

Appendix 1

HAUT-COMMISSARIAT AUX DROITS DE L'HOMME • OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
PALAIS DES NATIONS • 1211 GENEVA 10, SWITZERLAND

Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

REFERENCE:
OL JPN 3/2016 :

23 May 2016

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 24/6 and 25/13.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the existing Law No.111 of 2003, which allegedly contains a number of abusive restrictions and provisions that discriminate against transgender adults and children in Japan and unduly restrict their human rights, including the rights to health, physical integrity, equality before the law, respect for private and family life, education and the right not to be subjected to torture or ill-treatment.**

According to the information received:

Legal gender recognition in Japan is regulated by Law No. 111 of 2003, which came into effect on 16 July 2004. While this constitutes a positive attempt to provide access to legal gender recognition, it is alleged that the procedure established under Law No.111 violates the human rights of transgender adults and children in Japan. The Law reportedly stipulates various abusive and discriminatory criteria that transgender persons are required to meet before they can file an application with the family court for the legal recognition of their preferred gender. Only cases of those applicants who fulfil all of the law's criteria are adjudicated by the family court.

In 2016, a bi-partisan group of Japanese Members of Parliament will reportedly consider amendments to Law No. 111. It is expected that the revision of the Law will conclude with the end of the current parliamentary session in June 2016.

Mandatory medical certification

Law No. 111 obliges transgender persons in Japan, who seek legal recognition of their gender identity, to obtain a medical diagnosis of “Gender Identity Disorder” (GID) as a prerequisite. The Law defines GID as disorder of a person who, despite his/her biological sex being clear, “continually maintains a psychological identity with an alternative gender” and who “holds the intention to physically and socially conform to an alternative gender”. Applicants are required to obtain a medical certificate confirming the GID diagnosis by two or more physicians “generally recognized as holding competent knowledge and experience necessary for the task”.

The process for obtaining a medical certificate for GID is allegedly cumbersome and lengthy as it involves a number of unnecessary and arbitrary tests. While legally binding guidelines for diagnosing GID do not exist, the 2012 Diagnosis and Treatment Guidelines for Gender Identity Disorder recommend physicians to undertake the following three tests: (1) a gender identity test based on the testimony of the individual; (2) a biological gender test, which can entail an examination of chromosomes and hormonal actions as well as an inspection of internal and external genitals, or any “other examinations that doctors find necessary”; (3) a test excluding other diagnoses in order to ensure that “the denial of gender identity/ request for surgery is not coming from schizophrenia nor other cultural, social, or occupational reasons.” The Guidelines do not reference a timeframe within which these tests should be conducted.

This procedure is considered stigmatising and humiliating for the applicant since it bases legal recognition of gender identity on medical certification of a “disorder” and not on self-declaration and it restricts the autonomy and physical and psychological integrity of the persons concerned. In contrast, a human rights based approach to legal gender recognition is based on self-identification and self-declaration free of any unnecessary, disproportionate and abusive barriers imposed by pathological models. UN and other international mechanisms have called for national medical classifications to be reviewed to stop treating transgender adults and children as ill or disordered based on their gender identity, and to remove such abusive requirements for legal recognition of gender identity.

Coercive medical procedures

As per the provisions contained in law No.111, only those transgender persons who intend to undergo surgery and treatment to modify their body, including their genitals, can obtain legal recognition of their gender identity, as this is a requirement for a GID diagnosis. This effectively forces or coerces transgender persons seeking legal recognition of their gender identity to undergo physically transformative treatment and surgical interventions, even if, as is the case for many transgender persons, they do not desire such surgery or treatment.

In addition, Law No. 111 stipulates that transgender persons applying for legal recognition should “not have gonads or permanently functioning gonads”. Hence, transgender persons could be forced or coerced into undergoing often unwanted sterilization surgeries as a prerequisite to enjoy legal recognition of their preferred gender, in absence of any medical necessity. This abusive requirement directly affects the bodily integrity of transgender persons and has been condemned by UN human rights mechanisms as amounting to a violation of their right to be free from torture and ill-treatment, as well as of their right to the full enjoyment of the highest attainable standard of physical and mental health.

Age restrictions

Law No. 11 prevents all transgender persons under the age of 20, Japan’s age of majority, to secure the legal recognition of their gender identity. People under the age of 20 can obtain a GID diagnosis with two signatures from physicians. The GID certificate can reportedly be used by transgender persons to advocate for access to education according to their gender identity, including restroom access and school uniforms. However, only those who reached the age of majority can independently pursue the hormone treatment and surgical procedures required for legal gender recognition. As this process is long and costly, legal gender recognition is often not possible until the mid- 20s.

While Japan’s current model for transgender legal recognition only applies to people over the age of 20, it can have a detrimental impact on transgender children and their families. It is reported that the lack of access to legal gender recognition for persons under 20 and the rigid medical requirements for obtaining legal recognition as an adult causes anxiety and pressure among transgender children and young adults. Reports also indicate that transgender children are led to understand that future surgeries are obligatory and inevitable, which puts intense pressure on them to conform to gender stereotypes. Instead, transgender children and young adults need information, support and safe spaces to explore and express their gender. Particularly, in educational settings transgender persons experience discrimination, stigmatisation and social exclusion, often to the cause of extended and repeated absence from school, and even dropouts. These difficulties are unnecessarily prolonged and exacerbated by the requirement to wait until the age of 20 to seek legal gender recognition.

While safeguarding the rights of children and minors is a legitimate aim, restrictions on the rights of children and minors should not be disproportionate to the aim pursued, and should fully respect and protect the rights of children enshrined in international law. Concerns are expressed that a blanket prohibition on the rights of persons under the age of 20 to recognition of their gender identity could amount to a disproportionate interference with their right to freedom from discrimination, recognition of their gender identity, their right to be heard, and their right to their best interests being the primary consideration in the determination of all actions or decisions that concern them, which could have

serious effects on their right to health, privacy, recognition before the law, and education, and that it may also expose the child to intolerable pressure and family conflict.

Discrimination on the basis of relationship status and parental status

Law No. 111 requires that those seeking legal recognition of a change in gender be unmarried, implying mandatory divorce in cases where the individual is married. In addition, the Law stipulates that applicants must not have any underage children. Such requirements have also been condemned as abusive and disproportionate by UN and international human rights mechanisms.

Finally, it is reported that while Law No.111 provides for the full legal transition from one gender to the other, even transgender persons whose gender identity has been legally recognized face discrimination, for example, with respect to adopting children or obtaining life insurance.

While acknowledging that Law No.111 is a positive attempt to provide access to legal gender recognition for transgender people, serious concern is expressed that the Law, in its current form, contains a number of provisions that are abusive, are in conflict with international human rights norms, and discriminate against transgender persons in Japan. Concern is particularly expressed about provisions forcing or coercing transgender persons to undergo mandatory medical certification and coercive medical procedures, which affect their bodily integrity and could amount to torture or ill-treatment. Further serious concern is expressed at provisions precluding transgender persons who are under the age of 20, are married, or have underage children from seeking legal gender recognition. We express concern that such provisions could be disproportionate and unnecessarily restrict the human rights of transgender adults and children, including the right to be free from torture and ill-treatment, the right to the enjoyment of the highest attainable standards of physical and mental health, as well as the rights to equality before the law, physical integrity, respect for private and family life, and education, and the rights of the child.

We trust that the current revision of Law No. 111 will be conducted in a way that is consistent with Japan's international human rights obligations and in accordance with international best practices for legal gender recognition, which clearly advocate for a simple administrative process for legal recognition of the gender identity of transgender persons, the separation of the legal recognition process from any medical certification or GID diagnosis, the removal of any abusive requirements of sterilization or other forced or coerced medical interventions, the removal of other abusive requirements such as divorce or restrictions based on parental or family situations, and the establishment of a pathway for transgender children to have their gender identity recognized, without disproportionate, discriminatory or abusive restrictions.

In connection with the above alleged facts and concerns, please refer to **the Reference to international law Annex** attached to this letter which cites international human rights and standards relevant to these allegations.

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and comment you may have on the above-mentioned allegations.
2. Please provide information on measures taken to ensure the compliance of Law No. 111 with Japan's obligations under international human rights law and standards.
3. Please provide detailed information on measures taken to prohibit and combat discrimination against transgender adults and children, in compliance with Japan's obligations under international human rights law and standards. In particular, please indicate what measures have been taken to ensure that transgender persons in Japan have equal and non-discriminatory access to the effective legal recognition of their gender identity without disproportionate or abusive requirements including forced or coercive sterilization and other surgery or medical procedures, stigmatizing, humiliating and pathologizing medical certification, divorce, and discriminatory restrictions based on age, parental and relationship status.
4. Please provide information on measures taken to protect the rights of transgender children to have their gender identity recognized and respected, and to be protected from discrimination, including in the context of the exercise of their right to education and health.
5. Please provide information on training measures provided to professionals working in health care and education regarding the rights of transgender persons, including access to appropriate, respectful and gender-sensitive healthcare services without discrimination or pathologization.
6. Please provide information on the proposed amendments to Law No. 111 and the current status of its review. In Particular, please provide information on any measures that are being taken to include transgender adults and children and civil society organizations that work on the rights of transgender persons in meaningful consultations prior to the consideration of the proposed amendments by Members of Parliament.

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the

investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Juan Ernesto Mendez
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or
punishment

Dainius Pūras
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable
standard of physical and mental health

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, we would like to remind your Excellency's Government of the principle of non-discrimination as set forth in articles 2 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Japan in 1979; the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Japan in 1979; and the Convention on the Rights of the Child (CRC), ratified by Japan in 1994. Various treaty bodies have reiterated that the prohibition of discrimination includes discrimination on the ground of gender identity.

We would like to refer your Excellency's Government to the ICCPR, which provides for equal civil and political rights for all men and women (article 3), the right to recognition for everyone before the law (article 16), the right to one's privacy and family (article 17), and the right of men and women of marriageable age to marry and to found a family (article 23(2)). Furthermore, the ICCPR obliges States parties to ensure equality before the law and the equal protection of the law of all persons without discrimination. In this regard, the law must prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground, including sex (article 26). We would like to recall the recommendations made by the UN Human Rights Committee (CCPR/C/IRL/CO/4, CCPR/C/UKR/CO/7) that States should guarantee the rights of transgender persons including the right to legal recognition of their gender, that States should consult with transgender persons and their representatives in the elaboration of legislation that concern them, and that States should repeal abusive and disproportionate requirements for legal recognition of gender identity.

We also deem it pertinent to refer your Excellency's Government to the CRC, which stipulates, *inter alia*, that in all actions concerning children, including legislative measures, the best interest of the child should be a primary consideration (article 3(1)). The best interest must thereby be determined on a case-by-case basis, taking into account the child's personal context, situation and needs, the child's right to be heard (GC 14). Moreover, the CRC obliges States to ensure to the maximum extent possible the survival and development of the child (article 6), which is interpreted as a holistic concept including physical, mental, spiritual, moral, psychological, and social development (GC 5). The Convention also enshrines the obligation of States to respect the right of children to preserve their identity (article 8) and to ensure the right of children express their views in all matters affecting them, with due consideration to those views in accordance with age and maturity of the children (Article 12). Finally, the Convention reiterates that children, like adults, have the rights to privacy (article 16), health (24(1), and education (article 28).

Furthermore, we would like to bring to the attention of your Excellency's Government the right of everyone to the enjoyment of the highest attainable standard of physical and mental health as set forth in article 12 of the ICESCR and article 24(1) of the CRC. In this context, we recall that the Committee on the Rights of the Child stressed that in order to fully realize the right to health for all children, States have an obligation

to ensure that children's health is not undermined as a result of discrimination which is a significant factor contributing to vulnerability (GC 15). The Committee on the Rights of the Child has further emphasized that discrimination on the basis of gender identity is prohibited under the Convention (GC 15).

We would also like to refer to the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, specifying that “[e]ach person’s self-defined [...] gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom” (principle 3). The Principles further stipulate in principle 6 that “[e]veryone, regardless of [...] gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family [...]”, and in principle 24 that “[e]veryone has the right to found a family, regardless of [...] gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the [...] gender identity of any of its members”.

With respect to coercive medical procedures, the Principles reiterate “[...] no one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity [...]”.

In this connection, we would also like to refer to report A/HRC/31/57, in which the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment noted that subjecting transgender persons to forced or otherwise involuntary gender reassignment surgery, sterilization or other coercive medical procedures is abusive, is rooted in discrimination, and violates the rights to physical integrity and self-determination of individuals and amount to ill-treatment or torture, and recommends that forced and coerced sterilization be outlawed in all circumstances, that special measures be adopted to protect individuals belonging to marginalized groups from such forced or coercive sterilization, that other abusive requirements for legal recognition of gender identity be abolished, and that transparent and accessible legal gender recognition procedures be adopted (paras. 49, 72).

Finally, we recall that that the Committee on Economic, Social and Cultural Rights stressed that laws and policies which prescribe or indirectly perpetuate involuntary, coercive or forced medical interventions, including surgery or sterilization requirements for the legal recognition of one's gender identity, constitute a violation of the obligation to respect the right to sexual and reproductive health (General Comment 22, paras. 56-57).

Appendix 2

Response to the request for information from Special Procedures from the Government of Japan

Regarding the request for information about the existing Law No. 111 of 2003 (the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder, hereinafter referred to as the "Special Cases Act") by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, which was sent on May 23, 2016 to the Permanent Mission of Japan to the United Nations Office and other international organizations in Geneva, the response from the Government of Japan is as follows.

1. Please provide any additional information and comment you may have on the above-mentioned allegations.
2. Please provide information on measures taken to ensure the compliance of Law No.111 with Japan's obligations under international human rights law and standards.
3. Please provide detailed information on measures taken to prohibit and combat discrimination against transgender adults and children, in compliance with Japan's obligations under international human rights law and standards. In particular, please indicate what measures have been taken to ensure that transgender persons in Japan have equal and non-discriminatory access to the effective legal recognition of their gender identity without disproportionate or abusive requirements including forced or coercive sterilization and other surgery or medical procedures, stigmatizing, humiliating and pathologizing medical certification, divorce, and discriminatory restrictions based on age, parental and relationship status.
6. Please provide information on the proposed amendments to Law No.111 and the current status of its review. In particular, please provide information on any measures that are being taken to include transgender adults and children and civil society organizations that work on the rights of transgender persons in meaningful consultations prior to the consideration of the proposed amendments by Members of Parliament.

Additional information on measures taken to protect the human rights of transgender persons

1. In Japan, everyone can equally enjoy their human rights, free of discrimination under any circumstances. Violence, discrimination and discriminatory criminal penalties, including death penalties, based on sexual orientation or gender identity are unacceptable, and to this extent, in opposition to human rights violations based on sexual orientation or gender identity, Japan continues to actively engage in efforts for solving international issues surrounding LGBT persons. On 29 September 2015, Japan participated in the High Level LGBT Core Group Event during the UN General Assembly as a member of the Core Group. Japan also cosponsored the resolution on the protection against violence and discrimination based on sexual orientation and gender identity (A/HRC/32/L.2/Rev.1), adopted at the 32nd session of the Human Rights Council.
2. Nationally, discussions regarding the protection of the rights of LGBT persons have been advancing, following the establishment of the Nonpartisan Parliamentary Group on the rights of LGBT persons in March 2015, and the Special Mission Committee on sexual orientation and gender identity (hereinafter referred to as the "Special Mission Committee") by the Liberal Democratic Party (LDP) in February 2016. The LDP's Special Mission Committee compiled a report titled "LDP's basic stance towards a society accepting diversity in sexual orientation and gender identity," in which it is stated that upon applying the Special Cases Act, the LDP will take action when necessary, listening carefully to requests for improvement.

Additional information and comments on the point that legal gender recognition should be based on self-identification and the call to stop treating transgender persons as disordered

3. The Special Cases Act requires that Persons with Gender Identity Disorder receive "concurrent diagnoses on such identification with the opposite gender from two or more physicians equipped with the necessary knowledge and experience to give accurate diagnoses on this matter, based on generally accepted medical knowledge." This provision aims to ensure that such persons receive recognition of gender status from the family court in an appropriate and prompt manner, by assuring that the person has received an appropriate, objective and certain judgment by two or more physicians, and by also ensuring that such judgment be a prior condition for the ruling by the family court. The requirement also aims to prevent claims by persons claiming gender identity disorder for a change in gender status without having obtained a diagnosis.

4. The recognition of Person with Gender Identity Disorder is a basic condition for changes in legal gender status, which gives rise to fundamental consequences, and at the same time psychological gender is an internal issue that cannot be perceived physically. In order to ensure that recognition of Gender Identity Disorder be made objectively and certainly, concurrent diagnoses from two or more physicians are required, and those diagnoses should be made "based on generally accepted medical knowledge."
5. The Diagnosis and Treatment Guidelines for Gender Identity Disorder compiled by the Japanese Society of Psychiatry and Neurology, which was compiled before the enforcement of the Special Cases Act, also provides in principle that concurrent judgment from two or more physicians make the diagnoses determinable.

Additional information and comments on the point that legal gender recognition should be based on self-identification and self-declaration, not on medical certification

6. As mentioned above, the recognition of Person with Gender Identity Disorder is a basic condition for changes in legal gender status, which gives rise to fundamental consequences, and at the same time psychological gender is an internal issue that cannot be perceived physically. In order to ensure that it is recognized be made objectively and certainly, concurrent diagnoses from two or more physicians are required, and those diagnoses should be made "based on generally accepted medical knowledge."

Additional information and comments on the point that the requirement that the person "not have gonads or permanently functioning gonads" amounts to a violation of their right to be free from torture and ill-treatment, as well as their right to the full enjoyment of the highest attainable standard of physical and mental health

7. The Special Cases Act stipulates the inability to reproduce as a requirement based on the judgment that, upon recognizing a change in legal gender status, it is inappropriate that the reproductive capability of the former gender is maintained, or that the reproductive gland is functioning, secreting gender hormones of the former gender. In other words, when a person, after having had a change in legal gender status recognized, procreates using the reproductive function of the former gender, it may give rise to confusion and various problems. At the same time, the possibility that the secretion of gender hormones by the reproductive gland of the former gender may

have undesired physical and psychological influences cannot be denied.

Additional information and comments on the concern over the requirements that the person be over the age of 20, unmarried, and not have any underage children

8. The requirement that the person “is not less than 20 years of age” is stipulated in consideration of the following matters.
 - (1) Japanese Civil Law stipulates that the age at which a person obtains sufficient capability to manage one’s own affairs is the age of 20.
 - (2) The decision on change in recognition of legal gender status must be made carefully by the persons themselves, given that gender is an important matter that affects the person’s personality, and a change in gender is irreversible in nature.
 - (3) The Diagnosis and Treatment Guidelines for Gender Identity Disorder issued by the Japanese Society of Psychiatry and Neurology requires that in order to begin 3rd phase treatment (surgery of the reproductive organs), the person should be no less than 20 years of age.
9. The requirement that the person “is not currently married” is due to the fact that a change in legal gender status of a married person will result in a situation of same-sex marriage, which will give rise to various issues in the current legal order.
10. The requirement that the person “currently has no child who is a minor” is stipulated, taking into consideration the arguments that this system could give rise to confusion within the family, including between parent and child, or influence the child’s welfare. At the time of the enactment of the Special Cases Act, the requirement was that the person “currently has no child.” However, the requirement was amended to read “currently has no child who is a minor” in 2008, considering that in the case that the child is an adult, the impact of the change in legal gender status on the parent-child relationship or the welfare of the child would not be as strong in comparison to cases where the child is a minor.

Additional information and comments on the comment regarding support for transgender child in schools

11. On lines 15 through 18 of page 3 of the joint communication it is written that “the GID certificate can reportedly be used by transgender persons to advocate for access to education according to their gender identity, including restroom access and school uniforms.” We would like to elaborate on this.

12. The Ministry of Education, Culture, Sports, Science and Technology (MEXT) issued a directive in 2015 to prefectural boards of education. The directive illustrates examples of support in schools for students with sexual orientation or gender identity issues, such as permitting the students to wear school uniforms in line with their actual or perceived gender identity and permitting the use of faculty or multipurpose lavatories.

13. In order to allow support for students with anxieties and insecurities, the directive states that such support does not require the diagnosis of medical institutions. Such support does not require a GID certificate.

Additional information and comments on the point that Japan should amend the Special Cases Act to remove discriminatory provisions

14. As mentioned above, the Special Cases Act is exercised appropriately, taking into consideration international humanitarian laws and universal standards. With that in mind, Japan recognizes the need to consider the possibility of amending the Special Cases Act, taking into consideration national debate including that mentioned above in paragraph 2.

4. Please provide information on measures taken to protect the rights of transgender children to have their gender identity recognized and respected, and to be protected from discrimination, including in the context of the exercise of their right to education and health.

15. MEXT promotes appropriate measures by indicating ways to address matters related to gender identity concerning students, such as the following which were compiled in the 2015 directive:

- (1) Promote appropriate education that prohibits discrimination and bullying under any circumstances;
- (2) Encourage school faculties to endeavor to become good listeners for students who suffer from anxiety or insecurity;
- (3) Advance efforts in accordance with the individual circumstances of students, families and schools;
- (4) Create/maintain an environment in which students feel comfortable seeking help;
- (5) Enhance appropriate understanding of school faculty through training.

16. The directive illustrates examples of support in schools for students with sexual orientation or gender identity issues, such as permitting the students to wear school uniforms in line with their actual or perceived gender identity and permitting the use of faculty or multipurpose lavatories.

5. Please provide information on training measures provided to professionals working in health care and education regarding the rights of transgender persons, including access to appropriate, respectful and gender-sensitive healthcare service without discrimination or pathologization.

17. MEXT notified prefectural boards of education in 2015 to promote appropriate understanding of transgender issues amongst faculty through training on issues such as appropriate ways of addressing students with gender identity issues.

18. MEXT compiled an informative document in 2016 to be used by the prefectural board in training sessions, aimed at promoting understanding amongst faculty on appropriate ways of addressing issues with gender identity issues.

19. MEXT also promotes the understanding of transgender issue amongst faculty by explaining directives and informative documents at prefectural boards of education meetings.

Appendix 3

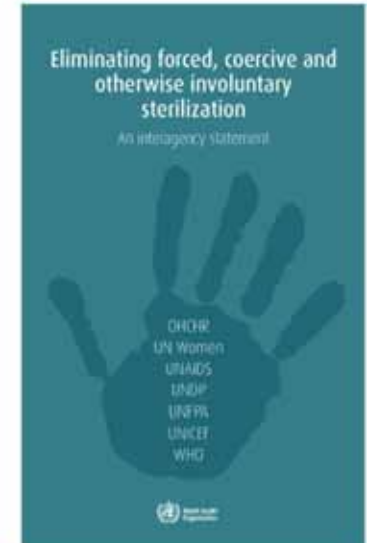
GID（性同一性障害）学会理事会 2017（平成 29）年 3 月 19 日提出

国連諸機関による「強制・強要された、または非自発的な断種の廃絶を求める共同声明」を支持する声明文（案）

WHOをはじめとする国連諸機関注 1)は、2014（平成 26）年 5 月 30 日「強制・強要された、または非自発的な断種の廃絶を求める共同声明」を発表した。この共同声明は、特定の集団（HIV 陽性者、障がいのある人々、先住民族、民族的マイノリティ、トランスジェンダー及びインターセックスの人びとなど）において、不均衡に、不妊手術などの断種が行われている実態について述べ、本人の同意に基づかない医療処置が、健康・情報・プライバシーに関する権利、生殖に関する権利、差別されない権利、拷問と残酷及び非人道的又は侮辱的取り扱い又は処罰からの自由に関する権利など、国内外の様々な公文書が保障する人権を侵害するものであるとして、強く非難している。

特にトランスジェンダーについては、「出生証明書及び他の法的文書における性別記載を望みの性に変更するために、断種を含む、様々な法的・医学的要件を満たさなければならない」（2 頁）ことを人権侵害の例として挙げ、「手術要件は、身体の完全性・自己決定・人間の尊厳の尊重に反するものであり、トランスジェンダー及びインターセックスの人々に対する差別を引き起こし、また永続させるものである。」（7 頁）と非難している。本学会理事会は、この共同声明を支持するとともに、以下の意見表明を行なうこととした。

国内においては、「性同一性障害者の性別の取扱いの特例に関する法律」（2004 年 7 月 16 日施行）の施行から 12 年が経過し、最高裁発表で 2015（平成 27）年 12 月末までに 6,021 名が戸籍上の性別を変更している。一方で、全国の主要医療機関を対象とした日本精神神経学会「性同一性障害に関する委員会」調査によれば、同年 12 月末までに性別違和を主訴に受診したのは 22,435 例で、戸籍を変更した割合はその 20.8%に過ぎない注 2)。全員ではないにせよ、受診者の大多数が戸籍変更を希望している実態からすれば、この数値は明らかに低い。特例法 3 条 1 項に規定された要件、特に「手術要件」がなければ、状況はかなり異なったものになると考えられる。



OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and O . Eliminating forced, coercive and otherwise involuntary sterilization: An inter-agency statement. World Health Organization: May 30 2014.

さらに重要な問題がある。意思決定の自律性は医療倫理の中核を成すものであり、十分に自由かつ情報に基づいた同意 (the full, free and informed consent) の表明によって担保される。「性同一性障害に関する診断と治療のガイドライン」注3)においても、「当事者の生活の質の向上を目的とした手段」である治療について、「医療現場では当事者の自己決定と自己責任を最大限に尊重しながら、個々のケースに応じたよりきめ細かい判断が必要である」と述べられている(1255頁)。しかし、法的な性別変更「手術要件」が規定されている状況では、医療現場で意思決定の自律性を担保することはできない。

2010(平成22年)年にいち早く学会の立場表明をしていたWPATH注4)は、今回の共同声明が発表された後の2015(平成27年)年に再び声明を発表し、「いかなる医学的・外科的・精神保健的治療及び診断の有無も、個人のジェンダー・アイデンティティの的確な指標(an adequate marker)になるものではない。したがって、法的な性別変更の要件にしてはならない」と勧告している注5)。こうした学会組織、国連諸機関、国際的人権団体などによる度重なる勧告を踏まえ、世界にはすでに「手術要件」のない法律の制定や法改正を行った例がある。実質的に性別適合手術をすることなく性別変更できる国も含めれば、欧州地域18か国(オーストリア、ベラルーシ、デンマーク、エストニア、フランス、ドイツ、ハンガリー、アイスランド、アイルランド、イタリア、マルタ、モルドバ、オランダ、ノルウェー、ポーランド、ポルトガル、スペイン、スウェーデン、英国)、南米地域2か国(アルゼンチン、ウルグアイ)、北米地域2か国(ただし州による)、アフリカ地域2か国(ボツワナ、南アフリカ)、アジア・オセアニア地域5か国(オーストラリア、ニュージーランド、インド、ネパール、台湾)など、「手術要件」撤廃の動きは広がりをみせている注6)。

共同声明は「不妊化処置など、避妊に関するサービスを含めた保健医療サービスは、トランスジェンダーやインターセックスの人々にとっても利用可能なものでなければならないが、他の人々と等しく、強要・差別・暴力がない状態でなければならない。」(8頁)と勧告している。世界に先駆けて1972(昭和47)年に「性の転換に関する法律」を公布したスウェーデンでは、2013(平成25)年の議会で「手術要件」撤廃を可決した後、1970年代までの優生政策のもとで断種を強いられた人々と要件撤廃前に手術を受けたトランスジェンダーを等しく扱い、損害賠償請求があった場合はこれに応じるとした注7)。

日本で「性同一性障害」への対応が始まったのは1990年代半ばのことである。国内固有の事情と経緯があるとはいえ、国際的潮流に反して特例法3条1項に規定された要件、特に「手術要件」をそのままにしておくことは、当事者にとってはもとより、「門番」の責を担わされる臨床家(医)にとっても、決して望ましいことではない。自己決定の主体が他者の意向や都合に過度な影響を受けることなく、インセンティブや強要から自由であるためには、環境の調整を図る必要がある。トランスジェンダーの健康に

関わる専門職者は、自由に、かつ十分な情報に基づいた意思決定を保障することに、無知・無関心であってはならない。

国内外で積み重ねられてきた議論と最新の科学的知見に基づき、当事者のウェルビーイング（well-being）を最大限に保障していくこと、そのための専門的見解を広く社会に公開していくことが、本学会の存在意義であり、社会的使命である。本学会は、ここに改めてそのことを確認し、「強制・強要された、または非自発的な断種の廃絶を求める共同声明」を支持することを表明する。

注1) 国連人権高等弁務官事務所（UNHCHR）、国連ウィメン（UN Women）、国連合同エイズ計画（UNAIDS）、国連開発計画（UNDP）、国連人口基金（UNFPA）、国連児童基金（UNICEF）、世界保健機構（WHO）

注2) 針間克己他（2017）「性同一性障害に関する委員会」による性別違和が主訴の症例数と国内外性別適合手術例数の推定調査. 第19回GID（性同一性障害）学会研究大会（札幌市2019年2月18-19日）.

注3) 日本精神神経学会・性同一性障害に関する委員会（2012）性同一性障害に関する診断と治療のガイドライン（第4版）. 精神神経学雑誌 114 (11): 1250-1266.

注4) World Professional Association for Transgender Health（旧 Harry Benjamin International Gender Dysphoria Association）はトランスジェンダーの健康に関する世界最古にして最大の専門職集団である。

注5) WPATH (2015) WPATH Statement on Identity Recognition, 19 January 2015. Retrieved from <http://www.wpath.org/>

注6) 各国の状況については、Open Society Foundation (2014) License to be yourself: Forced sterilization (A Legal Gender Recognition Issue Brief). 及び TGEU (2016) Trans Rights Europe Index 2016.に加えて、台湾についてはメディア情報を参照した。

注7) TGEU (2016) Trans people to receive compensation for forced sterilisation in Sweden. Retrieved from <http://tgeu.org/>

The Board of the Japanese Society of Gender Identity Disorder
Submitted on March 19, 2017

(Draft) Statement supporting “Eliminating forced, coercive and otherwise involuntary sterilization: An inter-agency statement” proposed by the various United Nations agencies

Several agencies of the United Nations¹²⁸ including the World Health Organization (WHO), issued the statement “Eliminating forced, coercive and otherwise involuntary sterilization: An inter-agency statement” on May 30, 2014. The inter-agency statement condemns the state in which people belonging to certain population groups (people living with HIV, persons with disabilities, indigenous peoples and ethnic minorities, and transgender and intersex persons) have been disproportionately subjected to sterilization without their full, free and informed consent, as a violation of fundamental human rights that many national and international official documents guarantee, including the right to health, the right to information, the right to privacy, the right to decide on the number and spacing of children, the right to be free from discrimination, and the right to be free from torture and other cruel, inhumane or degrading treatment or punishment.



Particularly for transgender persons, the inter-agency statement raises the example of human rights violation “in the various legal and medical requirements, including for sterilization, to which transgender persons have been subjected in order to obtain birth certificates and other legal documents that match their preferred gender” (p.2). The inter-agency statement condemns that “These sterilization requirements run counter to respect for bodily integrity, self-determination and human dignity, and can cause and perpetuate discrimination against transgender and intersex persons” (p.7) The Board of the Japanese Society of Gender Identity Disorder supports inter-agency statement and expresses its opinion as follows.

OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. *Eliminating forced, coercive and otherwise involuntary sterilization: An inter-agency statement*. World Health Organization: May 30 2014.

In Japan, it has been twelve years since “Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder” was enacted on July 16, 2004. According to The Supreme Court, there were 6,021 individuals who changed their sex on the family register until the end of December 2015. On the other hand, according to a survey conducted by the Japanese Society of Psychiatry and Neurology’s Gender Identity Disorder Committee which targeted major medical clinics throughout Japan, out of 22,435 consultations for gender dysphoria until

¹²⁸ The United Nations High Commissioner for Human Rights (UNHCHR), The United Nations Women (UN Women), The United Nations AIDS Program (UNAIDS), The United Nations Development Program (UNDP), The United Nations Population Fund (UNFPA), The United Nations Children’s Fund (UNICEF), The World Health Organization (WHO)

the end of December 2015, only 20.8%¹²⁹ changed their sex on family register. Considering the actual number of patients who wish to change their sex on the family register, even if not all patients, this number is far too low. Therefore, it can be assumed that if the requirements stated in Article 3 Section 1 of the Special Cases Act, especially the “surgery requirement,” did not exist, the situation would have been vastly different.

There is a problem of even greater importance. Autonomy in decision-making, which is secured through full, free and informed consent, shapes the core of medical ethics. “The Guideline regarding the Diagnosis and Treatment of Gender Identity Disorder”¹³⁰ states that regarding treatments that “aim to improve individual’s quality of life, it is important that at medical sites, decisions are based on each individual case, while respecting individual’s autonomy and self-responsibility to its maximum extent” (p.1255). However, under current circumstances where the “surgery requirement” is necessary to legally change one’s sex, it is not possible to secure autonomy in decision-making at medical sites.

WPATH¹³¹, which had expressed its academic position on the subject in 2010, released another statement in 2015 after the current inter-agency statement was released. It recommends that “WPATH continues to oppose surgery or sterilization requirements to change legal sex or gender markers. No particular medical, surgical, or mental health treatment or diagnosis is an adequate marker for anyone’s gender identity, so these should not be requirements for legal gender change.”¹³²

Considering the numerous recommendations from academic societies, the United Nations agencies, as well as international human rights organizations, there are countries that have established or revised laws not to include the “surgery requirement”. Countries where an individual can change their sex without having to undergo sexual reassignment surgery include: 18 European countries (Austria, Belarus, Denmark, Estonia, France, Germany, Hungary, Iceland, Ireland, Italy, Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Great Britain), 2 South American countries (Argentina, Uruguay), 2 North American countries (varies by state), 2 African countries (Botswana, South Africa), 5 countries in the Asia-Pacific region (Australia, New Zealand, India, Nepal, Taiwan). These countries demonstrate a growing trend of the abolishment of the surgery requirement¹³³.

¹²⁹ Katsuki Harima et al. (2017) Committee on Gender Identity Disorder "to estimate the number of cases with complaints of gender disagreement and number of surgical cases compatible with domestic and foreign sex. Presented at the 19th Annual Meeting of Japan Society of Gender Identity Disorder. Sapporo: February 18-19.

¹³⁰ The Japanese Society of Psychiatry and Neurology (2012) Japanese Guideline for the Diagnosis and Medical Treatment of Gender Identity Disorder [Version 4], *Psychiatria et Neurologia Japonica*, 114 (11): 1250-1266.

¹³¹ The World Professional Association for Transgender Health (Formerly known as the Harry Benjamin International Gender Dysphoria Association) is the world's oldest and largest professional organization on transgender health

¹³² WPATH (2015) WPATH Statement on Legal Recognition of Gender Identity, 19 January 2015. Retrieved from <https://www.wpath.org/policies>

¹³³ Regarding the situation of each country, we referred to *License to be yourself: Forced sterilization (A Legal Gender Recognition Issue Brief)* (Open Society Foundation, 2014); Trans Rights Europe Index 2016 (TGEU, 2016); and for Taiwan we deferred.

The inter-agency statement cites and supports that “Human rights bodies have condemned the serious human rights violations to which transgender and intersex persons are subjected and have recommended that transgender and intersex persons should be able to access health services, including contraceptive services such as sterilization, on the same basis as others: free from coercion, discrimination and violence. They have also recommended the revision of laws to remove any requirements for compulsory sterilization of transgender persons (39, para 21; 163, para 32; 164; 165; 166).” (p.8). In 1972, Sweden took the lead by implementing “Sex Determination Law (om fastställande av könstillhörighet i vissa fall)”. After the Swedish Parliament voted to remove the mandatory legal requirement of sterilization in 2013, the Swedish government announced to pay economic compensation to trans victims of forced sterilization if requested¹³⁴, treating them equally with those who were forced to undergo sterilization in the 1970s due to the eugenic policy.

Japan began to respond to “Gender Identity Disorder” in the middle of 1990s. Even though Japan has had its own domestic situations, keeping the Article 3 Section 1 of the Special Cases Act, especially the “surgery requirement”, against the international trend, is undesirable not only for the concerned individuals but also for the clinicians that have the burden of acting as “gatekeepers”. It is necessary to change the environment, so that an individual’s autonomy is respected without the excessive influence of others, incentives or coercion. Professionals involved in the health of transgender people should never be ignorant or unconcerned about guaranteeing the full, free and informed consent of the individual.

Based on the most scientific knowledge as well as domestic and international discussions, it is the Japanese Society of Gender Identity Disorder’s purpose and mission to disseminate professional opinion throughout society to guarantee the well-being of transgender people. The society once again affirms this mission and expresses its support towards “Eliminating forced, coercive and otherwise involuntary sterilization: An inter-agency statement”.

¹³⁴ TGEU (2016) Trans people to receive compensation for forced sterilization in Sweden. Retrieved from <http://tgeu.org/>

Appendix 4

平成30年（ク）第269号 性別の取扱いの変更申立て却下審判に対する抗告棄却決定に対する特別抗告事件

平成31年1月23日 第二小法廷決定

主 文

本件抗告を棄却する。

抗告費用は抗告人の負担とする。

理 由

抗告代理人大山知康の抗告理由について

性同一性障害者につき性別の取扱いの変更の審判が認められるための要件として

「生殖腺がないこと又は生殖腺の機能を永続的に欠く状態にあること」を求める性同一性障害者の性別の取扱いの特例に関する法律3条1項4号の規定（以下「本件規定」という。）の下では、性同一性障害者が当該審判を受けることを望む場合には一般的には生殖腺除去手術を受けていなければならないこととなる。本件規定は、性同一性障害者一般に対して上記手術を受けること自体を強制するものではないが、性同一性障害者によっては、上記手術まで望まないのに当該審判を受けるためやむなく上記手術を受けることもあり得るところであって、その意思に反して身体への侵襲を受けない自由を制約する面もあることは否定できない。もっとも、本件規定は、当該審判を受けた者について変更前の性別の生殖機能により子が生まれることがあれば、親子関係等に関わる問題が生じ、社会に混乱を生じさせかねないことや、長きにわたって生物学的な性別に基づき男女の区別がされてきた中で急激な形での変化を避ける等の配慮に基づくものと解される。これらの配慮の必要性、方法の相当性等は、性自認に従った性別の取扱いや家族制度の理解に関する社会的状況の変化等に応じて変わり得るものであり、このような規定の憲法適合性については不断の検討を要するものというべきであるが、本件規定の目的、上記の制約の態様、現在の社会的状況等を総合的に較量すると、本件規定は、現時点では、憲法

13条, 14条1項に違反するものとはいえない。

このように解すべきことは、当裁判所の判例（最高裁昭和28年（オ）第389号同30年7月20日大法廷判決・民集9巻9号1122頁，最高裁昭和37年

（オ）第1472号同39年5月27日大法廷判決・民集18巻4号676頁，最高裁昭和40年（ア）第1187号同44年12月24日大法廷判決・刑集23巻12号1625頁）の趣旨に徴して明らかというべきである。論旨は採用することができない。よって、裁判官全員一致の意見で、主文のとおり決定する。なお、裁判官鬼丸かおる、同三浦守の補足意見がある。

裁判官鬼丸かおる、同三浦守の補足意見は、次のとおりである。

1 性同一性障害者の性別の取扱いの特例に関する法律（以下「特例法」という。）は、生物学的には性別が明らかであるにもかかわらず、心理的にはそれとは別の性別であるとの持続的な確信を持ち、かつ、自己を身体的及び社会的に他の性別に適合させようとする意思を有する者であって、そのことについて2人以上の医師の診断が一致しているものを対象として、その法令上の性別の取扱いの特例について定めるものである。これは、性同一性障害者が、性別の違和に関する苦痛を感じるとともに、社会生活上様々な問題を抱えている状況にあることから、その治療の効果を高め、社会的な不利益を解消するために制定されたものと解される。そして、特例法により性別の取扱いの変更の審判を受けた者は、変更後の性別で婚姻をすることができるほか、戸籍上も、所要の変更等がされ、法令に基づく行政文書における性別の記載も、変更後の性別が記載されるようになるなど、社会生活上の不利益が解消されることになる。

また、性別は、社会生活や人間関係における個人の属性の一つとして取り扱われているため、個人の人格的存在と密接不可分のものといえることができ、性同一性障害者にとって、特例法により性別の取扱いの変更の審判を受けられることは、切実ともいえるべき重要な法的利益である。

本件規定は、本人の請求により性別の取扱いの変更の審判が認められるための要件の一つを定めるものであるから、自らの意思と関わりなく性別適合手術による生殖腺の除去が強制されるというものではないが、本件規定により、一般的には当該手術を受けていなければ、上記のような重要な法的利益を受けることができず、社会的な不利益の解消も図られないことになる。

さらに、性別適合手術については、特例法の制定当時は、原則として、第1段階（精神科領域の治療）及び第2段階（ホルモン療法等）の治療を経てなおその身体的性別に関する強い苦痛等が持続する者に対する最終段階の治療として行うものとされていたが、その後の臨床経験を踏まえた専門的な検討を経て、現在は、日本精神神経学会のガイドラインによれば、性同一性障害者の示す症状の多様性を前提として、この手術も、治療の最終段階ではなく、基本的に本人の意思に委ねられる治療の選択肢の一つとされている。

したがって、生殖腺を除去する性別適合手術を受けていない性同一性障害者としては、当該手術を望まない場合であっても、本件規定により、性別の取扱いの変更を希望してその審判を受けるためには当該手術を受けるほかに選択の余地がないことになる。

2 性別適合手術による卵巣又は精巣の摘出は、それ自体身体への強度の侵襲である上、外科手術一般に共通することとして生命ないし身体に対する危険を伴うとともに、生殖機能の喪失という重大かつ不可逆的な結果をもたらす。このような手術を受けるか否かは、本来、その者の自由な意思に委ねられるものであり、この自由は、その意思に反して身体への侵襲を受けない自由として、憲法13条により保障されるものと解される。上記1でみたところに照らすと、本件規定は、この自由を制約する面があるというべきである。

そこで、このような自由の制約が、本件規定の目的、当該自由の内容・性質、その制約の態様・程度等を総合的に較量して、必要かつ合理的なものとして是認されるか否かについて検討する。

本件規定の目的については、法廷意見が述べるとおり、性別の取扱いの変更の審判を受けた者について変更前の性別の生殖機能により子が生まれることがあれば、親子関係等に関わる問題が生じ、社会に混乱を生じさせかねないことや、長きにわたって生物学的な性別に基づき男女の区別がされてきた中で急激な形での変化を避ける等の配慮に基づくものと解される。

しかし、性同一性障害者は、前記のとおり、生物学的には性別が明らかであるにもかかわらず、心理的にはそれとは別の性別であるとの持続的な確信を持ち、自己を身体的及び社会的に他の性別に適合させようとする意思を有する者であるから、性別の取扱いが変更された後に変更前の性別の生殖機能により懐妊・出産という事態が生ずることは、それ自体極めてまれなことと考えられ、それにより生ずる混乱といっても相当程度限られたものといえることができる。

また、上記のような配慮の必要性等は、社会的状況の変化等に応じて変わり得るものであり、特例法も、平成15年の制定時の附則2項において、「性別の取扱いの変更の審判の請求をすることができる性同一性障害者の範囲その他性別の取扱いの変更の審判の制度については、この法律の施行後3年を目途として、この法律の施行の状況、性同一性障害者等を取り巻く社会的環境の変化等を勘案して検討が加えられ、必要があると認めるときは、その結果に基づいて所要の措置が講ぜられるものとする。」と定めていた。これを踏まえて、平成20年、特例法3条1項3号の「現に子がないこと」という要件に関し、これを緩和して、成人の子を有する者の性別の取扱いの変更を認める法改正が行われ、成人の子については、母である男、父である女の存在があり得ることが法的に肯定された。そして、その改正法の附則3項においても、「性同一性障害者の性別の取扱いの変更の審判の制度については、この法律による改正後の特例法の施行の状況を踏まえ、性同一性障害者及びその関係者の状況その他の事情を勘案し、必要に応じ、検討が加えられるものとする。」旨が定められ、その後既に10年を経過している。

特例法の施行から14年余を経て、これまで7000人を超える者が性別の取扱

いの変更を認められ、さらに、近年は、学校や企業を始め社会の様々な分野において、性同一性障害者がその性自認に従った取扱いを受けることができるようにする取組が進められており、国民の意識や社会の受け止め方にも、相応の変化が生じているものと推察される。

以上の社会的状況等を踏まえ、前記のような本件規定の目的、当該自由の内容・性質、その制約の態様・程度等の諸事情を総合的に較量すると、本件規定は、現時点では、憲法13条に違反するとまではいえないものの、その疑いが生じていることは否定できない。

3 世界的に見ても、性同一性障害者の法的な性別の取扱いの変更については、特例法の制定当時は、いわゆる生殖能力喪失を要件とする国が数多く見られたが、2014年（平成26年）、世界保健機関等がこれを要件とすることに反対する旨の声明を発し、2017年（平成29年）、欧州人権裁判所がこれを要件とすることが欧州人権条約に違反する旨の判決をするなどし、現在は、その要件を不要とする国も増えている。

性同一性障害者の性別に関する苦痛は、性自認の多様性を包容すべき社会の側の問題でもある。その意味で、本件規定に関する問題を含め、性同一性障害者を取り巻く様々な問題について、更に広く理解が深まるとともに、一人ひとりの人格と個性の尊重という観点から各所において適切な対応がされることを望むものである。

(裁判長裁判官三浦 守 裁判官 鬼丸かおる 裁判官 山本庸幸 裁判官菅野博之)

Heisei 30 nen (2018)(ku) No. 269 *Tokubetsu-koukoku* Appeal Case Against the *Koukoku* Dismissal Decision Against the Decision to Dismiss the Application to Change the Treatment of Sex
Heisei 31 nen (2019) Decision by the Second Petty Bench of the Supreme Court

Main text of the judgment

The *koukoku*-appeal is dismissed.

The costs of *koukoku*-appeal shall be borne by the appellant.

Reasons

Regarding the reasons for *koukoku*-appeal filed by the counsel for the *koukoku*- appeal, OYAMA Tomoyasu

Under Article 3(1)(4) of the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (hereinafter “the provision in question”) which requires that a person requesting a ruling of change in the recognition of gender status “has no gonads or permanently lack functioning gonads,” as a general matter if a person with gender identity disorder requests such a ruling, that person needs to have had surgery to remove his/her gonads. The provision in question does not specifically force a person with gender identity disorder to undergo such surgery, but it is possible that some persons with gender identity disorder may be compelled to undergo such surgery in order to receive a ruling of change in the recognition of gender status even when they do not desire such surgery, and thus it cannot be denied that [this law] impinges on freedom from invasion of bodily freedom. That said, the provision in question is understood to be based on the possibility of problems arising with regard to parent-child or other relationships that may cause confusion in society if a child is born from the reproductive functions of the former gender of a person who has received a ruling of change in recognition of gender status, as well as on the consideration for, among other things, the need to avoid abrupt changes in a society where the distinction of men and women have long been based on biological gender. The need for these considerations, the adequacy of the method, and other circumstances may change in relation to shifts in social conditions regarding the handling of gender status in accordance with a person’s gender identity as well as the understanding of the family system, and it should be said that the constitutionality of such a provision requires constant examination. However, after comprehensive consideration of the purpose of the provision in question, the state of the aforementioned restriction, the current social condition and other circumstances, the provision in question, at this time, cannot be said to be in violation of Article 13 and Article 14(1) of the Constitution.

It should be said that it is clear that such an interpretation is warranted in light of the purport of the precedents of this court (Supreme Court Showa 28nen (1953) (o) No.389, July 20 1955 Grand Bench decision ▪ Civil precedent Volume 9 Chapter 9 page1122, Supreme Court Showa 37nen (1962)(o) No.1472, May 27 1964 Grand Bench decision ▪ Civil precedent Volume 18

Chapter 4 page 676, Supreme Court Showa 40nen (1965) (a) No.1187, December 24 1969 Grand Bench decision ▪ Criminal precedent Volume 23 Chapter 12 page 1625). The reasons of appeal are not acceptable.

Therefore the Supreme Court unanimously decides as set forth in the main text. There is a concurring opinion by Justices ONIMARU Kaoru and MIURA Mamoru.

The concurring opinion by Justices Kaoru Onimaru and Mamoru Miura is as follows.

1 The Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (hereinafter “the Special Cases Act”) provides for special cases in handling the gender status under laws and regulations of a person, despite his/her biological sex being clear, who continually maintains a psychological identity with an alternative gender, who holds the intention to physically and socially conform to an alternative gender, and has received concurrent diagnoses on such identification with the opposite gender from two or more physicians.

It is understood that the Special Cases Act was enacted in order to increase the effect of treatment and to remove social disadvantages for persons with gender identity disorder, who experience pain regarding gender incompatibility and are in a situation where they face various problems in their social lives. Those who have received a ruling of change in recognition of gender status are able to marry as a person of the reassigned gender. Necessary changes are made in the family registry, and disadvantages in social lives are removed through measures such as the reassigned gender being entered as their gender in administrative documents based on laws and regulations.

Furthermore, because gender is treated as one of the attributes of an individual in social life and in personal relationships, it can be said that gender is inseparable from the existence as a person of an individual, and for persons with gender identity disorder, that they are able to receive rulings of changes in recognition of gender status under the Special Cases Act is an important, perhaps even urgent, legal benefit.

Because the provision in question sets one of the requirements for a ruling of change in recognition of gender status at the request of a person, it is not that the removal of gonads by sex reassignment surgery is forced without regard to the will of the person, but under the provision in question, as a general matter, without having undergone such surgery, a person is not able to receive the abovementioned important legal benefit, and disadvantages in social lives will not be removed.

In addition, at the time when the Special Cases Act was enacted, as a general rule, sex reassignment surgery was regarded as something to be performed as the final stage of treatment for a person whose severe pain and other symptoms related to his/her physical gender persist after the first stage (treatment in the psychiatric domain) and the second stage (treatment such as hormone therapy) of treatment. However, after consideration by experts based on subsequent clinical experience, currently, according to the guidelines of the Japanese Society of Psychiatry and Neurology, given the diversity of symptoms shown by persons with gender identity disorder, sex reassignment surgery is regarded not as the final stage of treatment but as one treatment option that is basically left to the person to choose.

Therefore, for persons with gender identity disorder who have not had sex reassignment surgery, even when they do not desire such surgery, under the provision in question, they have no choice but to undergo such surgery if they desire changes in recognition of gender status in order to receive a ruling in their favor.

2 The removal of the ovary and testicles by sex reassignment surgery is itself not only a severe invasion of the physical body but as with surgery in general poses a risk to life or the physical body, and brings about the serious and irreversible consequence of the loss of reproductive functions. Whether or not to undergo such surgery is a decision normally left to the person's free will, and it is understood that this freedom is secured by Article 13 of the Constitution as the freedom from invasion of the physical body against one's will. In light of 1 above, it should be said that the provision in question in one respect restricts this freedom.

Therefore, we consider whether the restriction of this freedom can be affirmed as necessary and reasonable upon comprehensive consideration of the purpose of the provision in question, the content and nature of the freedom in discussion, the state and degree of the restriction and other factors.

As the opinion of the court states, the purpose of the provision in question is understood to be based on the possibility of problems arising with regard to parent-child or other relationships that may cause confusion in society if a child is born from the reproductive functions of the former gender of a person who has received a ruling of change in recognition of gender status, as well as on the consideration for, among other things, the need to avoid abrupt changes in a society where the distinction of men and women have long been based on biological sex.

However, as stated above, because a person with gender identity disorder is someone who, despite his/her biological sex being clear, continually maintains a psychological identity with an alternative gender, who holds the intention to physically and socially conform to an alternative gender, it can be reasoned that it would be extremely rare for a person to become pregnant and give birth through his/her former gender after his/her gender status is changed, and it can be said that the confusion that such a situation might cause would be considerably limited.

In addition, the necessity for such considerations and other circumstances as stated above may change in relation to shifts in social conditions and the like, and Article 2 of the Supplementary Provision of the Special Cases Act as of its enactment in 2003 duly provided: "The range of Persons with Gender Identity Disorder who may request a ruling of change in recognition of gender status, and other aspects of the system regarding rulings of change in recognition of gender status are to be reviewed approximately three years after this Act comes into effect, taking into consideration matters such as the status of the enforcement of this Act and changes in the social environment surrounding Persons with Gender Identity Disorder, etc.; and measures are to be taken as required based on the result of such review, if said measures are found to be necessary." Based on this, in 2008, the requirement under Article 3(1)(iii) of the Special Cases Act that a person requesting a change in the recognition of gender status "currently has no child" was relaxed through an amendment so that the gender of a person who has an adult child may be changed, and it was legally affirmed that an adult child may have a man as his/her mother and a woman as his/her father. Further, Article 3 of the Supplementary Provisions also stated: "The system regarding rulings of change in recognition of gender status

for Persons with Gender Identity Disorder is to be reviewed as required, based on the status of the enforcement of the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder as revised by this Act, and taking into consideration the status of Persons with Gender Identity Disorder and persons concerned therewith, along with other circumstances.” Ten years have already passed since then.

Since the enforcement of the Special Cases Act more than 14 years ago, over 7000 persons have been granted changes in the recognition of their gender status, and in the recent years, in various fields in society including schools and corporations, efforts are being made to enable persons with gender identity disorder to be treated according to their gender identity. It can also be inferred that a corresponding shift is occurring in public consciousness and social acceptance.

Based on the social conditions and other factors described above, after comprehensive consideration of the aforementioned purpose of the provision in question, the content and nature of the freedom in discussion, the state and degree of the restriction and other circumstances, while it cannot be said that the provision in question is in violation of Article 13 of the Constitution at this time, it cannot be denied that doubts are emerging on that point.

3 Internationally, too, regarding changes in legal gender recognition of persons with gender identity disorder, at the time of the enactment of the Special Cases Act, many countries required the loss of reproductive functions, but in 2014, the World Health Organization issued a statement that opposed such a requirement, and in 2017, the European Court of Human Rights ruled that such a requirement was in violation of the European Convention on Human Rights. Presently, the number of countries that do not demand such a requirement is on the increase.

The suffering that persons with gender identity disorder face in terms of gender is also of concern to society that is supposed to embrace diversity in gender identity. In that regard, it is hoped that the understanding of the various problems surrounding persons with gender identity disorder including those related to the provision in question deepens even more broadly, and that appropriate measures are taken all around from the perspective of respect for the personality and individuality of each person.

23 January 2019

Second Petty Bench of the Supreme Court

Justice MIURA Mamoru, Justice ONIMARU Kaoru, Justice YAMAMOTO Tsuneyuki, Justice KANNO Hiroyuki