AMICUS BRIEF

1 APRIL 2024

1. This *amicus brief* is filed in support of the petitioners in the Complaints in 6 cases in "The Freedom of Marriage For All" Lawsuit.[1] This brief seeks to complement the petitioners' arguments under the Constitution of Japan, by drawing upon insights from comparative constitutional law and international human rights law. We respectfully submit that the constitutional rights applicable to the present petition – that is, the rights of dignity, equality, and autonomy – are integral to other bills of rights in other Constitutions, as well as to international human rights treaties. Constitutional courts across the world, and adjudicatory bodies under human rights law, have extensively considered the application of these rights to the question of same-sex marriage.[2] We therefore submit that a consideration of international and comparative constitutional law will be of assistance towards a just adjudication of the present petition.

2. This brief advances the following submissions: (a) international human rights norms support the recognition of the right of LGBTQIA+ couples to marry; (b) an analysis of comparative constitutional law illuminates how the recognition of same-sex marriage advances the Japanese Constitution's goals of securing the dignity, equality, and autonomy/privacy rights of all persons;[3] and (c) the judicial branch/courts are appropriate forums to grant the remedies necessary to ensure recognition of same-sex marriage, including a suspended declaration of invalidity or a reading down of the *Civil Code*.

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[1] Six cases have been filed in The Marriage For All Lawsuit, including: the Complaints dated 14th February 2019, before Sapporo District Court, Tokyo District Court, Nagoya District Court and Osaka District Court; the Complaint dated 5th September 2019, before Fukuoka District Court; and, the Complaint dated 26th March, 2021, before Tokyo District Court.

[2] Same-sex marriage means a marriage between two persons of the same legal sex. It therefore includes marriages between trans and cis couples, such as a trans man whose legal sex is female and a cis woman.

[3] In the context of this brief, we use the terms "autonomy", "personal autonomy" (protected under the Japanese Constitution) or "decisional autonomy" interchangeably with "privacy", in consonance with comparative constitutional and international human rights jurisprudence, which views decisional autonomy as a facet of the right to privacy. References to the concept of "privacy" may therefore be understood accordingly.

A. International Human Rights Norms

3. The protection and recognition of LGBTQIA+ rights are deeply embedded in international human rights law. Rights to equality, non-discrimination, and dignity are guaranteed by the International Covenant of Civil and Political Rights ["ICCPR"]; multiple UN human rights treaty bodies have affirmed that sexual orientation and gender identity are protected grounds when it comes to the rights to equality and non-discrimination. Article 23(2)-(4) of the ICCPR guarantees the right to marriage. While traditionally this has not been interpreted to apply to same-sex couples, it is our submission that Article 23, read with Articles 2 and 26 of the ICCPR requires that access to marriage be guaranteed to same-sex couples. The Human Rights Committee shared this view in its concluding observations in its seventh periodic report on Japan, where it recommended that Japan ensure that same-sex couples can enjoy all rights enshrined in the Covenant, including same-sex marriage based on Articles 2 and 26.[4]

4. In addition, a number of countries around the world have recognised that LGBTQIA+ rights extend to the recognition of marriages and/or civil unions. Same-sex marriage is recognised in thirty-six countries,[5] and in every continent (other than Antarctica). Civil unions are recognized in a further twelve jurisdictions.[6] Legal or de facto recognition short of marriage or civil unions exists in at least seven further jurisdictions[7] – including the "partnership certification system" and the "family-ship certification system" in many

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[4] Human Rights Committee, Seventh Periodic Report of Japan, November 30 2022, paras 10 and 11(b). See: <docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsuBJT%2Fi29ui%2Fb4Ih9%2FUIJO87S0HPMR1PnCPt3LQO6EoILe709268JsfEokJ6QyNqFgswSBy1rovzRJaQqYHclTttywUvvrbUCl%2F6iBnTGHkY>

[5] Netherlands (04/2001); Belgium (06/2003); Spain (07/2005); Canada (07/2005); South Africa (11/2006); Norway (01/2009); Sweden (05/2009); Portugal (06/2010); Iceland (06/2010); Argentina (07/2010); Denmark (06/2012); Brazil (05/2013); France (05;2013); Uruguay (08/2013); New Zealand (08/2013); Luxembourg (01/2015); United States (06/2015); United Kingdom (11/2015); Colombia (04/2016); Finland (03/2017); Malta (09/2017); Germany (10/2017); Australia (12/2017); Austria (01/2019); Taiwan (05/2019); Ecuador (07/2019); Northern Ireland (01/2020); Costa Rica (05/2020); Chile (03/2022); Switzerland (07/2022); Slovenia (07/2022); Cuba (09/2022); Mexico (12/2022); Andorra (02; 2023); Estonia (01/2024); Greece (02/2024). The Parliament of Thailand passed a same-sex marriage bill on March 27 2024, subject to Senate approval and royal endorsement.

[6] Czech Republic (07/2006); Hungary (07/2009); Lichtenstein (09/2011); Croatia (09/2014); Cyprus (12/2015); Italy (06/2016); San Marino (12/2018); Monaco 06/2020); Montenegro (07/2021); Aruba (09/2021); Bolivia (03/2023); Latvia (07/2024).

[7] Israel (1994); Gibraltar (2014); Japan (01/2019); Hong Kong (06/2019); Cayman Islands (2020); Bermuda (2022); Cambodia (in approximately 68 communes of 20 provinces). In Nepal, the first same-sex marriage was registered in November 2023, following an interim order of the Supreme Court; a final judgment of the Court is awaited.

Japanese municipalities. This shows that the recognition of same-sex marriage is not confined to a particular legal tradition, a particular corner of the globe, or a particular kind of society. Instead, there is a growing realisation within the global community of nations – of which Japan is a member – that the equal moral standing of LGBTQIA+ individuals is incomplete without enabling them to exercise the full panoply of rights and freedoms available to the rest of society, including marriage.

5. We therefore submit that the above consideration of international human rights norms provides strong and persuasive reasons for Japan to provide access to marriage for same-sex couples, on equal and non-discriminatory terms. Doing so would not only be consistent with Japan's own Constitution (for reasons explained below), but would also ensure that Japanese law is consistent with international human rights norms.

B. Constitutional Rights

6. The imperative towards the recognition of same-sex marriage is underpinned by the understanding that such recognition advances constitutional rights, or commitments, to equality, dignity, and privacy. These rights find expression in Articles 13 (dignity), 14, para 1 (equality), 24, para 1 (right to marriage), and 24, para 2 (individual dignity as a founding principle underlying marriage) of the Japanese Constitution. We respectfully submit that the manner in which other constitutional courts have interpreted these rights in the context of same-sex marriage provide persuasive grounds for a similar understanding to be adopted in the case of similar provisions within the Japanese Constitution.

7. The institution of marriage is one of the most important social institutions in existence. The ability – and the choice – to participate in the institution of marriage is both of intrinsic value, as well instrumental towards obtaining a bouquet of other valuable social rights (discussed below). Intrinsically, marriage is a source of social/community validation of a relationship. Social recognition is a marker of equal moral membership in society; more tangibly, social recognition offers a sense of security, especially to vulnerable couples and partners. Instrumentally, marriage is a gateway to a number of

other crucial legal entitlements, such as the right to found a family and enjoy family life, access to housing, health-care and pension benefits, inheritance of property, adoption, social security, hospital and prison visitation rights, insurance, and – in some contexts – tax arrangements.[8] The brief of the petitioners sets out these entitlements in some detail.

8. Consequently, marriage is not simply a benefit that is conferred by the State, and which can be granted – or withdrawn – at the discretion of the State. In modern society, marriage – and marital status – for those who choose it, is a vital source of dignity, fulfilment, and self-respect, and the ability to have and enjoy a family life. It is important to stress that part of what makes access to the social institution valuable is the ability to *choose*: that is, whether of the opposite sex or of the same sex, couples can *choose* whether or not to marry. We respectfully submit that the Constitution grants them that choice.

9. Dignity – which is protected under Articles 13 and 24, para 2 of the Japanese Constitution – is understood in comparative constitutional jurisprudence in two, complementary senses. *First*, to treat an individual with dignity means to treat them – and their choices – as "ends" in themselves, worthy of respect and concern, and not as merely as a "means." In the context of the present case, dignity compels the State and society to treat an individual's choice of spouse with *equal* concern and respect, regardless of sexual orientation or gender identity. *Secondly*, "dignity" in a positive sense requires the State to take specific action in order to ensure that all individuals possess the capabilities necessary to access a base level of physical, psychological, material, and social well-being. In the present case, given the importance of the institution of marriage in modern society as a source of both social well-being (i.e., in being recognised as an individual worthy of accessing the institution on equal terms, and not being treated as an outsider) as well as material well-being (as a gateway to many other rights, discussed below), the recognition of same-sex marriage is essential to guaranteeing individual dignity in its second sense as well. See **Rosalind Dixon and**

[8] See, for example, Ghaidan v Godin-Mendoza [2004] UKHL 30; 3 WLR 113; Satchwell v President of Republic of South Africa and Another (CCT45/01) [2002] ZACC 18; 2002 (6) SA 1; 2002 (9) BCLR 986 (25 July 2002).

Martha C. Nussbaum, "Abortion, Dignity, and a Capabilities Approach" in Beverley Baines, Daphne Barak-Erez and Tsvi Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press, 2012) 64; Rosalind Dixon and Martha C. Nussbaum, "Children's Rights and a Capabilities Approach: The Question of Special Priority" (2012) 97(3) *Cornell Law Review* 549; Martha C. Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice" (2003) 9(2–3) *Feminist Economics* 33.

10. A leading global exposition of these ideas is found in **Minister of Home Affairs v Fourie, [2005] ZACC 19,** where the Constitutional Court of South Africa[9] highlighted both these aspects of dignity as underpinning the constitutional imperative to recognize same-sex relationships, noting that the failure by the law to recognize same-sex relationships "represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone", thereby violating their entitlement to equal dignity.[10] In addition, it noted that marriage carries a range of tangible benefits, including material benefits and protection in the event of relationship breakdown, which could be considered necessary for the protection of full human dignity, and capabilities.

11. When the legal regime excludes a group of people from participation in a valuable social institution purely on the basis of ascriptive characteristics, it sends a public message of subordination.[11] Furthermore, by virtue of all the other rights that marriage is a

[9] South Africa is one of the leading jurisdictions on civil, political, and social rights, with its judgments being influential across the African continent, the US and Canada, Europe, and India, among others, South African judgments also engage deeply with, and are informed by, international human rights norms, and have in turn contributed to the evolution of rights doctrine within international bodies.

[10] Minister of Home Affairs v Fourie [2005] ZACC 19, at para 71.

[11] Fourie (supra), at para 72.

gateway to, exclusion from the institution has a direct and immediate consequence on individual well-being, which is an essential component of dignity.[12]

12. With respect to equality, the Constitutional Court noted that:

> Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society. (para 60)

13. The Court went on to draw on the reasoning of Judge Sachs in previous cases (**see below**) to establish the close connection between dignity and equality, and, with their reasons explained above, noted that exclusion from the institution of marriage is a violation of the right to equality. Moreover, this exclusion is based purely on ascriptive characteristics – i.e., sexual orientation – and is therefore impermissible.[13]

14. Judge Sachs had detailed the manner in which the rights to dignity and equality also overlap and reinforce each other in this context in his concurring opinion in **National Coalition for Gay and Lesbian Equality vs Minister for Justice, 1998 ZACC 15,** which decriminalised same-sex relations. The observations, however, apply equally to exclusion from the right to marry:

> One of the great gains achieved by following a situation-sensitive human rights approach is that analysis focuses not on abstract categories, but on the lives as lived and the injuries as experienced by different groups in our society. The manner in which discrimination is experienced on grounds of race or sex or religion or disability varies considerably - there is difference in difference. The commonality that unites them all is the injury to dignity imposed upon people as a consequence of their belonging to certain groups. Dignity in the context of equality has to be understood in this light. The focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons. Such focus is in fact the guarantor of substantive as opposed to formal equality.
> At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because

[12] Fourie, (supra), at para 73.
[13] Fourie (supra), at para 114.

they belong to a particular group. The indignity and subordinate status may flow from institutionally imposed exclusion from the mainstream of society or else from powerlessness within the mainstream; they may also be derived from the location of difference as a problematic form of deviance in the disadvantaged group itself, as happens in the case of the disabled. In the case of gays it comes from compulsion to deny a closely held personal characteristic. To penalise people for being what they are is profoundly disrespectful of the human personality and violatory of equality.[14]

15. Finally, as noted above in Footnote 2, the global understanding of the constitutional right to privacy – in its sense of a right to decisional autonomy – finds an echo in article 13 of the Japanese Constitution, as a part of the right to pursue happiness. Additionally, it is closely connected to, and in some cases interchangeable with, the right to marry, and related equality-based fundamental interests.[15] Further, the right to privacy has, as one of its essential components, a right to decisional autonomy: that is, a right to make intimate and private decisions without being subjected to a legal or social cost for such decisions. The choice of a life partner is one of the most intimate choices that an individual can make, over the course of their lifetime. Under a legal regime of exclusion from the marital institution, however, this choice is treated as being of less value under the eyes of law if one's partner belongs to the same sex. This is, therefore, a direct infringement of the right to privacy, understood in terms of decisional autonomy and the pursuit of happiness. To reiterate, we respectfully submit that the same interpretation can be made in the context of the Japanese Constitution, as it is generally understood that a right to privacy and a right to decisional autonomy are guaranteed under Article 13 of the Japanese Constitution, while the Japanese Constitution does not explicitly stipulate these rights.

16. To elaborate, decisional autonomy is a key part of the underpinning to a right to marry for same-sex couples. It also underpins the importance of understanding marriage as a choice same-sex couples can make: the right in question is as much a right to marry, as not to marry, as a fundamental expression of individual's personal identity and self-realization. This was recognised, for example, by the Supreme Court of Canada in **M vs H, [1999] 2 S.C.R. 3**, where, in holding that the exclusion of same-sex couples from a

[14] See National Coalition for Gay and Lesbian Equality v Minister for Justice, 1999 ZACC 15, at paras 126, 129.
[15] See, for example, Loving v. Virginia, 388 U.S. 1 (1967); Ghaidan (supra).

spousal support regime was unconstitutional, the Court also ensured – in crafting its remedy – that same-sex couples would retain the choice of "opting out" if they so desired. The Court noted that any interpretation of the law must respect the rights of individuals to "choose to order their own affairs in a manner reflecting their own expectations."[16]

17. It is also important to note that the violation of the rights to equality, dignity, and privacy can be caused both by State action, but also by *omission* – including legislative omission. In **Vriend vs Alberta, [1988] 1 S.C.R. 493,** the Supreme Court of Canada held that the *exclusion* of sexual orientation as a protected ground of discrimination under the Alberta Individual Rights Protection Act (IRPA)[17] violated the Canadian Charter of Rights and Freedoms,[18] as it effectively precluded an individual from seeking a legal remedy against discrimination. IRPA was a general anti-discrimination statute, but as originally drafted, did not expressly list sexual orientation as a prohibited ground of discrimination. The Court in **Vriend, supra,** also held that this omission represented an unconstitutional violation of the equality rights of LBGTQI+ Canadians.

18. While **Vriend, supra,** was not concerned with the issue of marriage, its logic is squarely applicable to a case where the Civil Code prohibits – or is interpreted to prohibit – same-sex couples from accessing the institution of marriage on equal terms with the rest of society.

19. The above arguments also make clear why a "differential" regime of recognition – such as the partnership certification system in certain Japanese municipalities, or a "civil union" regime, as followed in certain other countries – is insufficient. In **Lewis vs Harris, 188 N.J. 415 (2006),** the New Jersey Supreme Court held that the exclusion of same-sex couples from the marital institution was unconstitutional, but allowed the anomaly to

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[16] See M vs H [1999] 2 S.C.R. 3, at paragraph 14.

[17] The Individual Rights Protection Act is a civil rights statute enacted by the Canadian State of Alberta, which imposes obligations of non-discrimination on both public and private parties. It applies to various contexts, such as employment, tenancy, equal pay, etc.

[18] The Canadian Charter of Rights and Freedoms is a bill of rights, which is a part of the Constitution of Canada. The Charter protects various rights, including equality and non-discrimination rights, linguistic and cultural rights, minority and indigenous, the freedom of speech, conscience, and belief, etc.

be corrected through offering "civil unions" to same-sex couples. In a powerful dissenting opinion, three justices noted that:

> We must not underestimate the power of language. Labels set people apart as surely as physical separation on a bus or in school facilities. Labels are used to perpetuate prejudice about differences that, in this case, are embedded in the law. By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as "real" marriage, that such lesser relationships cannot have the name of marriage. (**page 467**)

20. This dissent subsequently became the prevailing view in the United States Supreme Court decision in **Obergefell vs Hodges, 576 U.S. 644 (2015),** which specifically recognised same-sex marriage under the US Constitution, on grounds of privacy, dignity, and equality. Other constitutional courts, across the world, have also held along similar lines. In **Sunil Babu Pant and Ors vs Nepal Government and Ors, Writ No. 917 of 2007 NJA Law Journal (2008), 262,** the Supreme Court of Nepal held that "looking at the issue of same-sex marriage, we hold that it is an inherent right of an adult to have marital relation with another adult with his/her free consent and according to his/her will" (pp. **285-286**). The Court based this on the finding that the constitutional guarantees of non-discrimination, equality, and dignity required that LGBTQIA+ individuals be able to enjoy the full panoply of rights in society, as enjoyed by heterosexual couples. While in that judgment, the Supreme Court of Nepal directed the government to set up a committee to examine the modalities by which to implement same-sex marriage; however, on the government's failure to do so, on 27th June 2023, the Supreme Court passed an interim order directing the government to register same-sex marriages; following this, in November 2023, the first Nepali same-sex couple registered their marriage.

21. Similar reasoning may also be found in the judgment of the Constitutional Court of Taiwan in Judicial Yuan Interpretation No. 748 of May 24, 2017. The Constitutional Court ruled that insofar as the marriage provisions of the Taiwanese Civil Code did not allow persons of the same sex to marry, they violated both the right to equality and the freedom to marry. In particular, the Constitutional Court held that the decision of *whom* to marry (regardless of sex) was an essential facet of decisional autonomy and human

dignity. The Constitutional Court granted the legislature two years to determine how to effectuate this right in law (failing which, same sex couples would be entitled to have their marriages registered under the Civil Code). The Taiwanese legislature complied with the judgment, an enacted legislation to authorise same-sex marriages on 17 May, 2019.

22. In Latin America, the regional Inter-American Court of Human Rights issued an advisory opinion in 2017 that same-sex marriage was protected under the right to family life, and equality and non-discrimination, under the American Convention on Human Rights (**OC-24/2017**). Following this, the Constitutional Court of Costa Rica – the government that had approached the IACHR for its advisory opinion – also ruled that the exclusion of LGBTQIA+ couples from the institution of marriage was unconstitutional, and granted the legislature eighteen months to remedy the defect in the law. Costa Rica accordingly legalised same-sex marriage. Similarly, the Constitutional Court of Colombia legalised same-sex marriages on the basis of a *right* to marry without discrimination, and the Supreme Court of Mexico held that it was unconstitutional for the legislature to restrict the definition of marriage to heterosexual unions.

23. We therefore submit that courts belonging to different legal traditions and different social contexts have, remarkably, articulated very similar reasoning: that the exclusion of LGBTQIA+ couples from the institution of marriage is a violation of their rights to equality and non-discrimination, dignity, and decisional autonomy. While the nature of the remedy may vary (see below), courts have recognised that, given the social and material valence of the institution of marriage in modern societies, LGBTQIA+ couples cannot be said to enjoy the full panoply of rights and freedoms in society, on equal terms with other individuals, without extending to them the right – and the choice – to access the institution of marriage.

24. It is sometimes argued that the recognition of same-sex marriage will go against deeply held religious beliefs. To this, two responses may be made. The legal recognition of same-sex marriages focuses upon the *civil* status conferred by the *legal* regime of marriage (this is borne out by the fact that in Japan, marriages are regulated under the

Civil Code). It does not seek to displace religious understandings of what constitutes marriage *for the purposes* of religion. Thus – and *secondly* – the legal recognition of same-sex marriage does not compel the performance of *religious* ceremonies that have to do with sanctifying or blessing marriages (see, e.g., legislation in Australia). Religious conviction, therefore, ought not to be the basis of restricting or denying the right to marry to same-sex couples. As noted above, this is underscored by the fact that, in Japan, marriage is a matter of civil rather than religious law.

C. The Role of the Judiciary

25. In the countries where same-sex marriage is recognised, there have been different paths that have led to recognition. In countries such as the Netherlands, Uruguay, and Andorra (among others), recognition has been achieved through legislation. In Ireland, recognition was achieved through a successful referendum to amend the Constitution of Ireland. However, in a number of countries, such as the United States, Brazil, Ecuador, and South Africa, recognition of same-sex marriage has come about through judicial rulings, rendered in constitutional challenges to laws that prohibited (or were interpreted to prohibit) same-sex marriages.[19] In countries such as Austria, Germany and the United Kingdom, while recognition has come about through legislation, courts have played an important *catalysing* role through interpreting legislation in order to extend various legal benefits to LGBTQIA+ couples (**see below**).[20]

26. The role of courts is particularly important when there is a "clogging" in the political process, due to which legal recognition of the rights of certain historically marginalised groups fail to keep pace, or be fully responsive to, evolving societal attitudes. This is often due to the onerous and time-consuming nature of the legislative process, which ensures that priority is not accorded to the rights-based claims made by majorities,

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[19] As noted above, following an interim order of the Supreme Court of Nepal in June 2023, Nepalese authorities have been directed to register same-sex marriages (and have done so in November 2023). A final judgment of the Court is awaited.

[20] We categorise the countries in the last two sentences based on whether or not a judicial verdict had the legal *effect* of recognising same-sex marriage. For example, in the United States, the Supreme Court judicially *recognised* the right to same-sex marriage. In the United Kingdom, on the other hand, in a series of cases, the judiciary progressively interpreted gendered laws in gender-neutral terms (for example, in the context of rent), thus creating an enabling atmosphere for the legislature to create a legal regime recognising same-sex marriages.

especially if there is no explicit or immediate majoritarian political support. Across various countries, the rights of LGBTQIA+ individuals have often been an example of this phenomenon. In such a situation, the role of courts is to effectively protect rights and reflect evolving democratic attitudes by overcoming "democratic burdens of inertia" (**Rosalind Dixon, *Responsive Judicial Review*, OUP 2023**; **William Eskridge, "Foreword: The Marriage Cases – Reversing the Burden of Inertia in a Pluralist Constitutional Democracy" (2009) 97(6) California Law Review 1785**). A rights-protecting judicial decision, thus, will enjoy both legal and political legitimacy.

27. There may also be a concern that there is a gap between *declaring* the existence of an equal right to marriage, and granting an appropriate *remedy* to realise this right, which involves an extensive rewriting (or creation) of the legal regime. This concern, however, can – and has been – addressed by courts, in various ways outlined below.

28. Many courts around the world have recognised same-sex marriage under their respective national constitutions. Courts have also recognised a range of rights that are incidental to, or flow from, the recognition of same-sex unions (involving housing, inheritance, adoption, and so on). As the examples cited above show, these courts belong to diverse legal traditions, and to diverse social and cultural contexts. In recognising these rights, these courts have been respectful of the separation of powers, and have not sought to replace or substitute judicial wisdom for the legislative process. Rather, their judgments have been founded on the constitutional rights to equality, dignity, and privacy – rights that (at least in the case of dignity and equality) are also directly guaranteed under the Japanese Constitution. These courts have also opted for a range of remedies in order to ensure that their declarations are effective, some of which are outlined below.

29. The judgment of the United States Supreme Court in **Obergefell vs Hodges, 576 U.S. 644** represents a straightforward example. The Supreme Court held that the fundamental right of marriage was guaranteed by the Equal Protection and Due Process clauses of the US Constitution. It followed that the denial of the right of marriage to same-sex couples by the State was unconstitutional. All the states of the US were

therefore required to recognise – and perform – same sex marriages, on equal terms and conditions with the marriages of opposite-sex couples.

30. However, where there exists an existing law, or a statute, that creates a regime of benefits or entitlements for couples, courts have sought to *interpret* it in a way that the said benefits are *extended* to same-sex couples. In this context, the judgment of the UK House of Lords in **Godin vs Ghaidan Mendoza, [2004 UKHL 30]**, is instructive. The question in that case was whether same-sex couples could avail of the provisions of the Rent Act of 1977. The phrase under the Rent Act was "as his or her wife or husband." The House of Lords affirmed the Court of Appeal's interpretation of this phrase to mean "*as if they were* his wife or husband." Under this interpretation, same-sex couples were included within the ambit of the Act.

31. The judgment in **Godin, supra**, is important in that it underscores that the courts may not always be required to strike down a statute, or to create a legal regime of marriage (or other rights) for same-sex couples. In **Godin, supra**, the House of Lords held that the Court will strive to *interpret* a law in order to make its terms consistent with the Human Rights Act (a "Human Rights compliant reading"). Where there exists a written Constitution – as in the case of Japan – this may be called a "constitution-compliant reading." The Court will be mindful of only two caveats: that its interpretation is consistent with the underlying "thrust" of the statute; and that the relief sought is within the institutional competence of the Court.

32. Indeed, the provisions of the Japanese Civil Code – which do not explicitly outlaw same-sex marriage, but use the gendered terms "husband" and wife" – are strikingly similar to the provisions that were at issue before the House of Lords in **Godin, supra**. Likewise, the Japanese Constitution guarantees fundamental rights – the rights to equality, dignity, and privacy – in a fashion similar to the UK Human Rights Act, and the European Convention of Human Rights, which is the inspiration from the Human Rights Act. The judgment in **Godin, supra**, therefore constitutes valuable precedent on the question of securing the rights of same-sex marriage within an existing statutory and constitutional scheme.

33. Finally, an alternative structure of remedies is offered by the South African Constitutional Court in **Minister for Home Affairs vs Fourie, [2005] ZACC 19 (Constitutional Court of South Africa)**. Here, the South African Constitutional Court was considering the Marriage Act, which also used the terms "wife" and "husband", and had been interpreted by the courts to be limited to marriages of opposite-sex couples. The Constitutional Court found the exclusion of same-sex couples from the scope of the Marriage Act to be unconstitutional. However, it issued what is known as a "suspended declaration of invalidity": that is, it gave Parliament one year to correct the "defect" in the law, before the declaration of unconstitutionality would come into effect. In response, the South African parliament amended the Marriage Act to allow same-sex couples to marry, thus legislatively curing the constitutional defect in the law.

34. The judgment in **Fourie, supra**, therefore represents a dialogue between the judiciary and the legislature. While the Court maintains its role of scrutinising the law for constitutional validity, and by declaring that same-sex couples have a right to marry, the legislature then has the opportunity to realise this right through legislative changes, in a time-bound manner. The protection of same-sex couples' right to marry is secured as a result of this dialogue, and therefore has both legal and political legitimacy.

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