

# Working Conditions Imposed on a Trans Woman and Their Unlawfulness

Supreme Court, 3<sup>rd</sup> Petty Bench, Judgement of 11 July 2023

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## I. INTRODUCTION

The attitude of the Japanese judiciary has shown rapid development in transgender-related legal issues in recent years.<sup>1</sup> Although the scope of constitutional protection of gender identity is still far less clear in Japan than it is in Germany, the legal interest in pursuing a life corresponding with one's gender identity is gradually being recognized in Japanese court decisions. In this case, the Japanese Supreme Court for the first time showed how it views the working conditions of a trans woman. Whether trans women can access women's spaces has been the subject of discussion in Japan since Ochanomizu Women's University declared, in 2018, that it would accept trans women. The discussion flared up before the passage of recent legislation, the Act to Promote Understanding of LGBT.<sup>2</sup> In this case, the Court provided a poten-

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Unless stated otherwise, the links given were last checked on 20 September 2023.

- 1 M. ISHIJIMA, *Rechtliche Anerkennung der Geschlechtsidentität und Familiengründung von trans\* Personen in Japan*, ZJapanR/J.Japan.L. 54 (2022) 15; more generally on the legal status of the LGBTQ+ community see T. KURISHIHIMA, *Rechte der LGBT+-Personen in Japan. Historische Entwicklung und aktueller Stand*, ZJapanR/J.Japan.L. 56 (2023) 143, in this volume.
- 2 LGBT 理解増進法 *LGBT rikai zōshin-hō*, official name: 性的指向及びジェンダーアイデンティティの多様性に関する国民の理解の増進に関する法律 *Seiteki shikō oyobi*

tial guideline for employers, although the conclusion in this particular case might not apply universally to all workplaces.

## II. THE COURT CASE<sup>3</sup>

### 1. *Facts (Summary of the facts apparent from the judgement)*

The appellant had been a national public employee in a department of the Japanese Ministry of Economy, Trade and Industry (METI) since 2004. Although she had had gender dysphoria since childhood, she started working as a man as assigned at birth. Her diagnosis of “gender identity disorder”<sup>4</sup> was confirmed around 1999, and in her daily life she has been living as a woman since around 2008. She has health conditions that have prevented her from undergoing sex reassignment surgery. Her legal gender status was hence still male, because Japan’s GID Act<sup>5</sup> required such a surgery to change her legal gender marker.

In 2009, after communicating about her diagnosis with her superior, the appellant submitted a request to her workplace that she might work as a

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*jendā aidentiti no tayō-sei ni kansuru kokumin no rikai no zōshin ni kansuru hōritsu*  
Act Promoting the Understanding of the People concerning the Diversity of Sexual  
Orientations and Gender Identities, Law No. 68/2023.

3 For a verbatim translation of the case by the Lawyers for LGBT and Allies Network (LLAN) see <http://llan-japan.org/llan17/cont/uploads/2023/09/Translation-products-20230920.pdf>.

4 This term is no longer used for the official medical diagnosis. Under the 11<sup>th</sup> edition of the International Statistical Classification of Diseases and Health Related Problems (ICD-11) published by the WHO in 2019, the terms “transsexualism” (性転換症 *sei-tenkan-shō*) and “Gender Identity Disorder” (性同一性障害 *sei-dōitsu-sei shōgai*) were replaced with “Gender Incongruence” (性別不合 *seibetsu fugō*). Japan adopted the ICD as a standard for compiling disease statistics in the field of social insurance. In this paper, the term “gender identity disorder” refers to the condition stipulated in Art. 2 of the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (性同一性障害者の性別の取扱いの特例に関する法律 *Sei-dōitsu-sei shōgai-sha no seibetsu no toriatsukai no tokurei ni kansuru hōritsu*, Law No. 111/2003, hereinafter: GID Act). Art. 2 stipulates the definition as follows:

“The term ‘Person with Gender Identity Disorder’ as used in this Act means a person whose biological gender is evident, but who holds a persistent conviction under which they psychologically identify themselves as being of the opposite gender (hereinafter referred to as 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 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.”

5 See *supra* note 4.

woman. In response, the department in which the appellant worked held a meeting on 14 July 2010, with the appellant's approval, to explain her gender identity disorder to other staff members. After the appellant left the meeting room, the person in charge of the meeting observed that several female employees appeared to be uncomfortable with the idea of the appellant using the women's restrooms on the floor on which the appellant worked. This person also obtained information on a female participant using the toilet located one floor upstairs to their department office. Based on these observations, METI took measures to prohibit the appellant from using the women's toilets on her own floor or the floors above or below but did allow the appellant to use the women's toilets on other floors. During the week following the meeting, the appellant started dressing as a woman at work and used women's toilets on a floor at least two floors away from her office. This has not caused any trouble with other staff members. In the meantime, by March 2010 she had received a medical certification of low levels of male hormones in her bloodstream, indicating that she would be unlikely to commit sexual violence based on sexual urges. In 2011, she also legally changed her name<sup>6</sup> to the one used at her workplace since then.

On 27 December 2013, the appellant requested administrative measures pursuant to Article 86 of the National Public Service Act<sup>7</sup> to the effect that she was in principle to be treated the same as other female employees, including by being granted unrestricted use of women's toilets in the workplace. The National Personnel Authority (人事院 *Jinji-in*), which is in charge of these administrative measures, in a decision of 29 May 2015, denied her request. The appellant claimed that the authority's decision was unlawful and requested that it should be rescinded.

The first instance<sup>8</sup> found METI's treatment of the appellant unlawful under the State Redress Act in the restriction of her use of toilets.<sup>9</sup> The first

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6 Unlike German law, an official name change on the grounds of gender transition in Japan is conducted through a general procedure for name changes that is separate from the procedure to change one's legal gender marker under the GID Act.

7 国家公務員法 *Kokka kōmu-in-hō*, Law No. 120/1947. Art. 86 provides that officials may request appropriate administrative action from the Personnel Authority with respect to salary, compensation, or any other working conditions. Article 87 stipulates that the National Personnel Authority must conduct investigations, hearings, or other fact-finding reviews as it finds necessary when a request based on Article 86 is received, and they determine the case with due regard to impartiality to the general public and the persons concerned and in terms of developing and improving the efficiency of officials. This paper referred to the Japanese Ministry of Justice, *Japanese Law Translation* <https://www.japaneselawtranslation.go.jp/> for the translation of provisions.

8 Tōkyō District Court, 12 December 2019, 労働判例 Rōdō Hanrei 1223 (2020) 52.

instance also rescinded the portion of the National Personnel Authority's decision in which it 1) denied her permission to freely use the women's toilets and 2) retained METI's requirement conditioning such use on her divulging her gender identity disorder to other female staff members. The second instance<sup>10</sup> dismissed her claim for rescission of the National Personnel Authority's decision regarding her use of toilets. The court of the second instance held that appellant's treatment by METI was not a failure to exercise the due care and attention required of public officials under the State Redress Act and was therefore not unlawful, because the continuing implementation and retention of such practices at METI were in fulfillment of its responsibility to create an appropriate work environment for all employees, including the trans woman.

## 2. *Judgement of the Supreme Court*

The Supreme Court reinstated the determination by the court of first instance, which had rescinded the National Personnel Authority's decision regarding the appellant's toilet use. The court found that the National Personnel Authority's decision was unlawful since it deviated from or abused its discretion when it denied the appellant free use of the women's toilets. The court then dismissed the rest of her appeal.

The Supreme Court found that METI's practices related to use of the toilets were to be evaluated as the ministry's attempt to balance the interests of employees, including appellant's interests, from the perspective of ensuring a suitable work environment. The court recognized that the practices at issue subjected the appellant to a fair amount of disadvantage on a daily basis, in that while diagnosed with gender identity disorder she is compelled to use either men's toilets, in a deviation from the gender she identifies with, or toilets located on a different floor. The court considered furthermore that, although she had not undergone sex reassignment surgery, she had received several medical interventions, including the administration of female hormones; a doctor had assessed that she was unlikely to engage in sexual violence based on her sexual urges; and no trouble was observed after she started working in women's clothes and using women's toilets located two floors or more away. The court found that at the explanatory meeting held at her department, the officer in charge had merely estimated that a few female staff members seemed to feel uncomfortable about the

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9 国家賠償法 *Kokka baishō-hō*, Law No. 125/1947.

10 Tōkyō High Court, 27 May 2021, 労働判例 Rōdō Hanrei 1254 (2022) 5. The first and second instances also found unlawful, under the State Redress Act, the statement by the trans woman's senior colleague. This paper refrains from discussing this point as the Supreme Court did not regard this matter in its decision.

appellant's use of women's toilets on their floor, and it found no indication that any staff member clearly objected to the appellant's use of women's toilets on the same floor. It observed that METI conducted no further investigation to detect whether any employees required particular consideration regarding the appellant's use of the women's toilets, nor was there any review of the status quo imposed on the appellant during the approximately four years and ten months between the explanatory meeting and the National Personnel Authority's decision.

The Supreme Court therefore found no concrete reasons to subject appellant to the above-mentioned disadvantages in the conditions imposed on her use of toilets, no reason to presume that trouble would arise through appellant's free use of women's toilets, and no confirmation that other staff members required special consideration at any time until the National Personnel Authority issued its decision. The court found that the National Personnel Authority's decision on the use of toilets unduly emphasized consideration of other employees without regard to the specific circumstances of the appellant's case, unreasonably underestimated the disadvantages to the appellant, and failed to render a determination impartial to all parties and for the development and improvement of the efficiency of employees, including the appellant, within the scope of Arts. 71, 86, and 87 of the National Public Service Act<sup>11</sup>. The court therefore found that the National Personnel Authority's decision significantly lacked validity and, regarding the appellant's use of toilets, was an unlawful deviation from or abuse of its discretion.

The court's judgment was unanimous, and attached to it were supplementary opinions by all five justices.

### III. COMMENT

In this case, the Japanese Supreme Court acknowledged the appellant's legal interest in a social life that corresponds to her gender identity even before changing her legal gender marker. The court weighed the comparative interests of the appellant in a social life consistent with her gender identity against the presumed interest of the other female employees in avoiding any discomfort or embarrassment they might feel in the appellant's use of women's toilets. The court assessed that the mere presumption of such discomfort does not suffice to limit the appellant's interest. It is worth noting that in recognizing a legal interest in living according to one's gender identity, the

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<sup>11</sup> See *supra* note 7. Article 71 stipulates the basic standards for efficiency. For example, its para. 1 provides that "effort must be made to fully develop and improve the efficiency of officials."

court did not rely on uniform criteria such as legal gender markers or the completion of sex reassignment surgeries. This also means that the solution that emerged in this case – unconditional access to women’s toilets – does not automatically apply universally to other workplaces. The weighing of respective interests calls for an assessment of the concrete situations of each party. The supplementary opinion of Justice WATANABE, with which Justice HAYASHI concurred, criticized METI’s vague assessment for ignoring differences of opinion among the female employees. And by the time of the National Personnel Authority’s decision, the appellant had already been living as a woman for almost five years without causing trouble, real-life experience that provided enough of a testing period for METI to assess the reactions of other female employees while preventing rapid changes and corresponding confusion<sup>12</sup> in the workplace. Aside from real-life experience, the court of the first instance in deciding this particular case referred to plaintiff’s diagnosis as "gender identity disorder" and recognized the low risk of her sexually assaulting anyone, loss of male reproductive function, and degree of passing as a woman. It also referenced the layout of the women’s toilets provided at the workplace, six examples from private companies, changes in public awareness and social acceptance of trans people, and legislation and practices abroad.

It should also be mentioned that this case was not about a trans woman accessing women’s toilets but rather about the National Personnel Authority’s range of discretion and limitation of toilet use. The appellant was in fact already using women’s toilets. This is not the first case in which Japanese courts have affirmed that employers cannot restrict trans women’s work settings simply for their expression of gender identities.<sup>13</sup> The remarkable aspect of this case is that the Supreme Court here confirmed that abstract discomfort or fear does not suffice to restrict a trans person’s legal interests.<sup>14</sup>

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12 The court posited avoiding rapid changes as the reasonable ground for retaining the sterilization requirement of the GID Act. Supreme Court, 23 January 2019, 集民 Shūmin 261, 1.

13 For instance, Tōkyō District Court, 20 June 2002, 労働判例 Rōdō Hanrei 830, 13, partially granted the plaintiff’s motion and invalidated her dismissal from the workplace for working in women’s clothing. In Ōsaka District Court, 20 July 2020, 労働判例 Rōdō Hanrei 1246, 79, a provisional payment of wages was granted to a taxi driver who was prohibited from driving for wearing makeup.

14 Several Japanese lower courts had already held as much. Tōkyō District Court, 20 June 2002, *supra* note 13, and Tōkyō High Court, 1 July 2015, ジュリスト Jurisuto 1492 (2016) 10. Y. TATEISHI, *Sei-dōitsu-sei shōgai-sha shoku'in ni taisuru shokuba no shogū no ihō-sei: Keizai sangyō-shō jiken, Tōkyō Kōhan 2021 (Reiwa 3), 5, 27* [Illegality of Workplace Treatment of Employee with Gender Iden-

### 1. *Judicial Trends and Backgrounds*

The Japanese Supreme Court affirmed the law's respect for the appellant's living situation as a woman without changing her legal gender. The respondent, METI, the appellant's employer, prompted the appellant to change her legal gender so as to receive the same treatment as other female employees in using toilets. METI simultaneously requested that she should undergo sex reassignment surgery as required for a change of one's legal gender marker under Japan's GID Act. This requirement raises the hurdle for trans people to have their gender identities legally recognized. Such circumstances may have led the court to refrain from adopting the appellant's unchanged legal gender as a decisive factor. The required surgery imposes a grave physical invasion, health risks, and a significant financial burden on the patient. There is also no guarantee that a patient will be able to receive the surgery, and in this case the appellant's health condition indeed prevented her from undergoing the surgery. Nor can the surgery be coerced on the appellant against her free will. The supplementary opinion by Justice UGA recognized these characteristics of sex reassignment surgery in this case.

Initially enacted in 2004, Japan's GID Act currently requires those applying for legal gender recognition to 1) have reached the age of majority, 2) be unmarried, 3) have no minor children, 4) have no reproductive glands or only such that have lost their function permanently, and 5) have the appearance of their genital area approximate that of the other gender,<sup>15</sup> together with concurrent diagnoses by two physicians<sup>16</sup>. Half of these requirements have been questioned in their constitutionality<sup>17</sup>, although the

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tity Disorder: The METI Case, Tōkyō High Court, 27 May 2021], 労働法律旬報 Rōdō Hōritsu Junpō 1994 (2021) 22, 26.

15 Art. 3 of the GID Act. Japanese law so far recognizes only two genders. In case the sex of a newborn cannot be determined, their gender information can be left blank at the registration of their birth with a statement of subsequent completion. N. IENAGA, *Seibetsu mikakutei de shushō shita ko no seibetsu kettei* [Legal Status of Indeterminate-sex Child in Japanese Law], 専修法学論集 Senshū Hōgaku Ronshū 131 (2017) 1, 31–32. One's gender information is not simply shown as female or male under Japanese civil registration. The gender of a person is registered on the Family Registry (戸籍 *koseki*), and it is shown as 続柄 *tsukigara*, combining two letters indicating the relationship with other family members and the gender of the person (such as 長女 *chōjo*: first daughter, 次女 *jijo*: second daughter, 長男 *chō'nan*: first son, and so on. Letters representing ordinal numbers (長, 次, 三, etc.) are assigned to children born to the same pair of parents, respectively counted by the children's gender).

16 Art. 2 of the GID Act.

17 Regarding the requirement to be unmarried: Supreme Court, 11 March 2020, Case No. 2019 ku 791, [https://www.courts.go.jp/app/hanrei\\_jp/detail?id=89311](https://www.courts.go.jp/app/hanrei_jp/detail?id=89311); re-

Japanese Supreme Court so far has retained all of them, confirming their constitutionality. Unlike the German Federal Constitutional Court<sup>18</sup>, the Japanese courts have not decisively answered whether one's gender identity is entitled to protection under Japan's Constitution. However, they have recently shown greater acknowledgment of a legal interest in leading one's life according to one's gender identity. Although the court of the second instance dismissed all the appellant's contentions, all three judicial instances that heard her case explicitly recognized this interest. In particular, the first two instances elevated a phrase from a supplementary opinion attached to the Supreme Court case in 2019<sup>19</sup> into their main reasoning: "gender (性別 *seibetsu*) is [...] tightly connected with and inseparable from one's personal existence (人格的存在 *jinkakuteki sonzai*)". However, it should be noted that both courts derived this legal interest not from the Constitution but from the legislative purpose of the GID Act.<sup>20</sup> The 2019 Court decision regarding the sterilization requirement may suggest that Japan's Constitution has not placed gender identity and the resulting legal recognition of gender under its protection. The court in that case upheld the constitutionality of the sterilization requirement and maintained the status quo, in which some trans people (essentially, those who have no need to undergo sex reassignment surgery to ameliorate gender dysphoria or establish a social life corresponding to their gender identity) have to barter their physical integrity in return for legal recognition of their gender. The enjoyment of one constitutional right cannot be conditioned upon waiving another. While

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garding the no-minor-child requirement: Supreme Court, 30 November 2018, 集民 Shūmin 266, 185; regarding the sterilization requirement: Supreme Court, 23 January 2019, *supra* note 12.

- 18 The German Basic Law protects one's gender identity in the scope of the general right to one's personality under Art. 2 para. 1 in conjunction with Art. 1 para. 1, according to the course of decisions made by the German Federal Constitutional Court. For example, see: Bundesverfassungsgericht [Federal Constitutional Court], 10. October 2017, BVerfGE 147, 1 marg. no. 39 ff.; 115, 1 marg. no. 47 ff.; 116, 243 marg. no. 64 ff.; 121, 175 marg. no. 37; 128, 109 marg. no. 56.
- 19 Supreme Court, 23 January 2019, *supra* note 12.
- 20 Y. ISHIZAKI, *Sei-ji'nin ni motozuku toire riyō no seigen to sono ihō-sei – Keizai sangyō-shō jiken* [Restriction on Toilet Use Based on Gender Identity and Its Unlawfulness – the METI Case] ジュリスト Jurisuto 1569 (2022) 130, 132. H. TAKEUCHI, *Sei-dōitsu-sei shōgai-sha de aru kokka kōmu-in no sei-ji'nin ni motozuku toire riyō no seigen to kokubai sekinin: kuni, jinji-in (Keisan-shō shoku'in) jiken, Tōkyō kōhan reiwa 3.5.27* [Restrictions on Use of Restrooms Based on Gender Identity of National Government Employees with Gender Identity Disorder and State Liability: State, National Personnel Authority, Employee of Ministry of Economy, Trade and Industry Case: Tōkyō High Court, Judgement of 27 May 2021], ジュリスト Jurisuto 1562 (2021) 4, 5.

the Japanese Constitution certainly protects the right to be free from an unwanted physical invasion, the sterilization requirement would not have been deemed constitutional if legal recognition of gender had been a constitutional demand.<sup>21</sup>

The Supreme Court's 2019 decision recognized that the sterilization requirement had "an aspect of constraining the freedom of persons to not accept an invasion into their bodies against their will." But since the provision was intended to prevent social confusion concerning parent-child relationships and avoid rapid changes to the situation in which gender has long been distinguished based on biological sex, the court found no violation of a constitutional right "at this point of time" regarding the sterilization requirement. This suggests a possible change in the judiciary's stance in the near future, at least regarding the constitutionality of the sterilization requirement. Upon the abolishment of the sterilization requirement, the existing kinship law is already capable of providing an interim solution by applying existing criteria to establish the legal status of mother or father.<sup>22</sup> Another case questioning the constitutionality of this requirement is currently pending at the Grand Bench of the Supreme Court, with hearings set to open on 27 September 2023.

The practical meaning of the sterilization requirement has been diminished through the development of assisted reproductive technologies. There is indeed an ongoing case in which a trans woman's two children, who were conceived using her frozen sperm, are seeking legal recognition of her parental status.<sup>23</sup> Since the court has established the woman's legal status as parent of the elder child, who is a minor, the requirement that the applicant should have no minor children has also become controversial. This third requirement used to prevent trans people from changing their legal gender

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21 S. KIMURA, *Sei-dōitsu-sei shōgai tokurei-hō no seishoku nōryoku yōken no gōken-sei: Saikō-sai daini shō-hōtei, heisei 31 nen 1 gatsu 23 nichi kettei* [Constitutionality of the Requirement of Reproductive Function on the GID-Act: Supreme Court, Second Petty Bench, Decision on 23 January 2019], *法律時報 Hōritsu Jihō* 1137 (2019) 4, 5–6.

22 M. ISHIJIMA, *Sei-dōitsu-sei shōgai-sha tokurei-hō ni okeru shintaiteki yōken no teppai ni tsuite no ichi kōsatsu* [A Practical Study on Elimination of Physical Requirements in Japanese Gender Identity Disorder Act], *Waseda Law Review* 93 (2017) 79–115.

23 Tōkyō High Court, 19 August 2022, Westlaw Japan, No. 2022WLJPCA08199001. Neither the trans woman nor the children objected to establishing the legal parental status of the trans woman. Therefore, this case only concerns the applicability of the existing kinship law. The court admitted the establishment of legal father status of the trans woman only with her elder child, as this child was born before she changed her legal gender as parent. This case has been appealed to the Supreme Court regarding her parental status with the younger child.

at all when they have children of any age. After the 2008 amendment, trans people can apply for legal gender recognition once their children reach the age of majority. This has resulted in Japanese law currently tolerating discrepancies between one's legal gender marker and one's legal status as mother or father. Confusion due to this discrepancy, which the court assessed in the 2019 case, has not occurred since this amendment, at least not within the legal system. The second requirement, that the applicant should be unmarried, has also failed to account for international cases. A spouse subject to non-Japanese law can legally marry in Japan as a member of a heterosexual couple and subsequently apply for legal recognition of their gender in the pertinent foreign jurisdiction, and can do so without fulfilling Japan's GID Act's requirements<sup>24</sup>. While the no-marriage requirement retains its meaning only when marriage is limited to heterosexual couples, a series of lawsuits, filed in Sapporo<sup>25</sup>, Tōkyō<sup>26</sup>, Nagoya<sup>27</sup>, Ōsaka<sup>28</sup>, and Fukuoka,<sup>29</sup> seeking decisions finding it unconstitutional to limit marriage to

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- 24 See the case of Prof. Dr. Elin MCCREADY. M. OSUMI, Couple Sues Japanese Government for Not Recognizing Gender Transition, *The Japan Times*, 21 June 2021. <https://www.japantimes.co.jp/news/2021/06/21/national/crime-legal/elin-mccready-gender-transition-marriage-lawsuit/> (last seen 19 September 2023).
  - 25 Sapporo District Court, 17 March 2021, 判例時報 Hanrei Jihō 2487 (2021) 3. English translation available at <https://www.call4.jp/file/pdf/202201/b9761d9382e55a45fe17af127c0a057f.pdf>. Although the claim for state redress itself was dismissed, the court remarkably found a violation of Art. 14 para. 1 of the Japanese Constitution, which stipulates the equality principle.
  - 26 Tōkyō District Court, 30 November 2022, case No. 2019 wa 3465, LEX/DB-Nr. 25593967. English translation available at <http://llan-japan.org/llan17/cont/uploads/2022/12/Translation-Tokyo-District-Court-20221130.pdf>. The court admitted that a situation that fails to provide same-sex couples the legal protection of families violates Art. 24 para. 2 of the Constitution while rejecting the contention that the current regulations of the Civil Code and the Family Register Act that limit the marriage to heterosexual couples are unconstitutional.
  - 27 Nagoya District Court, 30 May 2023, case No. 2019 wa 597, LEX/DB-Nr. 25595224. English translation available at <http://llan-japan.org/llan17/cont/uploads/2023/07/Nagoya-District-Court-Judgment-on-May-30-2023.pdf>. Although the claim for state redress was dismissed, the court found a violation of Art. 14 para. 1 and Art. 24 para. 2 of the Constitution regarding current registration preventing marriage between same sex.
  - 28 Ōsaka District Court, 20 June 2022, case No. 2019 wa 1258, LEX/DB-Nr. 25592785. English translation available at <http://llan-japan.org/llan17/cont/uploads/2022/08/Osaka-Decision-Translation-final29120911.1-revised.pdf>. The court dismissed the claim.
  - 29 Fukuoka District Court, 8 June 2023, case No. 2019 wa 2827 and 2021 wa 447 LEX/DB-Nr. 25595450. English translation available at <http://llan-japan.org/llan17/cont/uploads/2023/07/Fukuoka-District-Court-Judgment-20230608-clean.pdf>. Al-

heterosexual couples, have sought to prompt legal amendments for marriage equality<sup>30</sup>. Symbolic partnership registration systems have been implemented in 328 Japanese municipalities, currently providing 70.9 percent of the population in Japan a way to register same-sex partnerships.<sup>31</sup> Furthermore, the fifth requirement, that the appearance of one's genitals corresponds to that of the desired gender marker, must also be abolished if coercive physical intervention upon legal recognition of gender is to be regarded as a violation of constitutional rights. The Science Council of Japan (日本学術会議 *Nihon gakujitsu kaigi*) has reflected these circumstances in a published statement advocating the abolishment of the current pathology-based GID Act and its replacement by a new rights-based law for legal gender recognition<sup>32</sup>. Japanese legislation for legal gender recognition has certainly reached its turning point.

## 2. Political Background

It may also be worth mentioning that the negative decision of the second instance was issued around the time that the submission of the draft of the Act to Promote Understanding of LGBT had been postponed due to a series of dissenting opinions within the ruling Liberal Democratic Party (LDP). The draft at the time (2021) included the phrase “discrimination based on sexual orientation and gender identity shall not be tolerated” in Art. 1 (purpose).<sup>33</sup> Japanese media reported severe criticism of this sentence within

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though the claim itself was dismissed as the current legislative situation did not deviate from the range of the legislator's discretion enshrined in Art. 24, para. 2 of the Constitution, the court found that the provisions of the Civil Code and the Family Register Act that make same-sex marriages inadmissible violate Art. 24 para. 2 of the Constitution.

- 30 On the Sapporo and the Ōsaka decisions see R. EFFINOWICZ, *Aspekte der Gleichberechtigung in Japan. Zwei aktuelle Urteile zur gleichgeschlechtlichen Ehe*, ZJapanR/J.Japan.L. 54 (2022) 29. Generally on the legal situation of same-sex couples under Japanese civil law see M. AOTAKE, *Rechtsstellung von gleichgeschlechtlichen Paaren im japanischen Familienrecht*, ZJapanR/J.Japan.L. 54 (2022) 1–14.
- 31 By 28 June 2023. SHIBUYA CITY OFFICE AND NPO NIJIRO DIVERSITY, *Collaborative Study of LGBT Partnership Coverage in Japan*, available at [https://files.city.shibuya.tokyo.jp/assets/12995aba8b194961be709ba879857f70/90eee0e763c2455692e6233ada48eb8a/20230628\\_infographic.pdf](https://files.city.shibuya.tokyo.jp/assets/12995aba8b194961be709ba879857f70/90eee0e763c2455692e6233ada48eb8a/20230628_infographic.pdf) (last checked 30. September 2023).
- 32 NIHON GAKUJITSU KAIGI, *Teigen: Seitoki mainoriti no kenri hoshō o mezashite (II) – toransu jendā no songen o hoshō suru tame no hō-seibi ni mukete* – [Proposal: Toward Guaranteeing the Rights of Sexual Minorities (II) – Toward Legislation to Guarantee the Dignity of Transgender Persons] 2020.
- 33 ISHIZAKI, *supra* note 20, 132.

the LDP, including some harsh words.<sup>34</sup> When the LDP first drafted the act in 2016, the coalition of opposition parties concurrently drafted a so-called “Act to Eliminate Discrimination against LGBT (LGBT 差別禁止法, LGBT *sabetsu kinshi-hō*),” and coordinating these two proposals had been a prolonged process. The 2021 draft was a compromise between them provoked by the Olympic and Paralympic games scheduled to be held in Tōkyō in July 2021, since the Olympic Charter states that rights and freedoms were to be enjoyed without discrimination based on sex or sexual orientation.<sup>35</sup> The conflict over anti-discrimination legislation flared up what is known as the “women’s space problem”, a topic nowadays often disputed in Europe as well. Those voicing notions such as that people would not be able to stop men self-identifying as women from invading women’s spaces when the anti-discrimination law is passed provoked unreasonable associations of trans women with sexual offenders. It is profoundly significant that the Supreme Court has provided guiderails requiring concrete assessment of the interests of the parties involved when abstract notions were circulating causing bashing of trans women.

Further legislative momentum for the Act to Promote Understanding of LGBT was brought by the G7 summit in Hiroshima in May 2023. Shortly before the summit, a derogatory remark against sexual minorities by Katsuki ARAI, then secretary to the prime minister of Japan, leaked through the press. This scandal led to explicit reactions, both from the spokesman for the secretary-general of the United Nations and from the United States ambassador to Japan at that time, against discrimination and in support of enacting proper legal protections for sexual minorities in Japan. The media also reported that the ambassadors of the G7 member states except Japan (Canada, France, the UK, USA, Germany, and Italy) together with the EU ambassador to Japan addressed a joint letter to the Japanese gov-

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34 K. YABUKI, *LGBT rikai zōshin hō’an ni kansuru kaichō seimei* [Chairman’s Statement on the LGBT Understanding Promotion Bill], Tōkyō Bar Association, 10 June 2021, <https://www.toben.or.jp/message/seimei/lgbt.html>, Chairman and Board Members of Alliance for LGBT Legislation, *Kinkyū seimei: ichibu no jiyū minshutō gi’in no “LGBT shinpō” jōbun shinsa ni okeru hatsugen ni tsuite* [Urgent Statement: Addressing the Statement by Some Liberal Democratic Party Members at the Article Review of “New LGBT Law”], Japan Alliance for LGBT Legislation, 21 May 2021, <https://lgbtetc.jp/news/1946/>.

35 International Olympic Committee, Olympic Charter, 8 August 2021, <https://olympics.com/ioc/olympic-charter>; G. PARK, “LGBT rikai zōshin hō’an” mittsu no meisō-buri: sono chigai wa? Tōji-sha “genjō yori waruku naru” [Three Astray Points of “the Bill for the Act to Promote Understanding of LGBT”: What Are the Differences? Transgender People State, “We Will Be Worse Off Than It Is Now”]. The Asahi Shinbun Globe+, 7 June 2023, <https://globe.asahi.com/article/14921218>.

ernment advocating for legislation to protect sexual minorities from discrimination<sup>36</sup>. The Act to Promote Understanding of LGBT was eventually enacted in June 2023 as a result of gaffes and external pressures. As enacted, it stipulates roles for the state and municipalities to promote a society tolerant of diverse sexual orientations and gender identities.<sup>37</sup> However, it also contains crafty wordings implying room for compromises with conservative views.<sup>38</sup> A petty dispute also emerged regarding “性自認, *sei-ji'nin*”, the word that had served as the equivalent to “gender identity” in the course of the legislative movement. This term, long used in state policies and municipal administrations as a Japanese translation of “gender identity,” combines letters for gender/sex, self, and recognition and provoked concern that it would be applied arbitrarily and abused for self-proclaiming one’s gender.<sup>39</sup> Another candidate term, “性同一性, *sei-dōitsusei*,” has a vivid medical implication as it had been applied as the Japanese translation of the former medical diagnostic category of “gender identity disorder.” Since political implications were attached to both terms and a political cleavage arose around the terminology<sup>40</sup>, the unorthodox *katakana* notation of gender identity (ジェンダーアイデンティティ *jendā aidentiti*) was eventually adopted into the act.

36 Y. KAMIYA., *2023 nen no G7 Hiroshima samitto ni muketa hō-seibi no giron jōkyō* [Status of Discussions on Legislation for the G7 Hiroshima Summit in 2023] in: *SOGI o meguru hō-seibi wa ima* [The Current Legislative Movement Around SOGI], 2023, 12, 15.

37 Art. 1 of the Act to Promote Understanding of LGBT.

38 For example, the phrase “discrimination will not be tolerated” in the 2021 draft is revised to “unreasonable discrimination will not be tolerated” without specifying what is to be unreasonable (Art. 3). The promotion of “research and study (調査研究 *chōsa kenkyū*)” is reduced to the promotion of “academic research (学術研究 *gakujutsu kenkyū*)” (Art. 9). The independent clause for the effort to be made by people who establish schools was eliminated and integrated to the general effort clause for employers and those at similar roles (Art. 6. para. 2). Moreover, educational enlightenment in schools is to be conducted “with the cooperation of families, local residents, and other relevant parties” under the revised Act (Art. 6 para. 2, Art. 10. para. 3). The last provision of the Act was newly inserted, and it stipulates that the implementation of measures derived from this Act requires attention “so that all citizens can live in peace” (Art. 12). This provision has been criticized as implying that LGBT people are a threat to the safety of other citizens. M. MITSUNARI, *LGBT rikai zōshin-hō no mondai-ten* [The Problematic Points of the Act to Promote Understanding of LGBT], Women’s Action Network, 10 June 2023, <https://wan.or.jp/article/show/10665>.

39 “Naze jendā aidentitī ni?”: *LGBT hōan o kakutō giron* [“Why Gender Identity?” Parties Discuss LGBT Legislation], Asahi Shinbin Digital, 9 June 2023, 20:00, <https://www.asahi.com/articles/ASR6966HXR69UTFK01L.html>.

40 *Ibid.*

In Japanese academic discourse, gender identity has been placed within the scope of personality rights and self-determination stipulated in Art. 13 of the Japanese Constitution. In addition, Japan's international diplomacy has shown a relatively positive attitude toward protecting gender identity<sup>41</sup>. While Japan's judiciary has also recognized a legal interest in living according to one's gender identity, the country's political sphere still struggles to incorporate the concept. Wisely capturing such circumstances, the appellant in the 2018 Supreme Court case, who had challenged the non-minor-child requirement,<sup>42</sup> strategically conceptualized the right to correct a legal status that deviates from one's psychological, social, or physical situation. The approach pursued in that litigation was to structure the legal recognition of gender not as a special remedy to change one's legal gender, but as a procedure by which to align a person's legal status to their actual living circumstances. This structure to some extent requires the person's practical situation that is to be recognized in law to be already established, and it therefore succeeded in avoiding the nuance of arbitrariness seen in the discussion around the term *sei-ji'nin*. Although the court in the 2018 case ultimately rejected the appellant's claim, a dissenting opinion by Justice UGA adapted it to conceptualize the right to maintain one's self-identity/integrity (自己同一性を保持する権利 *jiko dōitsu-sei o hoji suru kenri*) under Art. 13 of the Japanese Constitution. While this dissenting opinion limited claims of such a right to those who "become physically female through medical procedures"<sup>43</sup>, the 2023 METI case recognized the appellant's interests in her life as a woman, which was already a given even though she had not undergone sex reassignment surgery.

### 3. Possible Effect on the Private Sector

The Japanese Supreme Court clarified its stance that restricting the interests of trans women in their existing lives as women requires countervailing interests concrete enough to justify such restrictions. In this weighing of the interests, an assessment of abstract risk does not suffice. Although the de-

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41 Japan voted in favor of the 17/19 resolution by the United Nations General Assembly on human rights, sexual orientation and gender identity adopted in 2011. See: U.N.Doc. A/HRC/RES/17/19, 14 July 2011. Japan is also listed as a member state of the UN LGBTI Core Group. H. TANIGUCHI, *LGBT to jinken: sekai jinken sengen 70 shūnen o mukaete* [LGBT and Human Rights: To the 70<sup>th</sup> Anniversary of the Universal Declaration of Human Rights] in: Taniguchi (ed.), *LGBT o meguru hō to shakai* [Law and Society Around LGBT], 2019, 186–213, 186–187.

42 Supreme Court, 30 November 2018, *supra* note 17.

43 This opinion did not clarify whether trans people who do not undergo medical treatments can claim such a right under the Japanese Constitution.

feudant in the initial litigation was a state authority and the complaint sought rescission of decisions by the National Personnel Authority, similar disputes may arise in the private sector in response to this case. According to ENSO, a private employer may be found liable in tort or incur other forms of liability through the application of general provisions of private law incorporating the intent of the Constitution<sup>44</sup> if restricting a trans person's use of toilets is to be deemed as a violation of constitutional rights<sup>45</sup> and the employer is sued for imposing such a restriction. In such cases, involving private parties, the law essentially respects the principle of private autonomy, and the effects of these general provisions are relativized according to the nature of the parties' relationship, which may differ from case to case.<sup>46</sup> On the other hand, if there is a specific infringement or concrete threat of infringement on an individual's fundamental freedom or equality, and if the nature and extent of the infringement exceeds the socially acceptable limit in light of the purpose of the constitutional provisions, the general provisions of the Civil Code and other provisions concerning torts may be applied and the challenged action declared void or determined to constitute a tort.<sup>47</sup> The decision in a given case will also depend, in addition to a balancing of interests among the parties, on factors such as the size and type of the business, the trans person's working circumstances, and whether the toilets are intended for use by the public or solely by employees<sup>48</sup>.

#### 4. Conclusion

Recent Japanese judicial decisions have recognized a social life corresponding to one's gender identity as the foundation of a significant legal interest, affirming the inseparable nature of gender and sex (性別 *seibetsu*) from one's personal existence. Courts have recognized gender and sex as a crucial attribute of an individual relative to their social lives and interpersonal relationships. The 2023 Supreme Court case, however, does not con-

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44 The prevailing theory and court precedents in Japan take the position that the human rights provisions of the Constitution are to be applied indirectly to private relationships. T. ENSO, *Keisan-shō sei-dōitsu-sei shōgai jiken hanketsu (Tōkyō chisai reiwa gannen 12 gatsu 12 nichi hanketsu) no kigyō ni ataeru eikyō* [Impact of the METI Gender Identity Disorder Case Judgement (Tōkyō District Court, Decision on 12 December, 2019) on Companies], 経済法曹 Keizai Hōsō 205 (2020) 7, 18.

45 It should be noted that the appellant in the METI case did not claim a violation of her constitutional rights.

46 ENSO, *supra* note 44, 18.

47 ENSO, *supra* note 44, 18, referred to Tōkyō High Court, 1 July 2015, *supra* note 14, in which the court found it illegal for a golf club to deny admission to a trans person on the grounds of her change of legal gender.

48 See the supplementary opinion of Justice IMASAKI on this case.

firm that gender identity is subject to constitutional protection in Japan. The appellant's lived experience and proven medical conditions played a significant role in the outcome. This mode of evaluating the appellant's claim resonates with the political controversy in Japan around the term *sei-jinin*, since requiring that there should be practical, existing circumstances contributes to avoiding the semantic nuance of arbitrary self-proclaiming of gender. The legal notion of gender identity and its legal protection may be developing differently in Japan than it has done in decisions of the German Federal Constitutional Court or of the European Court of Human Rights.<sup>49</sup> But even if the right to maintain one's self-identity and integrity becomes established in Japan's legal practices in the future, the Japanese judiciary may still be required to define the legal position of one's gender identity, because the practical state of living according to one's gender identity itself presumes the existence of one's gender identity. One's gender identity has legal significance linked to personal existence, and its realization may require active public intervention.<sup>50</sup> As seen in the fact that METI had been encouraging the appellant to change her legal gender so it could grant her accommodations, one practical aspect of legal recognition of gender is that it socially legitimizes one's gender identity and therefore facilitates organizing one's life according to one's gender identity. What should legal gender indicate within Japanese law: one's identity or the existing reality of one's life? Fundamental questions are posed here to Japanese law. The

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49 The German Federal Constitutional Court situates gender identity itself as within the scope of the general right to one's personality (Art. 2 para. 1 in conjunction with Art. 1 para. 1 of the German Basic Law). See *supra* note 18. The European Court of Human Rights places one's gender identity under the protection of the personal sphere of the individual, including the right to establish details of their identity (Art. 8 of the European Convention on Human Rights). EUROPEAN COURT OF HUMAN RIGHTS, Guide on Article 8 of the European Convention: Right to Respect for Private and Family Life (2022) 71.

50 If one's gender identity is to be protected within the scope of the right to self-determination under Art. 13 of the Japanese Constitution, gender identity is to be placed in a sphere tied to the individual's personality that may call for active intervention of the state – rather than in the sphere of general liberty which prevents reasonless intervention by a public authority in the freedom to make decisions, including arbitrary ones. An individual's interest realized by sexual self-determination, as well as the disadvantages suffered by that individual as a result of regulations restricting their interest, is to be weighed against other interests that the regulation protects, and to restrict the individual's interest there must be a concrete conflicting interest that particularly requires protection by the regulation. ISHIJIMA, *supra* note 22, 113. See also: K. TONAMI, *Jiko kettei-ken no igi to han'i* [The Meaning of the Right to Self-Determination and Its Extent], 法学教室 Hōgaku Kyōshitsu 158 (1993) 36, 41.

Japanese civil registration system (戸籍 *koseki*), which compiles one's legal status in a two-generational family unit and uses the legal gender marker to indicate one's position in the family,<sup>51</sup> adds a further layer to this question.

As seen in the several assessments of appellant's medical conditions in this case, the Japanese judiciary still premises the legal recognition of gender upon the pathologized state of the trans person. This pathologized image of applicants (which was strategically employed in 2003 by the legislative campaign behind the GID Act)<sup>52</sup> still persists, and Japan's judges have long interpreted the legal recognition of gender as a remedy for a disease. Similarly, judges tend to refer to an applicant's medical history, diagnosis, and distress to justify changing their legal name based on their gender identity<sup>53</sup> although the court procedure to change the legal name itself does not require the applicant to have the disorder. The implementation of the medical notion of gender identity disorder and subsequent development of the discourse around it in the late 90s in Japan contributed to justifying trans people's gender modality and to differentiating notions of trans people from the previous image of gender transition bearing the sensationalized, perverse depictions of postwar media<sup>54</sup>. The term "gender identity disorder" to describe their condition, which with the word "disorder" has a profound medical connotation, has been preferred by some members of the trans community in Japan.<sup>55</sup> This phenomenon is presumably unique to Japan,<sup>56</sup> and it stands in vivid contrast to the international movement to depathologize trans identities.<sup>57</sup> As the term *sei-ji'nin* was criticized for having a

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51 See *supra* note 15.

52 K. TAKEDA, On the Law Covering Gender Identity Disorder and Sex Status: A Political Perspective, *GEMC Journal* 1 (2009) 94–105, 94–105, available at [http://www.law.tohoku.ac.jp/gcoe/wp-content/uploads/2009/03/gemc\\_01\\_cate4\\_6.pdf](http://www.law.tohoku.ac.jp/gcoe/wp-content/uploads/2009/03/gemc_01_cate4_6.pdf). A. KAMIKAWA, *Kaeteiku yūki: "sei-dōitsu-sei shōgai" no watashi kara* [Courage to Change – From Me with "Gender Identity Disorder"], *Tōkyō* (2007) 106.

53 E.g., Ōsaka High Court, 11 September 2019, 判例時報 Hanrei Jihō 2448 (2020) 3, Ōsaka Family Court, 22 July 2019, 判例時報 Hanrei Jihō 2448 (2020) 4, Kobe Family Court, 15 September 2009, 家庭裁判月報 Katei Saiban Geppō 62 (2010) 80., Ōsaka High Court, 10 November 2009, 家庭裁判月報 Katei Saiban Geppō 62 (2010), 75., Takamatsu High Court, Decision of 12 October 2010, 家庭裁判月報 Katei Saiban Geppō 63 (2011) 58.

54 M. J. MCLELLAND, The Role of the 'Tojisha' in Current Debates about Sexual Minority Rights in Japan, University of Wollongong Faculty of Arts Papers 9-2009 (2009) 2–3, available at <https://ro.uow.edu.au/artspapers/206/>.

55 Y. HIGASHI, *Toransu jendā gainen to datsu byōri-ka o meguru dōkō* [The Concept of Transgender and the Movement around Depathologization], *Kokoro no kagaku* 189, 2016, 66–72, 67–69.

56 *Ibid.*

57 WPATH, *De-Psyopathologisation Statement*, 26. May 2010. <https://www.wpath.org/policies>, TGEU, Depathologization, [https://tgeu.org/issues/health\\_and\\_depatho](https://tgeu.org/issues/health_and_depatho)

nuance of self-proclaiming, Japan's legal practices, legislative movements, and some in the trans community tend to abstain from insinuating the possibility of choice. The self-determination model adopted in Germany or the trans rights advocacy of Europe<sup>58</sup> might not be preferred in Japan. While the concept of gender identity is evolving in Japanese legal practices, it is a matter for future scrutiny to see whether constitutional protections for gender identity itself will be established there. If legal protections are limited to the existing circumstances of lives lived according to one's gender identity, it is questionable whether those unable to establish living conditions aligning with their gender identity can expect to see their gender identities protected. It remains to observe the further development of Japan's judicial practices and legislation.

#### SUMMARY

*In July 2023, the Japanese Supreme Court rendered a decision concerning the working conditions of a trans woman. The appellant, a trans woman and employee of a government ministry, requested the rescission of restrictions on the conditions of her working as a woman including her use of women's toilets. The court weighed the comparative interests of the parties and ruled that an abstract discomfort vaguely assessed by the ministry did not suffice to restrict the appellant's legal interests. Although the conclusion reached in this specific case would not be universally applicable to other workplaces, it provides a guide for balancing the interests of the affected parties in similar cases.*

*The courts in various decisions have recognized the legal interests of trans persons in living lives corresponding to their gender identities. Although Japan's judiciary has not yet clarified whether one's gender identity per se is to be protected under Japan's Constitution, several court decisions and justices'*

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*logisation/depathologisation-health\_and\_depathologisation/*. The revision of ICD (see *supra* note 4) is also considered part of the depathologization movement. In the latest (11<sup>th</sup>) edition, gender incongruence is categorized as one of the conditions related to sexual health, while its predecessor, gender identity disorder, was categorized as one of the mental and behavioral disorders.

58 For example, see: TGEU, *Trans Rights Map, Europe & Central Asia 2022: Indicators*, 2022, <https://transrightsmap.tgeu.org/indicators>. See also: L. ADAMIETZ/K. BAGER et al., *Gutachten: Regelungs- und Reformbedarf für transgeschlechtliche Menschen: Begleitmaterial zur Interministeriellen Arbeitsgruppe Inter- & Transsexualität*, Bd. 7, 2016, and BUNDESMINISTERIUM DER JUSTIZ, *Entwurf eines Gesetzes über die Selbstbestimmung in Bezug auf den Geschlechtseintrag und zur Änderung weiter Vorschriften*, 9 May 2023, available at [https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/2023\\_Selbstbestimmung.html](https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/2023_Selbstbestimmung.html).

*supplemental opinions have acknowledged gender and sex as an element inseparable from one's personality. The so-called Gender Identity Disorder Act, which stipulates the judicial procedure for changing one's legal gender in Japan, requires the applicant to 1) reach the age of majority, 2) be unmarried, 3) have no minor children, 4) lose the function of reproductive glands, and 5) have their outer genital appearance approximate that of the other gender. Although the Supreme Court so far has held all these requirements constitutional, the significance of most of the requirements has already been diminished. The 2019 decision of the Supreme Court on the GID Act implies a possible change in its jurisprudence in the near future.*

*As seen in political debates around the newly enacted "Act to Promote Understanding of LGBT," Japan's legislator has struggled to establish the concept of gender identity and tends to try to avoid the connotation of arbitrariness. Similarly, the Japanese judiciary and some in the trans community tend to rely on pathologized features to justify trans persons' gender modality. Under such circumstances, the concept arose of a "right to maintain one's own identity and integrity," which claims to correct a legal status deviating from one's actual living situation. The logical structure of legal protections for a person's gender identity may thus develop differently in Japan from that in Europe.*

#### ZUSAMMENFASSUNG

*Im Juli 2023 hat der Oberste Gerichtshof Japans zu den Arbeitsbedingungen einer Transfrau entschieden. Die Rechtsmittelführerin, die Transfrau, war Angestellte eines Ministeriums und hatte beantragt, die Beschränkung ihrer Arbeitsbedingungen als Frau, einschließlich der eingeschränkten Benutzung von Damentoiletten, aufzuheben. Das Gericht hat die Interessen der Parteien gegeneinander abgewogen und entschied, dass ein abstraktes Unbehagen anderer Arbeitnehmerinnen, wie sie das Ministerium vage anführte, nicht ausreicht, um die rechtlichen Interessen der Rechtsmittelführerin zu beeinträchtigen. Auch wenn die in diesem speziellen Fall gezogene Schlussfolgerungen nicht universell auf andere Arbeitsplätze übertragbar sind, bietet dieser Fall einen Leitfaden für die Abwägung der Interessen der Betroffenen in ähnlichen Fällen.*

*In einer Reihe von Entscheidungen haben Gerichte die rechtlichen Interessen von Trans-Personen an einem Leben entsprechend ihrer Geschlechtsidentität anerkannt. Obwohl die japanische Justiz noch nicht geklärt hat, ob die Geschlechtsidentität durch die japanische Verfassung geschützt ist, haben mehrere Gerichtsentscheidungen und ergänzende Stellungnahmen von Richtern das Geschlecht als untrennbares Element der Persönlichkeit anerkannt. Das sog. Gesetz über die Störung der Geschlechtsidentität, das das rechtliche Verfahren zur Änderung des rechtlichen Geschlechts in Japan regelt, verlangt, dass der Antragsteller 1) das Volljährigkeitsalter erreicht hat, 2) unverheiratet*

ist, 3) keine minderjährigen Kinder hat, 4) die Funktion der Keimdrüsen verloren hat und 5) das äußere Erscheinungsbild der Genitalien dem des anderen Geschlechts nahe kommt. Obwohl der Oberste Gerichtshof bisher alle diese Anforderungen für verfassungsgemäß hält, hat ihre Bedeutung bereits abgenommen. Eine Entscheidung des Obersten Gerichtshofs zum GID-Gesetz aus dem Jahr 2019 deutet auf eine mögliche Änderung der Rechtsprechung in naher Zukunft hin.

Wie die politischen Debatten um das neu erlassene „Gesetz zur Förderung des Verständnisses von LGBT“ deutlich machen, ringt Japans Gesetzgeber damit, das Konzept der Geschlechtsidentität zu etablieren. Die Konnotation der freien Entscheidung wird hier eher vermieden. Bemerkenswerter Weise neigen nicht nur die japanische Justiz, sondern auch Teile der Trans-Gemeinschaft dazu, sich auf pathologisierte Merkmale zu stützen, um die Geschlechtsmodalität von Trans-Personen zu rechtfertigen. Unter diesen Umständen wurde das "Recht auf Wahrung der eigenen Identität/Integrität" konzipiert, das den Anspruch erhebt, einen von der tatsächlichen Lebenssituation abweichenden Rechtsstatus zu korrigieren. Die logische Konstruktion für den rechtlichen Schutz der eigenen Geschlechtsidentität könnte sich künftig in Japan anders entwickeln als in Europa.

(Die Redaktion)