual individuals also live as members of society by building close personal

unions, living together with partners, and even raising children in some cases; the actual situation is no different from that of married men and women, and it can be said that becoming a family legally with their partner has extremely important significance for their personal survival.

Thus, the benefit obtained from being legally protected as a family, receiving social recognition in terms of becoming a family with their partner, and living a communal life can be regarded as a significant personal benefit related to the dignity of individuals.

(iv) (a) Among the legal effects of marriage mentioned in (iii)(a) above, there are some that can be realized to a certain extent by contracts between parties even in a personal union between same-sex persons. These can be realized to a certain extent by using contracts and other systems under the Civil Code; for example, with regard to the obligation to live together and provide mutual cooperation and mutual assistance (Article 752 of the Civil Code), it can be said that a similar effect can be generated by a contract, and it is possible to vest the property of one of the parties with the other after their death, like inheritance by contract or will.

However, there are some cases, such as joint parental authority and preferential treatments under the tax laws, where it is impossible or difficult to realize the same benefits through contract that are obtainable through the marriage system. And, in the case of contracts, it is necessary to conclude an individual contract in advance, unlike in the case of a marriage.

(b) In addition, same-sex couples can freely live a communal life, which the Provisions do not restrict. However, as mentioned above, there is still a deep-rooted ideal in our country that emphasizes legal marriage, and it has been found that, in practice, it is only through marriage that a couple is really acknowledged and recognized as a family in society and thereby able to live a stable social life; however, since there is no such means of social recognition under the law for personal unions between members of the same sex, members of such unions experience the disadvantage of not being treated as families in their daily social lives. According to the results of the examination of the Plaintiffs in this regard, it is found that there may be persons who have suffered disadvantages, such as that s/he could not receive an explanation of the medical condition of their partner or could not become a guarantor at the time of hospitalization because s/he was not recognized as a family member when their partner received medical treatment at a medical institution.

As mentioned above, sexual orientation is not altered by the efforts or treatment of the person (Findings of Fact *(1)(a)* above), and it is practically impossible for homosexual persons to marry under the existing law.

(c) In this way, homosexual people do not currently have a legal system that enables them to form a family with their partner, and it is extremely difficult under the law for them to have a family and build a

home together throughout their lives. It goes without saying that individuals are free to choose not to have a family, but it can be said that it is a serious threat or impediment to their personal survival that, even if they wish to create a family with a particular partner, it is impossible for them to do so throughout their lives because they are homosexual. In addition, it seems that there are cases in which one member of a same-sex couple adopts the other to circumnavigate the prohibition on same-sex marriage. The use of adoption to create a parent-child relationship for the purpose of establishing a family union in a personal bond similar to that of a man and a woman is an alternative that is unavoidable due to a lack of other systems, and it cannot be said that that is comparable with the actual situation and conditions of their personal unions.

(v) (a) Taking the above into account, we examine whether or not the Provisions are in compliance with Article 24, Paragraph 2 of the Constitution, given that the current law, including the Provisions, does not provide a legal system for becoming a partner or family, or social recognition of cohabitation arrangements (hereinafter referred to collectively as a "Legal System for Becoming a Partner and Family"), which is unreasonable in light of the dignity of the individual and is beyond the scope of the legislative discretion of the Diet.)

(b) As mentioned in Section (1)(iv) above, the social circumstances surrounding homosexual individuals has recently undergone major changes, and the past conclusion that homosexuality is an aberration or an illness is undergoing revision. In many countries, Registered Partnership Systems, which provide certain status and legal effect to personal unions between individuals of the same sex, have been introduced. Furthermore, it is recognized that since 2001, legislation that allows marriage between individuals of the same sex has been enacted in approximately 30 countries. Many municipal governments in Japan have introduced partnership certification systems, and there are examples of private companies that treat personal unions between individuals of the same sex the same as that of husband and wife. Thus, there is a movement to provide a certain level of protection to same-sex couples.

In addition, according to a survey of sexual minorities, it is recognized that 80 – 90% of respondents desire a system of marriage between individuals of the same sex or a national-level partnership certification system (Findings of Fact (1)(i)(c) and (d) above).

Furthermore, although according to the results of a public opinion poll conducted in 2014, the number of people who opposed the legal recognition of marriage between individuals of the same sex exceeded the number of those in favor, since 2015, the number of those in favor exceeds the number of those opposed, and in a survey conducted in 2020 targeting voters nationwide, the number of those in favor was 46%, and the number of those opposed was 23%. It is noted that the number of those in favor increased by 14% from a survey conducted in 2005, and it is also noted that

in a survey conducted in 2018, more than 75% of respondents stated that some legal guarantees should be granted to same-sex couples (Findings of Fact (5) above).

(c) In light of the above, the fact that there is no Legal System for Becoming a Partner and Family is largely due to the fact that marriage has traditionally been regarded as heterosexual, as mentioned above. However, for purposes of establishing a Legal System for Becoming a Partner and Family, in addition to a system of marriage between individuals of the same sex, there are also systems similar to marriage, such as those introduced in Italy and other foreign countries (Findings of Fact (3)(i) above), and it is considered that such systems are at least capable of being compatible with the traditional values of marriage mentioned above.

In addition, many local governments have introduced and begun using partnership certification systems as mentioned above, and the use of such systems has expanded. Furthermore, there is nothing that suggests that there would be any major obstacle to the establishment of a national-level system similar to marriage in respect of personal unions between individuals of the same sex. Rather, the establishment of such a system would strengthen personal unions between individuals of the same sex and would contribute to the stability of cohabitation arrangements, including that of children raised in such households, and this would strengthen the social base and lead to greater stability of society as a whole, including for heterosexuals.

(d) On the other hand, with regards to how to establish a Legal System for Becoming a Partner and Family between individuals of the same sex, in addition to including same-sex marriage in the current marriage system as requested by the Plaintiffs, it is also possible to establish a separate system similar to marriage that can be used between individuals of the same sex, such as the systems introduced in other countries (Findings of Fact (3)(i) above), and to provide the partners with the same legal protections as spouses in a marriage.

Furthermore, in the case of foreign legislation that allows marriage between individuals of the same sex, as mentioned in (3)(ii)(e) above, there are cases where the legal effect of "marriage" between individuals of the opposite sex and "marriage" between individuals of the same sex differ (or where there were differences at the time of introduction). The main reasons for this are whether or not the presumption of legitimacy is applicable, whether or not adoption is permitted, and whether the use of assisted reproductive technology is acceptable. It can be said that the legislature should fully discuss and consider what kind of legal system should be adopted in the event that a Legal System for Becoming a Partner and Family in regard to personal unions between individuals of the same sex is introduced, taking into account various social factors, including the national tradition and public sentiment, as well as the welfare of children.

(e) Taking the above points into consideration

comprehensively, it can be said that the absence under the existing law of a Legal System for Becoming a Partner and Family for homosexual individuals presents a serious threat and disability to the personal survival of homosexual individuals, and there are no reasonable grounds for such absence in light of the dignity of individuals, and therefore such absence is in violation of Article 24, Paragraph 2 of the Constitution. However, there are various ways to construct such a legal system, which are left to legislative discretion, and it is not necessarily limited to the inclusion of same-sex marriage in the current marriage system that is stipulated in the Provisions (for example, a system that applies a slightly altered version of the existing marriage system to personal unions between individuals of the same sex, or a system similar to marriage that can be applied to individuals of the same sex, etc., could be established).

It is possible to adopt another method. Therefore, it cannot be concluded that the Provisions are in violation of Article 24, Paragraph 2 of the Constitution because they do not recognize marriage between individuals of the same sex.

(vi) (a) Considering the above, the Plaintiffs argue that the Provisions are in violation of Article 24, Paragraph 2 of the Constitution because they exclude same-sex couples from marriage and they promote social discrimination and prejudice against the existence of same-sex couples, etc. and they divide society even though such couples have a communal life that is not in any way different from heterosexual couples.

(b) In this respect, it is noted above that the Provisions exclude homosexual individuals from the legal framework of the family, and as a result, it is a violation of Article 24, Paragraph 2 of the Constitution that there is no Legal System for Becoming a Partner and Family with respect to homosexual individuals under the current law. However, legislation by the legislature, including the addition of marriage between individuals of the same sex in the present marriage system, is an option to solve the above- mentioned situation (as mentioned above, Article 24 of the Constitution is not construed to prohibit legislation on marriage between individuals of the same sex).

Furthermore, despite recent improvements, given that homosexuality has long been considered unusual and has been the subject of discrimination and prejudice, the Plaintiffs' argument that including marriage between individuals of the same sex in the current marriage system, or the establishment of an identical system to marriage between individuals of the same sex would contribute to the elimination of discrimination and prejudice is also acknowledged.

(c) However, matters related to marriage and family should be determined by thorough consideration that takes into account various social factors, including national traditions and public sentiment, as well as the overall discipline of family relations in each era. Therefore, it can be construed that the legislature has reasonable legislative discretion. Even in

countries where a system of marriage between individuals of the same sex has been introduced, many such countries introduced a partner registration system in advance of the introduction of the marriage system (Finding of Facts (3)(i) and (ii) above), and the process of the introduction of such system varies. In addition, as mentioned above, it is noted that even in countries where same-sex marriage has been introduced, discussions have been held on whether the presumption of legitimacy is applicable, whether or not adoption should be permitted, whether or not the use of assisted reproductive technology should be used, and so on. It is inevitable that these points should be examined in Japan as well from the viewpoint of the welfare of children and bioethics, and that we consider the compatibility of these points with other systems, and this work should primarily be left to legislative discretion. The Plaintiffs' submission that the exclusion of personal unions between individuals of the same sex from the marriage system would promote discrimination and prejudice can be considered a matter to be considered in the legislative body's examination as well. However, it is difficult to conclude that the only option of the legislature is to adopt legislation that would add marriage between individuals of the same sex into the present marriage system. As mentioned in (5) of the Findings of Fact above, it is not unrealistic to leave the discussion and consideration of the above-mentioned points to the legislature in a gradual manner, given that there has been a widespread positive shift in opinion in recent years regarding the recognition of marriage between the same sex and the recognition of legal guarantees for same-sex couples.

(vi) For the reasons stated above, the Provisions in the present case, which do not permit marriage between individuals of the same sex but are limited to marriage between individuals of the opposite sex, are not in violation of Article 24, Paragraph 2 of the Constitution.

5. Concerning the Point at Issue (2) (Whether the Failure of the Diet to Take Legislative Measures to Enable Marriage Between Members of the Same Sex is Considered Illegal for Purposes of the Application of Article 1, Paragraph 1 of the State Redress Act)

(1) Article 1, Paragraph 1 of the State Redress Act provides that the national government or a public entity shall be liable for any damage incurred as a result of a public official exercising the public authority of the national government or of a public entity in violation of a legal obligation in the course of his/her duties owed to an individual citizen. Whether legislation or omission by a member of the Diet is illegal in the application of this clause is a question of whether or not action taken by a member of the Diet during the legislative process has violated the legal obligations owed to individual citizens, and should be distinguished from the issue of the constitutionality of the legislation.

In principle, the evaluation of the above-mentioned actions should be left to the political judgment of the people, and even if the contents of the

legislation violate the provisions of the Constitution, legislative acts or legislative omissions of Diet members are not immediately deemed to be illegal for the purpose of applying Article 1, Paragraph 1 of the State Redress Act.

However, in cases where the Diet fails to enact legislative measures, such as revision or abolishment, for a long period of time without justification, despite the fact that it is clear that the provisions of the law are unconstitutional in that it restricts the rights and interests guaranteed or protected under the Constitution without reasonable grounds, such legislative omission is an exception because the Diet members' actions in the legislative process violated the above- mentioned legal obligation in the performance of their duties, and such legislative omission is subject to Article 1, Paragraph 1 of the State Redress Act.

(*See Case no. 1978 (O) 1240, Supreme Court First Petty Bench decision of November 21, 1985, Minshu Vol. 39, No. 7, at 1512, 2001 (Gyo-Tsu) No. 82, No. 83, 2001 (Gyo-Hi) No. 76, 77, Supreme Court Grand Bench decision of September 14, 2005, Minshu Vol. 59, No. 7, at 2087, decision of the Grand Bench concerning the Prohibition Period of Re-marriage of 2015*).

(2) The Plaintiffs argue that, despite the fact that the Provisions are in violation of Article 14, Paragraph 1, and Article 24, Paragraphs 1 and 2 of the Constitution, the Diet has neglected to pass legislative measures to make marriage as provided in the Provisions equally possible between homosexual individuals (legislative measures enabling marriage between individuals of the same sex) for a long period of time.

However, since the Provisions do not violate Article 14, Paragraph 1 or Article 24, Paragraphs 1 or 2 of the Constitution as stated in 2 above, it must be said that the argument of the Plaintiffs is without merit. As mentioned in 2(3) above, the absence of a Legal System to Become a Partner and Family for homosexual individuals under the current law presents a serious threat and disability to the personal survival of homosexual individuals, and there are no reasonable grounds for such absence in light of the dignity of individuals, and therefore, such absence is in violation of Article 24 Paragraph 2 of the Constitution. However, as also mentioned above, because it is possible to establish two legal systems in lieu of enacting legislation to include marriage between individuals of the same sex in the existing marriage system, no obligation to take legislative measures to enable marriage between the same sex arises.

Therefore, the failure of the Diet to take legislative measures to enable marriage between individuals of the same sex cannot be regarded as illegal for the purpose of Article 1 Paragraph 1 of the State Redress Act.

C. *Conclusion*

For the reasons stated above, the Plaintiffs' claims should be dismissed on the grounds that they lack a legal basis. Judgment is rendered as per the Main Text above.

Civil Department No. 16 of the Tokyo District Court
Presiding Judge Momoko Ikehara
Judge Tatsuya Mashitomi
Judge Reitaro Yokoyama