

Case No. 993 of 2020 (ku) Special Appeal against Decision to Dismiss Appeal against Ruling of Dismissal of Petition for Change in Recognition of Gender Status

[Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder](#)

5 October 25, 2023 Grand Bench Decision

Main text of Judgment

The original decision is reversed.

The case is remanded to the Hiroshima High Court.

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Reasons

Reasons for the appeal as presented by Masafumi Yoshida and Kazuyuki Minami, counsel to appellant

Part 1 Summary of the case

15 1. In this case, the appellant, whose biological gender is male but self-identifies as female, applied for a ruling of a change in recognition of gender status based on Article 3 (1) of the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (hereinafter, the “Act”).

20 2. Article 2 of the Act defines [a person having gender identity disorder as a person] whose biological gender is evident, but who holds a persistent conviction under which they self-identify themselves as being of the opposite gender, and who has the intention of physically and socially conforming with the opposite gender, and has received concurrent diagnoses on such identification from two or more physicians equipped with the necessary knowledge and experience to give accurate
25 diagnoses on this matter, based on generally accepted medical knowledge (hereinafter the “person with gender identity disorder”). Article 3(1) of the Act provides that a family court may make a ruling for a change in the recognition of the gender status of a person (hereinafter, a “Gender Status Change Ruling”) for a person with gender identity disorder who satisfies all of the conditions set forth
30 therein.

Furthermore, Article 3(1) Item 4 of the Act (hereinafter, the “Provision”) stipulates that “[such person] has no reproductive glands or whose reproductive glands have permanently lost function.” In order to satisfy the conditions of the Provision, a

35 person must undergo a gonadectomy (removal of the testicles or ovaries, which are
internal genital organs), unless there has been a permanent loss of overall gonadal
function due to administration of anticancer drugs or for other reasons. According
to the facts established at the Prior Instance, the appellant has not undergone a
gonadectomy, and there is no indication that the appellant has suffered permanent
loss of gonadal function.

40 3. The Prior Instance ruled and confirmed that the appellant is a person with gender
identity disorder that satisfies Article 3(1) Items 1 to 3 of the Act, but does not
satisfy the Provision. The Provision is based on considerations including the
possibility of causing societal confusion if a person who has received a Gender
45 Status Change Ruling were to have a child using their original reproductive
functions. The Prior Instance ruled that the petition should be dismissed, as the
manner of restrictions posed by the Provision is reasonable and does not violate
Article 13 and Article 14(1) of the Constitution.

50 Furthermore, the Prior Instance did not take a view on the appellant's argument that
the appellant satisfies Article 3(1) Item 5 of the Act (hereinafter, "Item 5")
stipulating that [such person] "has a body which appears to have parts that resemble
the genital organs of those of the opposite gender," and that if that argument fails,
whether in the alternative Item 5 violates Articles 13 and 14(1) of the Constitution.

4. The argument here is that the Provision violates Articles 13 and 14(1) of the
Constitution and is therefore invalid.

55 **Part 2 Constitutionality of the Provision with Article 13**

1. A summary of the facts related to this case is as follows.

(1) Gender identity disorder

60 Gender identity disorder is a condition where a person's biological gender and self-
identified gender do not align and the person requires medical treatment. Today, it
is understood that one's self-identified gender cannot be influenced by one's will.
As such, medical treatments aimed at aligning one's self-identified gender with
one's biological gender are no longer performed. Psychiatric and physical
treatments are carried out to assist persons with gender identity disorder to adapt
to society and improve their quality of life.

65 For persons with gender identity disorder, even if they undergo treatment and begin
to live according to their gender identity, their gender as listed on the family register
(hereinafter, one's "legal gender"), which is used as the basis for the application of
laws and regulations [to them], is their biological gender. This incongruity is said
70 to cause social disadvantages, such as by compelling them to reveal their gender
identity disorder in employment and other settings, or by not being treated in
accordance with their gender identity by society.

(2) Legislative background of the Act's enactment

a. As stated above, treatment is performed on persons with gender identity
disorder with the aim of improving their quality of life. When the Act was
75 enacted in July 2003, treatment was based on the concept of staged treatment,
in accordance with the second edition of the "Guidelines for Diagnosis and
Treatment of Gender Identity Disorder" (hereinafter, the "Guidelines")
established by the Japanese Society of Psychiatry and Neurology. In principle,
staged treatment consisted of three stages: psychiatric treatment such as for
80 mental health support in the first stage, followed by physical treatment (e.g.,
hormone therapy or mastectomy) in the second stage, and gender-affirming
surgery in the third stage (e.g., gonadectomy, external genital removal surgery,
or genital reconfiguration surgery). Gender-affirming surgery was considered
the final stage of treatment for people who continued to feel very uncomfortable
85 or repulsed by the physical characteristics of their biological gender and who
were experiencing difficulties in their lives. It should be noted that first and
second stage treatments do not necessarily need to be completed when one
moves to subsequent treatment stages. The staged treatments can be
administered concurrently. For instance, psychiatric treatments and hormone
90 therapy often continue even after the third stage.

Furthermore, the second edition of the Guidelines highlighted that persons with
gender identity disorder who have completed the third stage of treatment might
encounter significant societal challenges if their legal gender remains
unchanged.

b. When considering the reasons articulated at the time when the draft bill was
submitted for discussion at the National Diet, the Act was based on the
95 understanding that gender identity disorder is a medical illness listed in the 10th

100 revised edition of the International Classification of Diseases (ICD) developed
by the World Health Organization. [The legislature] also recognized that those
persons with gender identity disorder who had received medically necessary
treatment by reaching the third stage of the staged treatment process and who
were leading their lives in accordance with their gender identity, still faced
various issues due to their legal gender remaining the same as their biological
gender. Considering this, the Act was enacted to enable those persons to be
105 treated in accordance with their gender identity, to increase the effectiveness of
treatment and to eliminate social disadvantages, where certain requirements are
met.

c. Based on discussions at the drafting stage, the Act contains a supplementary
110 provision that requires the scope of persons with gender identity disorder who
may be granted a Gender Status Change Ruling should be reviewed and
discussed, and [the government should] take necessary measures based on the
results of the review and discussions, which take into consideration matters such
as the status of the enforcement of the Act and changes in societal views towards
persons with gender identity disorder, among others.

115 In addition, Article 3(1) Item 3 of the Act stipulates its applicability only to
persons who “currently [have] no children” at the time when the Act was
enacted, but this language was revised by Law No. 70 of 2008 (hereinafter, the
“2008 Amendment”) to persons who “currently [have] no minor children.”

(3) Progress in medical knowledge regarding gender identity disorder

120 a. At the time of the Act’s enactment, medical treatment of gender identity disorder
was based on the concept of staged treatment. However, the Guidelines were
subsequently revised following clinical experiences. The third edition of the
Guidelines, published in January 2006, relinquished the concept of staged
treatment, because it was found that symptoms varied among persons with
125 gender identity disorder, and that the necessary physical treatment also varied
from patient to patient. Specifically, while it was agreed that psychiatric
treatment should be the first treatment recourse for persons with gender identity
disorder, the Guidelines were revised such that if the patient required physical
treatment, any or all of hormone therapy, mastectomy, gonadectomy, external
130 genital removal surgery, or genital reconfiguration surgery could be utilized in

any order.

b. In the 10th revised edition of the ICD, gender identity disorder was classified among “mental and behavioral disorders.” Later, it was clarified that classification as a “disorder” was inappropriate. Therefore, in the 11th revised version of the ICD, approved in May 2019, gender identity disorder was defined as a “condition related to sexual health.” Accordingly, the term was changed from “gender identity disorder” to “gender incongruence.”

(4) Social conditions surrounding persons with gender identity disorder

Since the enforcement of the Act in July 2004, more than 10,000 people have received a Gender Status Change Ruling.

From 2004 onward, the Ministry of Justice has carried out human rights awareness activities with the aim of eliminating prejudice based on gender identity disorder. Since 2010, the Ministry of Education, Culture, Sports, Science and Technology has issued notices requesting that each local board of education ensure that appropriate measures are taken with due consideration to the feelings of students with gender identity disorder, and has created and distributed manuals for teachers and staff. In 2016, the Ministry of Health, Labour and Welfare also implemented initiatives requesting that employers not include sexual minority status as a disqualifying factor in hiring selection criteria when recruiting workers. In June 2023, the “Act on Promoting Public Understanding of Diversity in Sexual Orientation and Gender Identity” was enacted with the aim of contributing to the realization of a society that is tolerant of diversity in sexual orientation and gender identity. In addition, the ordinances of a considerable number of local governments, starting with Bunkyo Ward, Tokyo in 2013, now include a provision prohibiting discriminatory treatment based on gender identity and other human rights violations based on gender. Furthermore, in 2017, the Japan Business Federation (*Keidanren*) released a statement providing that it is urgently necessary for companies to promote appropriate understanding of LGBT people, including persons with gender identity disorder, and to make efforts to recognize them. In addition, since 2020, some women’s universities have been accepting students whose legal gender is male but whose self-identified gender is female.

At the time of the Act’s enactment, a majority of the countries which had procedures in place for a person to change their legal gender status required such

165 person to undergo sterilization. However, the World Health Organization and other
organizations issued an interagency statement in 2014 opposing the requirement,
and the European Court of Human Rights declared in 2017 that such a requirement
violates the European Convention on Human Rights. As a result, the number of
170 countries, mainly Western countries, that do not require sterilization [as a
prerequisite for someone to change their legal gender status] has increased
considerably.

2. Based on the above, the Court will consider the constitutionality of the Provision in
connection with Article 13.

(1) Article 13 of the Constitution provides that, “All people shall be respected as
175 individuals. Their right to life, liberty, and the pursuit of happiness shall, to the
extent that it does not interfere with public welfare, be the supreme consideration
in legislation and in other governmental affairs.” It is clear that the freedom not to
have one's body intruded against one's will (hereinafter, the “freedom from bodily
intrusion”) is protected under this article as an important right for living with
personal dignity.

180 A gonadectomy is an operation to remove one’s testicles or ovaries and is a severe
intrusion of one's body that poses a risk to life or body with irreversible
consequences. Being forced to undergo a gonadectomy would constitute a serious
restriction on the freedom from bodily intrusion.

The Provision only provides as a prerequisite that persons with gender identity
185 disorder who wish to receive a Gender Status Change Ruling undergo a
gonadectomy, but does not directly force persons with gender identity disorder in
general to undergo such surgery. Put another way, however, the Provision requires
persons with gender identity disorder, who do not otherwise require a gonadectomy
as medical treatment, to undergo such surgery in order to obtain a Gender Status
190 Change Ruling.

On the other hand, it should be considered an important legal interest tied to
personal dignity that a person with gender identity disorder is treated under the
relevant legislation in accordance with that person's own gender identity. This is
particularly pertinent when considering that legal gender is treated as one of the
195 basic attributes of individuals in various situations in their lives and the
circumstances persons with gender identity disorder are facing (as described

above). This does not vary depending on whether a person with gender identity disorder requires a gonadectomy by way of medical treatment or not.

200 Accordingly, the Provision should be considered a restriction on the freedom from
bodily intrusion as it becomes inevitable for persons with gender identity disorder
who do not require a gonadectomy for medical reasons, to undergo such surgery in
order for them to secure their important legal interest to be legally treated in
accordance with their gender identity. Even considering that this does not directly
205 force persons with gender identity disorder in general to have this surgery, such
restriction should not be allowed unless it is necessary and reasonable in light of
the importance of the freedom from bodily intrusion.

In order to examine whether the Provision is constitutional as a necessary and
reasonable restriction in light of Article 13 of the Constitution, it is necessary to
weigh the degree of necessity of such restriction for the purpose of the Provision
210 against the substance and nature of the freedom to be restricted and actual manner
and degree of the restriction.

(2) The purpose of the Provision is understood to be based on the following
considerations: a person subject to a Gender Status Change Ruling and able to have
a child with the reproductive function of their assigned gender may cause parent-
215 child relationship problems resulting in societal confusion, and to avoid sudden
changes in the long-standing distinction between men and women based on
biological gender.

However, persons with gender identity disorder are a minority in society, and there
is a considerable number among those seeking a Gender Status Change Ruling who
220 have undergone a gonadectomy to eliminate discomfort with the physical
characteristics of their biological gender. In addition, a number of people seem to
be reluctant to have children using their innate reproductive function. Considering
these points, even if the Provision were not in place, it would be extremely rare for
a person who has received a Gender Status Change Ruling without undergoing a
225 gonadectomy to have a child, resulting in the claimed parent-child relationship
issues. Furthermore, among the aforementioned problems related to parent-child
relationship issues, whether a legal parent-child relationship is established or how
to record it in the family register can be resolved through the interpretation of laws
and regulations, together with legislative measures. If a person who has received a

230 Gender Status Change Ruling has a child using the reproductive functions of their
assigned gender, a situation may arise in which there is a “female father” and “male
mother.” However, the 2008 Amendment to the Act already allows the existence of
a "female father" or "male mother" when a person with gender identity disorder
who has an adult child was granted a Gender Status Change Ruling and this has
235 not caused any societal confusion regarding parent-child relationships. In addition,
approximately 19 years have passed since the Act’s enforcement, and more than
10,000 people have received a Gender Status Change Ruling to date, with the
public becoming more informed and with a better understanding of persons with
gender identity disorder. Considering these factors and given that efforts are being
240 made in various areas of society to improve the environment to resolve societal
issues, the possibility of the above situation is unlikely to have an unexpected and
acute impact on society as a whole.

Based on the foregoing, the restrictions under the Provision which were considered
necessary at the time of the Act’s enactment are arguably less relevant due to
245 changes in the circumstances underlying the restrictions.

- (3) Next, the Court will examine the specific manner and degree of restriction imposed
by the Provision, considering progress in medical knowledge since the Act’s
enactment.

The Act’s purpose was to enhance the effectiveness of treatment and to eliminate
250 social disadvantages for people who have undergone the necessary treatment for
gender identity disorder, but still face societal problems because their legal gender
remains their biological gender. Gender-affirming surgery, including gonadectomy,
was positioned as the final stage in a staged treatment process at the time of the
Act’s enactment and the imposition of a requirement that a person seeking a Gender
255 Status Change Ruling had undergone a gonadectomy was of reasonable medical
relevance because it identified persons who had undergone the necessary treatment
for gender identity disorder. However, after the Act’s enactment, medical
knowledge of gender identity disorder has progressed, and the concept of staged
treatment is no longer utilized due to both general awareness of the diversity of
260 symptoms exhibited by persons with gender identity disorder and the diversity of
treatment methods for these symptoms. As a result, since it now understood that
the type of physical treatment required for persons with gender identity disorder
differs depending on the patient, whether a person has undergone the necessary

265 treatment is no longer determined by having undergone gender-affirming surgery.
Accordingly, the requirement [for surgery] lacks rational medical relevance.

270 Furthermore, with the development of medical knowledge as described above, the
restriction on the freedom from bodily intrusion imposed by the Provision forces
persons with gender identity disorder who do not medically require a gonadectomy
to make a grave choice to either (i) give up their freedom from bodily intrusion and
275 undergo a gonadectomy, which is a severe physical intrusion, or (ii) give up an
important legal interest to be legally treated according to their gender identity and
abandon their Gender Status Change Ruling. In addition, imposing restrictions that
lack rational relevance from a medical standpoint to achieve the purpose of the
Provision is an excessive restriction, considering that an increasing number of
countries do not make the loss of reproductive capability a requirement for
changing one's legal gender status.

Accordingly, the Provision imposes excessive restrictions by forcing a choice
between the two options described above and, consequently, the degree of
restriction imposed by the Provision should be considered significant.

- 280 (4) Based on the above, and considering that the necessity for restrictions on one's
freedom from bodily intrusion under the Provision has diminished and because the
degree of the restriction has become significant, it cannot be considered necessary
and rational.

Accordingly, the Provision violates Article 13 of the Constitution.

285 As such, the Supreme Court, Second Petty Bench Decision No. 269 of 2018,
January 23, 2018 which came to a different conclusion, shall be revised
accordingly.

Part 3 Conclusion

290 According to the above, the Provision violates Article 13 of the Constitution and is
invalid, and the Prior Instance's decision to dismiss the petition based on a different
opinion misinterpreted the Provision. There is a reason for this argument and there
is no need to judge the other grounds for appeal - the Court finds it inevitable to
rescind the original decision. The Court will then remand this case back to the Prior
Instance to further examine the appellant's argument regarding Item 5, which was

295 not decided in the Prior Instance.

Consequently, besides the dissenting opinions of Justices Mamoru Miura, Koichi Kusano, and Katsuya Uga, the decision is made as set forth in the main text of the judgment, based on the unanimous opinion of all justices. There is also a concurring opinion from Justice Masaaki Oka.

300 **Justice Masaaki Oka’s concurring opinion is as follows.**

I agree with the majority opinion that the restrictions imposed by the Provision are excessive at this point in time, and that the Provision violates Article 13 of the Constitution and is therefore invalid. I would like to provide a concurring opinion regarding the response of the legislature following this decision.

305 As this decision renders the Provision unconstitutional and invalid, we anticipate that the legislature will rescind the Provision. Of course, it is possible to create a new, less restrictive provision in order to achieve the purpose of the Provision or to amend the Act, including the other requirements thereof, after taking into account the impact that would arise from the removal of the Provision while balancing
310 society's general perception of persons with gender identity disorder who seek to change their gender status, as long as any such amendment is constitutional.

When amending the Act in response to this decision, it is entirely within the legislature’s discretion to exercise legislative policy in deciding whether to merely delete the Provision or to create new conditions to replace it as described above.

315 However, the legislature is expected to exercise such legislative discretion in a reasonable manner.

Justice Mamoru Miura’s dissenting opinion is as follows:

I agree with the majority opinion that the Provision violates Article 13 of the Constitution and is therefore invalid, but furthermore, since Item 5 also violates
320 Article 13 and is also invalid, I believe that the original decision should be reversed, the initial ruling [at the first instance] should be rescinded, and a decision should be made to change the gender status of the appellant from male to female. The reasons are explained below.

325 1. The Provision

(1) In the aforementioned Supreme Court Second Petty Bench Decision of January 23, 2019 (hereinafter, the “2019 Decision”) cited by the majority opinion, I agreed with the Court's opinion that the Provision then did not violate Article 13 of the Constitution. However, as stated in the joint concurring opinion with Justice Kaoru Onimaru, the Provision was already suspected of being unconstitutional at that time.

Furthermore, as stated in the 2019 Decision, the rationality of the Provision is subject to change in response to changes in social circumstances regarding the treatment of gender identity and the understanding of the family system. Therefore, its constitutionality needs to be constantly examined, and at this point, it is necessary to examine it considering subsequent circumstances [after the 2019 Decision].

(2) Article 2 of the Act requires that the definition of a person with gender identity disorder be based on a diagnosis in accordance with generally accepted medical knowledge, and one of the requirements is the “intention to physically conform with the Opposite Gender.” However, the Provision does not elaborate on the term “physically” nor does it provide the degree to which the intention to adapt to the other gender must be present. It is understood that this point is left to interpretation based on the above-mentioned medical knowledge, which evolves over time.

Disease classification in Japan is generally based on the statistical classification of diseases, injuries, and causes of death (currently Ministry of Internal Affairs and Communications Notification No. 35 of February 13, 2015), which is a statistical standard (Article 2(9) and Article 28 of the Statistics Act), and which is further based on the ICD by the World Health Organization.

In the 10th revised edition of the ICD in effect at the time of the Act's enactment, gender identity disorder was classified as a mental illness. Among the detailed classification for gender identity disorder, transsexualism was defined as “usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomical sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex.”

The 11th revised edition of the ICD, which revised the 10th revised edition, was

approved in May 2019 and went into effect in January 2022. In the 11th revised edition, the term gender incongruence was adopted instead of gender identity disorder and transsexualism, and it was classified as a condition related to sexual health, which is different from mental illness. Within this subcategory, gender incongruence of adolescence and adulthood is characterized by a “marked and persistent incongruence between an individual’s experienced gender and the assigned sex, which often leads to a desire to ‘transition,’ in order to live and be accepted as a person of the experienced gender, through hormonal treatment, surgery or other health care services to make the individual’s body align, as much as desired and to the extent possible, with the experienced gender.”

It is understood that recognition of the diversity of symptoms manifested by gender incongruence and its treatment methods in the 11th revised edition of the ICD is in line with the medical knowledge included in the American Psychiatric Association’s DSM (Diagnostic and Statistical Manual of Mental Disorders), 5th edition (2013), as well as the guidelines for the diagnosis and treatment of gender identity disorder in the Japanese Society of Psychiatry and Neurology’s 4th edition revised guidelines (4th edition in 2011, 4th edition revised in 2018).

According to such current general medical knowledge, symptoms such as discomfort due to physical characteristics based on one’s biological gender are diverse and individual. “The intention of physically conforming with the Opposite Gender” under Article 2 of the Act is understood to include a variety of intentions. Some persons with gender identity disorder may not necessarily desire to conform to the other gender in terms of their internal and external genitalia, but rather may wish to physically conform to the other gender in terms of secondary sexual characteristics, such as breast enlargement, facial hair, and voice. This is clear from the diagnostic criteria of the 5th edition of the DSM., and the 11th revised edition of the ICD is also based on this understanding. Such an intention is understood to be included in the meaning of “intention” in Article 2 based on generally accepted medical knowledge, and for such persons, there is no need to undergo gender-affirming surgery, including a gonadectomy, as a medical treatment.

As stated in Part 2, Section 2(3) of the majority opinion, it is irrational to impose the requirements of the Provision from a medical perspective based on medical knowledge that has been developed and generalized under the 10th revised edition of the ICD and reflected in the internationally accepted 11th revision of the ICD,

and in light of the interpretation of the definition of a person with gender identity disorder that is based on the same.

- 395 (3) In recent years, the adoption of the so-called partnership system has expanded dramatically among local governments. Although this system differs depending on the local government, it is generally a system where two unmarried people can be certified as partners in daily life by submitting a sworn notification [of partnership]. The purpose is to reduce the social disadvantages for people who are considered sexual minorities in terms of sexual orientation or gender identity, and to contribute to the formation of a society that respects their dignity and individuality. After 400 Shibuya and Setagaya Wards in Tokyo adopted this system in 2015, it spread to other local governments. At the time of the 2019 Decision, there were only about 10 municipalities which had adopted this system, but according to a survey done by Shibuya Ward and several other entities, as of June 28, 2023, more than 320 local governments, including 14 prefectures including Tokyo and Osaka, have 405 established partnership systems, which cover more than 70% of the total population of Japan.

Initially, the system was intended for two people of the same sex. However, it is now becoming common [for local governments] to have a system that also applies to two people of the opposite sex, which can includes persons with gender identity 410 disorder, regardless of a Gender Status Change Ruling. Furthermore, in recent years, an increasing number of local governments have established a “family-ship” system that includes children and parents in addition to the partnership system.

The fact that such systems are expanding among local communities and appear to be functioning without any major issues indicates a change in the social 415 circumstances regarding the diverse nature of families, where sexual minorities, including persons with gender identity disorder, can form families, raise children and lead fulfilling lives.

As stated in Part 2, Section 2(2) of the majority opinion, approximately 19 years have passed since the Act’s enactment, and understanding of persons with gender 420 identity disorder has become more widespread. Efforts are being made in various sectors of society to improve the environment and resolve societal problems they may face. The partnership system has important significance both as an official system and in terms of its nationwide expansion.

425 (4) Considering the above, in addition to the circumstances mentioned in the joint concurring opinion of the 2019 Decision, and considering them in a comprehensive manner, at this point in time, it cannot be said that the restriction on the right to freedom from physical intrusion under the Provision is necessary or reasonable, and the Provision violates Article 13 of the Constitution.

430 Considering (i) the purpose of the Act, (ii) the purpose of Article 2 and each Item of Article 3(1), and (iii) their relationship to each other, only the Provision should be invalidated rather than the entire Act even if the Provision is determined to be unconstitutional. It is clear that the majority opinion reaches the same conclusion.

2. Item 5

435 (1) The appellant has argued that both the Provision and Item 5 are unconstitutional. The appellant had also argued in the Prior Instance that both provisions were unconstitutional, but the original decision determined that the Provision was constitutional, and had not considered the appellant's argument regarding Item 5. Therefore, in light of the case, I will also consider the constitutionality of Item 5.

440 (2) Item 5 stipulates that “[one is requested to] ha[ve] a body which appears to have parts that resembles the genital organs of those of the Opposite Gender.” In order to meet the requirement, in principle, it is generally necessary for such a person to undergo external genital removal surgery, genital reconfiguration surgery, or hormone therapy to achieve the above appearance (hereinafter, “External Genitalia Removal Surgery or Treatment”).

445 Among these, external genital removal and genital reconfiguration surgeries include penectomy and vulvoplasty for biological males, and urethral lengthening and phalloplasty for biological females. Such surgical treatment is a severe intrusion of one's body that poses a risk to life or the body with irreversible consequences.

450 Hormone therapy involves the administration of hormone-related drugs to produce a certain effect to physically adapt the body to the other gender, in that the appearance of the external genitalia resembles that of the other gender. Although this is less intense than the above-mentioned surgical treatment, it is still intrusive. Hormone therapy is a lifelong or long-term treatment, and it is pointed out that
455 hormone therapies not only cause irreversible changes to the body, such as

testicular atrophy and loss of sperm-producing function, but they can also lead to fatal side effects such as thrombosis, as well as angina, liver dysfunction, gallstones, liver tumors, and pituitary gland tumors. Considering that, as a principle, hormone therapy should only be administered to persons who do not suffer from diabetes, hypertension, blood coagulation abnormalities, endocrine disorders, and malignant tumors, it constitutes a bodily intrusion that involves considerable risk or burden to one's life or body.

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Therefore, being forced to undergo an External Genitalia Removal Surgery or Treatment would constitute a serious restriction on the freedom from bodily intrusion.

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Item 5 only provides a prerequisite that generally requires persons with gender identity disorder who wish to receive a Gender Status Change Ruling to undergo an External Genitalia Removal Surgery or Treatment, but does not directly force persons with gender identity disorder in general to undergo such surgery. Put another way, however, Item 5 requires persons with gender identity disorder, who do not require an External Genitalia Removal Surgery or Treatment as medical treatment, to undergo such surgery in order to be granted a Gender Status Change Ruling; such cases include a person who does not wish to have external genitalia removal or a genital reconfiguration surgery, and chooses to receive hormone therapy but who [(i)] does not obtain an appearance that resembles the external genitalia of the other gender, or [(ii)] does not wish to continue hormone therapy because of difficulties due to side effects or illness.

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On the other hand, it should be considered as an important legal interest tied to one's personal dignity that a person with gender identity disorder is treated under the relevant legislation in accordance with that person's own gender identity. This is particularly pertinent when considering that legal gender is treated as one of the basic attributes of individuals in various situations in their lives and the circumstances persons with gender identity disorder are facing. This does not vary depending on whether a person with gender identity disorder requires External Genitalia Removal Surgery or Treatment.

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Accordingly, Item 5 should be considered a restriction on the freedom from bodily intrusion as it becomes inevitable for persons with gender identity disorder who do not require an External Genitalia Removal Surgery or Treatment for medical

490 reasons to undergo such surgery in order for them to secure their important legal
interest to be legally treated in accordance with their gender identity. Even
considering that this does not directly force persons with gender identity disorder
more broadly to have such surgery, such restriction should not be allowed unless it
is necessary and reasonable considering the importance of the freedom from bodily
intrusion.

495 To examine whether Item 5 is constitutional as a necessary and reasonable
restriction in light of Article 13 of the Constitution, it is necessary to weigh the
degree of necessity of such restriction for the purpose of Item 5 against the
substance and nature of the freedom to be restricted and actual manner and degree
of the restriction.

- 500 (3) a. As such, when looking at the purpose of Item 5, its intent is to prevent societal
confusion, such as in public baths, if one's appearance does not resemble the
external genitalia of the opposite gender.

505 The appearance of external genitalia is rarely noticed by other people and comes
into question only in limited situations, such as in a public bath. However,
public baths are generally subject to measures taken by business operators based
on laws and baths are separated by gender. Those operating public baths must
take necessary measures for the hygiene and morals of bathers, and the
standards for the above measures are stipulated by prefectural ordinances
(Article 3(1) and (2), and Article 2(3) of the Public Baths Act). In light of
510 technical advice from the Minister of Health, Labour and Welfare
("Management Guidelines for Hygiene etc. of Public Baths", the Director-
General of the Environmental Health Bureau of the Ministry of Health, Labour
and Welfare's Notification No. 1811 dated December 15, 2000), the standards
of these ordinances generally stipulate that men and women aged around or over
515 a certain age are not allowed to bathe together, and that baths must be separated
for men and women. Based on these standards, the operators must separate the
baths for men and women. Similar regulations apply to hotel operators (Article
4(1) and (2), and Article 3(1) of the Hotel Business Act). Although there are
many cases where there are no applicable ordinances that include the above
520 provisions with respect to communal baths in the hotel industry, baths are
generally separated by gender according to measures taken by hotel operators
(see the above-mentioned Director-General of the Environmental Health

Bureau of the Ministry of Health, Labour and Welfare's Notification, "Management Guidelines for Hygiene etc. of Hotel Businesses").

525 Such separation of baths is intended to maintain good morals and ensure an
environment where users can bathe with peace of mind without feeling
embarrassed. The separation is in accordance with the measures taken by each
business operator, which itself is not the treatment of gender through the
application of legal provisions (see Article 4(1) of the Act). In actuality, the legal
530 gender of each user is usually not confirmed by certificates [or other
identification], and assuming that users are able to recognize each other's
physical appearance, including the external genitalia area, it can be said that
men and women are distinguished based on the physical appearance
characteristics pertaining to each sex. In light of the nature of public baths,
535 which are facilities operated by business operators where a large number of
people using them are naked, there are considerable reasons for such distinction
of men and women based on physical appearance. The technical advice of the
Minister of Health, Labour and Welfare and the standards of ordinances based
on such advice are also understood to have the same purpose (see the Director
540 of the Environmental Health Division of the Pharmaceutical Safety and
Environmental Health Bureau of the Ministry of Health, Labor and Welfare's
Notification No. 0623 dated June 23, 2023). This sex-based distinction is
considered to form a norm for social life embodied by measures taken by
business operators based on laws. Item 5 stipulates the requirements for a
545 Gender Status Change Ruling be based on this norm, but does not prescribe the
norm.

b. Considering the above, it is clear that persons with gender identity disorder are
a minority in society as a whole, and among those who seek a Gender Status
Change Ruling, there are also a considerable number of people who have
550 undergone an External Genitalia Removal Surgery or Treatment in order to
relieve discomfort due to physical characteristics of their biological gender, and
whose appearance resembles the external genitalia of the opposite gender. In
addition, considering the nature of the norm based on physical appearance, as
mentioned above, even without Item 5, this norm would not naturally change,
555 and it is hard to believe that a replacement norm would be immediately formed.
Furthermore, a person with gender identity disorder is a person who is
recognized as having an intention to conform physically and socially to the

560 opposite gender based on the specific diagnosis of physicians and based on
medical treatment that the person has received (Article 2 of the Act). It is
unrealistic to assume that such a person would purposely embarrass and cause
confusion to other users while wishing to be accepted as a person of the opposite
gender. Based on these facts, even without Item 5, it would be extremely rare
for societal confusion to occur in relation to the use of public baths by persons
with gender identity disorder.

565 On the other hand, in the absence of Item 5, we cannot deny that users may feel
uneasy about the possibility that a Gender Status Change Ruling may cause a
discrepancy between norms based on physical appearance and legal gender.
However, even in that case, considering the nature of the above norms, such
norms will still be observed socially, including for those who have received a
570 Gender Status Change Ruling. To clarify the measures taken by business
operators based on such norms, we can take necessary measures, such as by
appropriately establishing ordinance standards and measures for business
operators regarding the classification and use of baths, based on technical
advice from the Minister of Health, Labour and Welfare. In addition, the Act
575 stipulates that a person who has received a Gender Status Change Ruling will
be deemed to have changed their gender to the opposite gender in the
application of the provisions of laws and regulations, but also stipulates an
exception to this rule if the law provides otherwise (Article 4 (1)). Therefore, it
is also possible to create a provision that creates an exception in the law to
580 address the limited situation of using public baths. Considering that the
possibility of the above-mentioned confusion is extremely low, it is fully
possible to maintain the situation where users can use public baths with peace
of mind as they currently do.

585 In relation to this point, it has been pointed out that without Item 5, persons with
the appearance of male external genitalia would enter women's public baths,
claiming that their mental gender is female. However, Item 5 is a provision that
establishes the requirements for a Gender Status Change Ruling for persons
with gender identity disorder who are certified based on a specific diagnosis of
physicians which is based on medical treatment. Even if Item 5 does not exist,
590 no one can be allowed to use women's public baths by simply calling oneself as
such. If there is any fraudulent behavior while the norms have not changed at
all, it should be dealt with appropriately as an issue of importance to all users,

as it has been in the past. It is clear that this issue has no rational connection to the restrictions on the rights of persons with gender identity disorder.

595 In addition, approximately 19 years have passed since the Act's enforcement,
and more than 10,000 people have received a Gender Status Change Ruling to
date, and the public understanding of persons with gender identity disorder is
more widespread. Considering these factors and given that efforts are being
600 made in various areas of society to improve the environment in order to resolve
societal issues, there is little possibility that societal confusion will occur even
without Item 5. It cannot be said that it is difficult for society as a whole to
understand the fact that it is possible to maintain a situation where users can use
a service [such as a public bath] with the same peace of mind as they currently
do.

605 Based on the above considerations, the need for restrictions under Item 5 is
currently quite low.

c. Regarding the use of restrooms and changing rooms, some also point out that
people with the external appearance of male genitalia enter women's restrooms
and other facilities, claiming that their mental gender is female. However, in
610 restrooms, there are usually few opportunities to recognize the external
appearance of other people's external genitalia, and separation is not based on
appearance. Therefore, we cannot think that Item 5 aims to avoid confusion in
restrooms. It is an important issue for all users to be able to use restrooms safely
and securely, but the nature of each facility (inside a school, company, for
615 members, public use, etc.) and how they are used vary, and appropriate
responses are required depending on specific circumstances. In addition, the use
of bathrooms, which is an essential part of life for persons with gender identity
disorder, is an urgent and difficult issue, regardless of whether they have
received a Gender Status Change Ruling. Appropriate responses are required
620 depending on individual circumstances, considering how a society should
function where diverse people live together. In this way, it is clear that there is
no rational reason to require restrictions under Item 5 in relation with the use of
restrooms.

(4) Next, I will examine the specific manner and degree of restrictions under Item 5,
625 considering progress in medical knowledge since the Act's enactment.

630 The reason for the Act's enactment was to enhance the effectiveness of treatment
and eliminate social disadvantages for people who have undergone necessary
treatment for gender identity disorder, but still face societal problems because their
legal gender remains their biological gender, by granting them a Gender Status
Change Ruling. Considering that, at the time of its enactment, gender-affirming
surgery, including external genital removal surgery and genital reconfiguration
surgery, was positioned as the final stage of a staged treatment process, and
hormone therapy was positioned as the preceding stage, the requirement that a
person seeking a Gender Status Change Ruling must have undergone such surgery
635 was of reasonable medical relevance in that it identified persons who had undergone
the necessary treatment for gender identity disorder. However, after the Act's
enactment, medical knowledge of gender identity disorder has evolved and staged
treatment is no longer utilized due to growing recognition of the diversity of
symptoms exhibited by persons with gender identity disorder and the various
640 treatment methods for these symptoms. It is now understood that the type of
physical treatment necessary for persons with gender identity disorder differs
depending on the patient. As a result, the determination of whether one has
undergone the necessary treatment is no longer determined by whether they have
undergone External Genitalia Removal Surgery or Treatment. As such, imposition
645 of the above requirements now lacks rational relevance from a medical perspective.

In addition, as stated in section 1(2), based on current general medical knowledge,
and given the diversity of symptoms exhibited by persons with gender identity
disorder, it is possible to interpret that "[such person] has the intention of physically
conforming with the Opposite Gender" in the definition of persons with gender
650 identity disorder includes a variety of intentions, and that treatment may not require
External Genitalia Removal Surgery or Treatment. Even under this interpretation,
imposing the above requirements does not have any rational medical relevance.

Furthermore, with the advancement of medical knowledge as described above, the
restriction that Item 5 imposes on the freedom from bodily intrusion has become
655 something that forces persons with gender identity disorder who do not otherwise
require External Genitalia Removal Surgery or Treatment to make a grave choice
to either (i) give up their freedom from bodily intrusion and accept External
Genitalia Removal Surgery or Treatment, which is a severe bodily intrusion
involving considerable risks and burdens or (ii) give up their important legal
660 interest to be treated in accordance with their gender identity and abandon their

Gender Status Change Ruling. In addition, in order to achieve the aforementioned purpose of Item 5, the imposition of such restrictions that lack rational relevance from a medical perspective is excessive, considering such persons have been specifically diagnosed by physicians to have gender identity disorder and have received [proper] treatment.

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Accordingly, Item 5 imposes excessive restrictions by forcing a choice between the two options described above and, consequently, the degree of those restrictions imposed by Item 5 should be considered significant.

- (5) Based on the above, considering that the need to place restrictions on the freedom from bodily intrusion under Item 5 is now considerably low, and that the extent of the restrictions has become significant, [the restrictions] cannot be considered necessary and rational.

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Therefore, Item 5 violates Article 13 of the Constitution.

- (6) If Item 5 is deemed unconstitutional, only Item 5 is invalid in respect of the Provision. However, if both the Provision and Item 5 are deemed invalid, then the only remaining provisions are the requirements related to Article 3(1) Items 1 to 3 of the Act and those related to the definition of persons with gender identity disorder in Article 2 of the Act. Therefore, I have examined, in light of the purpose of the Act, whether the entire Act or only the Provision and Item 5 are invalid. If a Gender Status Change Ruling is to be made based on the remaining requirements, it would contradict the purpose of the Act, and the question arises as to whether that would be tantamount to establishing new legislation based on a judicial decision and infringe on legislative power.

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The Act's purpose was to enhance the effectiveness of treatment and to eliminate social disadvantages with respect to people who have undergone necessary treatment for gender identity disorder but still face problems in their lives because their legal gender remains the same as their biological gender through the granting of a Gender Status Change Ruling. Article 3(1) of the Act stipulates that a person who seeks a Gender Status Change Ruling must have gender identity disorder and meet all of the requirements in the same paragraph. While the requirements regarding the definition of persons with gender identity disorder stipulated in Article 2 are the underlying requirements, those set forth in Article 3(1) are independent and separate in both form and content.

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695 In light of the purpose and provisions of the Act, the basic requirement thereunder
is the psychological and intentional state of having a persistent belief that one's
gender identity does not conform with their clear biological gender and the
intention to conform physically and socially to the other gender, and that it allows
for special exceptions in the recognition of gender status for people who are
700 diagnosed by physicians based on general medical knowledge and experience to
meet this requirement.

As stated in section 1(2), based on current general medical knowledge, the clause
"has the intention of physically conforming with the Opposite Gender" in Article
2 of the Act includes a variety of intentions, and, in some cases, treatment may not
require a gonadectomy or External Genitalia Removal Surgery or Treatment.
705 Further, since the main purpose of the Provision and Item 5 is to avoid societal
confusion, and one's physical state under the Provision and Item 5 does not depend
on the cause of such state, it cannot be that one's physical state is inseparable from
one's intentions. In providing the reasons for the Act's enactment along with the
explanations of those involved in its legislation (see, among others, "Commentary
710 on the Act on Special Cases in Handling Gender Status for Persons with Gender
Identity Disorder" supervised by Chieko Nohno (then-member of the House of
Councilors), NIHON KAJO Publishing (2004)), there is no indication that one's
physical state is considered as an essential element for the purpose of granting
special provisions for the recognition of gender status under the law.

715 Therefore, the requirements related to the Provision and Item 5 are not inseparable
from the purpose and fundamental concept of the Act, and it is clear that applying
special exceptions to persons who are not in the physical state described in both
provisions, but their psychological state and intentions as stated in Article 2 of the
Act are recognized through specific treatment-based diagnosis by a physician, is
720 consistent with the purpose of the Act. Given that it is an important legal benefit
tied to an individual's dignity that someone with gender identity disorder enjoy
legal recognition of gender status according to their gender identity, invalidating
the entire Act due to unconstitutionality of both provisions is surely contrary to the
purpose of the legislation.

725 In view of the above, if the Provision and Item 5 are deemed to be unconstitutional,
then only these provisions will be invalidated and rulings should be made based on
the remaining provisions, which does not change the purpose or fundamental

concept of the Act in any way and is clear that it should not be considered a violation of legislative power.

730 Therefore, only the Provision and Item 5 are invalid.

- (7) Even if the Provision and Item 5 are unconstitutional and invalid, it is obvious that appropriate judgment must be exercised regarding one’s psychological state and intentions under Article 2 of the Act based on general medical knowledge and a treatment-based diagnosis by a physician.

735 In this regard, the Act requires that diagnoses be made consistently by two or more physicians who have the necessary knowledge and experience to do so accurately based on generally accepted medical knowledge (Article 2). In addition, in order to seek Gender Status Change Ruling, a medical certificate from the physician stating the diagnosis results and treatment progress and results must be submitted
740 (Article 3 (2)). Additional matters to be included in the medical certificate are stipulated in the Ministry of Health, Labour and Welfare Ordinance No. 99 of May 18, 2004, and the reference format for medical certificates as well as detailed instructions on how to fill them out are stipulated in Notification No. 0518001 of the same date from the Director of the ministry’s Mental Health and Disability
745 Health Division, Department of Health and Welfare for Persons with Disabilities. Therefore, the medical certificate should include specific descriptions about the presence or absence of a persistent psychological belief that one is of the other gender, the presence or absence of an intention to adapt to the other gender, and the basis thereof, as well as the progress and results of treatment with the specific
750 duration, results and other details of each treatment, categorized into psychological support, hormone therapy, mastectomy, and gender-affirming surgery. Furthermore, one’s physical and social adaptation as the opposite gender must be specifically described.

If the Provision and Item 5 are unconstitutional and invalid, even if there are parts
755 that do not require description, the court will, as it has done so to date, make a decision that relies not only on the individual’s claims or an abstract diagnosis but on a specific diagnosis made by the physician based on the treatment results “that is generally recognized by two or more physicians who have the knowledge and experience necessary to make the diagnosis accurately.” Only in such cases will
760 the court decide that the requirements under Article 2 of the Act are satisfied.

The Japanese Society of Psychiatry and Neurology has so far established, and revised as necessary, detailed diagnosis and treatment guidelines for medical professionals, based on specialized discussions, medical knowledge and clinical experience regarding gender identity disorder. In addition, the GID Society (Japanese Society of Gender Identity Disorder), whose purpose is to promote research and improve knowledge on gender identity disorder, has established its own physician certification system to certify clinicians who have a certain level of knowledge and ability and have trained at specialist training sessions. These are important points that should be considered when determining whether a physician has the knowledge and experience necessary to accurately make the diagnosis, and whether it is made based on generally accepted medical knowledge.

Based on the above, the courts make decisions on the requirements stipulated in the Act based on appropriate grounds, and that the appropriateness of those decisions is guaranteed.

3. Conclusion

As stated above, the Provision and Item 5 are unconstitutional and invalid. Without having to assess whether the requirements of Item 5 are satisfied, and, in light of the remaining requirements of the Act, there are grounds for the appellant's petition. Therefore, the original decision should be reversed, the original ruling should be rescinded, and a decision should be made to change the appellant's gender from male to female.

- As stated in section 1, I am revising my conclusion of the 2019 Decision in light of the current decision on the constitutionality of the Provision, but I would like to add special comments due to the fact that more than just a few people have been considered to be seriously affected by it over the past four-odd years.

Law No. 70 of 2008, which partially amends the Act, stipulates in Paragraph 3 of the Supplementary Provisions that the system for Gender Status Change Rulings for persons with gender identity disorder should be examined as needed based on the status of the Act's enforcement after its amendment, taking into account the situation of those people and their related parties, as well as other circumstances. In addition to the joint statement by the World Health Organization and others, as well as national and international views on issues surrounding the Provision, and judicial and legislative precedents from other countries, the 2019 Decision pointed out that

795 the constitutionality of the Provision must be constantly scrutinized. However, since
the time of the above decision and for more than 15 years since the amendment, it
has not been amended nor given necessary consideration.

800 All citizens shall be respected as individuals, and their right to life, liberty and the
pursuit of happiness shall, to the extent that it does not interfere with public welfare,
be the supreme consideration in legislation and in other governmental affairs. It is
the responsibility of the state to take appropriate measures depending on the
805 circumstances. Above all, today, we need to ensure equal participation in all areas
of society, regardless of gender identity or sexual orientation, by removing social
barriers and addressing inappropriate norms and practices. There is a need to realize
a society in which people can enjoy a fulfilling life (see G7 Hiroshima Summit
Communiqué as of May 20, 2023, and G7 Elmau Summit Communiqué as of June
28, 2022, among others).

810 The suffering and disadvantages of people whose assigned gender and gender
identity do not match include a wide range of issues related to their personal dignity.
In the democratic process, the rights and interests of such minorities must not be
ignored.

Justice Koichi Kusano’s dissenting opinion is as follows.

815 Although I have no objection to the Provision being unconstitutional and invalid,
in light of the circumstances of this case, I consider it reasonable to render a decision
determining that Item 5 also is unconstitutional and invalid, and allowing for a
change in recognition of gender status of the appellant. I will explain the reasoning
behind this belief below.

- 820 1. As long as Item 5 remains in effect, the body of a person who files a Gender Status
Change Ruling petition based on Article 3(1) of the Act (hereinafter, the
“Applicant”) must satisfy the Item 5 requirement. However, a person seeking a
change in recognition of gender status from male to female must undergo gender-
affirming surgery to remove the penis and create a vulva, and a person seeking a
change of the treatment of gender from female to male must undergo gender-
affirming surgery to lengthen the urethra and form a penis, if they wish to fulfill the
825 Item 5 requirement without any doubt. (I say “without any doubt” because, as
discussed in 3 below, there is a view that there are cases in which the requirement

of Item 5 can be met without undergoing these surgeries.) However, these surgeries cause Applicants fear and pain, and those who undergo these surgeries must accept the risk of concurrent infection among other risks to their lives and bodies.

830 2. As the majority opinion points out, “the benefit of receiving legal recognition of
their gender in accordance with [one’s] gender identity” is an important legal
benefit. As such, the fact that an Applicant must undergo the surgeries described
above to receive this benefit, despite the existence of the Act, can be said to violate
the “freedom from bodily intrusion” guaranteed by Article 13 of the Constitution.
835 Therefore, for Item 5 to be constitutional, the purpose for which Item 5 restricts the
above-mentioned freedom (hereinafter, the “Purpose”) must be justified, and the
means chosen by Item 5 to achieve this should be reasonable in light of the Purpose.
Therefore, I will consider these points one by one below.

(1) The Purpose of Item 5 is generally explained as meant to avoid societal disruption
840 at public baths and similar facilities, but it is necessary to define, as specific and
concrete as possible, the benefits that natural persons enjoy [via Item 5] when
comparing such against the disadvantages and costs Item 5 brought upon
Applicants. From this point of view, it would be appropriate to view the Purpose of
Item 5 as the “interest of not being made to feel shame, fear, or disgust by being
845 shown the genitals of the opposite sex against one’s will” (hereinafter, the “interest
of not being shown the genitals of the opposite sex against one’s will” (always in
quotations for readability)). It is well-established precedent that the act of openly
exposing one’s genitals constitutes a crime under Article 174 of the Penal Code
(public indecency), and even in public bathhouses, which are facilities that
850 exceptionally allow the exposure of genitals within a certain area, the ordinances
of each local government delegated by the Public Bathhouses Act have stipulated
that bathrooms and similar facilities, should be separated by sex. In view of these
facts, the “interest of not being shown the genitals of the opposite sex against one’s
will” is an interest that deserves respect, and the Purpose of Item 5, which aims to
855 protect this interest, is justified.

(2) Therefore, the issue is whether the means chosen to achieve the above-mentioned
Purpose (i.e., Item 5) can be said to be reasonable in light of the Purpose (the issue
regarding the reasonableness of the means is hereinafter, the “reasonableness issue”
among the so-called means-for-purpose examinations).

860 There are various academic views on what framework should be used when making
judgments on the reasonableness issue. However, the essence of the reasonableness
issue is to compare and weigh the interests of parties that cannot be measured by
common indicators, and it is difficult to imagine that there is any judgment
865 framework a priori that can universally or typologically carry out such comparison
and weighing. It seems that the best way of thinking that can be adopted when
considering the reasonableness issue is to search for the viewpoint that can most
clearly indicate the reasonableness of the judgment through trial and error, and to
discuss the issue and make a judgment based on the “best viewpoint” discovered
870 as a result of the search. The “best viewpoint” that can be used in this case is
comparing the society that would emerge if Item 5 were held to be constitutional
(hereinafter, a “society in which Item 5 is held to be constitutional”) and the society
that would emerge if Item 5 were held to be unconstitutional and eliminated
(hereinafter, a “society in which Item 5 is held to be unconstitutional”) and
examining which society would be a better society in light of the various
875 philosophies embodied by the Constitution.

3. First, I will consider a society in which Item 5 is held to be constitutional. In this
society, an applicant who meets all requirements to receive a Gender Status Change
Ruling under the Act except for Item 5 (hereinafter, a “person who does not satisfy
Item 5”) cannot receive a Gender Status Change Ruling. Therefore, such person
880 who does not satisfy Item 5 would not be permitted to enter into areas in certain
facilities, such as a public bathhouse, that are separated by sex and in which
exposure of genitals by [persons with designated sex] * is allowed (hereinafter, a
“Permissible Area”). Consequently, the “interest of not being shown the genitals of
the opposite sex against one’s will” will not be impaired by a person who does not
885 satisfy Item 5 [since such person would not be able to enter Permissible Areas that
are designated for similarly cisgendered persons that do not correspond to their
legal sex]. On the other hand, in order for a person who does not satisfy Item 5 to
change their [legal] gender status definitively, they must undergo gender-affirming
surgery; therefore, they have no choice but to accept an infringement on their

*** [persons of the same designated sex] here means (i) cisgender persons whose biological sex is opposite that of the person who does not satisfy Item 5 or (ii) persons who have satisfied Item 5 (i.e., have had a gonadectomy) and are of therefore of the sex designated for the relevant Permissible Area. For example, female users (including cisgender women and transgender women who satisfy Item 5) of Permissible Areas of a public bathhouse designated for use by women, or male users (including cisgender men and transgender men who satisfy Item 5) of Permissible Areas of a public bathhouse designated for use by men.

890 freedom from bodily intrusion or give up [their right to] enjoy the benefit of
receiving legal recognition of their gender in accordance to their gender identity. In
short, a society in which Item 5 is held to be constitutional is indeed a tranquil
society in that the “interest of not being shown the genitals of the opposite sex
against one’s will” is very unlikely to be impaired by a person who does not satisfy
895 Item 5, but this tranquility is nothing but the result of the constant suppression of
the freedoms and interests of those who do not satisfy Item 5.

Some argue that a person with gender identity disorder may undergo hormone
therapy for a considerable period of time, which may cause a noticeable change in
the external appearance of their genitals, and that such a noticeable change may
900 satisfy the requirement of Item 5 even without [such person] undergoing gender-
affirming surgery; however, even if there are those who undergo such a change, this
does not change the fact that the freedom and interests of persons who do not
undergo such a change or do not satisfy Item 5 are under constant suppression.

4. Next, I will consider a society in which Item 5 is held to be unconstitutional. In this
905 society, it is understandable there may be people who are concerned with the
possibility of the “interest of not being shown the genitals of the opposite sex
against one’s will” held by other users of the Permissible Area being impaired by
the entry into the Permissible Area of a person who does not satisfy Item 5 but has
received a change in recognition of gender status [to their gender identity]
910 (hereinafter, if it is clear from the context, the term a “person who does not satisfy
Item 5” will be used in this limited sense). However, two points must be kept in
mind here.

The first thing to keep in mind is that, according to published survey results, the
proportion of persons with gender identity disorder in the total population of Japan
915 is extremely low, and among them (considering that not a small number of persons
with gender identity disorder willingly undergo gender-affirming surgery because
they wish to conform their physical characteristics to those of the other sex [i.e., to
their gender identity]), the number of persons who do not satisfy Item 5 would be
even smaller; in addition, there are even fewer, if any, who dare to enter a
920 Permissible Area and act in such a way that their genitals are visible to other users,
knowing that the traditional order of Japanese society has respected the “interest of
not being shown the genitals of the opposite sex against one’s will.” Considering
this point, even if we set aside the second point, the possibility of a situation in

925 which the “interest of not being shown the genitals of the opposite sex against one’s
will” of Permissible Area users is impaired by persons who do not satisfy Item 5 is
extremely low.

930 The second thing to note is that all Permissible Areas are under the control of those
who are in the business of providing them for public use. Therefore, operators of
Permissible Areas faced with a society in which Item 5 is held to be unconstitutional
will be forced to establish some kind of rule of use as to whether to prohibit or allow
935 persons who do not satisfy Item 5 to enter the Permissible Area (it may be possible
to limit the entry of persons who do not satisfy Item 5 to certain date, time and/or
day of the week), or to take some intermediate measures (it may be possible to allow
entry on the condition that a swimsuit is worn, either free of charge or provided for
a fee), considering (i) the interpretation of “male and female” provided for in the
940 technical advice given by the Minister of Health, Labour and Welfare to each local
government and in the various ordinances that require separation by gender for
Permissible Areas based on this technical advice (the current technical advice (NHI
No. 0623-1, dated June 23, 2023) states that the distinction between “male and
female” should be based exclusively on physical characteristics) and (ii) the
945 opinions of users of Permissible Areas. Therefore, given that providing services that
can satisfy as many users as possible while preventing trouble among users should
be a top priority for Permissible Area operators from the perspective of smooth and
appropriate Permissible Area management, in establishing Permissible Area usage
rules for persons who do not satisfy Item 5, operators of any Permissible Area are
950 expected to pay close attention to ensuring that users’ “interest of not being shown
the genitals of the opposite sex against one’s will” is not impaired, and endeavor to
make the users of such Permissible Areas are thoroughly aware of the area’s
established usage rules. As a result, the possibility of Permissible Area users’
“interest of not being shown the genitals of the opposite sex against one’s will”
being impaired will be further reduced.

955 In summary, even in a society in which Item 5 is held to be unconstitutional, it is
extremely unlikely that the “interest of not being shown the genitals of the opposite
sex against one’s will” will be impaired. On the other hand, since persons who do
not satisfy Item 5 are given the option of receiving the change in recognition of
gender status [to their gender identity] without having to undergo gender-affirming
surgery in this society, the suppression of their freedom or interests will be
significantly reduced (though not “completely” as they are not allowed unlimited

access to Permissible Areas).

960 In addition, in a society in which Item 5 is held to be unconstitutional, it is expected
that the various views on how the rules for the use of Permissible Areas by persons
who do not satisfy Item 5 should be regulated will become the subject of debate in
various public spaces; and depending on the outcome of such discussions, it is not
965 impossible that additional legislative measures or new judicial decisions may result
in a situation slightly different from the one described above (within the limits of
what is permissible under the Constitution, of course) with regard to the freedom or
interests of either or both the persons who do not satisfy Item 5 and other citizens.
In view of this possibility, a society in which Item 5 is held to be unconstitutional
970 may be a somewhat noisier society than a society in which Item 5 is held to be
constitutional. However, this “noisiness” can be seen as an effort, and its result, to
maximize citizen’s enjoyable welfare, with full respect for the freedom and interests
of both persons who do not satisfy Item 5 and other citizens.

5. Accordingly, a society in which Item 5 is held to be unconstitutional is a better
975 society than a society in which Item 5 is held to be constitutional in light of the
various philosophies embodied in the Constitution. Therefore, the restrictive
measures in Item 5 are not reasonable in light of the Purpose of Item 5, and it is
appropriate to consider Item 5 to be unconstitutional, as is the same with the
Provision. Since it is clear from the record of the case that the appellant satisfies the
requirements of the Act except for the Provision and Item 5, I believe it is
980 appropriate [for the Court] to make a decision to overturn the original decision and
grant the petition in this case.

Justice Katsuya Uga's dissenting opinion is as follows.

1. I fully agree with the majority opinion that the restriction on the freedom from
985 bodily intrusion caused by this Provision is unnecessary and unreasonable, and that
the Provision is unconstitutional. As the majority opinion states, a gonadectomy is
not necessarily the final stage of treatment and is only one of the treatment options,
the selection of which should be left to the individual's will. A gonadectomy should
be approved only if it is confirmed to be considered necessary from a medical
990 perspective and the individual's true consent has been obtained. Therefore, a system
that does not allow a person to change their legal gender unless they undergo a

gonadectomy, regardless of medical necessity or an individual's preference, forces those who have suffered material disadvantages due to discrepancies between their gender identity and their legal gender to make a grave choice between undergoing gonadectomy, which involves risks to their lives and bodies in order to make their legal gender match their gender identity, or accepting the various disadvantages in life that would result from the discrepancy between their gender identity and their legal gender, in order to avoid the risks involved with a gonadectomy. Furthermore, the Provision may foster a perception that those who do not undergo a gonadectomy are not persons with genuine gender identity disorder which is illogical and has no medical basis.

The main concern behind the Provision was that if a change in legal gender was allowed while reproductive capacity remained, a female could be a father and a male could be a mother, which was thought to lead to societal confusion. However, as the majority opinion noted, based on the 2008 Amendment, the existence of a female father and a male mother had already been legally recognized in the event their children were already adults. More than 15 years have passed since the 2008 Amendment and there has been no such societal confusion. In addition, separate from the legal perspective, it is not only extremely rare for an individual who appears to be male to give birth to a child, but it is also possible to do so regardless of whether there is a change in the individual's legal gender. The Provision is not effective in preventing such situation. Furthermore, it is now medically possible for persons with gender identity disorder to cryopreserve sperm and ovaries before undergoing hormone therapy or gonadectomy, and subsequently use them to have children after changing their gender. Even if such a situation were to occur, not only would it be extremely rare, but also it would not be prevented by the Provision, and in this respect, the Provision is not effective.

Persons with gender identity disorder do not suddenly start living their self-identified gender by changing their legal gender; rather, in general, their outward gender changes through hormone therapy, etc., they change their names with the permission of the family court, and live their lives with a gender identity that matches both their appearance and name. Therefore, it seems that discrepancies between a person's gender as indicated by their appearance or name and their legal gender are often the cause of societal confusion.

2. The Provision also has serious issues in terms of infringement of reproductive

rights, which is a right for an individual to make decisions regarding their own reproduction. Regarding this point, the joint concurring opinion of the Supreme Court's Second Petty Bench dated January 23, 2019 also stated that removing the ovaries or testicles for gender-affirming surgery poses a danger to both life and body and impairs reproductive function which would lead to serious and irreversible consequences. Reproductive rights can also be understood as a fundamental human right guaranteed by Article 13 of the Constitution, and unwillingly consenting to a gonadectomy, in order to match one's self-identified gender with one's legal gender, and thereby losing one's reproductive ability, poses a grave choice and is an excessive restriction on reproductive rights.

Reproductive rights can be interpreted as being guaranteed separately from the freedom from bodily intrusion, but it is also possible to interpret them as being included in that same freedom. In 2011, Germany's Federal Constitutional Court ruled that a provision requiring a loss of reproductive capacity for changes in gender treatment was unconstitutional, stating that it is an element of the inalienable right of the person protected by Article 2(2) [of Germany's constitution].

3. In my opinion, not only the freedom from bodily intrusion, but also, as in this case, the right of a person with gender identity disorder to be legally treated in accordance with their gender identity is essential for the pursuit of happiness and is a fundamental human right guaranteed under Article 13 of the Constitution. Although the issue regarding freedom from bodily intrusion is limited to the Provision and Item 5, if the right to be legally treated in accordance with one's gender identity is a fundamental human right guaranteed by Article 13 of the Constitution, then the question arises whether the other provisions of Article 3(1) of the Act abridge that fundamental human right.

The view that the right to have one's gender treated in accordance with his or her gender identity ought to be recognized as a constitutional right is not only a prevailing academic theory in Japan, but also in other countries, where the idea that such a right is guaranteed under international human rights law or the constitutional law is accepted by many. In 2011, the Federal Constitutional Court of Germany held that it was unconstitutional to make gender-affirming surgery a requirement for a change of legal gender by persons with gender identity disorder, because of (i) the excessive burden the requirement places on the right to bodily integrity guaranteed by Article 2(2) of the Basic Law ([i.e., Germany's constitution]), and (ii) the

1060 excessive burden that the requirement puts on fundamental human rights
guaranteed by Article 1(1) of the Basic Law, which guarantees the right to human
dignity, and Article 2(1) of the Basic Law, which guarantees the right to freedom of
1065 personality. Regarding the latter (ii), the Federal Constitutional Court of Germany
has held that the right to human dignity, coupled with the fundamental human right
to the protection of personality, requires legal recognition of one’s gender identity.
In addition, in 2017, the European Court of Human Rights held that requiring
persons with gender identity disorder to undergo sterilization to have their legal
gender changed violates the European Convention on Human Rights (hereinafter,
1070 the “Convention”). There, the court held that such a requirement is not only a
violation of the right to physical integrity but also of the right to sexual identity
under the Convention.

Since gender identity is diverse, it can be argued that the scope of individual
interests in receiving legal recognition of gender status in accordance with [one’s]
gender identity lacks clarity; however, with respect to the individual interest of a
1075 person with gender identity disorder defined by Article 2 of the Act in receiving
legal recognition of gender status in accordance with the one’s gender identity, its
scope is not necessarily unclear. Furthermore, if we were to adhere to the idea that
an individual right will not be recognized as a new fundamental human right based
on the second sentence of Article 13 of the Constitution if the scope of individual
1080 interests it bestows is even slightly unclear, then it would be difficult to recognize
a new fundamental human right that is not specifically enumerated in the
Constitution. Until now, this Court has clearly recognized the “freedom not to have
one’s appearance/demeanor (...) photographed without reason” (Supreme Court of
Japan (a) No.1187 of 1965, Decision by the Grand Bench dated on December 24,
1085 1969, Vol. 23, No. 12, p.1625 of the Supreme Court Cases Reports Compilation
Criminal Section), the “freedom from being compelled to be fingerprinted without
reason” (Supreme Court of Japan (a) No. 848 of 1990, Decision by the Third Petty
Bench dated December 15, 1995, Vol. 49, No. 10, p. 842 of the Supreme Court
Cases Reports Compilation Criminal Section), and the “freedom not to have
1090 personal information disclosed or published to third parties without reason”
(Supreme Court of Japan (o) No.403 of 2007, (Ju) No. 454 of 2007, Decision by
the First Petty Bench dated March 6, 2008, Vol. 62, No. 3, p. 665 of the Supreme
Court Cases Reports Compilation Civil Section), each as a new fundamental human
right based on the second sentence of Article 13 of the Constitution. In each case,

1095 we used the uncertain concept of “without reason”, which is by no means clearly
defined, and the definition of the term is a controversial academic topic and often
subject to litigation. Furthermore, the outer boundaries of the fundamental human
rights guaranteed in articles other than Article 13 of the Constitution are by no
means clear, as is obvious when considering freedom of expression and freedom of
1100 religion, and the majority of research by constitutional scholars has focused on the
pros and cons of various interpretations of the boundaries of the fundamental human
rights guaranteed under the Constitution. Just as the advent of search engines and
SNS has necessitated a new discussion on the scope of freedom of expression, the
scope of fundamental human rights may change as social conditions change,
1105 including as a result of advances in technology, and efforts to determine the
changing scope must be left to judicial precedents and academic theories.
Furthermore, the fact that gender identities can be diverse is not a situation unique
to Japan, as the Federal Constitutional Court of Germany and the European Court
of Human Rights have recognized, as mentioned above, the right to have one’s
1110 gender treated in accordance with the one’s gender identity as a fundamental human
right, rather than refusing to recognize such a right because of the ambiguities
surrounding the scope of the right, and they likely did so because they decided to
recognize the core part of the right to be treated in accordance with one’s gender
identity as a fundamental human right and left clarification of its exact scope to
1115 subsequent judicial decisions and academic discourse.

In addition, if we were to imagine a situation where the gender of a person whose
gender identity and biological gender match is mistakenly recorded in his or her
family register as a different gender from one’s gender identity, and if he or she is
not allowed to correct it and has to accept a legal gender that is different from one’s
1120 gender identity for the rest of one’s life, most people would likely agree that the
interest of receiving legal treatment in accordance with one’s gender identity is
essential to one’s personal dignity. Furthermore, although the total number of
approved Gender Status Change Rulings has exceeded 10,000, there is no indication
that this has caused societal confusion, and family registers in which a change of
1125 legal recognition of gender status are recorded based on the Act and are not open to
the public, and since the legal gender is changed to match the appearance or name
that has already been changed, it is difficult to imagine that the rights of others are
violated due to a change in legal recognition of gender status of a person with
gender identity disorder. Thus, it seems reasonable to assume that Article 13 of the

1130 Constitution guarantees the interest of persons with gender identity disorder to
enjoy legal recognition of gender status in accordance with their gender identity.

1135 4. In cases where there are special circumstances, such as a permanent loss of gonadal
function due to the administration of anti-cancer drugs or other reasons, the
requirements of the Provision can be fulfilled by loss of reproductive ability without
a gonadectomy. The requirements for Item 5 can also be satisfied without surgery
1140 through hormone therapy or other similar methods. Surveys have shown this [to be
true] among many cases involving individuals who have received a Gender Status
Change Ruling to change their gender status from female to male. Nonetheless,
regarding Item 5 as well, surgery is usually required in the case of a person seeking
a Gender Status Change Ruling to change their gender status from male to female,
and that surgery is highly intrusive, poses a threat to physical health and can be life-
threatening. Furthermore, even if surgery is not required to fulfill the requirements
of Item 5, hormone therapy performed to satisfy such requirements is also
1145 associated with inducing risks of serious side effects. Therefore, Item 5 does not
differ from the Provision in that it also forces persons with gender identity disorder
to make a grave choice to either receive legal recognition of [one's] gender status
in accordance with one's gender identity or maintain the freedom not to have one's
body intruded. On the other hand, societal issues that may arise if Item 5 is
abolished should, of course, be carefully considered, but as indicated in the
1150 dissenting opinions of Justice Miura and Justice Kusano, they do not seem to hold
sufficient weight as justification for [subjecting persons with gender identity
disorder to] such a grave choice as described above. Therefore, I agree with the
dissenting opinions of Justice Miura and Justice Kusano in holding that Item 5 is
also unconstitutional, as well as the Provision.

1155 And since it is clear that the appellant satisfies the requirements of the Act other
than the Provision and Item 5, I believe that the original decision should be reversed
and a judgment granting the petition shall be made.

1160 (Presiding Justice: Saburo Tokura, Justice Atsushi Yamaguchi, Justice Takuya Miyama,
Justice Mamoru Miura, Justice Koichi Kusano, Justice Katsuya Uga, Justice Michiharu
Hayashi, Justice Kazumi Okamura, Justice Yasumasa Nagamine, Justice Ryosuke Anami,
Justice Eriko Watanabe, Justice Masaaki Oka, Justice Toru Sakai, Justice Yukihiro
Imasaki, Justice Akira Ojima)