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• The “Marriage for All” case has been submitted to court on February 14<sup>th</sup>, 2019 in Sapporo, Tokyo, Nagoya, and Osaka.

• This complaint is submitted to the Tokyo District Court

• Sections about the plaintiff have been omitted from this modified version of the complaint

# Complaint

February 14, 2019

To: Tokyo District Court, Civil Division

Attorney for the Petitioners:

Same as above

Same as above

Same as above

Same as above

Same as above

Same as above

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Attorneys for the Petitioners:	As listed in Exhibit, List of Attorneys for the Petitioners
Associate -Attorneys for the Petitioners:	As listed in Exhibit, List of Sub-Attorneys for the Petitioners

1-1-1 Kasumigaseki, Chiyoda-ku, Tokyo 100-8977

Respondent: The State

Representative Minister of Justice: Takashi Yamashita

"Marriage for All" Lawsuit

Value of claim: JPY 12 million

Amount of stamp affixed: JPY 56,000

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## Summary of Claim

The Petitioners seek the following judgments and a declaration of provisional execution:

1. the Respondent shall pay the respective Petitioners JPY 1 million as well as an amount at the rate of 5% per annum from the service date of this Complaint up to the completion of the payment; and
- 2 court fees shall be borne by the Respondent.

## Ground of Claim

### I. Overview of this case

This case is filed by the Petitioners as a claim for damages against the Respondent pursuant to Article 1, Paragraph 1 of the State Redress Act, for the psychological damage that each of the Petitioners suffered from having their right to marry impeded upon, due to the Respondent's failure to enact legislation that provides for the marriage of legally same-sex couples.

Currently in Japan, the registration of marriage for legally same-sex couples are regarded as unlawful. Such treatment unjustly infringes on the constitutional right to freedom of marriage (Article 24, Paragraph 1 of the Constitution) between two persons legally of the same sex, and unjustly discriminates against them on the basis of their sexual orientation, which is prohibited by Article 14 of the Constitution,.

This complaint is filed to seek immediate revision of the laws that violate the Constitution, as well as to resolve the difficulties and restore the dignity of all people who are in the same situation as the Petitioners.

### II. Petitioners in this case

(This is the modified version of the complaint for the Marriage for All website. Sections about the plaintiff have been omitted)

### III. Diversity in people's gender

#### 1. Sexual orientation and gender identity

There is diversity in people's sexual orientation and gender identity.

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## **(1) Sexual orientation**

Some people are sexually attracted to the opposite sex, and some are attracted to the same sex. Some are attracted to both, and some are attracted to neither. Among people's sexualities, sexual attraction to either, both or neither sex is referred to as sexual orientation.

Homosexuality means sexual attraction to the same sex, heterosexuality means sexual attraction to the opposite sex, and bisexuality means possible sexual attraction to both sexes. All of these are "*types of sexual orientation that human beings have*" (Petitioners' Evidence A1-1, 1-2 (translation), *Resolution by the American Psychological Association Council of Representatives*; Petitioners' Evidence A2-1, 2-2 (translation), American Psychiatric Association "*Let's Talk Facts About: Sexual Orientation*"; Petitioners' Evidence A3-1, 3-2 (translation), *Obergefell Case Amici Opinion*; and Petitioners' Evidence A4, Tokyo District Court, 30 March 1994 Judgment Hanrei Times Issue 859, p.163 "Part3, 1, 1" (p.169), the judgment is hereinafter referred to as "*Judgment in the First Instance of Fuchu Youth House Case*").

## **(2) Gender identity**

A person's gender is also diverse with regards to how they identify their gender.

Specifically, a person can identify themselves as being of a specific gender (gender identity), however, they will also have an "*assigned sex*", given at birth under law and by society (based on biological traits).

In some cases, one's gender identity will match the assigned sex, and in other cases it does not. When a person feels that their identity does not match the assigned sex and wishes to live with the gender they identify with, the person is called transgender. When one's gender identity matches the assigned sex, the person is called cisgender (Petitioner's Evidence A5, The World Professional Association for Transgender Health (WPATH), "*Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*", 7th edition (p.97)).

Gender identity as an aspect of people's sexuality is diverse as well, and transgender and cisgender people must be respected, as both are natural identities of human beings (Petitioners' Evidence A5, p.4; Petitioners' Evidence A6, Hiroyuki Taniguchi, "*Gender Identity and Human Rights – Critical Analysis of Act on Special Cases for Persons with Gender Identity Disorder*," Law Seminar Issue 753, p.51 (2017) p.53).

In Japan, the "*Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (16 July 2003, Act No. 111)*", enacted in 2003, made it possible to legally change gender status; however, such change is only permitted if

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strict conditions are met (such as removal of reproductive organs), and on 10 December 2013, the Supreme Court confirmed that the legitimacy presumption under the Civil Code (Article 772 of the Civil Code) applies to those who changed their gender status to male under the law (*Supreme Court Judgment, 10 December 2013*, Minshu Vo. 67-9, p.1847). Moreover, in the *Supreme Court Judgment, 23 January 2019* (2018 (Ku) No. 269), Judges Kaoru Onimaru and Mamoru Miura stated, in their supporting opinion, that gender is "*inseparably linked to individual personal existence*", and that being able to change gender status under the Act on Special Cases is a "*desperately important legal right*", and referred to "*The recognition of diversity of gender identity is an important issue for society to consider*".

### **(3) Sexual orientation and gender identity**

Sexual orientation and gender identity are different concepts and should be treated as such when discussing a person's sexuality. For example, a person who is identified as female based on biological traits may identify as female, male, or neither. Further, regardless of whether the gender identity is female or male, in either case one may be sexually attracted to males or females.

For example, when a person who is regarded as being female biologically and has a male gender identity (transgender man), the person may be sexually attracted to other males. The sexual orientation here is based on gender identity, thus the person is considered homosexual. In regard to sexual orientation, a person sexually attracted to the same sex is homosexual, and a person sexually attracted to the opposite sex is heterosexual, based on their gender identity. Be that as it may, the fact remains that all of these, including the above case, are natural sexualities of people.

Both gender identity and sexual orientation are important factors of a person's identity, and are individual traits deeply rooted in each personality. It is regarded as difficult to change them by one's own will (Petitioners' Evidence A7-1 (p.148), 7-2 (translation) (p.13), Herek "*Myths About Sexual Orientation*" "C Myth 3"; Petitioners' Evidence A2-1, 2-2 (translation) (p.2), *Let's Talk Facts: Sexual Orientation*; and Petitioners' Evidence A3-1, 3-2 (translation), Obergefell Case Amici Opinion "*Opinion Main Text II*").

People who have sexualities or gender identities other than heterosexuality and cisgender account for a small percentage of the population, and have historically been regarded as "*abnormal and deviant*" in society, and have been called "*sexual minorities*".

They are often called "*LGBT*" as well, which takes the first letters of the words "*lesbian*", "*gay*", "*bisexual*" and "*transgender*".



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The words "*homo*" and "*les*" have insulting nuances in many cases, thus should not be used.

## 2. Sexual diversity and society

As described above, human sexuality is diverse, and homosexuality or bisexuality in relation to being transgender and other gender identities are all natural expressions of human sexuality. The idea that only heterosexuality and cisgender are "*normal*" is incorrect.

In other countries, there have been attempts to estimate the proportion of people with various types of sexuality on a national basis. In the United States, multiple surveys have found that an estimated 3.5% of adults identify as lesbian, gay, or bisexual and an estimated 0.3% of adults are transgender (Petitioners' Evidence A8-1, 8-2, *Gates 2011 Executive Summary*). Canada, Norway, Australia and the United Kingdom have also reported that there are an estimated 1% to 2% of adults who identify as lesbian, gay, or bisexual (same as above, Figure 1).

In Japan, there has never been a similar survey of the whole adult population. However, for example, in 2018, the City of Nagoya conducted a "*Public Attitude Survey*" on 10,000 citizens aged 18 and older who were randomly selected from the Basic Register of Residents, and it was reported that 1.6% of the respondents identify themselves as sexual minorities (Petitioners' Evidence A9, Gender Equality Promotion Office, General Coordination Division, General Affairs Bureau, City of Nagoya, "*Public Attitude Survey in relation to Gender such as Sexual Minorities*" p.55). Similarly in a 2017 survey on second year students attending public high schools in Mie Prefecture, it was reported that 10% of the respondents had answered that they are homosexual, bisexual or transgender, or that their own gender is "*undecided*" "*unknown*" or "*not applicable*" (Petitioners' Evidence A10, Mie Prefectural Gender Equality Center "*Questionnaire Survey on Various Sexualities and Lifestyles*" p.17 "*Parties in Interest*").

As is the case with the Petitioners, such sexual minorities have been, and are currently living as family, schoolmates or neighbors in our community and as members of our society.

However, "*in the past, the majority of psychological research on homosexuality was based on the hypothesis that homosexuality is a disease, and such researches were aimed at identifying the cause*" and "*in such circumstances, in the past, homosexual individuals were prone to becoming isolated and distressed by their sexual orientation*" (Petitioners' Evidence A4, *Judgment in the First Instance of Fuchu Youth House Case* (1994) p.170, upper paragraph 3). It was considered that being heterosexual and cisgender was the only proper expression of sexuality. There has been a long history of social prejudice and discrimination against homosexual individuals, and such mindsets and perceptions remain deeply rooted in present-day Japan (Petitioners' Evidence A9, "*Public Attitude*

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*Survey in relation to Gender such as Sexual Minorities*" p.26; Petitioners' Evidence A104-1, Saori Kamano *et al.* 2016 "*Attitudes toward sexual minorities in Japan: report of 2015 national survey*" Chapter 7 "*Prejudice against familiar people*" p.14, p.123). Furthermore, the laws and systems of society are created on the basis of such mindsets, and the existence of those other than heterosexual and cisgender individuals are not recognized in those laws, systems and practices of our society, and remain ignored. The issue in this case, where marriages between legally same-sex couples are not recognized in Japan, is a typical example.

While the "*marriage*" of opposite-sex couples is automatically recognized the marriage of legally same-sex couples are not recognized merely because the partners are of the same sex, and the fact that such couples cannot receive various benefits that can be gained from legally recognized marriage (as discussed below) is a serious violation of human rights. To be recognized as entering marriage with one's desired partner and to be accepted as a family are earnest desires that have been much awaited, and these are inevitable problems that must be overcome to regain the dignity of such people and to realize a fair society where all of the people are truly "*respected as individuals (Article 13 of the Constitution)*".

#### **IV. Japanese legal system**

##### **1. Provisions of the Civil Code**

Article 739, Paragraph 1 of the Civil Code provides that "[*m*]arriage shall take effect upon notification pursuant to the Family Registration Act (Act No. 224 of 1947)" and Article 731 through Article 737 of the Civil Code list the causes on which marriage is prohibited, but there is no express provision that requires partners to legally be persons of the opposite sex.

However, in general, the words "*husband and wife*" in the Civil Code or the Family Register Act are said to mean a male husband and a female wife and are interpreted as meaning that one cannot enter into a marriage with a person of legally the same sex. The government holds a same view (Petitioners' Evidence A11, *Written Inquiry at the 196th session of the Diet*; Petitioners' Evidence A12, *Written Answer at the 196th session of the Diet "Regarding 4 through 6"*). As a result, if a same-sex couple attempts to submit a marriage registration, it will be denied as being unlawful (Petitioners' Evidence A13, Koshi Yamazaki "*Current Issues in relation to the Administration of Family Registration*" *Journal of the Family Registration* (Koseki Jiho) No. 739, p.42).

##### **2. Sexual minorities and marriage**

As a result of the above clause, homosexual individuals who are cisgender (where the person's gender identity is the same as their assigned sex) are, in fact, robbed of the ability

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to enter into a marriage with their desired partners. Bisexual individuals who are cisgender may face the same problem as well (hereinafter, homosexual individuals and bisexual individuals are collectively referred to as "*Homosexual Individuals, etc.*").

Further, transgender individuals who have not altered their legal genders and who are heterosexual or bisexual are, likewise, not able to marry their partner if their desired partner is a person of the opposite sex based on his or her gender identity (a person of legally the same sex). Transgender individuals who are homosexual or bisexual cannot marry a legally same-sex person if their legal gender is the same as their gender identity.

In this case, since there are no transgender individuals among the Petitioners, the Petition and written allegation will be argued on the premise of cisgender individuals unless stated otherwise. However, as described above, since the Civil Code and the Family Register Act do not approve marriage between legally same-sex couples, transgender individuals may be denied the ability to marry their desired partner based on their sexualities, thereby being shut out of the marriage system.

## **V. Not recognizing marriage between legally same-sex couples violates the freedom of marriage**

### **1. Outline**

People's ability to autonomously enter into a civil marriage based only on mutual consent with their desired partner is the core element of marriage in our modern society, and it is an important human right guaranteed in Article 24, Paragraph 1 of the Constitution. Further, there is no reason that this would differ whether the partner is legally a person of the opposite sex or the same sex.

The provisions of the existing Civil Code and Family Register Act which do not approve marriage between legally same-sex couples unjustifiably infringe the freedom of marriage which is a constitutional human right, and, to that extent, is unconstitutional and invalid.

In the following section, the Petitioners will argue, as a matter of constitutional interpretation, that the freedom of marriage is a constitutional human right (paragraph 2), that there is no reason for this to differ whether between same-sex couples or opposite-sex couples, and that this should not be restricted based on an individual's sexual orientation or gender identity (paragraph 3). In addition, since there have been public suggestions that "*Article 24 of the Constitution prohibits marriages between legally same-sex couples,*" the Petitioners will also explain the inaccuracy of such statements (paragraph 4).

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## **2. Freedom of marriage is a constitutional right**

Article 24, Paragraph 1 of the Constitution stipulates that "*[m]arriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.*"

Assuming the existence of a system where the laws stipulate requirements in order to protect, approve and validate any permanent communal life based on intimate interpersonal relationships (i.e. civil marriage), this provision guarantees the ability of an individual to have a civil marriage with their desired partner based only on mutual consent, without interference from any nation or third party, as a constitutional human right (hereinafter referred to as "*Freedom of Marriage*").

The following section argues that Article 24, Paragraph 1 of the Constitution guarantees the Freedom of Marriage as a constitutional right on the grounds of (i) the right to Individual autonomy (Article 13 of the Constitution), (ii) the intrinsic attribute of modern marriage, and (iii) the enactment background of Article 24, Paragraph 1 of the Constitution.

### **(1) Freedom of Marriage and the right to individual autonomy (Article 13 of the Constitution)**

#### **i. The Constitution and the right to individual autonomy**

Individual dignity is the fundamental principle at the heart of the Constitution. The first part of Article 13 of the Constitution declares "*[a]ll of the people shall be respected as individuals.*" In order to realize this, the Constitution acknowledges "*[t]heir right to life, liberty, and the pursuit of happiness*" (second part of Article 13) and further lists and guarantees various other rights separate from the right to the pursuit of happiness. A constitutional right is established when a legal interest is developed alongside the above fundamental principle of the Constitution (Petitioners' Evidence A14, Kazuyuki Takahashi "*What All Citizens Being 'Respected as Individual' Means*" in Mitsuro Kobayakawa et al. (eds.) "*Development and Change of Administrative Laws (First Volume)*" (Yuhikaku, 2001) p.288).

One of these constitutional rights is the right to individual autonomy.

The right to individual autonomy is the right of an individual to determine matters closely related to their personality on their own without the intervention or interference of any public authority (Petitioners' Evidence A15, Nobuyoshi Ashibe and Kazuyuki Takahashi (revised) "*Constitution (Sixth Edition)*" (Iwanami Shoten, 2015) p.126). The right to individual autonomy is not explicitly listed in the Constitution. However, it was recognized as essential to ensure that "*[a]ll people shall be respected as*

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*individuals*" as society developed following the formulation of the Constitution, and this has been upgraded to a constitutional right with the assistance of the right to the pursuit of happiness (Article 13) (Petitioners' Evidence A14, p.289).

In other words, given that individuals have diverse characteristics and values and are different from one another, in order for all people to "*be respected as individuals*", every person must be allowed to freely select their own way of living and fulfill their own life. Therefore, the Constitution is understood to guarantee the constitutional right for individuals to self-determine matters which "*substantially affect how they live their life*" without intervention or interference from any public authority.

## **ii. Meaning of Freedom of Marriage**

The situations in which the right to individual autonomy is relevant include actions concerning one's life and body, formation and maintenance of a family and reproduction, etc. Within this, the issue of freedom of marriage constitutes an important aspect. This is because, as elaborated below, being able to decide by oneself whether, when and with whom to have a civil marriage (which is an institution with an important function) is essential in order to realize the fundamental principle of the Constitution (i.e. respect for individuals) and the constitutional right to individual autonomy.

### **(i) What is civil marriage?**

People live by meeting and establishing various relationships with other people in the course of their lives. In doing so, they may intend to have a permanent communal life based on an intimate relationship which may involve sexual love. A relationship built in this way contributes to the fullness of the individual's life through sharing pleasure, joy and sadness, maintaining energy, and securing peace, and can provide meaning to the individuals' existence and pursuit of life and happiness.

Historically, every society created a system to admit and validate the formation of a family under certain rules, known as "*marriage*". In modern society, the nation, through its laws, plays a role in stipulating the requirements for, and giving effect to, marriage. Accordingly, the system through which permanent communal life between individuals is admitted and validated in accordance with the requirements of law is civil marriage.

The Constitution also assumes the presence of civil marriage (Article 24, Paragraphs 1 and 2 of the Constitution). The Civil Code collectively establishes various "*legal and economic interests*" based on the

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characteristics of marriage, defined as "*communal life based on intimate relationships*," such as (i) the obligation of mutual cooperation between the parties (see Article 760 of the Civil Code and Article 24, Paragraph 1 of the Constitution), (ii) the system for achieving fair and equal property rights (Inheritance (Part V, Article 882 et seq. of the Civil Code), and (iii) the distribution of property (Article 768 of the Civil Code), etc.). Within a marriage, the parties' relationship is enhanced by these interests and obligations. Furthermore, civil marriage plays an intangible but important role in legally and socially approving and validating the relationship of the parties as a family, thereby further enhancing the relationship. This is what is called the "*psychological and social interests*" of marriage (Petitioners' Evidence A16, Michio Aoyama and Toru Arichi (eds.) "*New Edition: Annotated Civil Code (21) [Revived]*" [Masakazu Ueno] (Yuhikaku, 1989) p.179).

As shown above, civil marriage is an important system that can play a major role in the lives of individuals who intend to live together based on an intimate relationship.

(ii) Freedom of Marriage is essential for an individual's self-fulfillment

As described above, civil marriage is a system that deeply impacts an individual's life and way of living. Furthermore, each individual holds various different values and characteristics. Therefore, civil marriage can only work if each individual can decide independently whether, when and with whom to marry, without interference from anyone else. Only with such freedom of marriage is it possible for individuals to pursue life and happiness in a manner appropriate to that individual. It is essential for an individual's self-fulfillment to have the option of a civil marriage when and with whom they desire, and freedom of marriage coincides with the basic principle of the Constitution that all persons must be respected as individuals (Article 13 of the Constitution).

(iii) Freedom of marriage as an important basis for democracy

Individuals recognize and feel that they are members of society and have the power to fulfil their responsibility to society when they are allowed to make choices based on their own values and characteristics and feel approved as part of a family or marriage. This leads to such individuals participating in politics and becoming motivated to contribute to society. The existence of individuals who are essentially diverse, establishing families with their desired partners in the circumstances they desire, autonomously pursuing happiness based on

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their own values, characteristics and experience as a family, undergoing hard times and sharing good fortunes, overcoming failures and repeating successes, and holding onto their values and respect, lays the groundwork for the plurality of society which is essential for the democratic society advocated by the Constitution.

Freedom of marriage forms the basis of a democratic society and enables self-fulfillment and contributions to democratic politics. This leads to all people being respected as individuals.

Prof. Ashibe's statement that "*[o]nly through guaranteeing the rights of individuals to autonomously decide the shape of their families, does it become possible to ensure the plurality of society, which is the basis of democracy*", reflects the above point (Petitioners' Evidence A17, Nobuyoshi Ashibe "*Constitutional Law II: General Theory of Human Rights*" (Yuhikaku, 1994) p.393).

Furthermore, with regard to the importance of the protection of privacy, Prof. Hasebe states that the "*[p]rotection of privacy does not only benefit individuals but also the whole of society. Anyone whose right to establish an intimate relationship with their desired partner is not protected, will not feel that they are respected as a person living autonomously nor will they have the motivation to seriously consider and contribute to social and public issues.*" This statement brings to light the significance of the freedom of marriage as part of the right to individual autonomy (Petitioners' Evidence A18, Yasuo Hasebe "*Constitution (Seventh Edition)*" (Shinseisha, 2018) p.150).

(iv) Freedom of marriage as the infrastructure of a pluralistic society

If individuals who intend to have a communal life are validated and protected under a common system, this makes it possible for their family to smoothly communicate with and receive services from the community, schools, healthcare, welfare and other government systems. Also in connection with the people surrounding the individuals, through a common system, they can understand the structure of a particular relationship and become involved with the individuals in a predictable way without infringing on their privacy.

Ensuring that the system for forming a family only requires a couple to have mutual consent (regardless their characteristics and values) is essential for a pluralistic and fair society where all people are "*respected as an individual.*" Also, in line with this, civil marriage plays an important role beyond benefitting the marrying parties.

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### **iii. Conclusion**

As elaborated above, allowing individuals to have a civil marriage with their desired partners based only on their mutual consent means that diverse individuals can decide on important matters in their lives on their own. The freedom of marriage should be guaranteed as a constitutional right as it is an important part of the right to individual autonomy.

### **(2) Freedom of marriage is an essential attribute of modern marriage**

Furthermore, the freedom of marriage is an essential attribute of marriage in modern society.

In pre-modern Japanese society, marriage was governed by feudal constraints such as the "*class system*," the "*feudalistic family system*," and the "*patriarchal family system*" which made it exceedingly difficult for people to marry freely. In contrast, in modern civil society, social relationships have been freed from communal restraints, and all people have been given equal rights as abstract and conceptual legal personalities, thus marriage has become a contractual relationship between free individuals. This "*constitutes the principle of modern civil law, together with the unconditional nature of private ownership*." "*Modern Civil Law establishes marriage as a mutual consent between two willing individuals with equal rights, that is to say, a contract*". "*Such modern marriage meant a departure from the dominant relationship of the patriarchal family-oriented community of pre-modern societies, and the understanding of marriage as a contract symbolizes marriage in modern societies*". (Petitioners' Evidence No. A-16, Michio Aoyama and Toru Arichi, ed., "*New Edition of Annotated Civil Code* (21) (Reprinted edition)", [Michio Aoyama / Toru Arichi], (Yuhikaku, 1989), p. 152; Sakae Wagatsuma, "*Collected Studies in Law, Family Law*" (Yuhikaku, 1961), p. 9).

Civil marriage, by which individuals may marry whom they desire solely of their free will upon mutual consent, is the form of marriage that was acquired as a universal principle in modern society in which people were freed from the class system and communal restraints. Any form of marriage lacking this principle arguably does not meet the definition of "*marriage*" in the modern sense. The characteristics of marriage in modern society, namely that it marriage is based on the mutual consent of individuals with equals rights exercising their free will, are established as a constitutionally guaranteed right in constitutions enacted in many countries in the recent past and in modern times. The Constitution of Japan is no exception.

### **(3) Background to the enactment of Article 24, Paragraph 1 of the Constitution**

We discussed above that the freedom of marriage is an essential attribute of modern



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marriage and constitutes the right to individual autonomy, which is indispensable to the right of respect for individuals. Furthermore, examining the historical context of the reason for Article 24, Paragraph 1's inclusion in the Constitution will lead to a better understanding of why "*freedom of marriage*" is a constitutional right.

### **i. Purpose of the enactment of Article 24, Paragraph 1 of the Constitution**

Article 24, Paragraph 1 of the Constitution states 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.*"

Why is this clause placed at the beginning of Article 24 of the Constitution, which sets forth matters pertaining to marriage (civil marriage)?

In order to ensure respect for individuals and equality between men and women (the principles of the Constitution), it was absolutely necessary to change the form of marriage of the Old Civil Code (promulgated in 1898) in which the "*family*" was considered superior to individuals and to secure respect for individuals and equality between both sexes in family life. That is to say, under the Old Civil Code, the backbone of the feudalistic family system marriage was regarded as a matter between two families and the wife was deemed to enter the husband's family by marriage (Article 788 of the Old Civil Code, "*the wife shall enter the husband's family by marriage*"). The consent of both "*heads of the household*" was required for marriage (Article 750 of the Old Civil Code), and the consent of "*the father and mother of the family*" was required until the age of 30 for males and 25 for females (Article 772 of the Old Civil Code). Due to the principle that the continuation of the family was the top priority, an individual who was the legally presumed heir to the household was not allowed to marry into another family (Article 744 of the Old Civil Code).

Such laws greatly affected people's thinking. People thought that marriage was something for the family, rather than for the individual's pursuit of happiness, and even if they wished to marry someone, they were often opposed by their family members on the grounds that the person whom they want to marry would not match social standing of the family, and even after a couple started living together, it was common practice for the "*head of the family*" or the couple's parents not to give consent to the marriage until they were certain that the woman would fit their "*family ways*" or that the woman could bear an heir. As a result, women, who were legally and economically disadvantaged compared to men, often found themselves in forced marriages.

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In addition, this type of pre-war notion of placing the family's priorities ahead of the individual's created a perception or atmosphere that accepted the sacrifice of individuals for the good of society, which deprived society of the diversity of values and the possibility of free thinking that ultimately resulted in "*the horrors of war through the action of government*" (preamble to the Constitution). This is the reason why Professor Ashibe stated in (V-2 (1) B. (c)) above that, "*diversity in society, which is the basis of democracy, can only be secured by guaranteeing the right of individuals to autonomously determine the ideal form of their families*" (Petitioners' Evidence No. A-17, Ashibe, Nobuyoshi, "*Kenpogaku II Jinkensouron [Constitutional Law II Human Right: General Part]*" Yuhikaku, 1994, p. 393).

Article 24 of the Constitution "*declares that people may decide whom they wish to marry by themselves, and it demands legal adjustment of the concept of family life based on an individualistic view of the family with the enhancement of the individual as the goal*" (Petitioners' Evidence No. A-19, "[Annotated Constitution of Japan Vol. 1]" *Journal of Jurisprudence Association*, Yuhikaku, 1953, p. 470), and also declares that "*the provisions of the Old Civil Code that were incompatible with Article 24 of the Constitution have been amended or abolished, and the freedom of marriage has greatly increased*" (Petitioners' Evidence No. A-16, p.180).

## **ii. The Constitution called for the freedom of marriage to be at the heart of the new marriage system**

To begin with, a marriage presupposes a close relationship between the parties. Therefore, marriage with someone other than the person whom one wishes to marry is incompatible with the nature of marriage. However, that is not all. Learning from the bitter experience in pre-war Japan that the fact that the freedom of marriage was not guaranteed resulted in the obstruction of the pursuit of happiness of many people and led to a dysfunctional democracy, the Japanese people came to believe that the freedom of individuals to decide "*to marry or not to marry*" and "*whom and when to marry*" at their own will and decision without interference from anyone, is essential to the fundamental value of the Constitution that "*all of the people shall be respected as individuals.*"

For this reason, the Constitution not only prohibits the head of the family or any other party to interfere with marriage, but also provides a general provision that "*Marriage shall be based only on the mutual consent of both sexes.*" The Constitution makes clear that civil marriage adopted the universal concept that modern marriage is formed only by the "*mutual consent of two willing individuals with equal rights, which is a vitally important and essential attribute that must be maintained throughout the marriage system.*"

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### iii. Summary

With respect to civil marriage, Article 24, Paragraph 1 of the Constitution guarantees, as a constitutional human right, that an individual may marry whom they desire upon mutual consent, without interference from the state or any third party (the freedom of marriage).

#### (4) Freedom of marriage under the Constitution of the United States

Japan is not unique.

In the United States, there has often been excessive interference with family life under common law and state law, and since the 1960s, a series of lawsuits have been filed asserting their unconstitutionality. In this context, the US Supreme Court pronounced a series of judgments that respected the autonomy of the individuals emphasizing that the freedom of marriage is a fundamental right under the U.S. Constitution (Petitioners' Evidence No. A-20, Tanamura, Masayuki, "*Gendai amerika kazoku ho* [Contemporary Family Law in the U.S.]"; Kawai, Susumu et al., ed., "*Koza gendai kazoku ho* [Contemporary Family Law]" Nippon Hyoron-sha, 1992, p.141).

In *Griswold v. Connecticut*, (1965), the constitutionality of a law in Connecticut that prohibited any person, including married couples, from using contraceptives, was questioned. The court admitted the constitutional right to privacy by emphasizing the existence and importance of an area free from federal and state intrusion, and established that the right to privacy between married couples as well as the right to marry and create a family were in the same category as the fundamental rights that are explicitly guaranteed under the constitution, and that individuals should be protected from governmental intrusion.

In *Loving v. Virginia*, the constitutionality of a Virginian law that prohibited and punished interracial marriage was questioned. The Supreme Court ruled in 1967, that,

*"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."*

It held that the relevant law in Virginia violated the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution (Petitioners' Evidence No. A-21, Fujikura, Kouichiro, "*America saiko-sai no hanrei ni mirareru 'kazoku kan'* [Perception of Families: As Seen Through Supreme Court Decisions]" *Doshisha Hogaku* Vol.32 No. 3/4 111(505), II, 1).

The above demonstrates that in the United States, freedom of marriage was also

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often violated by public authorities and society, but ultimately the "*freedom of marriage*" was recognized as a constitutionally protected right so that people may marry according to their free will. This process shares the underlying disregard for human rights similar to the history of Japan, in which women in particular, were deprived of the freedom of marriage under the Meiji Civil Code, which caused much unhappiness, and the subsequent drafting of Article 24 of the Constitution by the GHQ, Beate Sirota Gordon, and others, which was welcomed by the Japanese government, the Diet, and the people

## (5) Cases

In Japan under the new Constitution, in the so-called "*forced retirement upon marriage*" case, the court held that "*freedom of marriage is one of the fundamental human rights guaranteed to the people by the Constitution*" (Petitioners' Evidence No. A-22, *Judgment of the forced retirement upon marriage case Mobara City Office*, p. 111 (Judgment of Chiba District Court, May 20, 1968, Hanrei Times 221, p. 109)).

In another similar case, the court ruled that "*Article 24 of the Constitution provides that 'marriage shall be based solely on the mutual consent of both sexes,' and the state should be prohibited from enacting legislation that restrains the freedom of marriage of the people, and it is tasked to reduce interference in matters of the freedom of marriage,*" and that "*marriage, being a lasting bond between a man and a woman, is important enough to affect the lives of individuals, and the sublime choice of when and whom to marry is derived from the inherent dignity of the human person. In light of this fact, restraining freedom of marriage in a grossly unreasonable manner denies human dignity; therefore, on the basis of the guarantee of freedom of marriage, any restraint under private statutes shall be denied for going against public order*" (Petitioners' Evidence No. A-23, Judgment of the Osaka District Court, December 10, 1971, Ta-271, page 147 (*Judgment in Mitsui Engineering and Shipbuilding forced retirement upon marriage case*) page 155).

The Supreme Court also ruled on the constitutionality of the 'Period of Prohibition of Remarriage' (Supreme Court Grand Bench, December 2, 2015, 69(8) Supreme Courts Reports (civil cases) page 2427) that "*Article 24, Paragraph 1 of the Constitution provides that 'marriage shall be based solely on the mutual consent of both sexes and it shall be maintained through mutual cooperation founded upon the equal rights of husband and wife,' which should be interpreted as a clear statement that the decision on whether to marry, when to marry, and whom to marry should be left to the parties, having free and equal will,*" and that such decision is "*worthy of sufficient respect.*" Although this judgment does not clearly state whether or not the "*freedom of marriage*" is a constitutional right, as is stated earlier, it is appropriate for the freedom of marriage to be regarded as a constitutional right, and

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it should be construed that the term "*worthy of sufficient respect*" is tantamount to stating that it is a constitutional right.

### **3. Freedom of Marriage extends to same-sex couples**

Does the freedom of marriage, as a matter of law, extend to marriage with a person of the same sex?

Hereinafter, we argue that the freedom of marriage guaranteed under Article 24, Paragraph 1 of the Constitution also extends to same-sex couples under the law, which is what the Petitioners are seeking.

#### **(1) The basis on which the freedom of marriage has been raised to a constitutional right is appropriate for same-sex couples.**

First, freedom of marriage was regarded as a constitutional right, as mentioned earlier, because it is essential to "*respect for individuals*," which is a fundamental value of the Constitution (Article 13). In other words, (i) the guarantee of the freedom of marriage is indispensable for the self-realization of individuals, (ii) it is of particular importance as the basis of democracy, and (iii) it is important as the basis of an equitable society where the marriage system is open to all people regardless of their personality or values.

As described below, points (i) to (iii) above are equally valid with respect to marriage with a person of legally the same sex.

For those individuals who met their partners and live together in a relationship based on love and trust, or those individuals who are thinking about doing so, the "*legal and economic benefits*" of marriage, such as the mutual obligation of cooperation and inheritance and the "*psychosocial benefits*" of being recognized and publicly certified, as a family, are crucial issues and they have important implications to individual self-realization and the pursuit of happiness. If same-sex marriage is recognized, the bonds between a man and a man / a woman and a woman will be validated with legal support. That is why it is important to be able to decide autonomously whether or not to marry, when to marry, and whom to marry, without interference from the state or any other party. This does not change, as long as one is human, because of the attributes of the person, such as race or skin color, sexual orientation, gender identity, or whether the assigned sex of a person matches the gender identity of the person.

The same is true for the fact that the freedom of marriage contributes to ensuring a diverse society, which forms the foundation of a democratic government, and has important implications with respect to the principle that all people shall be respected as individuals (Article 13 of the Constitution). Heterosexual couples marry for a variety of reasons, purposes and motives. While the meaning, roles and priorities

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of marriage may change with time and age, married couples live their lives in the manner suited to them and continue their family history. The Petitioners in this case clearly demonstrate that legally same-sex couples also have different values and personalities and desire to marry for a variety of reasons, purposes, and motives. For legally same-sex couples, the meaning, roles and priorities of marriage will also change over time and they will have families in the manner suited to them. For each family to have a variety of important keepsakes originating from their lives that each family must protect is the very foundation of a diverse democratic society. This does not change in any way due to the sexual orientation or gender identity of the couple seeking marriage or whether the sex of each person therein under the law is the same or different.

Furthermore, making the system of marriage, which has played a vital role in the lives of many people and is extremely familiar to many people, is available to every couple, regardless of the personality or values held by each individual concerned, so long as there is mutual consent and is part of the essential "*infrastructure*" of a diverse and equitable society. The freedom of marriage, regardless of sexual orientation or gender recognition and open to all, will have a symbolic meaning for realizing an equitable society.

Likewise, with respect to the Petitioners in this case who wish to marry their partners of the same sex under the law, the freedom to marry the person one wishes to marry, and to freely decide whether or not to marry, when to marry and whom to marry, should be guaranteed as an area without interference from anyone. This is fundamentally important for each individual's ability to live his / her life and is indispensable in order to be able to say that all of the people are "*respected as individuals*".

Inevitably the freedom of marriage became a constitutional right and this is no less appropriate for legally same-sex couples. It must be a constitutional right, even for legally same-sex couples, to be able to marry whom they desire based solely upon mutual consent of the parties.

**(2) General perception of sexual orientation and gender identity and the "*respect for individuals*".**

As discussed in (1) above, freedom of marriage should be construed to extend to marriage to a person of the same sex under the law. Here we demonstrate the fundamental change that occurred in social perceptions of sexual orientation and gender identity, and argue that such change renewed the meaning of "*respect for individuals*," which is a fundamental value of the Constitution.

**i. Change in perceptions of sexual orientation and gender identity**

This section will discuss matters from the Petitioners' Evidence A-24,

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Kazama, Takashi and Kawaguchi, Kazuya "*Doseiai to iseiai* [Same-sex sexuality and heterosexuality]" (Iwanami-shoten, 2010) pages 77-109.

- (a) The diversity of human sexuality is evident from a variety of documents, records, and art works throughout history and across the world. In the Christian world in the Middle Ages, among others, sexual intercourse between parties of the same sex was viewed as a religious sin, and even in the modern era, sexual intercourse between parties of the same sex was punishable by law in the United Kingdom, the United States, Germany and other countries.

During the latter half of the 19<sup>th</sup> century, the assertion of homosexuality as a mental illness emerged. Although such assertions were made with the intention of opposing penalties for sexual intercourse between parties of the same sex, in actuality, it helped create the perception among the public that "*homosexuality was a mental illness that deviated from the normal way of life and should be treated by discovering the cause*". Although having an illness per se should not be regarded as a reason to restrict the human rights of individuals, in societies at the time that lacked the awareness of human rights, the opinion of specialists justified the exclusion of homosexuals from the enjoyment of their natural rights as people and denied their dignity as individuals. The assertion that associated homosexuality with psychopathology provided "*justification*" and strengthened discrimination and prejudices within society.

Later, in Nazi Germany, homosexuals were included in the people to be eliminated and tens of thousands were sent to concentration camps because they were homosexuals. In the 1950s, in the United States, the House Committee on Un-American Activities identified as many as 40 to 60 government employees every month as homosexuals and terminated their employment (Petitioners' Evidence No. A-24, page 81).

In modern Japan, except for a few years in the early part of the Meiji period, no law existed to punish sexual behavior between people of the same sex. However, through "*sexology*," which became popular during the Taisho period, homosexuality was introduced as a "*sexual perversion*" and the perception that "*heterosexuality is normal and homosexuality is pathological*" spread widely and penetrated society. This view continued even after the end of World War II which was around the time that the new Constitution was enacted. Even when the "*Fuchu Youth Hostel*" court case took place in 1991, nearly half a century later, the entries in Japanese dictionaries, such as *Kojien* (Petitioners' Evidence No. 1-25-1, *Kojien* third edition, under "*same-sex*"; Petitioners' Evidence No. 1-25-2, *Kojien* fourth edition, under "*same-sex*"), and the

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terminology dictionaries for the general public, such as *Imidas*, and most textbooks for psychiatry / psychology, treated homosexuality as a mental disorder and the Ministry of Education, Culture, Sports, Science and Technology published guidance materials on sexual delinquency and deviation indicating that homosexuality "*is not endorsed in contemporary society*" (Petitioners' Evidence No. A-26, "*Basic Material on Problematic Behavior of Students*," page 62).

- (b) However, as discussed below, it became evident that, through empirical research conducted from the middle of the twentieth century, the above medical perspectives, which promoted discrimination and prejudice against homosexuals, were not based on evidence and had radically altered psychiatrists' and psychologists' views of homosexuality (Petitioners' Evidence No. A-7-1 Herek, "*Myths about Sexual Orientation*," page 138 IIIA; Petitioners' Evidence No. A7-2 (translation), from page 6).

Namely, Kinsey and others published studies in respect of sexual behavior among Americans in 1948 and 1953 and reported that many more Americans than previously suspected had engaged in homosexual behavior. Furthermore, Ford and Beach reported in their 1951 book that similar behavior could be confirmed in other human societies and animal species. In addition, an unpublished study conducted by the United States military during World War II demonstrated that the stereotype that "*homosexual recruits could not be good soldiers*" was not based on evidence.

Previous studies that supported homosexuality being equated with psychopathology were largely based on analysts' clinical observations of patients known by the analysts to be homosexual. They were patients or incarcerated individuals and were few in number. As a result, the study samples were not representative. The analysts' personal views were also likely to bias the clinical observations of patients known by the analysts to be homosexual. Whereas, Hooker recruited thirty homosexual persons and thirty heterosexual persons from the general community and matched the two groups for conditions other than sexual orientation, conducted the Rorschach and other tests, and concluded in the 1957 paper that "*homosexuality as a clinical entity does not exist*" (Petitioners' Evidence No. A-7-2 (translation), page 19 of the Herek translation). Subsequently, a large amount of empirical research was accumulated and it became evident that there was no empirical evidence that homosexuality is an illness.

The accumulation of such empirical research evolved into a major debate



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among mental health professionals as the homosexual community escalated its human rights movement in the 1960s. Finally, the American Psychiatric Association (APA), in 1973, decided that "*homosexuality*" per se should not be treated as a mental disorder. In the second edition of the Diagnostic and Statistical Manual (DSM-II), which was published by the APA in 1968, "*homosexuality*" was considered to be a form of "*sexual deviation*." However, as a result of the above decision, the wording was eliminated from the 7th print of the DSM-II. The diagnostic name for the persistent desire to change one's sexual orientation remained for those who were seriously troubled by their sexual orientation and wished to change it; however, this was done based on the assumption that homosexuality was not a mental disorder. In the revised DSM-III (DSM-III-R), in 1986, even that was eliminated (Petitioners' Evidence Nos. A-27-1, A-27-2 (translation), DSM-III, page 380; Petitioners' Evidence Nos. A-28-1, A-28-2 (translation), DSM-III-R). The International Classification of Diseases (ICD) by the World Health Organization also classified "*homosexuality*" as an independent diagnostic name in ICD-9 but deleted it in ICD-10 (1992); clearly stating that "*sexual orientation per se is not a disease*" (Petitioners' Evidence No. A-29, ICD-9; Petitioners' Evidence Nos. A-30-1, A-30-2 (translation), ICD-10).

Also, in January 1975, the American Psychological Association Council of Representatives adopted a resolution stating that, "*homosexuality per se implies no impairment in judgment, stability, reliability, or general social and vocational capabilities*" and settled the dispute. This resolution further stated that "*the American Psychological Association urges all mental health professionals to take the lead in removing the stigma (note by the Petitioners' attorneys: A strong feeling of disapproval imposed by society or a mark of disgrace) of mental illness that has long been associated with homosexual orientation*" (Petitioners' Evidence Nos. A-1-1, A-1-2, *Resolution adopted by the American Psychological Association Council of Representatives (APACR)*). Psychiatrists' and psychologists' historical view that homosexuality was a disorder had promoted discrimination and prejudice against homosexuals in society. The above resolution looked squarely at this history, in which the APACR had played a major role in the formation and maintenance of the stigma, and urged its members to take the initiative in removing social prejudice.

- (c) In the mid-twentieth century, "*sex reassignment surgery*" gradually became available for individuals who claim that their gender identity is incompatible with their biological sex, paving the way for transgender people to live their gender identity through medical procedures. A legal

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system was created in various countries that allowed individuals to legally change their assigned sex. Initially, the legal system often treated the assigned sex incompatibility as a mental disorder and required a highly invasive surgery, such as removal of the reproductive glands. However, it has become a common understanding that having a gender identity that differs from the biologically assigned sex is an aspect of human sexuality and that an individual's gender identity must be effectively respected in various situations. In Japan, too, the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (Act No. 111 of July 16, 2003) was finally enacted in 2003, making it possible to make "*changes in recognition of the gender status of a person.*" Although the law imposes inhumane and harsh requirements, such as not being married, having no minor children, requiring surgery to remove the reproductive glands and surgery on the external genital organs, it also recognizes the diversity of human sexuality and opened up a way for individuals who identify differently from their biologically assigned sex to live according to their gender identity.

**ii. Universal recognition by international communities that discrimination against individuals based on sexual orientation and gender identity is prohibited and restrictions on their human rights are unacceptable**

The fundamentally modified views of medicine and psychiatry gained momentum to such an extent that, since the beginning of the 21<sup>st</sup> century, they have become universally recognized by the international community.

In the field of international human rights law, the human rights of homosexuals and transgender people were first raised as important issues in the European Court of Human Rights based on the European Convention on Human Rights. With respect to sexual orientation, starting with the 1981 ruling that the Sodomy Law in Northern Ireland was a violation of human rights, precedents were established providing that punishing adults for engaging in homosexual behavior violated Article 8 of the European Convention on Human Rights and providing for the "*Right to respect for private and family life*" (Petitioners' Evidence No. A-31, Taniguchi, Hiroyuki "*Doseiai to 'Kokusai jinken'* ['Homosexuality' and 'International Human Rights']", Mitsunari, Miho, ed. "*Doseiai wo meguru rekishi to ho* [History and Law Concerning Homosexuality]" (Akashi Shoten, 2015), pages 148 and 152). On the 31<sup>st</sup> of March 1994, the United Nations Human Rights Committee stated that "*sex,*" protected under Article 2, Paragraph 1 (respect and protection of human rights without discrimination) and Article 26 (equality under the law and prohibition of discrimination) of the International

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Covenant on Civil and Political Rights, included "*sexual orientation*" and for the first time, a committee for a major civil rights convention (which monitors the implementation of the convention and decides the handling of reports / information received thereby) indicated that homosexuality is a civil rights issue (Petitioners' Evidence No. A-32-1, *Human Rights Committee Views on Toonen v. Australia, State of Tasmania*), 8.7 of the main text; Petitioners' Evidence No. A-32-2, (translation), page 12). Precedents based on international civil rights have continued to accumulate ever since (Petitioners' Evidence No. A-31, Taniguchi, Hiroyuki "*Doseiai*' to '*Kokusai jinken*' ['Homosexuality' and 'International Human Rights'], Mitsunari, Miho, ed. "*Doseiai wo meguru rekishi to ho* [History and Law Concerning Homosexuality]" (Akashi Shoten, 2015), page 153).

In addition, efforts were made to formulate these results into legal documents and this was realized in the form of the adoption of the Yogyakarta Principles of 2006 (Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity) (Petitioners' Evidence No. A-33-1; Petitioners' Evidence No. A-33-2 (translation)). The Yogyakarta Principles provided that existing international human rights instruments, starting with the Universal Declaration of Human Rights, are applicable to all without discrimination by sexual orientation or gender identity and human rights must not be restricted in any way by sexual orientation or gender identity.

The Yogyakarta Principles were drafted and adopted by experts, including incumbent and former officials in the field of international human rights (including eight UN Special Rapporteurs on Human Rights and five present and former members of the UN committees that monitor the implementation of each convention). Due to the fact that the Yogyakarta Principles were adopted by such authoritative people, it was cited in subsequent UN documents and was given a semi-official document status in international human rights law (Petitioners' Evidence No. A-31, page 156).

In June 2011, the UN Human Rights Council adopted a resolution entitled "*Human rights, sexual orientation and gender identity*" (A/HRC/RES/17/19) (Petitioners' Evidence No. A-34-1, Resolution adopted by the Human Rights Council on its seventeenth session, "*Human rights, sexual orientation and gender identity*" (original); Petitioners' Evidence No. A-34-2, Translation of the resolution by the United Nations Information Centre). The resolution expressed grave concern for acts of violence and discrimination committed in all regions of the world against individuals because of their sexual orientation and gender identity and requested that the United Nations High Commissioner for Human Rights commission a study, to be finalized by December 2011, documenting discriminatory laws and practices and acts of

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violence against individuals based on their sexual orientation and gender identity in all regions of the world. Subsequently, the resolution declared that a panel discussion (informed by the study) should be convened and the issue should continue to be prioritized. In response, the High Commissioner for Human Rights prepared a report and a panel was convened in 2012. Additionally, a website for the Office of the United Nations High Commissioner for Human Rights was established and educational videos and pamphlets were distributed. The UN LGBT Core Group (Japan is a member of this group) was also established and is actively addressing this issue. The Human Rights Council strengthened its efforts to grapple with this issue by adopting a similar resolution in 2014 and, in 2016, appointed "*independent experts*" to conduct a study on human rights violations based on sexual orientation and gender identity. Indeed, it could be said that "*assuring the rights of sexual minorities is a central issue in the UN's human rights policy*" (Petitioners' Evidence No. A-114, Science Council of Japan, "*Teigen - seiteki mainoriti no kenri hoshō wo mezashite – konin, kyouiku, rodo wo chuusin ni* [Proposal to secure rights of sexual minorities – Focusing on Marriage, Education and Labor]", page 4).

Today, it is universally recognized in the international community that discrimination against people based on their sexual orientation and gender identity is not permitted and restrictions on human rights based on sexual orientation and gender identity are unacceptable.

### **iii. Contemporary meaning of "respect for individuals"**

In 1947, Beate Sirota Gordon of the GHQ and Japanese citizens wrote Japan's new constitution with the ideal of creating a democratic country where human rights are respected. Nevertheless, it is unclear whether or not they had in mind homosexual and bisexual persons in terms of sexual orientation and transgender persons relating to gender identity.

As mentioned above, in the past, outdated opinions and perceptions had imposed stigma on homosexual, bisexual and transgender people which meant that their individual rights were often not respected. However, it became clear that these opinions had no scientific basis, which caused people to reflect on the history of the use of incorrect medical information as an excuse to violate the human rights of others. Furthermore, the fundamental shift in psychiatry and psychology meant that legal and ethical views changed and it became unacceptable to discriminate against any individual or to violate their basic human rights based on their sexual orientation and gender identity. This view is now universally recognized and shared by the international community. (Petitioners' Evidence No. A-6, Taniguchi, Hiroyuki, "*Sei jinin to jinken – Sei doitsu shogai sha tokurei ho no hihanteki kosatsu* [Gender

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Identity and Human Rights - A Critical Consideration of the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder]" Hogaku Seminar, Issue 753, page 51 (Nippon Hyoron-sha, 2017)). Today, the United Nations and the international community are working together to eliminate discrimination based on sexual orientation and gender identity.

In these circumstances, the meaning of the first sentence of Article 13 of the Constitution that "*all of the people shall be respected as individuals*" must naturally evolve from the position where only heterosexual and cisgender persons were recognized as having the correct form of human sexuality. Human sexuality is deeply associated with an individual's personality and life, and human sexuality is diverse. Homosexuality, bisexuality, heterosexuality and having no sexual identity at all are natural forms of human sexuality. Furthermore, people may have different identities from their biological gender or their legally-assigned sex and may wish to live their life as a different gender. The meaning of the first sentence of Article 13 of the Constitution that "*all of the people shall be respected as individuals*" must be clearly premised on such diverse human sexuality.

If the concept of the freedom of marriage depended on the assumption that "*heterosexual and cisgender persons are the only ones that deserve to be respected*," freedom of marriage will have no meaning for those people who are not heterosexual and cisgender. If not interpreted together with the fundamental value of the Constitution that "*all of the people shall be respected as individuals*," even the essential attribute of modern marriage, that it is based on the "*mutual consent between two willing individuals with equal rights*," will be reduced to a mere vestige that was applied in a time when only certain types of individuals were considered to be "*normal*" and worthy of respect. However, the Constitution, which was drafted in circumstances in which the regrets of the past were fresh in peoples' minds, will not allow this outcome. If that was permitted, the Constitution itself would no longer be our constitution.

If the intent of Article 24, Paragraph 1 of the Constitution is to realize marriage based on the mutual consent between two individuals with equal rights, where the two sexes are "*respected as individuals*" in the true sense, then there can be no alternative interpretation except that the Constitution guarantees that marriage is permissible regardless of sexual orientation, gender identity, or legal gender.

#### **iv. Summary**

The freedom of marriage cannot and should not be denied merely because the parties are considered the same sex under the law. This is why same-sex

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marriage is being legislated in many countries around the world without changing the provisions of the constitution or the basic law of various countries.

#### **4. Article 24, paragraph 1 of the Constitution does not prohibit same-sex marriage**

Since Article 24, Paragraph 1 of the Constitution states that marriage is based on "*the mutual consent of both sexes*" and "*the equal rights of husband and wife*," it has been argued that same-sex marriage is prohibited under the Constitution.

However, Article 24, Paragraph 1 of the Constitution does not specify that having two people of the opposite sex is a condition for marriage nor does it indicate that only marriage between individuals of the opposite sex is recognized under the Constitution (Petitioners' Evidence No. A-35, Tsujimura, Miyoko, "*Kazoku to kenpo* [Family and Constitution]" (Nihon Kajo Shuppan, 2016) page 128). Based on the interpretation of the wording of the provision, there is no basis for deeming that the provision prohibits marriage between persons of the same sex under the law.

If the purpose of the enactment of Article 24 of the Constitution is considered, it would become even clearer that the provision does not prohibit marriage between persons of the same sex under the law. It is the purpose of the enactment of Article 24 to renounce the family system under the Meiji Civil Code and to extend the principle of respect for individuals to the institution of marriage. In order to realize the potential of individuals and the important function of marriage as the basis of a democracy, Article 24, Paragraph 1 of the Constitution, providing that "*marriage shall be based only on the mutual consent of both sexes*", renounced the family system under the Meiji Civil Code. The family system did not provide for individual freedom whereas the new Constitution guaranteed respect for individuals and the right of individuals to autonomously determine the form of their marriage, based only upon the free and equal consent of both parties and without any interference by a third party.

In light of the purpose of the enactment, it is impossible to construe that marriage other than between heterosexual couples is prohibited under the provision.

This is consistent with the relevant ruling of the Supreme Court. In its ruling on the Requirement for Married Couples to Adopt the Same Surname (Supreme Court Grand Bench, December 16, 2015, 69(8) Supreme Courts Reports (civil cases) page 2586), the Supreme Court held that "*Article 24, Paragraph 1, of the Constitution provides that 'marriage shall be based only on the mutual consent of both sexes and shall be maintained through mutual cooperation founded upon the equal rights of husband and wife,' is understood to indicate clearly that whether to marry, when to marry, and whom to marry should be left to the decision of the parties, having equal rights and free will.*" In the ruling, the court used terms such as "*between the parties*," which do not identify specific

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genders, and intentionally avoiding terms such as "*heterosexual*," "*between male and female*" or "*husband and wife*". It can be assumed that the Supreme Court demonstrated that said provision does not prohibit marriage with a partner of the same sex under the law (Petitioners' Evidence No. A-36, Kimura, Sota "*Fufu dosei goken hanketsu no imi – Nanno kubetsu ga mondai nanoka* [Constitutionality of Requiring Same Surname for Married Couples – What kind of distinction is the problem?]" Journal "Jiyu to Seigi" [Liberty & Justice] June 2016 Issue, page 110).

Furthermore, an influential doctrine in respect of the Constitution states that "*Article 24, Paragraph 1 of the Constitution should not be construed as prohibiting a union other than 'marriage' from being recognized in the same way as marriage under the Constitution* (Petitioners' Evidence No. A-37 Watanabe, Yasuyuki and Shishido, Jouji and others. "*Kenpo I Kihon ho* [Constitutional Law I, A Basic Law]," Nippon Hyoron-sha, 2016, page 456)" and states that Article 24, Paragraph 1 of the Constitution does not prohibit the marriage of same-sex couples.

When the Respondent states its argument for not accepting marriage registration from persons of the same sex under the law, it only refers to the provisions of the Civil Code and the Family Register Act and does not refer to the wording of Article 24, Paragraph 1 of the Constitution. Therefore, it is obvious that the above argument of the Respondent is without merit.

## **5. Conclusion**

The Petitioners are prevented from freely forming civil marriages and from autonomously determining with whom they wish to marry based solely on the mutual consent of the individuals. In other words, the Civil Code and the Family Register Act, which do not allow same-sex marriages, are violating the Petitioners' freedom of marriage, which is guaranteed under Article 24, Paragraph 1 of the Constitution.

Even if the Petitioners' same-sex marriages were allowed under the law, there can be no unreasonable restrictions on the human rights of others or circumstances that may harm civil marriage and other basic societal systems. The provisions of the Civil Code and the Family Register Act disallowing same-sex marriage unreasonably violate freedom of marriage, which is a constitutional right and therefore, in this respect, both the Civil Code and the Family Register Act are unconstitutional and invalid.

## **VI Not allowing same-sex marriage under the law violates the principle of equality**

### **1. Introduction**

Article 14, paragraph 1 of the Constitution provides that "*All of the people are equal under the law and there shall be no discrimination in political, economic or social relations*

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*because of race, creed, sex, social status or family origin.*" It is pointed out by the Supreme Court that this provision sets forth the equality under the law and prohibits discriminatory treatment under the law unless there are reasonable grounds based on the nature of the matter (Supreme Court Grand Bench, 27 May, 1964, Minshu Vol.18, No.4, at 676, etc.).

In the present case, there is no reasonable ground based on the nature of the matter (i.e., marriage) for the discriminatory treatment by the present civil code and the Family Register Act under which those who wish to marry someone from the opposite sex (heterosexual couples) are allowed to marry and those who wish to marry someone from the same sex (homosexual couples) are not allowed to marry (the "*Difference in Treatment*"), and thus the Difference in Treatment should be considered a discriminatory treatment under the law prohibited by Article 14, paragraph 1 of the Constitution. The details are as follows.

## **2. Discriminatory treatment based on sexual orientation**

First, the Difference in Treatment is based on sexual orientation.

That is, marriage is based on an intimate relationship with sexual love, with homosexuals being oriented toward the same sex, and bisexuals being also sometimes oriented toward the same sex. However, if homosexuals, etc. wish to marry a partner of legally the same sex in accordance with their sexual orientation, they are not allowed to marry the partner they wish because the law does not allow same-sex marriage. In contrast, heterosexuals may marry a desired partner of the opposite sex in accordance with their sexual orientation. Such a difference arises because the system of legal marriage which only allows opposite-sex marriage is not indifferent to the sexual orientation of those who wish to marry, and under this system, homosexuals are unable to realize marriage with their desired partner because of their sexual orientation. Therefore, the system of legal marriage which allows opposite-sex marriage and does not allow same-sex marriage introduces discriminatory treatment based on the sexual orientation of those who wish to marry.

## **3. Infringed rights / interests**

The rights / interests of homosexuals are violated by this Difference in Treatment.

### **(1) Violation of freedom of marriage**

First, homosexuals may not marry due to this Difference in Treatment. As mentioned above, freedom of marriage is constitutionally guaranteed for homosexuals (legally same-sex couples) too and this Difference in Treatment violates the freedom of marriage of homosexuals (legally same-sex couples) (Article 24.1 of the Constitution).



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## **(2) No enjoyment of social recognition**

Furthermore, as a result of this Difference of Treatment, same-sex couples not only cannot receive official certification in the form of a family registry showing their marriage, but also they cannot also receive social recognition.

In other words, as mentioned in the Supreme Court's judgment on the waiting periods required for remarriage (Supreme Court December 16, 2015, Vol. 69 no. 8 page 2427 of Collection of Civil Judgments of the Supreme Court), "*the sense of respect for legal marriage is still prevalent among the public*" in Japan and couples who marry legally will be recognized "*officially*" as a couple and as in a relationship which should be socially recognized. On the other hand, since same-sex couples cannot marry, they cannot be recognized "*officially*" as a couple and as a matter of course will not therefore be socially recognized.

For couples, recognition by society of their relationship is important. Without social recognition, both parties in the couple may not themselves recognize or respect their own relationship and may not be able to continue their relationship with peace of mind. Social recognition is essential for couples to respect their own relationship and establish a stable relation.

Since they are socially recognized, opposite-sex couples benefit from psychological and social gains by being able to build stable relationships and respect as a couple. On the other hand, same-sex couples do not benefit similarly and are prevented from building stable relationships and respect as a couple.

## **(3) No specific rights / benefits associated with marriage**

Furthermore, due to the Difference in Treatment, same-sex couples may not enjoy several legal and economic rights / benefits and *de facto* benefits that legally married couples may enjoy. The main examples are as follows.

### **i. Rights / benefits under the Civil Code**

#### **(i) Living together / cooperation / support obligations**

Married couples are obligated to live together, cooperate and support each other (Article 752 of the Civil Code). These are considered fundamental obligations associated with marriage (Petitioners' evidence A 38 - p. 189 of "*New Annotations on Civil Code (17)*" by Yu Kamiya, edited by Shuhei Ninomiya (Yuhikaku, 2017)). Under these obligations, either party to a married couple may demand from the other party to live together as well as cooperation and support. Failure to perform may constitute a cause for divorce and gives rise to a claim for compensation for damages.

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On the other hand, since same-sex couples cannot marry, a party to a couple may not demand from the other to live together, cooperate and support them pursuant to Article 752 of the Civil Code.

#### (ii) Right of Inheritance

When a member of a married couple dies, his or her spouse becomes the legal heir of the deceased person (Articles 890 and 900 of the Civil Code), and the heir is entitled to a contributory portion (Article 904-2 of the Civil Code) and to a statutory reserved portion (Article 1042 and thereafter under the amended Civil Code) of the inheritance under the Civil Code.

However, since the law does not recognize same-sex marriages, the member of a same-sex couple cannot become the legal heir of his or her partner, and there is no entitlement to a contributory portion or a statutory reserved portion of inheritance. Therefore, unless the partner leaves a will while alive, the remaining partner cannot inherit from the deceased partner.

#### (iii) Presumed co-ownership and distribution of property

When a married couple separates, a presumption of co-ownership of property applies (Article 762 (2) of the Civil Code), and a distribution of property may be claimed as part of the process of conciliation of domestic relations and adjudication of domestic relations (Article 768 of the Civil Code).

However, since the law does not recognize same-sex marriages, the presumption of co-ownership of property and the right to claim distribution of property does not, as a matter of course, apply.

#### (iv) Joint parental authority

For a heterosexual couple, upon marriage, the children born in the couple are subject to the couple's joint parental authority during the marriage (Article 818.3, main part of the Civil Code). However, for a same-sex couple, the partners are not able to exercise parental authority jointly, even if they raise the child together under the parental authority of either member of the couple.

For example, this may happen where a person with a child from a previous relationship with a person of the opposite sex meets a same-sex person and begins a relationship with them. There are also cases where a couple of two women may raise a child together which was borne from one of the women with sperm provided by a third party male donor and where the two women and the male donor take care of the child together. In these cases, however, the same-sex partner who does not have a maternal or paternal relationship with the child cannot have any legal relationship with him / her because same-

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sex marriage is not officially recognized and no legal framework allows a parental relationship between the non-maternal / non-paternal partners of a same-sex marriage and these children. Therefore, in cases where a same-sex partner who is the mother or father of the child dies, since the other partner has no parental authority, a procedure for designation of a guardian of a minor must be initiated (Article 838.1 of the Civil Code) unless the maternal / paternal same-sex partner died testate assigning the surviving partner to be the guardian of the minor (Article 839.1 of the Civil Code). In this procedure, there is no guarantee that the surviving partner will be assigned as the guardian of the minor. If not assigned, the surviving partner cannot raise the child, even if she / he has actually raised the child previously and has formed a de facto parental relationship. This situation is unstable and disadvantageous also from the perspective of the child.

Furthermore, a non-maternal / non-paternal same-sex partner adopts the child, the same-sex partner may gain parental authority over the child but in this case, the maternal / paternal same-sex partner must lose her / his parental authority (Article 818.2 of the Civil Code). Thus, it is not possible for a same-sex couple to exercise joint parental authority in any case.

## **ii. Rights and interests under tax laws**

### **(i) Income tax and inhabitant tax**

Married couples are entitled to spouse deduction for income tax and inhabitant tax (Article 2, paragraph 1, subparagraph 33 to paragraph 33-4, Article 83 and Article 83-2 of the Income Tax Law, and Article 34, paragraph 1, subparagraph 10-2 of the Local Tax Law), and the total amount of deductions for medical expenses for income tax and inhabitant tax can be calculated by household (Article 73 of the Income Tax Law and Article 34, paragraph 1, subparagraph 2 of the Local Tax Law).

However, same-sex couples who are not allowed to marry cannot receive any such preferential treatment.

### **(ii) Inheritance tax**

If a married person dies, no inheritance tax will be imposed on the remaining spouse no matter how large the inheritance is if the amount of inheritance that the spouse acquires is no more than the statutory share (Article 19-2 of the Inheritance Tax Law). However, same-sex couples cannot receive such preferential treatment.

In addition, in a same-sex couple, property can be inherited only by legacy (*izou*). However, the amount of inheritance tax levied on this is high as

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compared with the case in which a spouse in a married couple inherits the property as legal heir, since the amount of inheritance tax is 20% higher (Article 18 of the Inheritance Tax Law).

Furthermore, if there is a gift of real estate for residential use or money to acquire real estate for residential use between a couple married for at least 20 years, in addition to the basic deduction of 1,100,000 yen, there is a preferential deduction of up to 20,000,000 yen (Article 21-6 of the said law), but same-sex couples cannot benefit from such preferential treatment.

### **iii. Other legal rights and interests**

#### **(i) Visa status in Japan etc.**

For a Japanese and foreign national heterosexual couple, the foreign partner may obtain a Japanese visa status as "*spouse, etc. of a Japanese national*" upon marriage and is able to stay in Japan for a long period (Article 2-2 paragraph 2 of the Immigration Control and Refugee Recognition Act, and Table 2 thereof). On the other hand, the foreign partner of a same-sex couple cannot obtain such visa status since she / he is not legally recognized as spouse.

Also, for a Japanese and foreign national heterosexual couple, if the foreign partner overstays beyond the permitted visa period and is subject to deportation, a special visa status may be granted if such foreign partner has cohabited with a Japanese national as spouse for a significant period of time and there exist sufficient grounds showing that their marriage is stable and mature, such as having children (Article 50 paragraph 1 item 4. of the said Act. See also "*Guidelines on Special Permission to Stay in Japan*" issued by the Immigration Bureau, Ministry of Justice).

Court cases that have granted this special visa status include (i) Tokyo District Court, Judgment, 28 August 2007, *Hanrei Jihou* 1984, page 18, (ii) Fukuoka High Court, Judgment, 22 February 2007, (iii) Tokyo High Court, Judgment, 21 November 2007 and (iv) Tokyo District Court, Judgment, 25 August 2017. Although the abovementioned Guidelines require, as one of the positive criteria, that "*a marriage [...] has been legally established,*" even de facto marriage was admitted as ground for the special visa status in some court cases including (i) Nagoya High Court, Judgment, 19 January 2018, (ii) Nagoya High Court, Judgment, 28 February 2018 (2017, Gyo ko, No.3) and (iii) Nagoya High Court, Judgment, 11 April 2018.

In connection with the special visa status program, a court case (Tokyo District Court, Judgment, 29 February 2008, *Hanrei Jihou* 2013, page 61, as submitted to the court as Petitioners' evidence A 39) points out that if

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cohabitation has the substance of marriage, protection under the law should be granted to such relationship, by stating as follows:

*"Where a foreign national who wishes to stay in Japan claims that he / she has a legal or actual marriage relationship with a Japanese national, and such Japanese national also wishes said foreign national to stay in Japan, such fact should be taken into account as a significant element when considering the grant of special visa status to the foreign national, if their relationship has the substance of marriage, which is a bona fide cohabitation for the purpose of perpetual spiritual and physical union of both sexes".*

On the contrary, foreign partners in same-sex couples are not granted special visa status and, therefore, are forced to leave Japan back to their home countries.

In addition, while Japanese citizenship is granted by the government's permission upon application of a foreign national wishing to obtain the citizenship if he / she satisfies certain requirements such as continuous residence in Japan for more than 5 years (Article 5 of the Nationality Act), the foreign spouse of a Japanese national is granted a shortened period of residence of 3 years (Article 7 of the said Act). However, since same-sex marriage is not recognized, same-sex couples are not able to enjoy the privilege of this relaxed requirement.

#### (ii) Survivors' pension

In the case of a heterosexual couple, the survivor's welfare pension may be paid not only to the legally married spouse but also to the de facto spouse (Article 3 paragraph 2 and Article 59 paragraph 1 of the Employees' Pension Insurance Law). However, in the case of a same-sex couple, since they cannot marry, naturally they are not eligible to receive the survivor's welfare pension as legally married spouses. Furthermore, it is unclear whether they are eligible to receive the survivor's welfare pension as de facto spouses.

#### (iii) Survivors' benefits under the Crime Victims Benefit System

In the case of a heterosexual couple, when one of the partners dies because of a criminal act, the survivor's benefit under the crime victim benefit system which may be paid not only to the legally married spouse but also to the de facto spouse (Article 4 item 1 and Article 5 paragraph 1 item 1 of the Act on Support for Crime Victims by Payment of Crime Victim Benefits, etc.).

However, in the case of a same-sex couple, since they cannot marry, naturally they are not eligible to receive the survivors' benefits as legally married

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spouses. Furthermore, it is unclear whether they are eligible to receive the survivors' benefits as de facto spouses.

#### (iv) Occupancy in public housings

In many municipalities, the presence of "*relatives who live or plan to live together*" is a condition of occupancy in public housings. A legally married spouse falls under the category of "*relative*" here, and a de facto spouse is often considered to fall under the category of "*relative*" in the case of a heterosexual couple.

However, in the case of a same sex-couple, eligibility for tenancy is limited to a small number of municipalities. In most municipalities, same-sex couples are not eligible for occupancy in public housings.

#### (v) Protection from DV Prevention Act

The "*Act on the Prevention of Spousal Violence and the Protection of Victims*" (the "DV Prevention Act") applies not only to the spouse in a *de facto* marriage but also to the person who has been subject to violence from a person in a relationship where both shares the same living place (excluding relationships in which both persons do not live together in a manner similar to that of a marital relationship) (the first paragraph of Article 28-2 of the DV Prevention Act).

However, in practice, it is not clear whether protection under the DV Prevention Act applies to same-sex couples because they are not allowed to marry ("*Considering the fact that 'marriage' is understood as marriage between men and women, the application of DV Prevention Act to same-sex couples should be carefully considered,*" Petitioners' evidence A 40, Naoto Ogawa (2018), "*Reality of Protection Order at Tokyo District Court,*" Family Law and Judicial Decision, October, pp. 12.).

### iv. De facto disadvantage

#### (i) Medical consent, etc.

When a partner in a same-sex couple is transported by an ambulance in an unconscious state, the hospital may refuse requests for visits and an explanation of the medical condition, or may not allow them to proceed smoothly because the other partner is not legally a relative.

Additionally, it is usual for married heterosexual couples that the consent of one spouse is treated as putative consent of the other when medical acts, including surgery, are required to prolong life. On the other hand, it is also

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usual for same sex couples that hospitals do not accept such consent because the partner in a same-sex couple is not legally a relative. This means that a partner in a same sex couple cannot provide the necessary medical care to the other who is between life and death.

#### (ii) Moving into private housing

Even if same-sex couples apply for leases for private housing, lessors are often reluctant to rent a home to same-sex couples who are not allowed to marry. Therefore, for same-sex couples, it is not only that they cannot qualify to move into public housing by regulations, but it is also difficult to move into private rental properties.

#### (iii) Purchase of housing

When trying to buy a house, it is possible for married heterosexual couples to get a pair-loan considering both incomes. As a result, the partners to the married couple enter into a loan agreement separately and each of them becomes a joint and several guarantor of their respective debts so that the married couple owe the debts under the loan agreements equally and share the ownership of the house. Many financial institutions, however, do not allow pair-loan agreements for same-sex couples who are not allowed to marry. Therefore, same-sex couples cannot use pair-loans, and only one of them is forced to become the owner of the house and the borrower.

### (4) Summary

As mentioned above, the rights and benefits that homosexuals (same-sex couples) cannot obtain due to the difference in treatment are diverse including: constitutional freedom of marriage, psychological and social interests associated with social recognition, legal and economic rights and interests, and de facto interests. Therefore, it should be stated that the infringements and disadvantages that the difference in treatment subjects homosexuals to are extremely serious.

## 4. Matters that should be strictly reviewed

As set out above, this disparate treatment constitutes a substantial violation of rights and benefits of homosexuals, but whether it can be said that this discriminatory treatment, with such significant results, is based on "*a rational basis in light of the nature of the matter*", that is to say, whether there are grounds to justify excluding LGBT+ individuals (same sex couples) from the marriage system thereby creating a substantial violation of rights and benefits, must be strictly reviewed.

The reason for this is as follows.

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### **(1) It is disparate treatment based on matters enumerated in the latter clause [of Article 14(1) of the Constitution]**

First, it is thought that discrimination based on the matters enumerated in the latter clause of Article 14(1) of the Constitution is generally unreasonable in light of the principles of democracy, and the reasonableness of such discrimination must be strictly scrutinized (Plaintiff Exhibit A15, *Ashibe, Takahashi Kenpō*, Vol. 6, p. 134 (Iwaha Shoten, 2015)), and this disparate treatment of LGBT+ individuals (same sex couples) based on their sexual orientation, constitutes disparate treatment based on "*social status*" and "*gender*" enumerated in such latter clause.

That is to say, first, the "*social status*" in the latter clause of Article 14(1) of the Constitution, is understood to be "*the position or status a person occupies in society that is somewhat continuous and not temporary*" (broad interpretation), "*the position in society occupied non-temporarily by a person, that such person cannot escape through their own power, and that is accompanied by some type of societal evaluation as a practical matter*" (narrower interpretation), or "*a fixed position or status in society that was determined at birth or that cannot be avoided of one's own volition*" (narrow interpretation) (Plaintiff Exhibit A41, *Ashibe, Kenpōgaku III Jinken Kakuron* (Expanded Edition), p. 47 (Yuikaku, 2000)). With respect to this point, sexual orientation is a matter that you cannot freely change of your own volition.

Furthermore, for a long time, the sexual orientations of homosexuality and bisexuality have been the subject of societal prejudice, scorn, and a lack of understanding which portrays them as abnormal or perverse sexual desires, and have been branded as abnormal love, and such prejudice strongly remains today. Accordingly, regardless of the interpretation of the definition of "*social status*", sexual orientation constitutes a \*social status\*.

In addition, while it cannot be denied that the discrimination based on "*gender*" contemplated in the latter part of Article 14, Clause 1 of the Constitution focused on discrimination depending on whether one was male or female, the prohibition on gender discrimination was made clear in the Constitution because historically women were not viewed as having equal rights, and discrimination against woman regularly existed. One could consider that the discrimination against women is discrimination relating to the gender of the socioeconomic minority that was women. In sexual orientation this would be homosexuals, and in gender identification, transgender persons, as they are a "*gender*" minority. Conjointly, sexual minorities have also long been the subject of prejudice and discrimination. If considered in this way, then discrimination against sexual minorities is none other than discrimination relating to "*gender*".

On this point, the United Nations Human Rights Commission has confirmed that



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"sex", in Article 2, paragraph 1, clause 26 of the International Bill of Human Rights, includes sexual orientation (Plaintiff's exhibit 32-1, 32-2, March 31, 1994 complaint of Nicholas Toonen regarding Tasmania, Australia's law penalizing sexual relationships between consenting adults). Accordingly, the disparate treatment based on sexual orientation is disparate treatment based on "gender".

As described above, disparate treatment based on sexual orientation is disparate treatment based on "social status" and "gender". Accordingly, the reasonableness of this disparate treatment, as it is generally unreasonable disparate treatment in light of the principles of democracy, must be strictly scrutinized.

## **(2) Disparate treatment based on sexual orientation is discrimination based on something one cannot change of their own volition**

Also, considering that sexual orientation is not something one can change freely of their own volition, the reasonableness of disparate treatment based on an attribute that one cannot change through one's own volition or will must be carefully determined. This view has been adopted by the Supreme Court.

For instance, in the citizenship of children born out of wedlock case (Minshū Vol. 62, No. 6, p. 1367, (June 4, 2008)), the court considered whether Article 3(1) of the former Nationality Act, which, with respect to children of a Japanese father and non-Japanese mother, specifies that only when the parents were married did the child obtain Japanese citizenship, but did not recognize a child born out of wedlock as having obtained Japanese citizenship, violated Article 14(1) of the Constitution, the Supreme Court, taking into consideration that "*whether one is born in or out of wedlock is a matter that one cannot change through their will or effort*" and stated that "*it is critical that we carefully examine as to whether or not there is a rational basis for creating discrimination in making a trait like this a factor for obtaining citizenship.*"

In addition, in the discrimination in inheritance of children born out of wedlock case (Minshū Vol. 67, No. 7, p. 1320, (4 September 2013)), in which it was contested whether or not the provisions of the Civil Code regarding legally mandated inheritance of children born out of wedlock violated Article 14(1) of the Constitution, the Supreme Court determined that, when considered in totality, there was not a reasonable basis for discrimination in legally mandated inheritance, noting "*it can[not] be permitted to use a matter like whether a child's parents were married, which such child could not choose or correct, to lead to the disadvantage of such child.*"

## **(3) The infringed benefits and rights are substantial**

Furthermore, when considering discrimination relating to an important right or benefit, the reasonableness of such discrimination is subject to a strict scrutiny

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standard (Plaintiff Exhibit A42, *Takahashi, Rikkenshūgi to Nihonkoku Kenpō*, Vol. 4, p. 166 (Yuikaku, 2017)), considering as described above at 6(3) that this discrimination is "*discrimination relating to an important right or benefit*", regardless of whether or not this discrimination is of the type enumerated in the latter clause of Article 14(1) of the Constitution, the reasonableness of it must be strictly scrutinized.

#### **(4) It is a matter for which the democratic process cannot provide relief**

In addition to the above, those subject to this discrimination are LGBT+ individuals, who make up a small portion of the population, and are decisively a minority in society. What's more, LGBT+ individuals have been subject to discrimination and prejudice for many years, and fearing further discrimination and prejudice as a result of identifying their issue, they are in a position where it is extremely difficult to raise their voice to obtain their rights, and in light of the deeply-rooted and widespread discrimination and prejudice that exist broadly in society it is not something that can easily be corrected. Given the situation facing LGBT+ individuals, it is incredibly difficult for the democratic process to eliminate this discrimination and for LGBT+ individuals to obtain relief. Considering this, correction of this discrimination cannot be left to the Diet, and we ask the court to strictly scrutinize whether or not such discrimination is reasonable.

In Justice Ichiro Terada's concurring opinion in the Supreme Court's decision on regulations relating to married couples' surnames (Minshū Vol. 69, No. 8, p. 2586, (December 16, 2015)), he wrote that "*when it comes to the nature of a decision related to the ways of a distinct minority, it is difficult to discover or expect a fair consideration through the democratic process*", and (setting aside whether the decision as to whether married couples should have the same surnames is amenable to the democratic process), it is understood that it can be difficult to protect the human rights of minorities via the democratic process.

#### **(5) Summary**

In summary, the determination as to the reasonableness of this discrimination must be strictly reviewed.

### **5. The disparate treatment is not justifiable**

Now, we turn to consider whether there is a reasonable basis for this discrimination in connection with marriage?

#### **(1) In light of the meaning and purpose of marriage, there is no reason to exclude LGBT+ individuals**

First, the meaning and purpose of marriage is found in stabilizing the personal

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connection between partners (Plaintiff's Exhibit A38, *Shūhei Ninomiya's Shin Chūshaku Minpō* (17), Ninomiya, p. 69 (Yuikaku 2017)), there is no difference, whether in a heterosexual couple or a homosexual couple, in the importance of stabilizing the personal connection between partners.

In this regard, discrimination based on sexual orientation in marriage, in other words, completely excluding homosexual couples from the marriage system, is not driven by the meaning and purpose of marriage, and, in fact, is inconsistent with the meaning and purpose of marriage.

## **(2) There is no logical basis for not granting each infringed right and benefit**

Next, in considering each right and benefit that same sex couples cannot receive as a result of this discrimination, there is no logical basis for not granting them to same sex couples. Below, we consider the meaning and purpose of granting each of the main rights and benefits associated with marriage under the Civil Code.

### **i. Cohabitation, cooperation and support obligation (Civil Code, Article 752)**

From the fact that a married couple form a "*spiritual, physical, and economic collective*", the obligation to maintain and perpetuate that collective is the cohabitation, cooperation and support obligation (Plaintiff's Exhibit A38, *Shūhei Ninomiya's Shin Chūshaku Minpō* (17), Kamiya, p. 187 (Yuikaku 2017)).

Regardless of whether a couple is heterosexual or homosexual, they form a "*spiritual, physical, and economic collective*", so the fact that a couple is homosexual is not a reason for not giving them the legal effect of the cohabitation, cooperation and support obligation.

### **ii. Right of inheritance (Civil Code Articles 890 and 900)**

The meaning of giving a right to inheritance to a spouse is to settle the marital assets, support the surviving spouse and life security (Plaintiff's Exhibit A43, *Yoshinosuke Nakagawa and Hisao Izumi's Shinpan Chūshaku Minpō* (26), Nakagawa, pp. 276-277 (Yuikaku 1992)).

Regardless of whether a couple is heterosexual or homosexual, there is no change in the necessity of settling the marital assets or for the support and life security of the survivor.

### **iii. Presumption of common ownership of assets (Civil Code Art. 762(2)) and allocation of assets (Civil Code Art. 768)**

The presumption of common ownership of the assets of a married couple was

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established because, as married life progresses, the means by which one member of the couple obtains an asset becomes vague, and it becomes impossible to clearly establish assets as separate property (Plaintiff's Exhibit A38, *Ninomiya Shūhei's Shin Chūshaku Minpō (17)*, Inubushi, p. 260 (Yuikaku 2017), and allocation of assets is the division of assets obtained through the cooperation of the couple, and, following divorce, has the quality of being a source of subsistence and compensation, and acts as a sanction against the culpable party (Inubushi at 397).

As any of these rationales and qualities apply regardless of whether a couple is heterosexual or homosexual, the fact that a couple is homosexuals cannot be a basis for stripping the effect of the regulations relating to the presumption of common ownership and the allocation of assets.

#### **iv. Joint custody (Civil Code Art. 818(3))**

The notion of custody entrusts the social duty to provide benefits and welfare to minor children to the love of a parent, and joint custody reflects the equality of parents (Plaintiff's Exhibit A44, *Fujio Obo and Atsushi Nakagawa's Shinpan Chūshaku Minpō (25)*, Shinzoku (5) (Revised Edition), p. 15 (Yuikaku 2004)). Regardless of whether a couple is heterosexual or homosexual, there is no change in their obligation to fulfill the social duty to provide benefits and welfare to minor children, or in that obligation being borne equally by both halves of the couple.

The important thing for a parent-child relationship is the child's welfare and protection, and as a homosexual couple's familial relationship is stable, ensuring the child's upbringing therein leads to the child's welfare. The substantial matter is whether an appropriate reciprocal relationship between the parent and child has formed, and there is no necessity that the father be a man and the mother be a woman (Plaintiff's Exhibit A38, *Shūhei Ninomiya's Shin Chūshaku Minpō (17)*, Ninomiya, p. 77 (Yuikaku 2017)).

As described above, with respect to any of the main rights and benefits that accompany marriage pursuant to the Civil Code, when examined in light of their meaning and purpose, not a single one logically requires that a couple be heterosexual. The same is true for those rights and benefits not discussed above.

### **(3) It violates the dignity of LGBT+ individuals**

Furthermore, as marriage has the effect of granting societal recognition that a couple is legally a family, the current state of not recognizing the marriage of same sex couples applies a stigma to them that "*society does not recognize your relationship*", and is the equivalent of labeling same sex couples and LGBT+

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individuals as second class citizens. In addition, with respect to sexual orientation, the idea that only heterosexual love is normal and homosexual or bisexual love is abnormal, in other words a "*heterosexual canon*", creates heterocentrism, which is a self-perpetuating seed.

This situation harms the dignity of LGBT+ individuals, interferes with the development and lowering of self-esteem, worsens mental health, leads to thoughts and attempts of suicide, and is one of the major factors in creating the difficult life led by LGBT+ individuals.

Put another way, according to multiple domestic surveys, the percentage of LGBT+ individuals who have had suicidal thoughts or attempted suicide is high (Plaintiff's Exhibit A45, Furumoto et al. "*Bengoshi / Bengoshikai ni yoru Jisatsusaku no Tenbō*" Jiyū to Seigi (Oct. 2013), p. 44). The government's 2012 and 2017 Comprehensive Suicide Prevention Overview (Plaintiff's Exhibit A46, *Jisatsu Sōgō Taisaku Daimō*, p. 8 (2012); Plaintiff's Exhibit A47, *Jisatsu Sōgō Taisaku Daimō*, p. 15 (2017)), also comments on the high percentage of thoughts of suicide amongst sexual minorities, including LGBT+ individuals.

Analysis shows that the source of this high rate of suicidal thoughts is that, in a society where heterosexuality is viewed as obvious while homosexuality is subject to discrimination and prejudice, LGBT+ individuals are forced to put on the appearance of being heterosexual, often causing intense internal psychological tension, which results in the worsening of one's mental health (Plaintiff's Exhibit A45, at 52). The two aforementioned Comprehensive Suicide Prevention Overviews also state that "*lack of understanding, prejudice, etc. should be taken as societal forces behind this.*"

The background of suicidal thoughts and attempted suicide amongst sexual minorities, including LGBT+ individuals, is considered to be caused by several factors, but, in particular, what kind of partner one (i) has romantic feelings for, (ii) finds sexually attractive, and (iii) builds the intimate relationship based on sexual love, is inseparable from one's identity, character, life, and pursuit of happiness. In a society where the fact that one's partner is of the same sex is viewed as abnormal or the person is viewed as a second class citizen. On a daily basis, LGBT+ individuals have to bear the feeling of hopelessness and powerlessness of their existence and the fact that they will not be accepted by society the same as heterosexuals, and the discomfort and fear of being discriminated against and expelled from society.

The marriage system has broadly penetrated the national consciousness; it is recognized as an important life event that can affect all, and the fact that a pair is a legally married couple is recognized as obvious in social life, and respected. For that reason, the state of the marriage system directly and indirectly has a large

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impact on people's consciousness. The current state of the marriage system, in which marriage is limited to heterosexual couples, grounds, supports, and prevents the correction of discriminatory attitudes and prejudice that homosexual couples and LGBT+ individuals are abnormal and "*do not deserve the recognition of society*". If the current marriage system, in which same sex couples cannot marry, is not revised, it is unimaginable that the discriminatory attitudes and prejudice against same sex couples and LGBT+ individuals will be corrected.

In addition, for LGBT+ individuals, the fact that heterosexuals can marry the partner of their choosing in accordance with sexual orientation, but an LGBT+ individual cannot, fosters in the LGBT+ individual a feeling of hopelessness and powerlessness associated with society not recognizing the individual's life and pursuit of happiness in accordance with the individual's sexual orientation.

In these ways failing to recognize the marriage of same sex couples is a factor in forming the basis for the societal acceptance of the view that, when compared to heterosexuals, LGBT+ individuals are abnormal or inferior, and, through that, as we speak, the dignity of LGBT+ individuals continues to be seriously harmed. Accordingly, there is no room for legitimizing the disparate treatment that leads to this situation.

#### **(4) It violates the purpose of the principle of marriage by notification**

In addition to the foregoing, in Japan, marriage occurs by delivery of a marriage notification to the authority responsible for administering the family registry (principle of marriage by notification), but the purpose of this means of concluding a marriage is to confirm that the parties have a desire to marry, that there is no impediment to the marriage, such as a polygamous marriage or the prohibition on marriage between close relatives, and to make a public record of the marital relationship and make the familial relationship clear (Plaintiff's Exhibit A38, *Shūhei Ninomiya's Shin Chūshaku Minpō (17)*, Ninomiya, p. 80 (Yuikaku 2017)).

However, as a result of not recognizing the marriage of same sex couples, even where same sex couples are practically in a marital relationship, as they are not recognized as family on the family register, the objective of "*making a public record of the marital relationship and make the familial relationship clear*" cannot be achieved.

Accordingly, not only does this disparate treatment not have a reasonable basis considering the nature of marriage, but it gives rise to being in direct contravention of the objective of the principle of marriage by notification of "*making a public record of the marital relationship and make the familial relationship clear*."

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## **(5) Summary**

As demonstrated above, as a result of this disparate treatment, extremely important rights and benefits of same sex couples are being infringed upon and, in light of the nature of marriage, the exclusion of same sex couples from the marriage system is impermissible. Even when examining each of the rights and benefits conferred upon married couples in light of their purposes, no logical basis for excluding same sex couples can be found.

Furthermore, the current state of not recognizing same sex marriage, in addition to seriously harming the dignity of LGBT+ individuals, has the effect of contradicting the purpose of the marriage system to "*make a public record of the marital relationship and make the familial relationship clear*". It follows that this disparate treatment, when considering the nature of marriage, has no reasonable basis.

## **6. Conclusion**

In addition to the reasonableness of this disparate treatment needing to be strictly scrutinized, when considering the current law in light of the nature of marriage, there is no room to justify this disparate treatment.

Accordingly, this disparate treatment constitutes discriminatory treatment prohibited by Article 14(1) of the Constitution.

## **VII Legislative inaction is unlawful under the State Redress Act**

### **1. Criteria for the unlawfulness of legislative inaction under the State Redress Act**

The Grand Bench judgment of the Supreme Court regarding the unconstitutionality of prohibiting remarriage within a certain period (Supreme Court Grand Bench judgment, December 16, 2015, Minshu Vol. 69, No. 8, p. 2586) states that "in cases such as where the Diet neglects, for a long time and without justifiable reasons, to take legislative measures such as revising or repealing the provisions of a law even though it is clear that those provisions are in violation of the Constitution as they restrict rights and interests constitutionally guaranteed or protected without reasonable grounds, the legislative inaction of the Diet members should, on an exceptional basis, be deemed to be unlawful for the purpose of applying the provisions of Article 1, paragraph 1 of the State Redress Act as the actions of the Diet members in the legislative process breach the legal obligations they bear under their duties stated above (see case number 1978 (O) 1240, Supreme Court, First Petty Bench judgment of 21 November 1985, Minshu Vol. 39, No. 7, p. 1512, and case numbers 2001 (Gyo-Tsu) 82 and 83 and 2001 (Gyo-Hi) 76 and 77, Supreme Court, Grand Bench judgment of 14 September 2005, Minshu Vol. 59, No. 7, p.

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2087)." In this case, although it is clear that the provisions of the current law under which it is not legally possible for people of the same sex to marry infringe upon the freedom of marriage of LGBT individuals and also violate the principle of equality of Article 14, paragraph 1 of the Constitution, the Diet has neglected to take legislative measures legally enabling marriage between people of the same sex for a long time and without justifiable reasons. Therefore, the legislative inaction in regard to legally enabling marriage between people of the same sex is unlawful under the State Redress Act. The details are as follows.

## **2. The unconstitutionality of the provisions is clear**

As set out above, the provisions of the current law under which it is not legally possible for people of the same sex to marry are unreasonable constraints on the freedom of marriage guaranteed under Article 24, paragraph 1 of the Constitution and on the equal rights and principle of equality guaranteed under Article 14, paragraph 1 of the Constitution. In addition, in light of the facts stated below, it was clear to the Diet considerably before September 2018 at the latest, when Petitioner Nakajima and Petitioner Christina married in Germany (the first of the petitioners who would have married if the above legislative measures were taken) (Petitioners' Evidence G2, 3), that the provisions of the current law violate Article 24, paragraph 1 and Article 14, paragraph 1 of the Constitution.

### **(1) The awareness that it is not acceptable to restrict a person's rights and interests or to discriminate against a person for being LGBT has been established and has permeated society**

#### **i. Establishment of scientific knowledge**

As described in section V.3(2), in the past, psychiatry and psychology have regarded homosexuality as a "*sexual abnormality*" and "*psychiatric disease*." However, since the latter half of the last century, there has been a growing movement in other countries to grant rights for LGBT individuals, and numerous empirical and interdisciplinary studies have demonstrated that these past views are groundless, thereby establishing the knowledge that homosexuality and bisexuality are not in any way diseases. In 1987, the American Psychiatric Association, an international authority in psychiatry, removed all terms related to homosexuality from the section on psychiatric disorders in its diagnostic manual, the DSM (Petitioners' Evidence A48, Toshiaki Hirata, "*Changes in the Handling of Homosexuality in Western Psychiatry*," Japanese Journal of Psychiatric Treatment, Vol. 31, No. 8, pp. 985-990; Petitioners' Evidence A28-1, 28-2, DSM-III-R). In the International Classification of Diseases (ICD) published by the World Health Organization, the 10th edition in 1992 stated that "*sexual orientation by itself is not to be regarded as a disorder*", (Petitioners' Evidence A30-1, 30-2).



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## **ii. Establishment of legal and ethical awareness**

As set out below, since the 1990s, the United Nations human rights treaty bodies (committees, etc. for various human rights treaties) have referred to the protection of sexual orientation in their interpretations of the various treaties and have continued to issue international statements and resolutions prohibiting discrimination based on sexual orientation and gender identity (Petitioners' Evidence A31, 33-1 to 34-2).

- (i) (The International Covenant on Civil and Political Rights (ICCPR))

### Article 17

1. *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
2. *Everyone has the right to the protection of the law against such interference or attacks.*

This article sets out the right to be respected in private life and family life. In 1994, in *Toonen v. Australia* (CCPR/C/50/D/488/1992), a case regarding whether the law that criminalized homosexual activity violated the ICCPR, it was stated that sexual orientation is included in the right to be respected in private life, and the law was found to violate the ICCPR (Petitioners' Evidence A32-1, 32-2).

### Article 23

1. *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

This article guarantees the right of the family to be respected as a fundamental unit of society. General Comment No. 28 (general comments provide the formal interpretation of the relevant treaty body regarding the meaning and function of particular covenant clauses and the measures required for their implementation) states that "*it is important to accept the concept of the various forms of family.*" The Committee on the Elimination of Discrimination against Women also referred to the protection of same-sex relationships in General Recommendation No. 29.

Therefore, it can be said that respecting same-sex relationships as families is required by Articles 17 and 23 of the ICCPR.

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### Article 26

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

This article provides for equality before law, and the Human Rights Committee clearly stated in *Toonen v. Australia (CCPR/C/50/D/488/1992)* that "sex" in this article includes sexual orientation. Similarly, in 2003, in *Young v. Australia (CCPR/C/78/D/941/2000)*, in which the unlawfulness of not paying same-sex couples survivors' pensions that were granted to heterosexual couples was contested, it was concluded that the refusal to pay survivors' pensions to the complainants on the basis of sex or sexual orientation was contrary to equality under the law as provided for in Article 26 of the ICCPR on the grounds that "sex" in this article includes sexual orientation (Petitioners' Evidence A49).

(ii) International Covenant on Economic, Social and Cultural Rights (ICESCR)

### Article 2, paragraph 2

*Each party to the present Covenant undertakes to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

This article provides for economic, social and cultural non-discrimination. It is clearly stated in General Comments No. 14, paragraph 18, No. 15, paragraph 13, No. 18, paragraph 12, No. 20, paragraph 32, and No. 22, paragraph 9 that "other status" includes sexual orientation (Petitioners' Evidence A50-1 to 50-5).

(iii) Statements and resolutions

In 2006, the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity were adopted (Petitioners' Evidence A33-1, 33-2).

The principles set out the measures to be taken by state agencies, including legislatures, to eradicate violence, abuse and discrimination against sexual

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minorities and to ensure equality.

In June 2011, the UN Human Rights Council adopted the first resolution that clearly focused on human rights violations based on sexual orientation and gender identity (Petitioners' Evidence A34-1, 34-2). This resolution affirms the universality of human rights and expresses grave concerns about violent acts and discrimination that people are suffering because of their sexual orientation and gender identity (see section V.3(2)B herein).

#### (iv) Summary

As set out above, the awareness that it is not acceptable to restrict a person's rights and interests or to discriminate against a person for being LGBT has been established and has permeated society as an international legal and ethical awareness, and as a result, it should be said that national governments are also required to take measures to guarantee such rights.

### iii. Trends in Japan

Within Japan, the awareness that it is not acceptable to restrict a person's rights and interests or to discriminate against a person for being LGBT has come to be established and to permeate society.

#### (i) Judicial precedents

Until now, there have not been many cases in Japan regarding the restriction of rights and interests or discrimination against LGBT individuals that have developed into court proceedings.

However, it is erroneous to think that the small number of such cases meant it was difficult for the Diet to recognize the current state of affairs in which LGBT individuals are having their rights and interests infringed upon and are being discriminated against. The reason why it is rare for such cases to develop into court proceedings is not because there was no infringement of rights and interests or discrimination against LGBT individuals, but because it was difficult even to seek redress from the judiciary, as that infringement, discrimination and prejudice occurs on a daily basis. Conversely, the small number of cases that developed into court proceedings shows the depth of discrimination against LGBT individuals in Japanese society.

In the first place, it is not acceptable for a person who exercises public authority to overlook serious violations of human rights simply due to there being few court cases, as the Tokyo High Court firmly stated 22 years ago, in 1997, in its judgment of the Fuchu Youth Home case (Petitioners' Evidence A51):

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*"At the time of the relevant events in 1990, it can be thought that both the general public and the administrative authorities were indifferent to and had no accurate knowledge regarding homosexuality or homosexuals. However, setting aside the general public, the administrative authorities, including the Tokyo Metropolitan Board of Education, are required when performing their duties to make well-thought-out arrangements keeping in mind homosexuals as a minority and to protect the rights and interests of homosexuals in a sufficient manner. It is not acceptable to be indifferent or lacking in knowledge as a person who is in charge of exercising public authority. This is not acceptable at present, of course, nor was it acceptable in 1990" (Section III.1(10)).*

Furthermore, in recent years, a series of lawsuits have been filed regarding legal protection for same-sex couples, as detailed below. The filing of these lawsuits indicates that there is a growing awareness in Japan that it is not acceptable to infringe on a person's rights and interests or to discriminate against a person for being LGBT.

For example, in March 2017, a Taiwanese man who had been with his Japanese same-sex partner for more than 20 years filed a lawsuit with the Tokyo District Court to revoke the issuance of a deportation order due to overstaying his visa, seeking special permission to stay in Japan (Petitioners' Evidence A52, 53).

In April 2018, a lawsuit was filed with the Osaka District Court by a man from Osaka Prefecture who had been with his same-sex partner for more than 40 years seeking compensation of seven million yen from his partner's sister, alleging that she refused to allow him to attend the funeral of his partner as his spouse (Petitioners' Evidence A54).

In July of the same year, a lawsuit was filed with the Nagoya District Court by a man whose same-sex partner was killed, claiming that the decision of the Aichi Prefectural Public Safety Commission not to pay survivors' benefits under the national crime victims' benefits system because they were a same-sex couple was illegal and seeking a revocation of the decision (Petitioners' Evidence A55, 56).

#### (ii) Administrative measures of the national government

Since the 2000s, the Japanese government has become conscious of the protection of human rights of LGBT individuals, and various administrative measures have gradually taken shape.

For example, during the United Nations Decade for Human Rights Education

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(1995-2004), the Act on the Promotion of Human Rights Education and Human Rights Awareness-Raising was enacted in 2000, and in March 2002, the Basic Plan for Human Rights Education and Awareness-Raising based on that act was approved by the cabinet. The Basic Plan stipulated that measures that contribute to the resolution of sexual orientation issues, such as discrimination against homosexuals, would be considered (Petitioners' Evidence A57, Chapter 4.2(12)).

Since 2002, the Ministry of Justice has also explicitly prohibited discrimination on the grounds of sexual orientation in its *"Matters to be Emphasized for Human Rights Week"* (from 2009, *"Matters to be Emphasized through Awareness-Raising Activities"*), which were carried out in accordance with the above act. The list of *"Matters to be Emphasized through Awareness-Raising Activities"* for FY2018 includes the item, *"to eliminate prejudice and discrimination on the grounds of sexual orientation,"* and it states that: *"There is persistent prejudice against sexual orientation minorities, such as homosexuals, and human rights issues have arisen in various aspects of social life, such as people in some cases being forced out of work. It is necessary to deepen our concern for and understanding of this issue"* (Petitioners' Evidence A58).

Furthermore, the Civil Liberties Bureau of the Ministry of Justice lists sexual orientation among its main human rights issues and conducts awareness-raising activities in regard thereto, saying, *"There are people who suffer from persistent prejudice and discrimination against 'men liking men and women liking women.'* *It is necessary to eliminate prejudice and discrimination on the grounds of sexual orientation and deepen our understanding thereof"* (Petitioners' Evidence A59).

### (iii) Discussions and resolutions by the Diet

On July 6, 2018, the Act for Partial Amendment to the Civil Code and the Domestic Relations Case Procedure Act (Act No. 72 of 2018) was enacted (and promulgated on July 13, 2018). That act amended the part of the Civil Code pertaining to inheritance law, and as part of the amendments, a special contribution system was introduced as a measure to take into account the contributions of persons other than heirs (Article 1050 of the amended Civil Code), so that if a relative of the deceased other than the heirs provided medical treatment or nursing care, etc. for the deceased without charge, financial claims may be made to the heirs under certain conditions.

In its deliberations regarding the amendment, the Diet discussed the question of whether or not the scope of persons regarding whom special contributions would be recognized should be limited to relatives. From the standpoint that

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the scope should not be limited to relatives, the protection of same-sex partners was argued, and people were summoned to provide opinions for reference (Petitioners' Evidence A60 to 62). Ultimately, the scope was limited to relatives, but the supplementary resolution stated that "*efforts should be made to establish a system enabling persons in various positions, including sexual minorities, to consult in advance about the content of a will, and to spread knowledge among the public regarding the legal system pertaining to wills so that, through active use of wills, inherited property can be distributed in a way that respects the wishes of the deceased,*" clearly stating the necessity of protecting the rights of LGBT individuals (Petitioners' Evidence A63 to 65).

(iv) Efforts by local governments

At the local government level, the Tokyo Metropolitan Government's "*Guidelines for Promotion of Human Rights Measures*" (2000) included "*various issues concerning homosexuals*" as human rights issues (Petitioners' Evidence A66, p. 8), and other ordinances, plans, and guidelines referring to sexual minorities, sexual orientation, gender identity, and the like have been created by various local governments (Petitioners' Evidence A67, p. 23). Local governments are making progress ahead of the national government in enacting ordinances in accordance with the idea of sexual diversity. Not only ordinances that prohibit discrimination in general but also ordinances and protocols focusing on guaranteeing the rights of same-sex couples are increasingly being established.

a Ordinances, etc. that stipulate respect for diverse sexual orientation and prohibit discrimination

Various ordinances stipulating respect for sexual orientation and prohibiting discrimination have been enacted, including among others the "*Basic Ordinance for Gender Equality*" of Koganei City, Tokyo (which took effect in 2003) (Petitioners' Evidence A68), the "*Ordinance for the Promotion of Equal Gender Participation*" of Sennan City, Osaka Prefecture (which took effect in 2012) (Petitioners' Evidence A69), the "*Ordinance for the Promotion of Equal Gender Participation*" of Bunkyo Ward, Tokyo (which took effect in 2013) (Petitioners' Evidence A70), the "*Tama City Ordinance for the Promotion of Equal Participation of Women and Men*" of Tama City, Tokyo (which took effect in 2014) (Petitioners' Evidence A71), the "*Ordinance for the Promotion of Gender Equality*" of Musashino City, Tokyo (which took effect in 2017) (Petitioners' Evidence A72), the "*Kunitachi City Ordinance for the Promotion of Equal Participation of Women, Men, and Diverse Sexualities*" of Kunitachi City, Tokyo (which took effect in 2018) (Petitioners' Evidence A73), and the "*Tokyo Ordinance for Achieving the Principle of*

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*Respect for Human Rights under the Olympic Charter*" of Tokyo (which took effect in 2018) (Petitioners' Evidence A74).

#### b Guaranteeing the rights of same-sex couples

Since 2015, local governments have been introducing a series of so-called partnership systems (Petitioners' Evidence A67, pp. 64-82).

In Shibuya Ward, a partnership certification system was launched in November 2015 (Petitioners' Evidence A76) based on the "*Shibuya Ward Ordinance for Promoting a Society that Respects Gender Equality and Diversity*" (Petitioners' Evidence A75) enacted in March of that year. Also in November 2015, a same-sex partnership oath system was launched in Setagaya Ward (Petitioners' Evidence A67, p. 126; Petitioners' Evidence A77). It is of great significance that governmental administrations recognized the existence of same-sex couples and certified their relationships.

As of the 31<sup>st</sup> of January 2019, the partnership system has been established in Iga City, Mie Prefecture (since April 2016) (Petitioners' Evidence A67, p. 129; Petitioners' Evidence A78), Takarazuka City, Hyogo Prefecture (since June 2016) (Petitioners' Evidence A67, pp. 127-128; Petitioners' Evidence A79), Naha City, Okinawa Prefecture (since July 2016) (Petitioners' Evidence A67, pp. 130-131; Petitioners' Evidence A80), Sapporo City, Hokkaido (since June 2017) (Petitioners' Evidence A67, pp. 132-133; Petitioners' Evidence A81), Fukuoka City (since April 2018) (Petitioners' Evidence A82, 83), Osaka City (since July 2018) (Petitioners' Evidence A84, 85), Nakano Ward, Tokyo (since August 2018) (Petitioners' Evidence A86, 87), Oizumi-cho, Gunma Prefecture (since January 2019) (Petitioners' Evidence A88, 89), and Chiba City (since January 2019) (Petitioners' Evidence A90, 91). The population of these 11 municipalities is about 9.4 million people.

Municipalities planning to introduce the partnership system in the future include Saitama City, Toshima Ward in Tokyo, Sakai City in Osaka Prefecture, Fuchu City in Tokyo, Kumamoto City, Nagasaki City, Yokosuka City in Kanagawa Prefecture, and Hirakata City in Osaka Prefecture. The total population of the municipalities that have already introduced the partnership system and those stated above that are planning to introduce it in the next fiscal year and beyond is approximately 13.6 million people, which accounts for more than 10% of the total population of Japan.

In July 2018, the Designated City Mayors Association consisting of the mayors of all 20 designated cities nationwide unanimously adopted the "*Request of the Designated City Mayors Association for Unification of Points of Contact and Strengthening of the Partnership System for Sexual*

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*Minorities*" addressed to the national government, which stated among other things that "*the national government needs to provide support to promote efforts by local governments and to promote the understanding of sexual minorities, including through the partnership system,*" and submitted the request to the Cabinet Office (Petitioners' Evidence A92, 93).

#### (v) Efforts by the private sector

Private organizations and private companies are also making progress in efforts that give consideration to diverse sexuality. On 16 May 2017, the Japan Business Federation (Keidanren) announced its recommendation titled "*Towards the Realization of a Diverse and Inclusive Society*" and appealed to its members regarding the necessity of promoting the understanding of and prohibiting discrimination against sexual minorities, including LGBT individuals, in addition to which it published the results of its "*Survey on Corporate Efforts on LGBT Issues*" conducted between March 1st and 31st of the same year (survey subjects: 1,385 Keidanren member companies and 156 member organizations) (Petitioners' Evidence A94, p. 15 and below). More than 90% of companies responded that companies need to make efforts on sexual minority issues. In addition, 42.1% of companies were already undertaking some kind of measures regarding sexual minorities, and 34.3% were considering such measures, which is significantly higher than the 23.2% of companies that did not plan to undertake such measures. According to the results of the above survey, out of 93 companies that responded that they had taken specific measures for sexual minorities, 22 companies responded that they applied or were considering applying the personnel systems (or parts of them, such as marriage leave, bereavement leave, etc.) applicable to spouses to same sex partners, and nine companies responded that they had started or planned to start offering products and services that give consideration to same-sex partners (such as by making it possible to designate same-sex partners as the recipients of life insurance benefits).

#### **iv. Recommendations, etc. for improvement from the international community to Japan**

As set out above, efforts to eliminate restrictions on the rights and interests of, and discrimination against, people for being LGBT are progressing in Japan, but specific measures at the national level have lagged behind. In particular, the protection of the rights of same-sex couples remains unaddressed. For this reason, the national government has received repeated recommendations from the United Nations.

Following its consideration of the fifth periodic report of Japan regarding the ICCPR, the concluding observations of the Human Rights Committee (dated



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October 30, 2008) stated, among the principal subjects of concern and recommendations:

*"29. The Committee is concerned about discrimination against lesbian, gay, bisexual and transgender persons in employment, housing, social security, health care, education and other fields regulated by law, as exemplified by Article 23 (1) of the Public Housing Law which applies only to married and unmarried opposite-sex couples and effectively bars unmarried same-sex couples from renting public housing, and by the exclusion of same-sex partners from the protection under the Law for the Prevention of Spousal Violence and the Protection of Victims. (arts. 2 (1) and 26) The State party should consider amending its legislation, with a view to including sexual orientation among the prohibited grounds of discrimination, and ensure that benefits granted to unmarried cohabiting opposite-sex couples are equally granted to unmarried cohabiting same-sex couples, in line with the Committee's interpretation of article 26 of the Covenant. (See Young v. Australia, Communication No. 901/1999 and X v. Colombia, Communication No. 1361/2005)" (Petitioners' Evidence A95-1, 95-2 (translation), p. 9).*

Additionally, following its consideration of the sixth periodic report of Japan regarding the ICCPR, the concluding observations of the Human Rights Committee (dated August 20, 2014) stated, among the principal subjects of concern and recommendations:

*"11. The Committee is concerned about reports of social harassment and stigmatization of lesbian, gay, bisexual and transgender persons and discriminatory provisions that exclude same-sex couples from the municipally operated housing system (arts. 2 and 26). The State party should adopt comprehensive anti-discrimination legislation that prohibits discrimination on all grounds, including sexual orientation and gender identity, and provides victims of discrimination with effective and appropriate remedies. The State party should intensify its awareness-raising activities to combat stereotypes and prejudice against lesbian, gay, bisexual and transgender persons; investigate allegations of harassment against lesbian, gay, bisexual and transgender persons; and take appropriate measures to prevent such stereotypes, prejudice and harassment. It should also remove the remaining restrictions in terms of eligibility criteria applied to same-sex couples with respect to publicly operated housing services at the municipal level." (Petitioners' Evidence A96-1, 96-2 (translation), p. 4)*

Furthermore, following its consideration of the third periodic report of Japan regarding the ICESCR, the concluding observations of the Committee on

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Economic, Social and Cultural Rights (dated May 17, 2013) stated, among the principal subjects of concern and recommendations:

*"10. The Committee notes with concern that provisions which are discriminatory towards women, children born out of wedlock and same-sex couples continue to exist in the State party's legislation insofar as Covenant rights are concerned, in spite of the State party's efforts to ensure compliance with its obligations under the Covenant when undertaking legislative revisions (art. 2(2)). The Committee urges the State party to review in a comprehensive manner and, where necessary, amend its laws to ensure that they do not directly or indirectly discriminate in relation to the exercise and enjoyment of the Covenant rights." (Petitioners' Evidence A97-1, 97-2 (translation), p. 2)*

These recommendations also demonstrate that the national government was aware of the necessity for specific measures to guarantee the rights of same-sex couples.

#### **v. Conclusion**

As set out above, the awareness that it is not acceptable to restrict a person's rights and interests or to discriminate against a person for being LGBT has been established and has permeated certainly the international community, centering around the United Nations, as well as Japanese society.

#### **(2) Worldwide, the trend is to make legislative changes allowing same sex couples to marry.**

##### **i. Many foreign states are now recognizing marriage for same-sex couples in the same way they recognize marriage for opposite-sex couples**

Globally, the worldwide trend is to guarantee the rights of same-sex couples by recognizing marriage for same-sex couples in the same way marriage for opposite-sex couples is recognized. Between April 2001 and January 2019, the following countries made it possible for same-sex couples to marry: the Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Argentina, Denmark, Uruguay, New Zealand, France, Brazil, Great Britain (England, Scotland and Wales), Luxembourg, Finland, Ireland, United States of America, Colombia, Malta, Germany, Austria and Australia (Petitioner A Exhibit 98, pp. 66 and 68). Countries that recognize same-sex marriage are becoming more common, particularly in Europe. Japan is an observer state of the Council of Europe, the pan-European international organization, and as an international leader in setting standards in the areas of human rights, democracy, and rule of law; as such, Japan

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cannot ignore this trend.

**ii. In many countries, the judicial branch has determined that the constitution requires the legislature to take measures to recognize marriage between same sex persons.**

Different states have taken different paths in introducing same-sex marriage, but the United States and Taiwan are examples of jurisdictions where the issue was heavily litigated, and the judiciary played a large role in its implementation.

- (i) US Supreme Court Decision of 26 June 2015 (Petitioner A Exhibits 99, 100: *Doseikon Jinkenkyuusai Bengodan* [Same Sex Marriage Human Rights Aid Attorney Group], "*Doseikon Daremoga Jiyuuni Kekkonsuru Kenri* [Same Sex Marriage: Right for Anyone to Marry Freely]" (Akashi Shoin, 2016), pp. 219 to 256).

On 26 June 2013, the US Supreme Court found Section 3 of the Defense of Marriage Act ("*DOMA*"), which limited the definition of marriage and spouse under federal law to relationships between a man and a woman, violated the right to equal protection under the law and was thus unconstitutional. This resulted in the legal recognition of same-sex marriages under federal law. However, on the same day, a case on the constitutionality of a California law limiting marriage to between a man and a woman was dismissed by the US Supreme Court without substantive discussion. The Supreme Court thereby declined to determine whether provisions of state law prohibiting marriage between persons legally of the same sex determination violated the Constitution. As a result, lawsuits throughout the United States regarding state constitutions and state laws which prohibited marriage between persons of the same sex continued (Petitioner A Exhibit 100: pp. 214 to 218).

In one case, plaintiffs from Michigan, Kentucky, Ohio, and Tennessee, each of which had state laws prohibiting same-sex marriage, sued to have marriage between persons of the same sex recognized on the grounds that each respective state's laws banning same-sex marriage were unconstitutional. On the 26<sup>th</sup> of June 2015, the US Supreme Court decided that state laws banning same-sex marriage were unconstitutional. As a result, same-sex marriage was legalized throughout the United States (Petitioner A Exhibit 100: p. 218).

In its opinion, the US Supreme Court recognized that same-sex couples have the same right to marry as opposite-sex couples, finding that (i) the right to individual autonomy of marriage is inherent in the concept of individual autonomy, (ii) the right to marry is fundamental, (iii) recognizing the right to

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marry between persons legally of the same sex safeguards children of same-sex couples, and (iv) marriage is a keystone of the nation's social order.

- (ii) 24 May 2017 decision of the Justices of the Constitutional Court of Taiwan (J.Y. Interpretation No. 748) (Petitioner A Exhibits 101-1, 101-2 (translation)).

Chia-Wei Chi, a gay Taiwanese man, filed a petition regarding the constitutionality of the Taiwanese Civil Code provisions regarding marriage with the Taipei City Government and the Justices of the Constitutional Court, who have the power to decide Constitutional issues in the abstract. The petition sought the Justices' interpretation on whether a provision of the Civil Code that denied same-sex marriage violated Article 22 of the Constitution, which guarantees freedom of marriage, and Article 7 of the Constitution, which guarantees equality.

The Justices of the Constitutional Court noted, "*Persons without a spouse eligible to marry shall have their freedom to marry, which includes the freedom to decide 'whether to marry' and 'whom to marry'... Such decisional autonomy is vital to the sound development of personality and safeguarding of human dignity, and therefore is a fundamental right to be protected by Article 22 of the Constitution. Creation of a permanent union... for the committed purpose of managing a life together by two persons of the same sex will not... alter the social order established upon the existing opposite-sex marriage. Furthermore, [it will] constitute the... basis, together with opposite-sex marriage, for a stable society.*" The Justices also noted, "*The need, capability, willingness and longing, in both physical and psychological senses, for creating such permanent unions of intimate and exclusive nature are equally essential to homosexuals and heterosexuals, given the importance of the freedom of marriage to the sound development of personality and safeguarding of human dignity. Both types of union shall be protected by the freedom of marriage under Article 22 of the Constitution.*" The Justices concluded that the discriminatory treatment was not based on reasonable grounds and that it violated the principle of equality.

The Justices of the Constitutional Court also ordered the legislature to enact laws in accordance with the ruling of the court decision within two years, and stipulated that even if appropriate legislation were not passed within the prescribed period same-sex couples would be able to register their marriage under the current Civil Code.

### **(3) Increased demand to recognize same-sex marriage in Japan**

Today, an increasing number of people are demanding the right to same-sex

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marriage.

**i. Petition Seeking Human Rights Relief filed with the Japan Federation of Bar Associations.**

On the 7<sup>th</sup> of July 2015, a petition was filed with the Japan Federation of Bar Associations on the ground that "*it is a human rights violation not to have marriage between persons legally of the same sex recognized by law.*" As of the 15<sup>th</sup> of January 2019, there were 453 petitioners (from 41 prefectures). Petitioners all either seek, or may seek, to marry a partner of the same sex. 17,284 signatures were collected in support of said petition (as of 7 July 2018) (Petitioner A Exhibit 102).

The written statements submitted by these petitioners are filled with their heartfelt desire to be able to marry their same-sex partners. A glimpse of their emotions can be seen from part of the written statements included in "*Doseikon Daremoga Jiyuuni Kekkonsuru Kenri [Same Sex Marriage: Right for Anyone to Marry Freely]*" (Petitioner A Exhibit 100).

(i) A desire for societal recognition

- "*Of course it is important that we will get security, but I think the biggest factor is the emotional stability that comes from being recognized by society. I look forward to a society where I can tell people that I am married to her without being self-conscious*" (ibid. p. 51).
- "*From an existence not recognized to an existence that is recognized both legally and socially*" (ibid. p. 40).
- "*If same-sex marriage is recognized, it will strengthen our efforts to build a life together. While we are now living together, in fact we are just two persons living under the same roof. If we can get married, I think the two of us will be treated as being one in society*" (ibid. p. 48).
- "*[If same-sex marriage is established] I can express my gratitude to family members, relatives, friends to whom I have already come out and who have been supportive of us, and give / receive blessings of having become a full-fledged citizen [of Japan]*" (ibid. p. 49).
- "*I hope that when the laws are put in place and same-sex marriage becomes official, homosexuals living in rural areas find it easier to come out of the closet*" (ibid. p. 50).

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(ii) A desire for marriage and family

- *"If same-sex marriage becomes a norm in Japan, I think we can feel that we can have a family and have children" (ibid. p. 28).*
- *"I want to marry her. Some say that we can get legal benefits as a family if one of us adopts the other, but I do not want a parent-child relationship with her" (ibid. p. 138).*

(iii) A desire to live just like opposite-sex couples.

- *"There is only one thing I wish for: to be at the same starting line as opposite-sex couples. I want to have more options in life. If things do not change, I am so afraid of the future. I want to wear a wedding gown, and be blessed by everyone in my family and all of my relatives, friends and co-workers. I want to be able to take for granted things that heterosexuals have always taken for granted" (ibid. p. 52).*
- *"All I wish for is to live just like a heterosexual person. I'm not asking for anything more or anything special. I want to live a safe and happy life with the person I love. That is all" (ibid. p. 52).*

(iv) A resolution to logistical issues.

- *"The two of us bought a used house to live out our days there, but the title is in X's name. If something happens to X, like an unforeseeable accident, I want X's partner Y to inherit the entire house. For this reason, I seek same-sex marriage" (ibid. p. 101).*
- *"My current partner is a foreign national and in Japan where same-sex marriage is not recognized, my partner needs to obtain a student or working visa to obtain resident status. The only way we can now live together in Japan is to get a resident status other than through marriage, which is a great inconvenience" (ibid. p. 125).*

**ii. Various surveys**

- (a) In an October 2015 survey on sexual minorities conducted by NHK in cooperation with the Japan Alliance for Legislation to Remove Social Barriers based on Sexual Orientation and Gender Identity (covering all 47 prefectures of Japan, with 2,600 responses), 65.4% responded that they *"want laws that recognize*

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*marriage for same-sex couples*" (of a total of 2,397 persons who responded to this question) (Petitioner A Exhibit 103, 15/17).

- (b) In another survey conducted that same year, the "*Awareness on Sexual Minority – Report of the 2015 Nationwide Survey*" (Saori Kamano, Hitoshi Ishida, Takashi Kazama, Takashi Yoshinaka, Kazuya Kawaguchi) 2016 '*Awareness on Sexual Minority – Report of the 2015 Nationwide Survey*' Grants-in-Aid for Scientific Research "*Construction of Queer Studies in Japan*" Research Group (Principal Investigator: Kazuya Kawaguchi, Hiroshima Shudo University) ed.), (Covering all 47 prefectures, with 2,600 participants aged 20 to 79), 55.3% responded that they were in favor of, or slightly favorable to, same-sex marriage. In comparison, only 44.7% answered that they were either against or slightly against same-sex marriage (Petitioner A Exhibit 104-2, p. 152). In the aforementioned survey, 72.3% of respondents in their twenties and thirties were in favor of same-sex marriage, suggesting that among the younger generation same-sex marriage seems like a natural way to protect of rights of same-sex couples (Petitioner A Exhibit 104-2, Fig. 10-9 on p. 155).

Other surveys also corroborated the finding that a majority of people support same-sex marriage, although with narrower margins. In March 2015, in a public opinion poll conducted by the Mainichi Shimbun, 44% responded they were in favor of "*same-sex marriage*" while 39% were against (Petitioner A Exhibit 105). In a March 2017 NHK public opinion poll, 51% responded "yes" to the question, "*Should marriage between two men, or two women, be recognized?*" (Petitioner A Exhibit 106, Q. 24B on p. 6; Petitioner A Exhibit 107). In a May 2017 Asahi Shimbun public opinion poll, 49% responded that "*same-sex marriage should be recognized*" while 39% responded that "*it should not be recognized*" (Petitioner A Exhibits 108 and 109). Furthermore, in an October 2018 survey conducted by Dentsu Inc., 78.4% of those who responded said that they were "*for*" or "*slightly more for*" legally recognizing same-sex marriage, a strong majority compared to the 21.6% of respondents who said that they were "*slight more against*" or "*against*" the legal recognition of same-sex marriage (Petitioner A Exhibit 110).

- (c) During the lead up to the 48th general election for the House of Representatives (voting was held on 22 October 2017), the office of Professor Masaki Taniguchi of the University of Tokyo conducted a joint survey with the Asahi Shimbun of the electoral

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candidates. This survey, which had a 97% response rate, asked respondents whether they believed "*Marriage should be recognized between two men or two women*" (Petitioner A Exhibit 111). The fact that a leading newspaper would conduct a study of the attitudes of members of the House of Representatives on the issue of same-sex marriage demonstrates how important this policy issue is.

### **iii. Recommendations and Proposals**

The 33rd Symposium held by the Japan Society for Socio-Legal Studies on Family Issues in 2016, proposed establishing a new provision stating that "*two persons of opposite or same sexes may marry.*"

In September 2017, noting that "*it is impermissible to restrict a person's right to marry unless there are strong state and / or social interests that deny individual interests,*" the Science Council of Japan recommended that "*it is imperative to make marriage gender-neutral, and in order to do so, the Civil Code needs to be amended.*" (Petitioner A Exhibit 114: "*Teigen seitekimainoriti no kenrihosho wo mezashite – kon'in / kyoiku / roudo wo chuushin ni* [Recommendations for Guaranteeing the Rights of Sexual Minorities -- Marriage, Education and Labor]", pp. ii, 8 to 11). The Science Council of Japan "*represents Japan's scientists both domestically and internationally,*" and is authorized to provide policy recommendations to the government (Articles 2 and 5 of the Charter of the Science Council of Japan). As such, its recommendation carries considerable weight.

In 2018, the American Chamber of Commerce in Japan (ACCIJ) also recommended that the Japanese government extend the right to marry to same-sex couples (Petitioner A Exhibit 112, p. 2 "*Recommendation*").

In the same year, the Hokkaido Federation of Bar Associations passed a "*Resolution Seeking Equality in the System of Marriage to Legally Guarantee the Relationship of Same-Sex Couples as a Family*" on the ground that recognizing opposite-sex marriage but not recognizing same-sex marriage violates the human rights of same-sex couples wishing to get married (Petitioner A Exhibit 113).

As seen from the above, it has long been known that that there is a need for laws and a legal structure that include sexual minorities in Japanese society. Clear proposals and recommendations have already been made to codify marriage between persons legally of the same sex.



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#### **(4) Sub-conclusion**

The National Diet was aware before September 2018, when Petitioner Nakajima and Petitioner Christina got married in Germany (Petitioner Exhibit G2, 3), that the provisions of the current law which do not recognize marriage between persons of the same sex violates Articles 24(1) and 14(1) of the Constitution. There is now an established and growing awareness in the international and Japanese society that violating an individual's rights, or discriminating against a person, based upon the fact that an individual is LGBT is wrong. Globally, there has been a trend towards enacting legislation that recognizes same-sex marriage in order to protect the rights of LGBT persons. Furthermore, an increasing number of people are seeking same-sex marriage in Japan. For all of these reasons, the National Diet was on notice that the current laws do not protect LGBT citizens' rights, and are unconstitutional.

### **3. The National Diet has neglected to make legislative changes for an extensive period of time without justification.**

In addition to the circumstances set forth above, the implementation of the legislative measures necessary to recognize marriage between same-sex couples is neither expensive nor time consuming. Thus, the National Diet had little justification for its failure to make the necessary legislative changes by September 2018, when Petitioner Nakajima and Petitioner Christina got married in Germany.

### **4. Conclusion**

For all of the reasons above, the current provisions governing marriage violate Articles 24(1) and 14(1) of the Constitution, and that the National Diet has failed, without justification, to take legislative measures to rectify this violation.

Therefore, Respondent is liable for damages under Article 1 of the State Redress Act for legislative inaction, i.e., the failure to enact legislation recognizing marriage between a two people of the same sex.

## **VIII Occurrence of damage**

Respondent's legislative inaction, i.e., the failure to enact legislation recognizing same-sex marriage, has infringed upon Petitioners' constitutionally guaranteed freedom of marriage, and as a result has denied Petitioners the emotional / social benefits, legal and economic rights / interests, and actual benefits that are concomitant to the social recognition conferred by marriage. Petitioners have also suffered, and continue to suffer, serious harm from the stigma attached to them for being in a "*relationship not approved by society*" and as a result of all of the above, have suffered significant emotional distress.

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If their emotional distress were given a monetary value, it would be no less than one (1) million yen for each Petitioner.

## **IX Conclusion**

Therefore, based on Article 1(1) of the State Redress Act, Petitioners seek payment from Respondent in the amount of one (1) million yen to each Petitioner, with interest accrued thereon at the rate of 5% per annum as set forth in the Civil Code, from the date of service of this Complaint until the date the amount is fully paid.

- End -

## Evidence

As set forth in the Description of Evidence.

### Annexes

1	Duplicate of the Complaint	One copy
2	Copy of Petitioner Exhibits	Two copies each
3	Description of Evidence	Two copies each
4	Letter of attorney in litigation	Twelve copies
5	Letter of attorney (sub-attorney)	Two copies