2013 (O) 1079

Date of the judgment (decision)	2015.12.16
Case Number	2013 (O) 1079

Reporter	Minshu Vol.69, No.8
Title	Judgment concerning whether the part of the provision of Article 733, paragraph (1) of the Civil Code, which prescribes the 100-days period of prohibition of remarriage violates Article 14, paragraph (1) and Article 24, paragraph (2) of the Constitution
Case name	Case to seek damages
Result	Judgment of the Grand Bench, dismissed
Court of the Second Instance	Hiroshima High Court, Okayama Branch, Judgment of April 26, 2013
Summary of the judgment (decision)	1. The part of the provision of Article 733, paragraph (1) of the Civil Code, which prescribes the 100-days period of prohibition of remarriage, does not violate Article 14, paragraph (1) or Article 24, paragraph (2) of the Constitution. 2. The part of the provision of Article 733, paragraph (1) of the Civil Code, which prohibits women from remarrying for a period exceeding 100 days, had come to violate Article 14, paragraph (1) and Article 24, paragraph (2) of the Constitution by 2008. 3. In cases such as those where provisions of a law restrict, without reasonable grounds, any rights or interests that are constitutionally guaranteed or protected and thus obviously violate provisions of the Constitution, and yet, the Diet has failed to take legislative measures such as amending or abolishing these provisions of the law for a long period of time without justifiable grounds, Diet members' acts during the legislative process should be held to be in violation of the legal obligation they assume in the course of their duties regarding each individual among the people, and their legislative inaction should exceptionally be assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act.

4. With regard to the provision of Article 733, paragraph (1) of the Civil Code, there are such circumstances as those indicated in the judgment, including: (i) the part of said provision prohibiting women from remarrying for a period exceeding 100 days became unreasonable due to the advancement in medical techniques and scientific technology and the changes in the social situation that had taken place after the amendment to the Civil Code in 1947; (ii) in 1995, the Third Petty Bench of the Supreme Court ruled that it was obvious that the case in dispute cannot be regarded as an exceptional case in which the Diet's legislative inaction in amending or abolishing said Article should immediately be deemed to be illegal; and (iii) even after that, no judicial ruling was issued to point out the question of unconstitutionality arising with regard to said part of the provision. Given these circumstances, it is difficult to say that the unconstitutionality of said part of the provision was obvious to the Diet as of 2008, and hence the Diet's legislative inaction should not be assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act.

(There is a concurring opinion concerning 1, a concurring opinion and an opinion concerning 1 and 2, and a concurring opinion and a dissenting opinion concerning 1 to 4).

References

(Concerning 1 to 4) Article 14, paragraph (1), Article 24 of the Constitution, Article 733, 772 of the Civil Code; (Concerning 3 and 4) Article 1, paragraph (1) of the State Redress Act

Constitution

Article 14

(1) 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.

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.

Civil Code

Article 733

(1) A woman may not remarry unless six months have passed since the day of dissolution or rescission of her previous marriage.

(2) In the case where a woman had conceived a child before the cancellation or dissolution of her previous marriage, the provision of the preceding paragraph shall not apply.

Article 772

(1) A child conceived by a wife during marriage shall be presumed to be a child of her husband.

(2) A child born after 200 days from the formation of marriage or within 300 days of the day of the dissolution or rescission of marriage

	shall be presumed to have been conceived during marriage. State Redress Act 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.
Main text of the judgment (decision)	The final appeal is dismissed. The appellant of final appeal shall bear the cost of the final appeal.
Reasons	Concerning the reasons for final appeal argued by the appeal counsel, SAKKA Tomoshi I. Outline of the case 1. In this case, the appellant of final appeal alleges that the provision of Article 733, paragraph (1) of the Civil Code, which prescribes a six-month period of prohibition of remarriage imposed on women (hereinafter referred to as the "Provision"), violates Article 14, paragraph (1) and Article 24, paragraph (2) of the Constitution, and accordingly, the appellant seeks damages against the appellee of final appeal under Article 1, paragraph (1) of the State Redress Act, on the grounds of the illegality of the appellee's legislative inaction, that is, its failure to take legislative measures to amend or abolish the Provision (hereinafter referred to as the "Legislative Inaction"). According to the facts legally determined by the court of prior instance, the appellee divorced her former husband in March 2008, and then remarried her current husband in October 2008.

The appellant asserts that the start of her remarriage was delayed from the time that the parties desired due to the existence of the Provision, and she demands that the appellee should pay her 1,650,000 yen with delay damages accrued thereon, as compensation for the mental distress, etc. that she has suffered from such delay.

2. Before the court of prior instance, the appellant alleged that the Provision violates Article 14, paragraph (1) and Article 24, paragraph (2) of the Constitution because it discriminates against women without reasonable grounds, and that the Legislative Inaction should be assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act. The points of the appellant's allegations are understood as follows.

(1) The Provision contains an unfair objective of compelling widows to remain in mourning during a certain period of time based on moral reasons. Furthermore, even though the legislative purpose of the Provision was to avoid confusion over paternity resulting from more than one man being presumed to be the father of a child, in light of the facts such as that recently, it has become easier to ascertain a father-child relationship by DNA testing, etc., it may be sufficiently possible to determine the father of a child by taking measures such as expanding the scope of cases in which an action to seek determination of paternity (Article 773 of the Civil Code) may be filed, and hence, restricting women's freedom to marry by setting a special period for prohibiting their remarriage is found to be unreasonable.

(2) Moreover, Article 772 of the Civil Code provides that a child born after 200 days from the formation of marriage or within 300 days of the day of the dissolution, etc. of marriage shall

be presumed to have been conceived during marriage. This means that it is possible to avoid confusion over paternity by ensuring that a child will not be born within 300 days from the dissolution, etc. of the previous marriage and after 200 days from the formation of the current marriage. This can be achieved simply by prohibiting women from remarrying within 100 days after the dissolution, etc. of their previous marriage, and thus the part of the Provision prohibiting women from remarrying for a period exceeding 100 days (hereinafter referred to as the "prohibition of remarriage for a period exceeding 100 days") imposes an excessive restriction on women's freedom to marry and it is therefore unreasonable.

3. In response to these allegations made by the appellant, the court of prior instance held as follows. It is considered that the legislative purpose of the Provision is to avoid confusion over paternity and thereby prevent the occurrence of a dispute over a father-child relationship. This legislative purpose is reasonable, and how long women should be prohibited from remarrying in order to achieve this purpose is an issue to be decided by the Diet while adjusting the balance between said legislative purpose and women's freedom to marry. Accordingly, the Provision that prescribes a six-month period of prohibition of remarriage cannot immediately be considered to be an excessive restriction, and hence, the Legislative Inaction should not be assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act. In conclusion, the court of prior instance dismissed the appellant's claim.

In summary, the appeal counsel argues that the court of prior instance made errors in interpreting Article 14, paragraph (1) and Article 24, paragraph (2) of the Constitution.

II. Constitutionality of the Provision

1. Article 14, paragraph (1) of the Constitution provides for equality under the law, and this provision should be interpreted as prohibiting discriminatory treatment under the law unless such treatment is based on reasonable grounds in line with the nature of the matter. This is case law established by this court (see 1962 (O) No. 1472, judgment of the Grand Bench of the Supreme Court of May 27, 1964, Minshu Vol. 18, No. 4, at 676, 1970 (A) No. 1310, judgment of the Grand Bench of the Supreme Court of April 4, 1973, Keishu Vol. 27, No. 3, at 265, etc.). The Provision prohibits only women from remarrying for a period of six months after the dissolution or rescission of their previous marriage, thereby making a distinction between men and women in terms of the requirements for remarriage. Therefore, it is appropriate to construe that if such distinction is not found to be based on reasonable grounds in line with the nature of the matter, the Provision is considered to be in violation of Article 14, paragraph (1) of the Constitution.

Matters concerning marriage and the family should be decided while taking into consideration various factors in the social situation including the national traditions and the people's sentiments, and by making a comprehensive assessment with a focus on the overall rules in terms of the relationships between husbands and wives and between parents and children of the times. Consequently, it may be suitable for details of these matters to be specified by law, rather than to be uniformly provided by the Constitution. From this perspective, Article 24, paragraph (2) of the Constitution leaves it primarily to the Diet's reasonable legislative discretion to establish specific systems for those matters concerning marriage and the family, and

it further indicates the legislative requirement or guideline that laws to specify such matters should be enacted from the standpoint of individual dignity and the essential equality of the sexes, thus defining the limits of the Diet's discretion. Moreover, paragraph (1) of said Article provides, "Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis." This provision is interpreted as clearly stipulating that matters such as whether to marry or not, and whom and when to marry should be left to the decisions made by the parties freely and equally. Marriage is supposed to bring about important legal effects to the parties such as the spouse's right of inheritance (Article 890 of the Civil Code) and the legitimacy of a child born to a married couple (Article 772, paragraph (1), etc. of said Code). In addition, although the people's views on the family, etc. are said to have been diversified in recent years, it seems that the attitude to respect legal marriage still prevails widely among the people. In consideration of these facts, freedom to marry as described above can be considered to be worthy of respect in light of the purport of the provision of Article 24, paragraph (1) of the Constitution.

If so, it is necessary to examine whether or not any reasonable grounds exist to support the Provision, which is a law that governs the marriage system and imposes direct restrictions related to marriage, while fully taking into consideration the nature of the matters mentioned above.

Given this, in the present case, it is appropriate for this court to make a constitutional review, based on the view explained above, regarding the Provision that makes a distinction between men and women in terms of the requirements for remarriage, from the perspective of whether or

not any reasonable grounds exist in the legislative purpose of making such a distinction and whether or not the specific contents of that distinction are reasonable in association with said legislative purpose. In the sections below, we examine the case from this perspective.

2. Legislative purpose of the Provision

(1) As a result of the partial amendment to the Civil Code by Act No. 222 of 1947 (hereinafter referred to as the "1947 Civil Code Amendment"), the provisions concerning marriage and the family under the Former Civil Code (meaning Act No. 9 of 1898 prior to the 1947 Civil Code Amendment; hereinafter the same applies) were drastically revised in accordance with Article 24, paragraph (2) of the Constitution, which provides that with regard to matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes. For example, the traditional family system that was against the spirit of the Constitution was abolished, and also in line with the legislative guideline mentioned above, equality between husband and wife was assured by measures such as abolishing the provisions concerning the wife's incompetency, and father and mother were permitted to exercise parental authority jointly on an equal footing.

Through this amendment, however, the provisions of the Former Civil Code prescribing a period of prohibition of remarriage only for women, i.e. Article 767, paragraph (1) of said Code which provided that "A woman may not remarry unless six months have passed since the day of dissolution or rescission of her previous marriage," and paragraph (2) of said Article which provided that "In the case where a woman had conceived a child before the cancellation or dissolution of her previous marriage, the

provision of the preceding paragraph shall not apply from the delivery date," were maintained in the current Civil Code, along with the provisions of the Former Civil Code concerning presumption of paternity, i.e. Article 820, paragraph (1) of said Code which provided that "A child conceived by a wife during marriage shall be presumed to be a child of her husband," and paragraph (2) of said Article which provided that "A child born after 200 days from the formation of marriage or within 300 days of the day of the dissolution or rescission of marriage shall be presumed to have been conceived during marriage."

(2) With regard to a legitimate parent-child relationship, the current Civil Code sets out a framework for presumption of paternity by way of the following provisions: a child conceived by a wife during marriage is presumed to be a child of her husband (Article 772, paragraph (1) of the Civil Code); a husband may not rebut the presumption that a child is his child born in wedlock other than by filing an action to rebut the presumption of legitimacy (Article 775 of said Code); and such action must be filed within one year from the time the husband comes to know of the child's birth (Article 777 of said Code). This framework makes it possible to determine the legal father-child relationship at an early date. If, under this framework, a woman remarries soon after the day of the dissolution, etc. of her previous marriage and gives birth to a child, a situation could occur in which whether the child's father is her former husband or current husband cannot be determined immediately. Needless to say, should any disputes arise as to the father-child relationship under such circumstances, it would be against the interests of the child.

Article 733, paragraph (2) of the Civil Code provides that the Provision shall not apply from the delivery date if a woman had conceived a child before the dissolution, etc. of her previous

marriage, thus making exceptions to the prohibition of remarriage for a woman who would not have a child that could be presumed to be a child of her former husband after remarriage. Also, Article 773 of said Code provides that if a woman who has remarried in violation of the Provision gives birth to a child, and the paternity of the child cannot be determined pursuant to the provisions concerning the presumption of paternity under Article 772 of said Code, the court shall determine paternity of the child, thus setting out a procedure for determining a father-child relationship in the situation where confusion over paternity exists. These provisions of the Civil Code are interpreted as being premised on the fact that the Provision has been enacted with a view to avoiding confusion over paternity.

(3) In light of the legislative background and the position of the Provision in the set of provisions of the Civil Code concerning a legitimate parent-child relationship, etc. as explained above, it is appropriate to construe that the legislative purpose of the Provision is to avoid confusion over paternity of a child who is born after the remarriage of his/her mother, thereby preventing the occurrence of a dispute over a father-child relationship (see 1992 (O) No. 255, judgment of the Third Petty Bench of the Supreme Court of December 5, 1995, Saibanshu Minji No. 177, at 243; hereinafter referred to as the "1995 Judgment"). In consideration of the importance of clearly determining a father-child relationship at an early date, such legislative purpose is found to be reasonable.

(4) There is a contrary view, however, arguing that even when confusion over paternity occurs, it would be easy to determine the father of the child by expanding the scope of cases in which an action to seek determination of paternity (Article 773 of the Civil Code) may be filed, and therefore it is not absolutely necessary to prohibit women

from remarrying in order to avoid confusion over paternity.

DNA testing technology has made progress owing to the advancement in medical techniques and scientific technology in recent years, and it is now possible to affirm or deny a biological parent-child relationship at an extremely high probability, at low cost and by a minimally invasive method. This is a fact that is publicly known.

However, if a father-child relationship is to be determined by scientific testing, a child who is born during a period in which confusion over paternity would occur cannot avoid being treated as a child whose legal father is yet to be determined until after the necessary court proceedings have been gone through, etc., and thus such child would be unable to determine his/her legal father without going through these proceedings. If the child remains unable to have his/her legal father determined for a certain length of time, this could have various influences on the child. Given such possibility, it should be considered to be reasonable, from the perspective of securing the interests of children, to maintain the system whereby confusion over paternity can be avoided from the beginning, without going through the abovementioned court proceedings, etc. for determining the legal father.

3. Then, the next question is whether or not the Provision, which prescribes a six-month period of prohibition of remarriage only for women, can be assessed as being in line with the abovementioned points in association with the legislative purpose and therefore reasonable. We examine this question below.

(1) As explained above, it is considered that the legislative purpose of the Provision is to avoid confusion over paternity and thereby prevent the

occurrence of a dispute over a father-child relationship. In this respect, Article 772, paragraph (2) of the Civil Code provides that "A child born after 200 days from the formation of marriage or within 300 days of the day of the dissolution or rescission of marriage shall be presumed to have been conceived during marriage," thus estimating the time of the conception of a child by counting backwards from the time of the child's birth, and with regard to a child who is presumed, based on such estimation, to have been conceived by a wife during marriage, paragraph (1) of said Article provides that "A child conceived by a wife during marriage shall be presumed to be a child of her husband." Accordingly, in respect of a child who is born after the remarriage of his/her mother, it is possible, according to calculation, to avoid confusion over paternity by prescribing a 100-day period of prohibition of remarriage. Marriage has an important effect in that it gives a child born to a married couple the status of a legitimate child. In light of the reason why the system has been established to presume the paternity of a child born in wedlock on the basis of the clear and uniform criterion for reckoning the period that commences from the time of the birth and to determine the father-child relationship at an early date with a view to ensuring the legal stability of the child's family status, the measure to uniformly restrict women from remarrying within said 100-day period to avoid confusion over paternity can be held to be within the scope of the reasonable discretion that is given to the Diet to legislate matters concerning marriage and the family, and therefore be reasonable in association with the abovementioned legislative purpose.

Consequently, the part of the Provision prescribing the 100-day period of prohibition of remarriage does not violate Article 14, paragraph (1) of the Constitution nor Article 24, paragraph (2) of the Constitution.

(2) On the other hand, the remaining part of the Provision prescribing the prohibition of remarriage for a period exceeding 100 days cannot be justified as setting a period necessary for avoiding confusion over paternity, as provided in Article 772 of the Civil Code.

According to the explanation given by the drafters of the Former Civil Code, Article 767, paragraph (1) of the Former Civil Code prescribed a six-month period of prohibition of remarriage for the following reasons. At that time, it was difficult even for specialists to determine a woman's pregnancy until after about six months from her conception of a child, and the medical techniques and scientific technology for determining a father-child relationship were still in the infant stage. Under such circumstances, from the perspective of minimizing the possibility of a woman having a child of her former husband after remarrying her current husband so as to prevent family discord, and also from the perspective of reducing disputes over a father-child relationship with regard to a child who is born after the remarriage of his/her mother so as to prevent a mistake in the determination of paternity that could cause confusion in a blood line, the drafters may have chosen to not limit the period of prohibition of remarriage to strictly correspond to an interval by which it is possible to avoid confusion over paternity, but rather they intended to set a somewhat longer period of prohibition. Another possible factor may be the fact that laws of some foreign countries prescribed a 10-month period of prohibition of remarriage. In light of these circumstances at the time of the drafting of the Former Civil Code, it is understandable in some aspects that the drafters considered that disputes over a father-child relationship could be prevented by taking the measure to not limit the period of prohibition of remarriage to strictly correspond to an interval by

which it is possible to avoid confusion over paternity, but rather by setting a somewhat longer period of prohibition. It is therefore difficult to say that the drafters' decision to set a six-month period of prohibition of remarriage based on this idea was unreasonable. This also holds true even after the provision prescribing the period of prohibition of remarriage was inherited from the Former Civil Code and adopted in the current Civil Code, and hence, it is too much to say that said provision prescribing the period of prohibition of remarriage was beyond the scope of the reasonable legislative discretion given to the Diet at that time.

However, with the current progress in medical techniques and scientific technology, it must be said that it is now difficult to justify, from the abovementioned perspectives, the measure that does not limit the period of prohibition of remarriage to strictly correspond to an interval by which it is possible to avoid confusion over paternity, but rather sets a somewhat longer period of prohibition.

In addition, since the 1947 Civil Code Amendment, the realities involving marriage and the family have changed in Japan along with the changes in the social and economic environments, and, since the beginning of the Heisei period (from 1989) in particular, while more people tend to marry later, the numbers of divorces and remarriages have increased, and against such backdrop, there seems to be a growing call for reducing restrictions on remarriage to the greatest possible extent. Furthermore, among other countries that previously prescribed the period of prohibition of remarriage, there is a tendency to legislate to abolish such prohibition. Actually, Germany enacted the Child Law Reform Act (put into effect in 1998) and France enacted the Reform Act of May 26, 2004 on Divorce (put into effect in

2005), to abolish the period of prohibition of remarriage. It is a fact that is publicly known that more countries around the world choose not to prescribe a period of prohibition of remarriage. Since countries have different systems concerning dissolution of marriage and determination of a father-child relationship, the legislative trends in foreign countries regarding the period of prohibition of remarriage, which forms part of these systems, cannot be considered to have direct influence on the assessment of the system prescribing the period of prohibition of remarriage in Japan. Nevertheless, such trends in foreign countries can be items of evidence to show that there is a growing call for reducing restrictions on remarriage to the greatest possible extent.

Also in consideration of the abovementioned facts that freedom to marry should be fully respected in light of the purport of the provision of Article 24, paragraph (1) of the Constitution, and that a woman giving birth to a child that she conceived before marriage is not limited to the case of remarriage, it is difficult to justify the measure to prescribe, only in the case of remarriage, a period during which women are prohibited from marrying beyond an interval by which it is precisely possible to avoid confusion over paternity, from the abovementioned perspectives: minimizing the possibility of a woman having a child of her former husband after remarrying her current husband so as to prevent family discord, and reducing disputes over a father-child relationship with regard to a child who is born after the remarriage of his/her mother so as to prevent a mistake in the determination of paternity that could cause confusion in a blood line. Apart from this, no justifying grounds can be found for said measure, and thus the part of the Provision prescribing the prohibition of remarriage for a period exceeding 100 days should be held to be imposing an

unreasonable and excessive restriction.

Taking all these matters into consideration, the part of the Provision prescribing the prohibition of remarriage for a period exceeding 100 days is considered to have gone beyond the scope of the reasonable legislative discretion given to the Diet to legislate matters concerning marriage and the family and to have become unreasonable in association with the legislative purpose of the Provision, by the time of expiration of the 100-day period from the date of the dissolution of the appellant's previous marriage, at the latest.

(3) For the reasons given above, it is also obvious that the part of the Provision prescribing the prohibition of remarriage for a period exceeding 100 days was no longer based on the essential equality of both sexes as provided in Article 24, paragraph (2) of the Constitution, and hence, it should be said that by the time mentioned above, said part of the Provision had come to violate Article 14, paragraph (1) of the Constitution and also violate Article 24, paragraph (2) of the Constitution.

III. Illegality of the Legislative Inaction under the State Redress Act

1. Article 1, paragraph (1) of the State Redress Act provides that when a public officer who exercises the public authority of the State or of a public entity has violated the legal obligation that he/she assumes in the course of his/her official duties regarding each individual among the people and thereby inflicted damage to any such individual, the State or public entity is responsible for compensating for such damage. Whether or not Diet members' legislative action or inaction is deemed to be illegal in the context of the application of said paragraph is an issue of whether or not Diet members' acts during the legislative process have violated the legal

obligation that they assume in the course of their official duties regarding each individual among the people, and it should be differentiated from the issue of unconstitutionality of the content of the legislation. Assessment of such acts by Diet members should in principle be left to the people's political decision, and even if the content of the relevant legislation violates any provisions of the Constitution, Diet members' legislative action or inaction should not be assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act only because of such fact.

Nevertheless, in cases such as where provisions of a law restrict, without reasonable grounds, any rights or interests that are constitutionally guaranteed or protected and thus obviously violate provisions of the Constitution, and yet, the Diet has failed to take legislative measures such as amending or abolishing these provisions of the law for a long period of time without justifiable grounds, Diet members' acts during the legislative process should be held to be in violation of the abovementioned legal obligation they assume in the course of their duties, and their legislative inaction should exceptionally be assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act (see 1978 (O) No. 1240, judgment of the First Petty Bench of the Supreme Court of November 21, 1985, Minshu Vol. 39, No. 7, at 1512, 2001 (Gyo-Tsu) No. 82 and No. 83, 2001 (Gyo-Hi) No. 76 and No. 77, judgment of the Grand Bench of the Supreme Court of September 14, 2005, Minshu Vol. 59, No. 7, at 2087).

2. Given this, we examine whether or not the Legislative Inaction should be assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act.

(1) As explained above, the Provision, including the part prescribing the prohibition of remarriage for a period exceeding 100 days, may have been reasonable to some extent at the time of the 1947 Civil Code Amendment, but later, due to the advancement in medical techniques and scientific technology and the changes in the social situation in Japan, it has become difficult to account for the reasonableness of the part of the Provision prescribing the prohibition of remarriage for a period exceeding 100 days, from the perspective of minimizing the possibility of a woman having a child of her former husband after remarrying her current husband so as to prevent family discord, or from the perspective of reducing disputes over a father-child relationship with regard to a child who is born after the remarriage of his/her mother so as to prevent a mistake in the determination of paternity that could cause confusion in a blood line.

(2) In 1995, there was a case in which it was disputed whether the Diet's legislative inaction in abolishing or shortening the period of prohibition of remarriage, should be assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act. The Third Petty Bench of this court ruled that it was obvious that the case cannot be regarded as an exceptional case in which the Diet's legislative inaction in amending or abolishing Article 733 of the Civil Code, should immediately be deemed to be illegal (the 1995 Judgment). Since the 1995 Judgment did not hold Article 733 of said Code to be unconstitutional, it can be said that it is unavoidable for Diet members, hearing said judgment, to have thought that a judicial ruling was issued to declare it to be appropriate even in 1995 to basically have the issue of whether to amend or abolish or to maintain the Provision decided based on a legislative policy.

Furthermore, in 1994, the Counsellor's Office of

the Civil Affairs Bureau of the Ministry of Justice published the "Draft Outline of the Amendment to the Civil Code Regarding the Marriage System, etc." based on the deliberation at the Personal Status Law Subcommittee of the Civil Law Committee of the Legislative Council, and then having further studied this draft, the Legislative Council submitted to the Minister of Justice a report titled "Outline of a Bill for Partial Amendment to the Civil Code" in 1996. These drafts of legal amendments contained the proposal to amend the Provision to shorten the period of prohibition of remarriage to 100 days. However, this proposal was accompanied by explanatory notes such as the period of prohibition should be shortened within the extent of the current system of presumption of legitimacy. Thus, said proposal does not seem to have been prepared as a result of the discussion that was held on the premise that the prohibition of remarriage for a period exceeding 100 days was unconstitutional.

(3) Matters concerning marriage and the family are matters for which the task to establish a specific system addressing them should be left primarily to the Diet's reasonable legislative discretion. In light of this, given the circumstances where, even after the 1995 Judgment had been rendered, no judicial ruling was issued to point out the question of unconstitutionality in the part of the Provision prescribing the prohibition of remarriage for a period exceeding 100 days, it is difficult to say that it was obvious to the Diet that due to the advancement in medical techniques and scientific technology and the changes in the social situation in Japan, the part of the Provision prescribing the prohibition of remarriage for a period exceeding 100 days had come to violate Article 14, paragraph (1) and Article 24, paragraph (2) of the Constitution as of 2008.

3. According to the above, the part of the Provision prescribing the prohibition of remarriage for a period exceeding 100 days had become unconstitutional by the time mentioned above, but when viewed in the context of the application of Article 1, paragraph (1) of the State Redress Act, it cannot be said that even though said part of the Provision restricts, without reasonable grounds, any rights or interests that are constitutionally guaranteed or protected and thus obviously violates provisions of the Constitution, that the Diet has failed to take legislative measures such as amending or abolishing said part of the Provision for a long period of time without legitimate grounds. Consequently, the Legislative Inaction should not be assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act.

IV. Conclusion

For the reasons explained above, the determination by the court of prior instance can be affirmed for its conclusion to dismiss the appellant's claim.

Therefore, the judgment has been rendered in the form of the main text by the unanimous consent of the Justices, except that there is a dissenting opinion by Justice YAMAURA Yoshiki. There are also a concurring opinion by Justice SAKURAI Ryuko, Justice CHIBA Katsumi, Justice OTANI Takehiko, Justice ONUKI Yoshinobu, Justice YAMAMOTO Tsuneyuki, and Justice OTANI Naoto, a concurring opinion by Justice CHIBA Katsumi, a concurring opinion by Justice KIUCHI Michiyoshi, and an opinion by Justice ONIMARU Kaoru.

The concurring opinion by Justice SAKURAI Ryuko, Justice CHIBA Katsumi, Justice OTANI Takehiko, Justice ONUKI Yoshinobu, Justice

YAMAMOTO Tsuneyuki, and Justice OTANI Naoto is as follows.

We are in agreement with the majority opinion that the part of the Provision which prescribes the 100-day period of prohibition of remarriage (hereinafter referred to as the "prohibition of remarriage for a period not exceeding 100 days") does not violate Article 14, paragraph (1) nor Article 24, paragraph (2) of the Constitution. However, based on the idea that problems arising from the prohibition of remarriage should be reduced to the greatest possible extent, we consider that there may be much room to exclude women from being prohibited from remarrying even within said 100-day period. We hereby give some comments on the issues in legal interpretation concerning the exclusion from the prohibition of remarriage for a period not exceeding 100 days.

As stated in the majority opinion, it is considered that the legislative purpose of the Provision is to avoid confusion over paternity and thereby prevent the occurrence of a dispute over a father-child relationship, and the measure to prescribe the 100-day period of prohibition of remarriage in order to avoid confusion over paternity, as provided in Article 772 of the Civil Code, can be held to be within the scope of the reasonable legislative discretion that is given to the Diet, and therefore be reasonable in association with the abovementioned legislative purpose.

Article 733, paragraph (2) of the Civil Code, which provides for the exclusion from the prohibition of remarriage for a period not exceeding 100 days, exemplifies a case where a woman, after remarrying her current husband, gave birth to a child whom she had conceived before the dissolution, etc. of her previous marriage, as the grounds for exclusion from the

prohibition of remarriage. This may be because, if that woman subsequently conceives another child, this child is of course not the one she conceived during the marriage with her former husband, and in such case, there is no need to apply the rule of presumption of paternity under Article 772 of said Code. Assuming so, and considering that the legislative purpose of prescribing the period of prohibition of remarriage only for women is to avoid confusion over paternity as mentioned above, it may be appropriate to interpret Article 733, paragraph (2) of the Civil Code as allowing the exclusion from the application of the provision of paragraph (1) of said Article in cases other than the exemplified case, such as where there is no need to try to avoid confusion over paternity. This interpretation can also be deemed to be in line with the majority opinion that gives respect to freedom to marry.

Specifically, the provision of Article 733, paragraph (1) of the Civil Code should not be applied in the following cases: there is no possibility of confusion over paternity (e.g. it is biologically certain that the woman will not conceive a child); there is no problem even if both the former husband and current husband of a woman are presumed to be the father of a child (e.g. the woman remarries her former spouse); either the former husband or current husband could not be presumed to be the father of a child for some reasons (see 1968 (O) No. 1184, judgment of the First Petty Bench of the Supreme Court of May 29, 1969, Minshu Vol. 23, No. 6, at 1064, 1968 (O) No. 1310, judgment of the First Petty Bench of the Supreme Court of September 4, 1969, Saibanshu Minji No. 96, at 485, 1995 (O) No. 2178, judgment of the Second Petty Bench of the Supreme Court of August 31, 1998, Saibanshu Minji No. 189, at 497, etc.).

In the conventional practice in handling family

registers, the competent authorities have issued instructions to allow the family register divisions to accept notifications of marriage involving women who are during the period of prohibition of remarriage in the cases such as the following: a woman remarries her former husband (Response by the Director-General of the Civil Affairs Bureau, Civil No. 708 of November 25, 1912); a woman has dissolved her previous marriage based on a judgment of divorce rendered on the grounds that it is not clear whether her husband is dead or alive for a period of not less than three years (Response by the Director-General of the Legal Affairs Bureau, Civil No. 1735 of September 13, 1918, and Response by the Director-General of the Civil Affairs Bureau, Civil-Ko No. 2 of January 6, 1950); a woman who is to remarry is beyond the reproductive age (67 years of age) (Response by the Director-General of the Civil Affairs Bureau, Civil-Ko No. 1951 of May 27, 1964); a woman has dissolved her previous marriage based on a judgment of divorce rendered on the grounds that she has not heard from her husband for three years and she is found to have been abandoned by the husband in bad faith (Response by the Director-General of the Civil Affairs Bureau, Civil-Ko No. 540 of March 16, 1965). This practice seems to be in line with the abovementioned understanding of the exclusion from the application of the provision of Article 733, paragraph (1) of the Civil Code.

According to this understanding, even in the case of a woman who has received an operation of female sterilization, if it is biologically certain that the woman will not have a child because of that operation, it may be justified to treat such case in the same manner as the cases described above. Furthermore, in the case of a woman who was not pregnant at the time of the dissolution, etc. of her previous marriage, her situation is objectively not different from the situation of a

woman who, after remarrying her current husband, gave birth to a child whom she had conceived before the dissolution, etc. of her previous marriage as provided in Article 733, paragraph (2) of the Civil Code, and it may not be inappropriate to exclude such case as well from the prohibition of remarriage for a period not exceeding 100 days.

Thus, in association with the legislative purpose of the Provision, it can be said that the cases that may possibly be excluded from the prohibition of remarriage for a period not exceeding 100 days are not limited to those directly provided in Article 733, paragraph (2) of the Civil Code or those actually excluded in the conventional practice in handling family registers.

In the first place, in the context of the submission of notifications of marriage, it is unavoidable that the scope of cases that may be excluded from the application of the provisions of Article 733, paragraph (1) of the Civil Code may be subject to change at the very time of the submission due to the limits to the formality check by the administrators of family registers. The fact that a woman who is to remarry was not pregnant at the time of the dissolution, etc. of her previous marriage, which can be the grounds for exclusion from application as mentioned above, needs to be certified by reliable means of proof to ensure clarity and objectiveness, such as a certificate prepared by a medical practitioner. This kind of restriction should necessarily be accepted.

The concurring opinion by Justice CHIBA Katsumi is as follows.

I hereby give my opinion in addition to the majority opinion with regard to the approach for the constitutionality review of Article 733, paragraph (1) (the Provision), which prescribes the period of prohibition of remarriage, and the

framework for assessment of the illegality under the State Redress Act of the legislative inaction in amending, etc. an unconstitutional law.

1. Approach for constitutionality review of the Provision, which prescribes the period of prohibition of remarriage

(1) In the judgment on the present case, the majority opinion states that the legislative purpose of the Provision is to "avoid confusion over paternity and thereby prevent the occurrence of a dispute over a father-child relationship." By stating so, the majority opinion may be meant to clearly point out that avoiding confusion over paternity is a direct legislative purpose of the Provision, and explain that disputes can be prevented if this purpose is achieved. Article 767, paragraph (1) of the Former Civil Code prescribed a six-month period of prohibition of remarriage, which is longer than a period theoretically necessary for avoiding confusion over paternity. As explained in the majority opinion, this may be based on the idea that, given the circumstances of that time where the medical techniques and scientific technology for determining a father-child relationship were still in the infant stage, it was necessary to set a longer period of prohibition in order to actually prevent disputes over a father-child relationship. In the judgment on the present case, the majority opinion gives a clear and plain explanation of the legislative purpose of the Provision as shown above, and accordingly, since it is now easy to identify the time of conception owing to the advancement in the medical techniques, etc., the part of the period of prohibition of remarriage exceeding 100 days can no longer be deemed to be a period necessary for avoiding confusion over paternity, and thus it objectively has no reasonable association with the legislative purpose. In conclusion, the majority opinion holds that due to the nature of

the matter, the part of the period exceeding 100 days cannot be found to be within the Diet's reasonable legislative discretion.

(2) In the judgment on the present case, the part of the Provision which prohibits women from remarrying for 100 days out of the six-month period is confirmed to be reasonable based on the legislative purpose as explained clearly and plainly, i.e. to avoid confusion over paternity, and hence, said part of the Provision is theoretically deemed to be reasonably associated with the legislative purpose as a means to achieve the purpose. Meanwhile, in the past cases in which constitutionality review was conducted with regard to the laws and regulations causing inequality under law, this court examined whether or not the legislative purpose was justifiable and reasonable and whether or not the means to achieve the legislative purpose was reasonably associated with the purpose, and if both questions were answered in the affirmative, this court basically declared the relevant laws and regulations constitutional as they were. In the constitutionality review of the laws or regulations imposing restrictions on psychological freedoms, a strict assessment criterion is employed to compare the interests to be achieved and the interests to be lost due to the restrictions. To the contrary, in the constitutionality review of the laws or regulations causing inequality, it is sufficient under normal conditions to employ the abovementioned approach that is more theoretical and formality-oriented, i.e. examining whether the legislative purpose is justifiable and reasonable and whether the means to achieve the legislative purpose is reasonably associated with the purpose, because such inequality exists in one of the legal systems established by the Diet and the task to establish such legal system is in itself subject to the Diet's broad legislative discretion.

However, even when the legislative purpose is justifiable, the measure to prescribe the period of prohibition of remarriage that has been taken in order to achieve the purpose---even though the period is limited to 100 days---could undermine women's interests relating to freedom to marry, which deserves constitutional protection, in that women are unable to remarry during that period. Moreover, as pointed out in the majority opinion, while more people tend to marry later, the numbers of divorces and remarriages have been increasing, and against such backdrop, there seems to be a growing call for reducing restrictions on remarriage to the greatest possible extent. Given such circumstances, it is doubtful whether there is no problem as long as the abovementioned means is found to be reasonably associated with the purpose in the formal meaning. In such case, it may also be necessary to further examine whether or not the means to achieve the legislative purpose is in itself substantially appropriate (and whether or not the decision to adopt this means can be deemed to be within the legislative discretion). The majority opinion may include this view when stating, "it is necessary to examine whether or not any reasonable grounds exist to support the Provision, which is a law that governs the marriage system and imposes direct restrictions related to marriage, while fully taking into consideration the nature of the matters mentioned above."

(3) In connection with this, there may be a view as follows: if, in the course of examining the reasonableness, etc. of the legislative purpose and the means to achieve the purpose as mentioned above, it is also necessary to assess whether or not the means adopted to achieve the purpose is in itself substantially appropriate, then, when giving an explanation in the constitutionality review, this court should follow the approach that was employed by the Grand

Bench of this court in 2013 in conducting review and declaring unconstitutionality of the rules concerning the statutory share in inheritance of children born out of wedlock (2012 (Ku) No. 984 and No. 985, decision of the Grand Bench of the Supreme Court of September 4, 2013, Minshu Vol. 67, No. 6, at 1320), that is, to straightforwardly question the discriminatory treatment of women that is enforced by prohibiting only women from remarrying and assess whether or not any reasonable grounds can be found to support such prohibition while comprehensively taking into consideration all the circumstances concerned. However, with regard to the reason for legislation of the first sentence of the proviso to Article 900, item (iv) of the Civil Code, which was addressed in the abovementioned Grand Bench decision rendered in 2013, the Grand Bench of this court had previously held in its decision rendered in 1995 (1991 (Ku) No. 143, decision of the Grand Bench of the Supreme Court of July 5, 1995, Minshu Vol. 49, No. 7, at 1789) that said clause was designed to ensure the balance between the respect for legitimate marriage and the protection of children born out of wedlock. The explanation given in the Grand Bench decision in 2013 was based on the result of studying how such previous holding should be understood. With regard to the Provision, on the other hand, the majority opinion clearly states that its direct legislative purpose is to "avoid confusion over paternity" as mentioned above. Since the legislative purpose of the Provision is thus simple and clear, the present case is perfectly suitable to be reviewed by explicitly examining the reasonableness, etc. of the legislative purpose and means to achieve the purpose. For this reason, this court conducted such explicit examination rather than giving an explanation that assessment should be made by comprehensively taking into consideration all the circumstances concerned. It can be said that this

court also examined the issue of whether or not the means to achieve the legislative purpose is appropriate, by conducting examination from the perspective of whether or not the decision to adopt that means can be regarded as the exercise of reasonable legislative discretion, while fully taking into consideration the nature of the matter.

(4) On the premise of the above, I would make additional comments regarding whether or not the means adopted to achieve the legislative purpose is appropriate. On this point, there may be a view as follows: the measure to prescribe a period of prohibition of remarriage for women could bring about serious disadvantages to women even where the period is limited to 100 days, and in this respect, prescribing a period of prohibition of remarriage is in itself inappropriate as a means to achieve the legislative purpose and constitutes unreasonable discrimination against women; for this reason, instead of prescribing a period of prohibition of remarriage, problems arising from confusion over paternity should be solved by methods such as implementing DNA testing for the child and the current and former husbands of the child's mother, filing an action to seek determination of paternity, and enhancing the system of filing such action. Considering that, as mentioned in the majority opinion, many countries do not have such a system of prohibiting remarriage for a certain period, abolishing the period of prohibition of remarriage may be a possible legislative policy to be adopted.

According to this view, however, if confusion over paternity actually occurs, the child's legal father would be uncertain at the time of his/her birth, and therefore it would be necessary to implement DNA testing or file an action to seek determination of paternity. In such case, there could be a considerable delay in determining the

child's legal father (due to such circumstances as where the relationship between the mother and her current husband later becomes worse and she finds difficulty in gaining his cooperation, or where the court proceedings of an action to seek determination of paternity become delayed). As pointed out in the majority opinion, this could cause an unfavorable situation affecting the welfare of the child and it is therefore against the interests of the child.

According to the above, the two measures mentioned above have problems respectively, i.e. prohibiting women from remarrying could undermine their interests in enjoying marriage freedom to a certain extent, while not prohibiting their remarriage could cause a situation that would be against the interests of the child. Both measures have advantages and disadvantages, and neither of them can be assessed as being more reasonable than the other. If so, the former measure, that is, the part of the Provision which prescribes the 100-day period of prohibition of remarriage, cannot be assessed as an inappropriate means to achieve the legislative purpose and going beyond the scope of the Diet's legislative discretion or constituting an abuse of such discretion and therefore unconstitutional.

(5) There may be the following concern about the former measure. In cases where a woman has received an operation of female sterilization, or it is objectively clear from the specific circumstances that a woman was not pregnant at the time of the dissolution, etc. of her previous marriage, there is no room to consider the issue of the presumption of the time of conception provided in Article 772, paragraph (2) of the Civil Code, and therefore there would be no need to take the measure to prohibit remarriage under the Provision, for which the direct purpose is to avoid confusion over paternity on the premise of the system of presuming paternity of a child who

is born after the remarriage of his/her mother. Despite this, the majority opinion states that said measure is within the scope of the legislative discretion in all cases, to the extent that it prohibits remarriage for a period of 100 days. This measure could result in imposing a greater restriction than necessary on freedom to marry, and it should after all be held to be an inappropriate means to achieve the legislative purpose.

However, in these cases, the application of the Provision would be precluded even within the 100-day period, as explained in the joint concurring opinion, and there is no need to have such concern.

2. Framework for assessment of the illegality under the State Redress Act of the legislative inaction in amending, etc. the unconstitutional law

(1) This point was addressed in the following cases adjudicated by this court: 1978 (O) No. 1240, judgment of the First Petty Bench of the Supreme Court of November 21, 1985, Minshu Vol. 39, No. 7, at 1512 (hereinafter referred to as the "1985 Judgment"), and 2001 (Gyo-Tsu) No. 82 and No. 83, 2001 (Gyo-Hi) No. 76 and No. 77, judgment of the Grand Bench of the Supreme Court of September 14, 2005, Minshu Vol. 59, No. 7, at 2087 (hereinafter referred to as the "2005 Judgment").

The 1985 Judgment was rendered in the case in which Diet members' legislative action of having abolished the home voting system and failing to restore it was claimed to be illegal under the State Redress Act. In the judgment, this court stated, "for legislation, in principle, Diet members assume only political responsibility in relation to the people as a whole, and they do not assume legal obligation corresponding to rights of each

individual among the people," and held, "Diet members' legislative action is not assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act except in exceptional cases that are difficult to imagine, such as where the Diet dares to enact legislation even though the content of the legislation is in violation of any text of the Constitution that has only a single meaning." Holding as such, this court did not present generalities concerning all cases in which Diet members' action can be deemed to be illegal under the State Redress Act, but it intended to emphasize a view that the possibility of Diet members' action being deemed to be illegal should be limited to a great extent, and with such intention, this court described a typical and extreme case in which Diet members' action would be necessarily or immediately deemed to be illegal. Thus, this holding did not go so far as to say that Diet members' legislative action could never be deemed to be illegal in other cases, and therefore it should not be interpreted as referring to all cases in which Diet members' legislative action would be assessed as illegal (this holding was maintained as it was in a judgment on the subsequent case that addressed the illegality of Diet members' legislative action of not amending or abolishing the Provision (inaction) as in the present case (1992 (O) No. 255, judgment of the Third Petty Bench of the Supreme Court of December 5, 1995, Saibanshu Minji No. 177, at 243).

The 2005 Judgment was rendered in the case in which the Diet was accused of having failed to take legislative measures to assure the opportunity for Japanese citizens residing overseas to vote for an election for members of the House of Representatives. In the judgment, this court stated, "In cases such as where it is obvious that the content of legislation or legislative inaction illegally violates citizens' constitutional rights or where it is absolutely

necessary to take legislative measures to assure the opportunity for citizens to exercise constitutional rights and such necessity is obvious, but the Diet has failed to take such measures for a long period of time without justifiable reasons, Diet members' legislative action or inaction should exceptionally be assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act," and then additionally stated that the 1985 Judgment "is not contrary to this reasoning."

As shown above, the 2005 Judgment consists of two parts. The first part is related to the case in which the dispute was about the illegality of the legislative action or inaction of Diet members who enacted unconstitutional legislation, as in the case of the 1985 Judgment (and the present case is also similar to the case addressed in the first part of the 2005 Judgment). The holding in the first part of the 2005 Judgment differs in some expressions from those of the 1985 Judgement. However, the 2005 Judgment should be interpreted not as presenting a different determination but as following the previous determination and describing it in simple expressions, or in other words, as indicating nothing other than an extreme case in which legislative action or inaction would necessarily be deemed to be illegal, as was indicated in the 1985 Judgment.

On the other hand, the holding in the second part of the 2005 Judgment addressed Diet members' responsibility for taking legislative measures to assure the opportunity for citizens to exercise their constitutional rights, which was the core of the issue of the case, and explained in general terms an assessment criterion of, "if it is absolutely necessary to take legislative measures…, but the Diet has failed to take such measures for a long period of time without

justifiable reasons," Diet members' legislative action or inaction should exceptionally be deemed to be illegal.

(2) Meanwhile, the present case is similar to the case addressed in the first part of the holding in the 2005 Judgment, but it is not an extreme case such as that described in the first part of said holding in which infringement of constitutional rights constitutes violation of any text of the Constitution that has only a single meaning. Therefore, in the present case, the majority opinion reestablished and presented anew a general assessment criterion that may also cover these precedent judgments of this court, and it is not intended to modify the 2005 Judgment.

Furthermore, although the present case is related to the issue of the illegality of the legislative inaction in amending unconstitutional legislation, which was also addressed in the first part of the 2005 Judgment, the generalities presented in the majority opinion can be interpreted, from the holding thereof, as presenting an overall framework for assessment regarding the cases where Diet members' act of taking legislative measures in the course of their duties would be deemed to be illegal under the State Redress Act, including not only the case addressed in the first part of the 2005 Judgment but also the case addressed in its second part (it is possible to consider that the extreme case exemplified in the 1985 Judgment is included in the cases described in the majority opinion, i.e. "in cases such as where…the Diet has failed to take legislative measures such as amending or abolishing these provisions of the law for a long period of time without justifiable grounds ").

(3) As a general criterion whereby legislative action or inaction is deemed to be illegal, the second part of the 2005 Judgment required that it is absolutely necessary to take legislative

measures to assure the opportunity for citizens to exercise constitutional rights and that such necessity is obvious. Having applied this criterion to the case, this court found that such necessity was obvious and assessed the legislative inaction in question as illegal under the State Redress Act, and in conclusion, it partially upheld the claim for state compensation. However, the 2005 Judgment was accompanied by the dissenting opinion by two Justices that the Diet's failure to establish an election system that would assure the opportunity for Japanese citizens residing overseas to exercise the right to vote cannot be deemed to go beyond the scope of the Diet's legislative discretion or constitute an abuse of such discretion and therefore be unconstitutional. This dissenting opinion intends to say that it is not absolutely necessary for the Diet to take the abovementioned legislative measures. According to the general use, the term "obvious" usually means a case that allows no objection. However, there is a doubt that the 2005 Judgment may have used this term with a more loose meaning, contrary to such general use. For example, if the "majority" considers said legislative measures to be absolutely necessary, the necessity might be deemed to be "obvious." There is also concern about the use of this term in connection with the phrase "where it is obvious" as mentioned in the first part of the 2005 Judgment.

At any rate, my understanding is that the assessment criterion presented in the 2005 Judgment, including both the first and second parts thereof, has been reestablished in the present case, while taking into account the point mentioned above. In the future, the assessment criterion regarding this point will be applied as explained in the majority opinion.

The concurring opinion by Justice KIUCHI Michiyoshi is as follows.

I. Reasonableness of the measure to prescribe a 100-day period of prohibition of remarriage

On the premise of the current provision concerning the presumption of paternity, it is possible for a child to be born in the situation where confusion over paternity exists, unless women's remarriage is not prohibited during a period of 100 days. If such situation arises, the child's legal father cannot be determined without filing an action to seek determination of paternity (or seeking a ruling equivalent to an agreement under Article 277 of the Domestic Relations Case Procedure Act).

With the recent advancement in techniques to ascertain a biological father-child relationship, such as DNA testing, it is now very rare that difficulty arises in determining paternity, but the burden to initiate the abovementioned legal procedures cannot be overlooked.

An action to seek determination of paternity must be filed against a woman's former husband as long as he is alive (Article 43 of the Personal Status Litigation Act), and since her former husband is presumed to be the father of the child, her current husband is unable to acknowledge the child. When neither the mother, her current husband, nor her former husband attempts to initiate legal procedures, the child is unable to file an action independently until he or she acquires sufficient mental capacity, although his/her capacity to sue is not limited (Article 13 of the Personal Status Litigation Act). In reality, even after reaching the age of sufficient mental capacity, it is difficult to expect the child to file an action to seek determination of paternity independently.

If so, it is anticipated that it can often happen that both the mother and her current husband, and of course her former husband, would leave

the child's status as it is without initiating legal procedures. In such case, the child's father would be uncertain at the time of his/her birth, and moreover, the child would be left in the condition of not having a definite father for a long period of time. This is considerably prejudicial to the interests of the child.

I agree with the joint concurring opinion for the legal interpretation regarding the exclusion from the application of the part of the Provision which prescribes the 100-day period of prohibition of remarriage, and based on this interpretation, cases that may be subject to the 100-day period of prohibition of remarriage would be limited.

Thus, considering both the interests of children and the prejudice toward women who wish to remarry, the part prescribing the 100-day period of prohibition of remarriage can be held to be not in violation of Article 14, paragraph (1) nor Article 24, paragraph (2) of the Constitution.

II. Reasonableness of the measure to prescribe the prohibition of remarriage for a period exceeding 100 days

In examining the reasonableness of the part of the Provision which prescribes the prohibition of remarriage for a period exceeding 100 days, the majority opinion states that said part of the Provision cannot be justified either from the perspective of minimizing the possibility of a woman having a child of her former husband after remarrying her current husband, nor from the perspective of reducing disputes over a father-child relationship with regard to a child who is born after the remarriage of his/her mother.

In concrete terms, this conclusion would be valid provided that confusion over paternity could be avoided by maintaining the 100-day period of

prohibition of remarriage. In this respect, there could be the following cases.

[1] The child is presumed to be a child of a woman's former husband and this is true, but family discord (dispute) could arise from the very fact that the woman gives birth to a child of her former husband after her remarriage.

[2] A dispute could arise because the child is presumed to be a child of a woman's former husband but is truly a child of her current husband.

[3] A dispute could arise because the child is presumed to be a child of a woman's current husband but is truly a child of her former husband.

In order to avoid case [1], the six-month period of prohibition of remarriage is not enough and remarriage must be prohibited for 300 days. Furthermore, case [1] is a type of dispute that may arise regardless of whether the marriage in question is a woman's remarriage or not, in that a woman gives birth to a child who is not presumed to be a child of her husband (within 200 days from the day of marriage) and the child is truly not a child of her husband. The current rule is designed to avoid this case only where the marriage in question is a woman's remarriage. In other words, the part of the Provision which prescribes for the prohibition of remarriage for a period exceeding 100 days has been established with a view to avoiding a type of dispute only in the case of a woman's remarriage, although such dispute could occur not only in the case of a woman's remarriage, and hence, it is an inadequate measure to avoid disputes and it cannot be found to be reasonable, even though it is intended for the purpose of preventing disputes.

Case [2] could occur in the following situation: after a woman got a de facto divorce from her former husband, she started a de facto married life with her current husband, and then finalized the divorce from her former husband and submitted a notification of marriage with her current husband. This may be the most popular type of case. The measure to prescribe a period of prohibition of remarriage cannot prevent a woman from engaging in de facto marriage with another man after divorcing from her former husband, and it is thus useless in preventing this type of dispute.

Case [3] could occur when a woman has continued to have a relationship with her former husband after divorce, until nearly the time she remarries her current husband. In reality, this may rarely happen, but a woman's act of continuing her relationship with her former husband has nothing to do with the measure to prescribe the period of prohibition of remarriage.

Both cases [2] and [3] are concerned with the presumption of paternity and the reasonableness of the method of reversing it, and it is impossible to avoid disputes in these cases by prohibiting remarriage for a period exceeding 100 days.

Thus, while the measure to prescribe a period of prohibition of remarriage is reasonable as a means to avoid confusion over paternity for the period up to 100 days, it is not found to be reasonable as a means to prevent disputes over a father-child relationship for the period exceeding 100 days.

The opinion by Justice ONIMARU Kaoru is as follows.

I agree with the conclusion of the judgment in prior instance that dismissed the appellant's claim for state compensation, but I consider,

contrary to the majority opinion, that the Provision, which prescribes the six-month period of prohibition of remarriage for women, constitutes unreasonable discrimination by sex and violates Article 14, paragraph (1) of the Constitution, and that it also violates Article 24, paragraph (2) of the Constitution because it is not based on the essential equality of both sexes, which is one of the legislative guidelines, and in conclusion, I consider the Provision in whole to be void.

1. I consider that the holding in the majority opinion regarding the legislative purpose of the Provision is justifiable, in that it explains that the legislative purpose is to avoid confusion over paternity and thereby prevent the occurrence of a dispute over a father-child relationship. I also agree with the joint concurring opinion stating that it is appropriate to interpret Article 733, paragraph (2) of the Civil Code as allowing the exclusion from the application of the Provision in cases where there is no need to try to avoid confusion over paternity, e.g. where it is biologically certain that a woman would not have a child or where a woman was not pregnant at the time of the dissolution, etc. of her previous marriage, in addition to the case where a woman gave birth to a child whom she had conceived before the dissolution, etc. of her previous marriage.

However, based on the majority opinion and the joint concurring opinion, the exclusion from the application of the Provision should be allowed in any cases where there is no need to try to avoid confusion over paternity, as pointed out in the joint concurring opinion, including not only the abovementioned cases prescribed in Article 733, paragraph (2) of the Civil Code as the grounds for exclusion from the application of the Provision, and the cases where notifications of marriage involving women who intend to remarry

during the period of prohibition of remarriage may be accepted according to the conventional practice in handling family registers, but also the cases where a woman's former or current husband could not be presumed to be the father of a child based on the judicial precedent of this court. Thus, a varied and wide range of cases would be excluded from the application of the Provision. As a result, cases that may be excluded from the application of the Provision, or in other words, cases where there is no need to try to avoid confusion over paternity by prohibiting a woman's remarriage, would eventually be limited to very exceptional cases where a woman who has conceived of a child during her previous marriage (including cases where it is not objectively clear whether she had conceived a child during her previous marriage) has not given birth to the child within 100 days from the time of the dissolution, etc. of her previous marriage.

Since the Provision is an extremely important provision that prescribes the requirements for marriage, it is desired to be clear to every individual among the people and have a single meaning. However, although it is only exceptionally necessary to prescribe a period of prohibition of remarriage in order to avoid confusion over paternity, the Provision can be read, from its wording, as uniformly prohibiting remarriage for a certain period of time with regard to all women who have dissolved, etc. their previous marriage (excluding those who gave birth to children as described in Article733, paragraph (2) of the Civil Code). It may be difficult for the general public to correctly understand such circumstances concerning the interpretation, etc. of the Provision, that is, many cases may possibly be excluded from its application as mentioned above. It cannot be denied that this situation is likely to make people who wish to remarry confused, and in the end, to

unnecessarily restrict people's freedom to marry. Furthermore, I consider the legal interpretation presented in the joint concurring opinion to be justifiable in terms of the grounds for exclusion from the application of the Provision as provided in Article 733, paragraph (1) of the Civil Code. However, since administrators of family registers are authorized to only conduct formality checks when notifications of marriage are submitted, it may happen that notifications of marriage are not accepted due to reasons such as insufficient proof of the grounds for exclusion from the application of the Provision. Therefore, it cannot be denied that concerns remain for the possibility of different treatment of notifications of marriage on a case-by-case basis. If a notification of marriage is rejected as a result of a formality check, this means that a remarriage that should have been possible based on the legal interpretation is hindered by the administrator's authority to conduct formality check. The consequence of this would be inappropriate.

In light of the importance of freedom to marry and the possibility to analogically apply the provision concerning an action to seek determination of paternity (Article 773 of the Civil Code) as described below, I find it questionable, even taking into consideration the Diet's legislative discretion, to maintain the Provision, which can be read, from its wording, as uniformly prohibiting remarriage for a certain period of time with regard to all women who have dissolved, etc. their previous marriage (excluding those who gave birth to children as described in Article733, paragraph (2) of the Civil Code)---even for a period of 100 days from the day of the dissolution, etc. of the previous marriage---, given the fact that it is very exceptionally necessary to prescribe a period of prohibition of remarriage in order to avoid confusion over paternity. In my view, declaring unconstitutionality only for a part of the period of

prohibition of remarriage, as is done by the majority opinion, is not sufficient in the end to eliminate the circumstances wherein a number of women would be restricted from remarrying although they do not need to try to avoid confusion over paternity. Furthermore, relying on the legal interpretation presented in the joint concurring opinion or the case-by-case remedy through the practice in handling family registers may cause problems such as different treatment depending on the case or may have limits. Hence, it must be said that there are no reasonable grounds to support the Provision, which applies discriminatory treatment against women as compared to treatment of men.

Consequently, I consider that the Provision in whole goes beyond the scope of the Diet's legislative discretion, and that therefore it is in violation of Article 14, paragraph (1) and Article 24, paragraph (2) of the Constitution and void.

2. If the Provision in whole is considered to be void as mentioned in 1., this could cause confusion over paternity, although very exceptionally. In such case, the child's father would be determined by analogically applying Article 733 of the Civil Code (filing an action to seek determination of paternity). Then, the child's legal father would remain uncertain from the time of the child's birth until a judgment on paternity, etc. becomes final and binding.

The legal effect of a child's legal father being determined through the presumption of paternity is merely that such matters as the child's family status and the duty to support the child are determined, and whether or not the child can actually enjoy the interests and welfare, such as receiving support from the legal father, may be another issue. Even when the child's father is determined through the presumption of paternity, it is often the case that a dispute arises between

the mother's former husband and current husband, either of whom is presumed to be the child's father, and there may also be a case where a woman who has given birth to a child refrains from submitting a notification of birth of the child so that her former husband would not be presumed to be the child's father, which renders the child to not belong to any family register. In view of these facts, even when confusion over paternity exists, and the child remains to have no legal father during a certain period as necessary for going through the procedure to eliminate such situation (such period has been reduced owing to the progress in scientific technology, including DNA testing technology in particular), it is difficult to say that such absence of the legal father would be considerably prejudicial to the child's interests and welfare as compared to the child's father being determined through the presumption of paternity.

The majority opinion points out that if the child remains to be unable to have his/her legal father determined for a certain length of time, this could have various influences on the child. However, a child whose legal father is not determined can live a life in society without problems and receive administrative services. Therefore, other than the legal effect, I find no such circumstances in society as wherein a child's interests and welfare would be undermined due to the absence of a definite legal father.

3. If, contrary to the legal interpretation presented in the joint concurring opinion, Article 733, paragraph (2) of the Civil Code is literally interpreted to preclude any exceptional cases that may be excluded from the application of the Provision, there is no choice but to construe that the Provision prescribes a period of prohibition of remarriage for a considerable number of women although they do not need to avoid confusion

over paternity in the first place. If this interpretation applies, the Provision would be held to be unconstitutional to a greater extent.

Furthermore, another possible idea is to declare the Provision partially unconstitutional with a focus on the part that is not necessary for avoiding confusion over paternity. However, it may be difficult to establish a consensus view regarding the interpretation of such phrase, "the part that is not necessary for avoiding confusion over paternity." In light of the abovementioned issue of whether or not administrators of family registers are permitted to accept or reject notifications of marriage by exercising the authority to conduct formality check, such idea of declaring unconstitutionality only in part may not be practical.

For the reasons stated above, I consider the Provision in whole to be unconstitutional.

The dissenting opinion by Justice YAMAURA Yoshiki is as follows.

Contrary to the majority opinion, I consider that the Provision in whole, which prescribes the six-month period of prohibition of remarriage for women, violates Article 14, paragraph (1) and Article 24, paragraph (2) of the Constitution, and the Diet's legislative inaction, that is, its failure to take legislative measures to abolish the Provision by March 2008, when the appellant divorced her former husband, should be assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act, and in conclusion, the judgment in prior instance should be quashed and the case should be remanded to the court of prior instance to have it calculate the amount of damage sustained by the appellant. I will explain the reasons for my opinion below.

I. Constitutionality of the Provision

1. Article 24 of the Constitution of Japan that came into effect in 1947, with regard to matters concerning marriage and the family, is interpreted as completely throwing away the concept of male dominance under the Constitution of the Empire of Japan (put into effect in 1890) and the feudalistic and sexist ideas incorporated in the traditional family system based on the Former Civil Code enacted thereunder, and declaring that individual dignity and the essential equality of both sexes as universal values. In my view, on the basis of Article 24 of the Constitution that was thus established and Article 14, paragraph (1) that underlies it, freedom to marry has become an important, constitutional right or interest regarding the use of a marriage system that is free from unreasonable discrimination by sex and the ability to enjoy various effects arising therefrom. Consequently, it is appropriate to construe that in the process of examining constitutionality of the Provision, which imposes restrictions of marriage only on women, the scope of the Diet's legislative discretion should be considered to be limited to a reasonable extent, and from this standpoint, it is necessary to accurately identify the legislative purpose of the Provision and examine whether or not the purpose is reasonable even today, more than one century after its enactment, and also examine whether or not the Provision is a necessary and appropriate means to achieve this purpose. If, as a result, any other means with a lower impact is found, the Provision would be held to be unconstitutional.

2. In my view, since the primary objective of the Provision is to prohibit remarriage of divorced women as a means to achieve the purpose of "preventing confusion in a blood line," it is insufficient to examine only the length of the period of prohibition of remarriage in connection

with the issue of avoiding confusion over paternity, but it is necessary to directly examine whether or not the system of prohibition of remarriage in itself conforms to the spirit of the Constitution that provides for equality between men and women and freedom to marry.

At the meetings of the Investigation Committee of Codes and the sessions of the Imperial Diet held at the time of the enactment of the Former Civil Code, which introduced the provision of the same effect as the Provision, the government at the time explained that the period of prohibition of remarriage was designed to prevent confusion in a blood line. For example, UME Kenjiro, a drafter of the Former Civil Code, explained Article 767, paragraph (1) of the Former Civil Code (equivalent to Article 733, paragraph (1) of the current Civil Code) by stating, "The provision of this Article is introduced to prevent confusion in a blood line," and "A mistake in the determination (as to which man is the father of the child) could cause confusion in a blood line" ("Minpo Yogi Kan no Yon" (Principles of the Civil Code, 4th volume), page 91 (1899)). There was a strong consciousness of a biological perspective: when a man marries a woman who previously married another, and she gives birth to a child after marrying him, the identity of the biological father of the child is a critical issue to him; if a man marries a woman who has just divorced, without noticing that she is conceiving a child of her former husband, he might have the child as his legitimate child, while not knowing that the child has no blood relationship with him, and such consequence must be avoided (that is, such confusion in a blood line must be prevented). At that time, however, there was no scientific method to prove the existence or absence of a blood relationship (this question was said to "belong to the mystery of nature"). Therefore, the lawmakers decided to take an alternative measure to prohibit all divorced women from

remarrying for a certain period of time, though this was not logical. The period of prohibition was set as six months (Article 767, paragraph (1) of the Former Civil Code), by reference to the opinion given by Dr. KATAYAMA Kunika (professor of Tokyo Imperial University) that pregnancy can be ascertained from the woman's appearance when she is in six months pregnant or thereafter.

Consequently, according to this theory, some women such as a woman who has given birth to a child after divorce would not be subject to prohibition of remarriage (Article 767, paragraph (2) of the Former Civil Code). This is not because there is no possibility of confusion over paternity, but because there is no possibility of confusion in a blood line. Other provisions concerning the bar to marriage include prohibition of bigamy, prohibition of consanguineous marriage, and prohibition of marriage between an adulteress and her partner in adultery (Article 768 of the Former Civil Code). Prohibition of remarriage was enforced in the same manner as these provisions (the crime of adultery was a very feudalistic rule that was established to maintain the blood line of a family or paternal rights, and its objective is in some aspects the same as prohibition of remarriage). Such an extremely sexist system was formed due to the two backgrounds, i.e., historical and social. At that time, there was no scientific method to determine the existence or absence of a blood relationship, and moreover, under the Former Constitution, a male-dominated society centered on the traditional family system was thought to be the foundation of the national policy.

3. The majority opinion explains that the legislative purpose of the Provision is to "avoid confusion over paternity and thereby prevent the occurrence of a dispute over a father-child relationship." With such explanation, the majority opinion appears to try to replace the conventional

legislative purpose with a new one because, due to the changes in the social circumstances such as the establishment of scientific technology for determination of a blood relationship and the abolition of the traditional family system, etc., the old-fashioned purpose, i.e. preventing confusion in a blood line, is no longer able to support the system of prohibition of remarriage. If the issue is to avoid an overlap between the periods that could cause confusion over paternity, one could reach a conclusion that 100 days would be sufficient to avoid such overlap according to simple calculation, and that therefore the Provision would be made constitutional by shortening the period of prohibition of remarriage by about 80 days. However, it was already clearly indicated at the sessions of the Imperial Diet that an overlap between the periods that could cause confusion over paternity could be avoided just by setting a period of prohibition of remarriage so that no overlap or interval would be created between the periods regarding presumption. The six-month period of prohibition of remarriage was the result of deliberation and it was not an error in calculation that needs to be corrected. When scholars take up the issue of confusion over paternity, they often discuss this issue in the context of proposing an amendment to the Civil Code by arguing, inter alia, that the six-month period of prohibition of remarriage is too long according to calculation and it therefore needs to be shortened to 100 days. However, it must not be overlooked that the present case is a case disputing the constitutionality of the system of prohibition of remarriage itself, rather than the length of the period of prohibition, and that it questions the constitutional significance of existence of the system of prohibition of remarriage, which imposes a strict restriction, despite the fact that there are other means with a lower impact.

Furthermore, in connection with the viewpoint of

whether or not preventing the occurrence of a dispute over a blood relationship by means of the system of prohibition of remarriage is conducive to assuring the "interests of the child," the drafters of the Former Civil Code were worried, from the viewpoint of a man who is to marry a woman, about the possibility of the woman conceiving a child of her former husband, and they made no mention of the idea of assuring the interests of the child at the sessions of the Imperial Diet or meetings of the Investigation Committee of Codes, etc. In 1898, women did not have a right to vote, and only a limited group of men who paid a considerable amount of taxes participated in the legislation process. The Former Civil Code was enacted by the Imperial Diet under such circumstances. Both the Former Constitution and the Former Civil Code attached importance only to male children, and the first sons (who were to inherit family estate) in particular, while having no intention of considering the welfare of the second sons or female children, and in this respect, it can be said that children other than the first sons were excluded from the scope of protection. If one considers that the Former Civil Code enacted at such time, which prohibited women's remarriage after divorce, incorporated at all the viewpoint of assuring the interests of a child, such a view is too ignorant of history.

4. Nevertheless, it cannot be denied that it is reasonable to try to avoid inconsistency between a biological father-child relationship and a legal father-child relationship, and in this meaning, the legislative purpose of preventing confusion in a blood line can be deemed to be reasonable to some extent. Therefore, it is understandable for the drafters at that time, when there was no method to accurately determine a blood relationship, to have considered prohibiting women from remarrying for a certain period of time with a view to preventing women from

giving birth to children having no blood relationships with the husbands they remarried. However, as UME stated, "although it is appropriate to permit remarriage as long as there is no likelihood of confusion (in a blood line)" (UME, op. cit., p. 92), it was not necessary to prohibit women's remarriage if any scientific method to determine a blood relationship was available.

Looking at the changes in the level of medical science around 1898, when the Former Civil Code came into effect, and thereafter, for example, the ABO blood group system was discovered in 1900; in 1924, OGINO Kyusaku, a doctor specializing in obstetrics and gynecology, published his theory concerning ovulation, conception, and pregnancy, which is called Ogino Method, and this method was accepted among scholars around 1930 or thereafter. All these events occurred after the Former Civil Code was enacted. As for DNA testing, the double helix structure of DNA was discovered in 1953; DNA fingerprinting was established in 1985; and DNA testing was put into practical application in Japan around 1991. Subsequently, the use of DNA testing became popular in court practice, and recently, it has become possible to ascertain a father-child relationship accurately, by an easier method and at lower costs. Thus, during over 100 years since the enactment of the Former Civil Code, scientific and medical study in this area has made rapid progress, and today, it is possible to prevent confusion in a blood line without using a heavy-handed method, i.e. prohibiting remarriage of all divorced women, which was previously adopted on the presupposition that it was impossible to prove a biological parent-child relationship, while considering this matter to "belong to the mystery of nature."

Now that it is possible to scientifically and objectively clarify a biological father-child

relationship owing to the progress in DNA testing techniques as explained above, the necessity to prescribe a period of prohibition of remarriage as a means to achieve the legislative purpose of preventing confusion in a blood line has completely been lost, and hence, I consider the Provision in whole to be unconstitutional.

5. Having said that, if the Provision in whole is declared unconstitutional and void, confusion over paternity could occur in rare cases. The majority opinion states that from the viewpoint of "protecting the interests of such child," the part of the Provision which prohibits women from remarrying during a period of 100 days immediately after their divorce should be held to be constitutional. However, this idea remains questionable for its necessity and reasonableness if one compares the restriction imposed by the prohibition of remarriage and the value to be protected thereby as explained below, and it has always been criticized as "imposing a restriction on women in the name of the reason of avoiding a conflict in terms of presumption of paternity, which is elaborated by a legal technique." Based on the same view as this criticism, I cannot agree with the majority opinion.

(1) Even in the absence of the Provision, it is very rare for a woman to give birth to a child who may be affected by confusion over paternity. For example, according to the survey conducted by the Civil Affairs Bureau of the Ministry of Justice concerning Article 772, paragraph (2) of the Civil Code (Yomiuri Shimbun, May 1, 2007), among the 6,493 notifications of birth randomly selected from among all those submitted in November and December 2006, 17 notifications involved women who gave birth to a child within 300 days after their divorce (about 0.26 percent of the total of the survey subjects). Since the total number of notifications of birth submitted in Japan in 2006 was 1,092,674, the number of

women who gave birth to a child within 300 days from their divorce is estimated to be 2,860, and among them, only a small number of women were considered to be remarried at the time of giving birth to a child. By comparing this data with the number of women who divorced in 2006 (257,475) and the number of women who remarried in 2006 (118,838), it is revealed that prohibition of remarriage was, after all, objectively meaningless and unnecessary with regard to the majority of the women who divorced. In my view, restricting freedom to marry with regard to all divorced women is not an appropriate approach, but in the event that a child happens to be born during a period in which confusion over paternity would occur, which is a very exceptional case, the government should provide a case-by-case remedial procedure for determining the father of the child, rather than going nothing for the child by saying, inter alia, that permitting remarriage is against the interests of the child due to reasons such as that it takes time to determine the father. If any problem should occur regarding such a child, it is essential to try hard to find a method with a lower impact, e.g. by making a legal amendment or legal interpretation as necessary to ensure the reasonableness of the provision concerning presumption of paternity, or improving practice. I think the legislative purpose can be achieved sufficiently by taking these measures. Thus, the Provision imposes an excessive restriction, i.e. prohibition of remarriage, on all divorced women, for the sake of a child who may not be born. Today, after the Former Constitution was replaced with the New Constitution, and other effective methods for solving the problem have already been put into practical application, the Provision in whole cannot avoid being assessed as unconstitutional.

(2) The majority opinion argues that by prohibiting remarriage for a period of 100 days, it

is possible to determine in all cases that a child born within 300 days from the submission of the notification of his/her mother's divorce is to be a child of his/her mother's former husband, and that this is beneficial to all such children. However, in cases where the mother's divorce and remarriage are close in time, such measure would rather cause a child to have a father who has no blood relationship, and therefore, I consider that it is more appropriate to make a scientific and objective determination and create a father-child relationship through a reliable legal procedure. Based on the recent medical and scientific level, it is easy to ascertain a biological father-child relationship, and it would not be very troublesome to analogically apply Article 773 of the Civil Code (filing an action to seek determination of paternity). In litigation, the existence or absence of a blood relationship would be the sole point at issue, and there would be no need to have the parties' privacy including their sexual life exposed. It is unimaginable that the parties who allege to have a blood relationship would refuse to cooperate in the scientific examination that is required to prove their relationship. I consider that it is truly beneficial to a child to give him/her the first and last chance to determine his/her true father by making use of the best scientific technology.

(3) In addition, the possible disadvantage that a child would suffer from being unable to have his/her legal father determined for a certain period, as pointed out in the majority opinion, is not so serious at least in recent years. In reality, even while the litigation procedure, etc. is in process, it is possible for a child to be registered on a residence certificate, obtain a passport, and receive various administrative services (e.g. child allowance, admission to a nursery school, health guidance, medical checkup, etc.). It is questionable how much more beneficial to a child it is to prohibit a woman from remarrying for a

certain period of time in the name of the need to determine a father-child relationship at an early time, and to determine the woman's former husband to be the father of the child based on the formality-oriented criterion on the basis of the time of giving birth to the child, as compared to determining the true father of the child through a reasonable procedure, although the child's father remains uncertain for a while.

6. The joint concurring opinion interprets the Provision as not being applicable to women who were not pregnant at the time of the dissolution, etc. of their previous marriage, based on the premise that the legislative purpose of the Provision is to avoid confusion over paternity. However, even based on this interpretation, women who wish to remarry would be forced to bear practical burdens such as having to obtain a doctor's certificate that they are no longer able to conceive a child due to menopause, or receive a test and obtain a certificate that they are not pregnant. Rather, it seems more appropriate, from the perspective of assuring freedom to marry, to declare unconstitutionality of the Provision in whole, including the part prescribing the 100-day period of prohibition of remarriage, and in the very exceptional case where a child is born during a period in which confusion over paternity would occur, to leave the case to be solved by an ex post facto case-by-case remedial procedure.

7. In connection with the proof of a father-child relationship by blood through DNA testing, etc., I consider that a case in which an action is filed against a man who is presumed to be the father of a child in order to seek a declaratory judgment of the absence of a father-child relationship (see 2012 (Ju) No. 1402, judgment of the First Petty Bench of the Supreme Court of July 17, 2014, Minshu Vol. 68, No. 6, at 547), involves the issue of whether or not it is possible to change the

legal father of a child in the litigation after the father-child relationship has already been determined in the previous litigation, and that the circumstances in that case are different from those of the case in which an action to seek determination of paternity is filed as mentioned above. To be more specific, in the former case, since it is necessary to maintain the stability of the already determined legal father-child relationship, it is not necessarily beneficial to the child to later prove a father-child relationship by blood and reverse the legal father-child relationship, even based on reliable evidence such as the result of DNA testing. In the latter case, on the other hand, at the very instance when a child is born, the child has two possible fathers (both the former and current husbands are subject to presumption of paternity and they therefore are eligible to be the legal father of the child in form), and it is truly necessary to determine the father who has a blood relationship with the child. In such case, for the sake of the future of the child, it is necessary to accurately ascertain the child's biological father by making effective use of scientific technology and determine his/her legal father.

8. Declaring the Provision in whole to be unconstitutional would be in line with the trends in foreign countries toward complete abolition of the system of prohibition of remarriage. More specifically, in the past, due to the absence of a scientific method to prove a father-child relationship by blood anywhere in the world, an argument that prohibition of women's remarriage is contrary to the principle of equality of sexes was not clearly voiced. Subsequently, the trends drastically changed during a period starting from discovery of the double helix structure of DNA in 1953 until the practical application of DNA testing was achieved in 1985. During this period, foreign countries abolished systems of prohibition of remarriage in succession, and today, there are

only a few countries among the major countries that maintain such a system of prohibition of remarriage as that in force in Japan. As a recent example, let us take a look at the Republic of Korea, which had a legal system similar to that of Japan. In 1997, the Constitutional Court declared the system of an action to rebut the presumption of legitimacy (which is equivalent to an action to rebut presumption of legitimacy in Japan) to be unconstitutional, on the grounds that this system imposes an extreme restriction regarding the opportunity to rebut a parent-child relationship that is inconsistent with a true blood relationship and goes beyond the bounds of the legislative discretion. Following this, a legal amendment was made in 2005 to allow the husband and the mother to file an action to rebut legitimacy, and extend the statute of limitations so that this action may be filed within two years from the day the husband or the mother comes to know the grounds for rebuttal (Koh, Sang-Ryong, "Kankoku Kazoku Ho no Daikaikaku" (The great reform of the Korean Family Law), Jurist No. 1294, pp. 84 et seq.). At the same time, Article 811 of the Korean Civil Code which prescribed a six-month period of prohibition of remarriage for women was abolished, as explained as follows: "In a county where marriage is formed upon the acceptance of a notification of marriage, it is obvious that this system is virtually useless. This system rather poses the risk of bringing about a harsh consequence to women because the violation thereof is stipulated as the grounds for rescission of marriage. Accordingly, this provision was deleted through the partial amendment to the Civil Code in 2005" (Kim, Choo-Soo and Kim, Sang-Yong, "Chushaku Daikanminkoku Shinzoku Ho" (Commentary on the family law of the Republic of Korea), p. 28 (Nihon Kajo Publishing, 2007)). It was decided that if a child is born in the situation where confusion of paternity exists, the problem can be solved by filing an action to seek determination of paternity by the court

(Article 845 of the Korean Civil Code; which is equivalent to an action seeking determination of paternity in Japan), in which a family court is to determine paternity based on scientific judgment, and that in some cases, blood testing and DNA testing may be implemented using samples of the parties or interested persons, to the extent that these tests do not adversely affect the health or dignity of the persons to be tested (Article 29 of the Korean Domestic Affairs Litigation Law) (Lawyers Association of ZAINICHI Koreans, ed., "Q&A Shin Kankoku Kazoku Ho Dai 2 Han" (Q&A, New Korean family law, second edition), pp. 51 and 135 (Nihon Kajo Publishing, 2015)).

Another important fact is that the Human Rights Committee and the Committee on the Elimination of Discrimination against Women of the United Nations declared that Japan's system of prohibition of remarriage violates the provisions of international treaties concerning gender equality and freedom to marry, and since 1998, these committees have requested or recommended Japan to abolish this system.

Although these facts may not be direct grounds for the constitutional interpretation in Japan, they can still be recognized as material facts that show the changes in the social situation due to which the system of prohibition of remarriage is proved to be contrary to the principle of equality of sexes that is applicable to a married couple and the family as provided in Article 24, paragraph (2) of the Constitution.

II. Illegality of the Legislative Inaction under the State Redress Act

1. When the Provision became unconstitutional

The Provision has come to be assessed as unconstitutional because it has become possible

to ascertain a biological father-child relationship easily and accurately owing to the progress in scientific technology. Beside this, another factor is that the global trends toward realizing gender equality and eliminating discrimination by sex have taken place through international human rights activities and anti-discrimination activities carried out since the end of the Second World War. Consequently, it can be said that the system of prohibition of remarriage became unconstitutional when these two factors were put together to bring about the result. In my view, these factors became real in the beginning of the 21st century (2001) at the latest, and the Provision was already unconstitutional at that point in time.

2. Illegality of the Legislative Inaction

I have no objection to the criterion for assessing illegality of legislative inaction under the State Redress Act as indicated in III-1 of the majority opinion, but I cannot agree with the conclusion of the majority opinion that has been reached by applying this criterion, on the following grounds.

In connection with illegality of the legislative inaction in amending or abolishing the Provision, the 1995 Judgment denied illegality by making an assessment of the legislative inaction as of 1989, whereas in the present case, illegality is alleged regarding the legislative inaction as of 2008, when the appellant dissolved her previous marriage. Thus, in view of such a long interval, i.e. nearly 20 years, the 1995 Judgment cannot be an obstacle to reaching a conclusion to the contrary. As publicly known, since 1991, DNA testing technology has made progress and it has become possible to easily and accurately ascertain a biological father-child relationship. Furthermore, during this period, the people's views and the social situation concerning marriage and the family have drastically

changed, the trends in foreign countries toward abolition of systems of prohibition of remarriage have been revealed, and Japan has been repeatedly requested or recommended by the UN Committees to abolish the Provision.

Given these facts, it should be concluded that the fact that the Provision, which prohibits all women who have dissolved their previous marriage through divorce, etc. from remarrying during a period of six months, constituted an excessive restriction on freedom to marry and became unconstitutional, had already been obvious to the Diet well before the time when the appellant divorced her former husband in 2008 (even when considering the Provision to be unconstitutional only for the part prescribing the prohibition of remarriage for a period exceeding 100 days, as is stated in the majority opinion, in light of the facts that the Legislative Council submitted to the Minister of Justice a report titled "Outline of a Bill for Partial Amendment to the Civil Code" in 1996 and proposed therein an idea of shortening the period of prohibition of remarriage to 100 days, and that during the discussion on this bill, no reasonable explanation was given regarding why it was necessary to maintain the prohibition of remarriage for a period exceeding 100 days, and also in reference to the studies on the Provision by scholars of the Constitution and the Civil Code, it can be said that in 1996 and thereafter, it was obvious to the Diet that 100 days would be sufficient as a period of prohibition of remarriage in order to avoid confusion over paternity).

As for the point of whether or not the Diet has failed to take legislative measures to abolish the Provision for a long period of time without justifiable grounds, since there would be no difficulty in amending or abolishing the Provision in terms of legislative technique, it should be concluded that by 2008, at the latest, a sufficient period of time had passed for which the Diet

	should be held to have failed to take legislative measures without justifiable grounds. As a result of the above, the Legislative Purpose is assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act, and even the existence of negligence cannot be denied. The appellant should be held to have suffered mental distress from having not been able to remarry immediately after dissolving her previous marriage due to the Legislative Inaction. Consequently, I consider that in the present case, the appellant's claim for state compensation on the grounds of the Legislative Inaction that is thus illegal should be upheld.
Presiding Judge	Justice TERADA Itsuro Justice SAKURAI Ryuko Justice CHIBA Katsumi Justice OKABE Kiyoko Justice OTANI Takehiko Justice OHASHI Masaharu Justice YAMAURA Yoshiki Justice ONUKI Yoshinobu Justice ONIMARU Kaoru Justice KIUCHI Michiyoshi Justice YAMAMOTO Tsuneyuki Justice YAMASAKI Toshimitsu Justice IKEGAMI Masayuki

	Justice OTANI Naoto Justice KOIKE Hiroshi

(This translation is provisional and subject to revision.)