

Judgment (Court 802) delivered at 11am on March 17, 2021  
Case No. (Wa) 267 of 2021 Case re Claim for Damages  
(Second Civil Division, Three Judge Panel: Chief Judge Tomoko Takebe, Judge Ichita Matsunaga, Judge Yuya Kawano)

Plaintiffs: Plaintiffs Nos 1 to 6  
Defendant: The State

## Decision

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

## Summary of the Judgment

1. The provisions of the Civil Code and the Family Register Act which do not recognize marriage between same-sex couples (the "Provisions") do not violate Paragraphs 1 and 2 of Article 24 of the Constitution<sup>1</sup>.
2. The Provisions do not violate Article 13 of the Constitution<sup>2</sup>.
3. The fact that the Provisions fail to provide same-sex persons with any legal means to benefit from any of the legal benefits that arise from marriage exceeds the scope of discretion granted to the legislature and, to such extent, the Provisions violate Article 14, Paragraph 1 of the Constitution<sup>3</sup>.
4. In the context of the application of Article 1, Paragraph 1 of the State Redress Act, the fact that the Provisions have not been amended or repealed is not illegal<sup>4</sup>.

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<sup>1</sup> Translator's note:

Article 24.

1. 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.
2. With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

<sup>2</sup> Translator's note:

Article 13. All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

<sup>3</sup> Translator's note:

Article 14. All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

<sup>4</sup> Translator's note:

Article 1 (1) When a public officer who exercises the public authority of the State or of a public entity has, in the course of his/her duties, unlawfully inflicted damage on another person intentionally or negligently, the State or public entity shall assume the responsibility to compensate therefor.

## SUMMARY OF FINDINGS AND REASONS

The summary of this Court's judgment is as follows. The numbering below does not correspond to the numbering in the original judgment.

1. The issue in this case is whether the Provisions which limit marriage to heterosexual couples violate Article 13, Article 14, Paragraph 1, and/or Article 24 of the Constitution; and whether, in the context of the application of Article 1, Paragraph 1 of the State Redress Act, the fact that the Provisions have not been amended or repealed should be considered illegal.
2. The summary of findings by the Court, based on evidence presented to it, is as follows:
  - (1) Sexual orientation refers to the attraction a person feels towards another person in a sensual, emotional or sexual sense. A person who has such feeling of love and sexual attraction towards a person of the opposite sex is heterosexual, and a person who has such feeling of love and sexual attraction towards a person of the same sex is homosexual. Such feelings of attraction cannot be chosen or changed at one's own will.
  - (2) During the Meiji Period<sup>5</sup>, homosexuality was considered a mental disorder that should be treated and was strictly prohibited. In addition, the Meiji Civil Code defined marriage as a union between a man and a woman for the purpose of living jointly for life, consistent with the moral and social requirements. Under this view of the Meiji Civil Code, marriage was for a man and woman to live together as husband and wife and not necessarily for the sole purpose of producing children.
  - (3) From the end of World War II to around 1980, homosexuality continued to be regarded as a mental disorder that needed to be treated, and in the field of education, homosexuality was considered as an act that violated sound social morals and a potential disruption to the social order on sexuality. In 1947, the current Civil Code was introduced, but marriage was interpreted to mean the spiritual and physical union between a man and a woman to form a marital relationship consistent with social norms, and same-sex marriage was naturally not recognized.
  - (4) Since 1973, however, the American Psychiatric Association and the World Health Organization have demonstrated that homosexuality is not a mental disorder. In Japan, similar medical views began to prevail from around 1981.
  - (5) Internationally, more and more countries have introduced same-sex marriage or the Registered Partnership System. In some countries, courts have declared that the failure of their legal system to recognize same-sex marriage is unconstitutional. In Japan, since 2015, the number of local governments that have introduced the Registered Partnership System<sup>6</sup> has also increased.
  - (6) Opinion surveys conducted since 2015 show that approximately 50 percent of those surveyed react positively towards same-sex marriage or affording legal protections

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<sup>5</sup> Translator's note: The Meiji Period in Japan refers to the period from 1868 to 1912.

<sup>6</sup> Translator's note: The so-called "Partnership Registration System" in Japan is a social recognition of the loving relationship between same-sex couples but does not confer any of the legal benefits of marriage.

to same-sex couples. By age group, however, while people under the age of 60 generally exhibit a positive attitude, reactions from those over 60 are mostly negative.

3. Summary of the analyses by this Court as to whether the Provisions violate Articles 24 and/or Article 13 of the Constitution is as follows.

- (1) Considering the purposes of Article 24, Paragraph 1 of the Constitution, the so-called freedom of marriage should be accorded proper respect. However, in the early days of the post-war period when the Civil Code was amended and the Constitution enacted, homosexuality was considered a mental disorder and same-sex marriage was considered impermissible. In light of this background as well as the use of the term “both sexes” in Article 24 - a term that implies the union between a man and a woman, Article 24 should be considered as providing for heterosexual marriage and not same-sex marriage.
- (2) Article 24, Paragraph 2 of the Constitution, which is an individual provision addressing matters relating to marriage and family, should be interpreted as granting to the legislature the primary responsibility to establish specific systems [relating to marriage and family matters]<sup>7</sup> using its reasonable legislative discretion. Considering such purpose, it is difficult to interpret Article 13, a general human rights provision, as guaranteeing a right to a specific system regarding marriage and family matters of same-sex couples, including same-sex marriage. It is also difficult, substantively, to derive a specific system pertaining to same-sex marriage solely through the interpretation of Article 13.
- (3) Accordingly, we do not find that the Provisions violate Articles 24 or 13 of the Constitution.

4. Next, the following is a summary of this Court’s reasoning in relation to whether the Provisions violate Article 14 of the Constitution.

- (1) Based on the foregoing interpretation of Articles 24 and 13 of the Constitution, the legislature has broad discretion in determining marriage and family matters in relation to same-sex couples.
- (2) According to the provisions of the Civil Code and the Family Register Act, marriage is a legal act that, simultaneously and subsequently, confers comprehensive legal benefits (hereinafter referred to as “Legal Benefits of Marriage”) tied to the status created by a relationship, namely the creation of a family relationship between the parties to the marriage and their family, public certification of the relationship by means of the family register and a legal status comprising of a variety of legal rights and obligations.

Heterosexual couples can avail themselves of the Legal Benefits of Marriage, but same-sex couples cannot, and that constitutes differential treatment (hereinafter referred to as “Differential Treatment”), in that the latter are denied the Legal Benefits of Marriage. Therefore it is necessary to consider whether such

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<sup>7</sup> Translator’s note: Bracketed words added by translator.

differential treatment has a reasonable basis.

Under the Provisions, a homosexual person can legally marry a person of the opposite sex; however, even if a homosexual person were to legally marry a person of the opposite sex, such marriage, in most circumstances, would not embody the fundamental essence of marriage, and cannot be construed as marriage contemplated by Article 24 of the Constitution and the Provisions. Since a homosexual person cannot be regarded as enjoying the same legal benefits as a heterosexual person, we cannot deny that differential treatment on the basis of sexual orientation exists.

- (3) (i) Sexual orientation is a kind of inherent characteristic of a person which is determined irrespective of one's own will. In that sense, it is equivalent to sex and race. Whether differential treatment based on characteristics of this nature has a reasonable basis needs to be considered carefully.
- (ii) Considering various circumstances, including that the institution of marriage has survived since the Meiji Civil Code and that many couples still marry to this day, it can be concluded that the Legal Benefits of Marriage through marriage is an important legal benefit. Considering that the only difference between heterosexual and homosexual persons is their sexual orientation and sexual orientation cannot be chosen or changed by one's own will, there is no basis for differentiating between heterosexual persons and homosexual persons with respect to the Legal Benefits of Marriage, and both homosexual persons and heterosexual persons must be able to equally enjoy such legal benefits.
- (iii) While both the Meiji Civil Code and the current Civil Code have been interpreted, as a matter of course, as not allowing same-sex marriage, this was because, at the time the legislation was enacted, homosexuality was considered a mental disorder and homosexual couples were considered incapable of consummating normal marital relationships. By around 1992, however, it became established knowledge that homosexuality is not a mental disorder and there is no longer any scientific or medical basis for denying same-sex marriage.
- (iv) In light of the provisions of the current Civil Code, the background to amendment to the Civil Code and the purpose of marriage under the Meiji Civil Code, the important purpose of the Provisions is not only to provide legal protection to cohabitating heterosexual couples who bear and raise children, but also to cohabitating heterosexual couples irrespective of whether or not they have a child. Article 24 of the Constitution likewise cannot be interpreted to deny all legal protections to same-sex couples that are in a cohabitating relationship. Accordingly, neither the Provisions nor Article 24 of the Constitution can be a basis to deny any and all legal protection to same-sex couples.
- (v) In Japan, both the increasing number of local governments that have introduced the Registered Partnerships System and the positive responses in polls related to same-sex marriage and providing legal protection to same-sex couples demonstrate the increasing public awareness of the need to

eliminate differential treatment on the basis of sexual orientation. This is also the case in other countries.

- (vi) On the other hand, the perception that homosexuality is a mental disorder and must be prohibited was prevalent until around 1980 and was also a widely held belief in the area of education. One of the reasons why many people in the relatively older age group of 60 and above have formed a negative opinion toward same-sex marriage is attributable to this widely-held perception which has contributed to the general public's negative opinion and views on same-sex marriage. In light of the foregoing, the fact that not an insignificant number of citizens hold such negative opinions and values is something that the legislature may take into consideration when exercising its legislative discretion.

However, it is now established knowledge that homosexuality is not a mental disorder and cannot be chosen or changed at one's own will. To say that homosexual couples cannot even partially enjoy the Legal Benefits of Marriage, which is an important legal benefit, without the understanding or tolerance of the dominant heterosexual majority is a glaring lack of protection of homosexual persons compared to heterosexual persons. Taking into consideration the growing public awareness of the need to eliminate discriminatory treatment on the basis of sexual orientation and based on similar situations prevailing in other countries, the fact that not an insignificant number of citizens hold negative opinions and values toward same-sex marriage should only be given limited weight when considering whether there is any reasonable basis for not providing homosexual persons with legal means to enjoy, at least partially, the Legal Benefits of Marriage.

- (4) Matters pertaining to marriage and family in relation to same-sex couples cannot be unequivocally determined and must therefore await the legislative discretion of the legislature. If the legislature, within its broad legislative discretion, determines that the Provisions do not apply to same-sex couples, taking into consideration that matters relating to marriage and family require a comprehensive determination based on various social factors, including national tradition and public sentiment, and consideration of the overall principles that govern marital and parent-child relationships of the relevant era, as well as the existence of not an insignificant number of citizens that hold negative opinions and values toward same-sex marriage, such determination cannot be considered forthwith as lacking a reasonable basis.

However, the only difference between heterosexual persons and homosexual persons is their sexual orientation, which cannot be chosen or changed by one's own will and there should be no difference in legal benefits that can be enjoyed by persons of any sexual orientation. Notwithstanding this, no legal means have been made available to homosexual persons to enjoy even a part of the Legal Benefits of Marriage. When considering whether the failure to even partially provide Legal Benefits of Marriage has any reasonable basis, the growing desire in Japan and other countries to eliminate the distinction between homosexual and heterosexual persons should be taken into consideration, the existence of not an insignificant number of citizens holding negative opinions and values toward same-sex marriage should be given limited weight.

Based on the foregoing, this Court must conclude that the failure of the Provisions to offer legal means to same-sex couples to enjoy, even partially, the Legal Benefits of Marriage, exceeds the legislative discretion of the legislature and that the Different Treatment, to that extent, is discriminatory treatment that lacks a reasonable basis.

- (5) Accordingly, the Provisions, to the extent described above, violate Article 14, Paragraph 1 of the Constitution.
5. The following is a summary of the consideration by this Court as to whether, in the context of the application of Article 1, Paragraph 1 of the State Redress Act, the fact that the Provisions have not been amended or repealed should be considered illegal.
- (1) Generally speaking, introduction of same-sex marriage and other similar systems in countries outside Japan began to increase after 2000. However, the adoption of the Registered Partnership System in Japan lagged behind and only began after October 2015. In addition, according to recent surveys, the majority of people in the relatively older age group of 60 and above hold negative views, and accordingly it may be inferred that the positive views towards same-sex marriage became the majority view relatively recently. Furthermore, according to the evidence, discussion in the Diet<sup>8</sup> regarding protection of same-sex couples did not begin until 2015. In addition to these circumstances, in light of the fact that there was no judicial decision on the constitutionality of the lack of a system for same-sex marriage, this Court must conclude that it was not feasible for the Diet to immediately recognize that the Provisions are in violation of Article 14, Paragraph 1 of the Constitution.
  - (2) Accordingly, in the context of the application of Article 1, Paragraph 1 of the State Redress Act, the fact that the Provisions have not been amended or repealed is not illegal.
6. Based on the foregoing, this Court has determined that there is no basis to uphold the Plaintiffs' claims.

[END]

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<sup>8</sup> Translator's note: the 'Diet' is Japan's national bicameral legislature.