

Japan’s 2003 Gender Identity Disorder Act: The Sex Reassignment Surgery, No Marriage, and No Child Requirements as Perpetuations of Gender Norms in Japan

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INTRODUCTION

There have never been effective laws prohibiting same-sex sexual conduct in Japan. However, despite the absence of a first “enemy”—criminal sanctions of same sex relationships—to lesbian, gay, bisexual, transgender, and intersex (“LGBTI”) activists, Japanese law does not recognize other aspects of LGBTI rights. More to the point, it just ignores them. This is, by and large, true even given the legal developments with regard to transgender issues in this current decade.

In this paper, I begin by providing a brief overview of the so-called Gender Identity Disorder (“GID”) Act, which enables some transgender people to legally change their gender identity. I then move on to discuss three concepts that underlie the Act. These concepts are the Act’s sex reassignment surgery requirement, its “no marriage” requirement, and its “no child” requirement. Finally, I conclude that although the Act appears to be progressive, it ultimately preserves societal gender norms.

II. THE 2003 GENDER IDENTITY DISORDER ACT

In 2003 the Diet passed, without much resistance, the Act on Special Cases in Handling Gender for People with Gender Identity Disorder (“GID Act” or the “Act”¹) in the context of increasing social

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¹ See *infra* Appendix.

awareness of transgender issues² and with no additional changes to the existing legal system.³ This Act allows an individual with GID to legally change their gender in the family registry.⁴ An individual with GID is someone who (a) has a defined biological sex, (b) has a persistent conviction that he or she psychologically belongs to the opposite sex, (c) has the will to make himself or herself physically and socially conform with the opposite sex, and (d) has been diagnosed as having GID by two or more physicians.⁵ This was a groundbreaking act in that it was the first time GID had been introduced into Japanese law.

In addition to defining GID, the Act also provides five legal conditions that need to be satisfied in order for an individual to legally change their gender. An applicant must be (1) over twenty years old, (2) unmarried at the time he or she wishes to legally change his or her gender, (3) have no children, (4) be deprived of their reproductive organs or reproductive ability, and (5) have external genital organs similar to other members of the sex to which the applicant wishes to be assigned.⁶ In 2008, the Diet changed the third condition from “have no children” to “have no

² Koichi Taniguchi, *Sei Dōitsusei Shōgaisha no Seibetsu no Toriatsukai no Tokurei ni Kansuru Houritsu no Rippō Katei ni Kansuru Ichi Kōsatsu [A Study on Legislative Process of the Exceptional Treatment Act for People with GID]*, 2003 HOUTESTUGAKU NENPŌ [ANNUAL OF LEGAL PHILOSOPHY] 214 (2003).

³ Emiko Saito, *Sei to Kazoku no Tayōka to Jikokettei [Divergence of Gender and Family, and Self-Determination]*, in KENPOU DOTTO KOMU [CONSTITUTION.COM] 112, 117 (Shusuke Osawa et. al. eds., 2009).

⁴ Sei Dōitsusei Shōgaisha no Seibetsu no Toriatsukai no Tokurei ni Kansuru Hōritsu [Act on Special Cases in Handling Gender for People with Gender Identity Disorder], Law No. 111 of 2003, art. 4, para. 1 (Japan) [hereinafter Gender Identity Disorder Act]; *see infra* Appendix.

⁵ Gender Identity Disorder Act, art. 2. By virtue of requiring that a person with GID have a “defined biological sex,” the Act seems to exclude individuals who are intersex or who have been diagnosed with having Disorder of Sex Development (“DSD”). *See id. art. 2(a)*. DSD is defined as “when a less common path of sex development is taken” from that of your average boy or girl. CONSORTIUM ON THE MANAGEMENT OF DISORDERS FOR SEX DEVELOPMENT, HANDBOOK FOR PARENTS (2008), available at <http://www.accordalliance.org/dsdguidelines/parents.pdf>. DSD is the condition formally, but still commonly, known as “intersex,” “hermaphroditism,” or “pseudo hermaphroditism.” Univ. of Mich. Health Sys., *Disorders of Sex Development (“DSD”) Resources*, YOURCHILD DEVELOPMENT AND BEHAVIOR RESOURCES, <http://www.med.umich.edu/yourchild/topics/dsd.htm> (last visited Jan. 10, 2013).

⁶ Gender Identity Disorder Act, art. 3, para. 1; *see infra* Appendix. Judicial review by the Tokyo High Court and a subsequent Supreme Court Decision in 2005 determined the Act to be constitutional with regard to the provision that required applicants to have no children. KAISETSU: SEI DŌITSUSEI SHŌGAI SEIBETSU TORIATSUKAI TOKUREI HOU (Chieko Nohno ed., 2004) [COMMENTARY ON THE EXCEPTIONAL TREATMENT ACT FOR PEOPLE WITH GID] 258-65 (2004) (*citing* Tōkyō Kōtō Saibansho [Tōkyō High Ct.], Mar. 27, 2003, Hei 15 (Ra) no. 94; Saikō Saibansho [Sup. Ct.], May 23, 2003, Hei 15 (Ku) no. 409) (both unpublished decisions).

minor children.”⁷ From the point at which an applicant fulfills these conditions and the Family Court has recognized his or her legal change in gender, he or she is considered to be legally his or her new sex with respect to the application of the Civil Code and other laws and ordinances.⁸ As of the end of 2011, there were 2,847 individuals who have changed their legal gender since the enforcement of the Act.⁹ This is a relatively small number compared to the estimated number of 7,000 to 10,000 people with GID in Japan.¹⁰

Having provided an introduction to the Act, I next turn to discuss the sex reassignment surgery requirement, the no marriage requirement, and the no child requirement under Article 3.¹¹

III. THE SEX REASSIGNMENT SURGERY REQUIREMENT

In addition to defining an individual with GID, the Act essentially requires that an individual have sex reassignment surgery. Under Article 3(iv) the Act requires the removal of the gonads or gonadal function and, under Article 3(v), the Act requires the addition of external sexual organs that resemble those of the opposite biological sex.¹² Given these requirements, the ability to change one’s gender legally is limited to those who have undergone sex reassignment surgery.

This sex reassignment surgery requirement is quite different from the Guidelines for Diagnosis and Treatment Concerning Gender Identity Disorder (“GID Guidelines”),¹³ which are used by medical professionals

⁷ Sei Dōitsusei Shōgaisha no Seibetsu no Toriatsukai no Tokurei ni Kansuru Houritsu no Ichibu wo Kaisei suru Houritsu [Partial Amendment to the GID Act] Law No.70 of 2008 (Japan).

⁸ Gender Identity Disorder Act, art. 4, para. 1; *see infra* Appendix.

⁹ NIHON SEI DŌITSUSEI SHŌGAI TO TOMO NI IKIRU HITOBITO NO KAI [JAPAN ASS’N OF PEOPLE LIVING WITH GENDER IDENTITY DISORDER], *Sei Dōitsusei Shōgai Tokurei Hou ni Yoru Seibetsu Kōsei Sū no Sui’i* [Statistical Developments Regarding the Number of People Who Correct Their Gender in Accordance with the GID Act], http://gid.jp/html/GID_law/index.html (last visited Nov. 23, 2012).

¹⁰ SEI DŌITSUSEI SHŌGAI TO KOSEKI [GENDER IDENTITY DISORDER AND THE FAMILY REGISTRY] 70-73, 97 (Katsuki Harima et. al eds, 2007). Around 5,000 people with GID have visited medical offices in Japan. *Id.* at 97. However, the author of this essay takes into account the people with GID who do not or cannot visit a medical clinic and estimates the total number of individuals with GID to be between 7,000 to 10,000 people.

¹¹ *See* Hiroyuki Taniguchi, *Tokurei Hou no Sai Hyōka* [Review of GID Act in Japan], in SEI DŌITSUSEI SHŌGAI: JENDĀ, IRYŌ, TOKUREI HOU [GENDER IDENTITY DISORDER: GENDER, MEDICINE, AND LAW] 249-72 (Hitoshi Ishida ed., 2008).

¹² Gender Identity Act, art. 3; *see infra* Appendix.

¹³ The Japanese Soc’y of Psychiatry and Neurology, SEI DŌITSUSEI SHŌGAI NI KANSURU SINDAN TO CHIRYŌ NO GAIDORAIN [THE GUIDELINES FOR DIAGNOSIS AND TREATMENT CONCERNING GENDER IDENTITY DISORDER] (3d ed. Jan. 21, 2007), available at http://www.jspn.or.jp/ktj/ktj_k/gid_guideline/gid_guideline_no3.pdf.

when they diagnose gender identity disorder and when they provide consultation over the method of treatment. The GID Guidelines require that medical professionals must be well aware of and have respect for the self-determination of individuals with GID when discussing possible approaches to treatment.¹⁴ These guidelines support openness to a variety of treatments, such as hormone therapy, the removal of breasts (in the case of female-to-male transgender individuals), sex reassignment surgery, and the formation of genital organs, in accordance with the desires and the choices of the individuals concerned.¹⁵

This “à la carte” treatment never compels sex reassignment surgery or the reformation of genital organs, but instead respects the individuality and self-determination of each individual with GID. However, should an individual choose to undergo sex reassignment surgery or reform their genital organs, it is very difficult to actually do so. There are only a few medical institutions that provide sex reassignment surgery in Japan and, what is worse, treatment of GID, including sex reassignment surgery, is not covered by public health insurance.¹⁶ As a result, to meet the requirements to legally change one’s gender as imposed by the Act requires that an individual not only go to a certain facilities to undergo surgery, but also requires that they have enough money to pay for the surgery. A better approach would be to lower the Act’s requirement threshold, to have the Act respect individuality and self-determination as the GID Guidelines do, and to allow an individual to legally change his or her gender without surgery. As it stands, the Act reinforces gender binary not only in social contexts, but also at the physical level by requiring surgical intervention when it is not medically necessary.¹⁷

IV. THE NO MARRIAGE REQUIREMENT

In addition to the sex reassignment surgery, Article 3(ii) of the Act requires that individuals be unmarried at the time they seek to legally change their gender.¹⁸ This no marriage requirement was included to ensure that the Act conformed to Japanese family law, which limits marriage to heterosexual couples. In the event that an individual is married

¹⁴ *Id.* at 8.

¹⁵ *Id.*

¹⁶ Aki Nomiya et. al. eds., *SEI DŌITSUSEI SHŌGAI TTE NANI [WHAT IS GENDER IDENTITY DISORDER?]* 79 (2011).

¹⁷ The word “gender binary” can be replaced by “gender dichotomy” in this article. The GID Act seems to indirectly stipulate that there is a two-gender norm and that each gender has certain physical and biological characteristics (i.e. men should have male sexual organs and women should have female sexual organs). The physical and biological characteristics of each gender had not previously been defined in a legal context.

¹⁸ Gender Identity Act, art. 3, para 2; *see infra* Appendix.

when he or she legally changes his or her sex to that of his or her spouse, the marriage that would emerge would be a same-sex marriage. This marriage would be in violation of Japanese family law.¹⁹

The sexual orientation of an individual is determined in part on that individual's gender identity.²⁰ However, an individual may not be sexually orientated towards the opposite sex of his or her gender identity, as would be expected. An individual with GID could be sexually oriented towards individuals of the opposite sex, the same sex, or towards individuals of either sex. For instance, a female-to-male transgender can choose a female partner, a male partner, a female-to-male partner, or a male-to-female partner. Fortunately, the GID Guidelines described previously are not concerned with the sexual orientation of clients when diagnosing GID.²¹ An individual's sexual orientation and his or her gender identity are considered to be different dimensions of that individual's sexuality. As a result, when an individual's gender is changed legally and/or the individual's gender presentation is taken into account, that individual's physical presentation in a relationship may or may not represent his or her legal gender, creating diversity in relationships.

However, the Act is only concerned with the individual's legal gender identity when it comes to marriage. That is, a man with GID who presents as a woman, but cannot legally change his gender, can be legally married to a woman, but a woman with GID who has legally changed her gender to and presents as a man cannot be legally married to a woman. As a result, if a person wishes to change his or her legal gender, and he or she is married, that person must file for divorce to fulfill the conditions of the Act.²² This could force couples to divorce when they want to stay married²³ by forcing them to choose between preserving their marriage or

¹⁹ Nohno, *supra* note 6, at 130.

²⁰ PĀTONĀSHIPPU SEIKATSU TO SEIDO [PARTNERSHIP, LIFE, AND SOCIAL SYSTEM] 86 (Ikuko Sugiura et. al. eds, 2007).

²¹ Nomiya, *supra* note 16, at 23-25.

²² GID Act, art. 3, para. 2; *see infra* Appendix.

²³ Article 24 of the Japanese constitution clearly provides that every individual has the free and equal consent to marry:

(1) Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.

(2) With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 24, para. 1, 2 (Japan), *available at* http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitu

fulfilling the needs of one spouse to legally change his or her gender. This fails to demonstrate respect for the dignity of the couple or for the individual spouse. In addition, this puts individuals with GID in the position of having to choose to either file a false (in their minds) notification for wanting a divorce and then divorce, or to give up his or her wish for social recognition through legally changing to his or her new gender.²⁴ This requirement also limits an individual's right to marry after they have changed their legal gender because that individual can only marry another individual of the opposite legal gender.²⁵ Finally when a person with GID wishes to have a legally recognized relationship with a person of different gender (ex: a man who presents as a woman and wants to be legally married to a man), the individual comes under pressure to "choose" surgical intervention even if the operation is medically unnecessary and/or the individual does not wish to undergo it.²⁶

The requirement prohibiting individuals from being married at the time they seek to legally change their gender preserves heterosexual assumptions that marriage is between a man and a woman, regardless of the physical appearance of the couple and regardless of whether the couple wishes to divorce. The Act fails to make space for diversity in terms of composition of possible relationships and of the needs of the individuals concerned. Ultimately, this Act uses an outdated model of both gender and marriage that is not applicable in today's diverse Japan.

V. THE NO CHILD REQUIREMENT

Last, I would like to discuss the Act's no child requirement.²⁷ The Article 3(iii) no child requirement is intended to avoid disturbances in parent-child relationships and to protect the welfare of the child, which is that a child should live in a stable and economically-sound environment.²⁸ Critics target this requirement because Japan is the only country that has this requirement. Additionally, some argue that having a child should not

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²⁴ See Sachie Tsuruta, *Sei Dōitsusei Shōgai wo Kakaeru Hitobito no Kenkai (1) [Interview of People Living with Gender Identity Disorder (1)]*, in SEI DŌITSUSEI SHŌGAI: JENDĀ, IRYŌ, TOKUREI HOU [GENDER IDENTITY DISORDER: GENDER, MEDICINE AND LAW] 249, 249-72 (Hitoshi Ishida ed., 2008).

²⁵ Japanese law only recognizes marriage between one man and one women, both of whose gender must be registered in their family registry. See Sugiura, *supra* note 20, at 71-73.

²⁶ Hiroyuki Taniguchi, *Sei Dōitsusei Shōgai/Seibetsu Iwa wo Kakaeru Hitobito no Kazoku Keisei/Kazoku Seikatsu [Gender Identity Disorder/Gender Dysphoria and Rights to Found a Family and/or Respect for Family Life]*, 24 KAZOKU SHAKAI TO HOU [FAMILY LAW AND SOCIETY] 49, 49-63 (2011).

²⁷ Gender Identity Act, art. 3, para 3; see *infra* Appendix.

²⁸ Nohno, *supra* note 6, at 131.

be used to keep people with GID from fulfilling their right to legally change their gender.²⁹ Even after this requirement was revised to allow those who have no minor children to legally change their gender, the underlying purpose of the requirement is still to protect the welfare of minor children.

The no child requirement has been subject to specific criticisms, which revolve around two points.³⁰ First, an individual with children cannot change the fact that they have children by will or choice. The only way this fact could change is if the child or children unfortunately pass away or if the parent kills (!) their own child, neither of which is desirable. As a result, an individual with GID faces the option of having to wish their child's death—something many parents would have a difficult time doing—or wait until their children are no longer minors. In this case, a child who is aware of her or his parent's gender struggle may themselves suffer from the guilt of knowing that their existence prevents their parent from changing their legal gender.³¹ The irony of this latter situation is that it is caused by a law that is intended to protect and promote child welfare.

Second, critics have criticized the uniform approach to this no child restriction.³² Whether an individual with children can legally change his or her gender should be determined by the family, not by the government. The welfare of the child in these cases should be approached on a case-by-case basis.³³ Some children cannot accept a parent's gender change or may become confused as their parent transitions from one gender to the other. On the other hand, some children are able to easily accept their parent's gender transformation and will be comfortable with the gender transformation. The degree of acceptance differs in every parent-child relationship and may vary even within a single family.³⁴ In the GID Guidelines noted above, medical doctors carefully evaluate whether an individual is accepted by his or her family or how independent

²⁹ *Id.* at 43.

³⁰ See Shuhei Ninomiya, *Koseki no Seibetsu Kisai no Teisei wa Kanou Ka (2): Tokurei Hou wo Yomu [Is it Possible to Correct of Record of One's Sex in the Family Registry? (2): Reviewing the GID Act]*, 559 KOSEKI JIHOU 2, 2-17 (2003).

³¹ See Shuhei Ninomiya, *Sei Sōitsusei Shōgaisha no Seibetsu Toriatsukai no Henkou Mōshitata wo Kyakka Shita Jirei [A Case of Application Rejection for the Correction of One's Legal Gender because of Gender Identity Disorder]* 1204 HANREI TAIMUZU [HANTA] 49 (2006).

³² *Id.*

³³ See Norio Higuchi, “*Kodomo no Kenri*” *Sichou no Tenkai [Development of the “Rights of the Child” Concept]*, in KŌZA GENDAI KAZOKU HOU, VOL.3: OYAKO [FAMILY LAW: MODERN FAMILY LAW SERIES VOL.3] 86 (1992).

³⁴ See Katsuki Harima and Saeko Soma, *SEI DŌITSUSEI SHŌGAI 30 NIN NO KAMINGU AUTO [THE COMING OUT OF 30 PEOPLE WITH GENDER IDENTITY DISORDER]* (2004).

the individual is from his or her family when considering which GID treatment to suggest.³⁵ This approach should also extend to an individual's decision to legally change his or her gender. That is, the parent-child relationship should be handled by the family themselves, and this relationship should not be used as a reason to uniformly apply a no child requirement under the Act.³⁶

Moreover, the no child requirement seems to be based on the assumption that having transgender parents is, in and of itself, a negative factor for children.³⁷ This assumption represents a kind of revulsion, or transphobia, of transgendered individuals. It additionally seems to reinforce the idea that children should be raised in households in which parents conform to their biological genders, or at least, children should live apart from transgender individuals.³⁸ If a child faces bullying at school due to having a transgender parent, the cause should not be seen to be the transgender parent, but rather that society itself is intolerant to gender transition. In addition, the no child requirement seems to be based on the assumption that a child has two parents, one taking on a female role and the other taking on a male role, and that, that is conducive to child welfare.³⁹

Ultimately, the no child requirement ignores the reality of families with transgender members. Although the law was ostensibly written to recognize the transgendered condition, the no child requirement is based on negative and stereotypical attitudes toward transgender people. As a result, it does not ease the process of those who wish to legally change their gender, and in some cases, has the same effect on those around them, including the very children this section of the Act is intended to protect.

³⁵ Japanese Society of Psychiatry and Neurology, *supra* note 13, at 11, 14, 18, 20.

³⁶ Saito, *supra* note 3, at 112.

³⁷ The child welfare aspect of the no child requirement is not based on any evidence or statistical data that indicates the negative effect on a child growing up in a transgendered home, as this data does not exist. From the author's perspective and experience, the child welfare aspect of the no child requirement seems to be based on the general sentiment or feelings of those who are not accustomed to or who do not understand the GID.

³⁸ Hiroyuki Taniguchi, *Tokurei Hou no Sai Hyōka [Review of GID Act in Japan]* in SEI DŌITSUSEI SHŌGAI: JENDĀ, IRYŌ, TOKUREI HOU [GENDER IDENTITY DISORDER: GENDER, MEDICINE, AND LAW] 249, 268 (Hitoshi Ishida ed., 2008).

³⁹ See Masayuki Tanamura, *Tayōka suru Kazoku to Houteki Kadai [Divergence of Family and Legal Agenda]*, 24 KAZOKU SHAKAI TO HOU [FAMILY LAW AND SOCIETY] 14, 14-19 (2011). This very same child welfare assumption lies behind discrimination against single parents and negative attitudes toward divorce in Japan. *Id.*

CONCLUSION

The value of this Act for those with GID or who otherwise feel uneasy with their own biologically- and socially-assigned gender can hardly be overestimated. Though this essay takes a critical stance toward the GID Act, I do not wish to imply that the Act is worthless. The Act appears to have helped improve the quality of life for many transgender people living in Japan⁴⁰ and the term “GID” has received wide societal recognition as a result of this Act. However, the Act is only a starting point, not an ending point, to recognizing one's gender identity. Unfortunately, the enactment of this law does not mean that everyone now accepts transgendered persons. In some cases, this Act has had a secondary effect whereby an individual who changes their legal gender is seen as a “true” transgender and is entitled to be treated as their newly acquired legal gender. However, in the case where an individual has not changed his or her gender, that individual's gender presentation may be deemed to be false, and he or she may not be treated according to the gender in which he or she believes him or herself to be. Regardless of how progressive the Act seems to be, it was enacted without any fundamental change to the existing legal system,⁴¹ placing it upon outdated gender norms. As a result, without a systematic reform of the Japanese legal system to better recognize and support transgender people, the Act will never meet its full progressive potential.

APPENDIX

*Act on Special Cases in Handling Gender for People with Gender Identity Disorder (Japan) Law No. 111 of 2003 (Effective Jul. 16, 2004)*⁴²

Article 1: Purpose

This Act provides the statutory handling of special cases for people with Gender Identity Disorder.

Article 2: Definition

In this Act, “Gender Identity Disorder” means a person, despite his/her biological sex being clear, who continually maintains a psychological identity with an alternative gender (hereinafter, “alternative gender”), who holds the intention to physically and socially conform to an

⁴⁰ See generally Aya Kamikawa, KAETE IKU YŪKI [COURAGE FOR CHANGE] (2007).

⁴¹ Saito, *supra* note 3, at 117.

⁴² Chiaki Ota, Trans., *Act on Special Cases in Handling Gender in People with Gender Identity Disorder (Japan) Law No. 111 of 2003 (Effective Jul. 16, 2004)* 14 *ASIAN-PAC. L. & POL'Y J.* 203 (2012), available at http://blog.hawaii.edu/aplpj/files/2013/01/APLPJ_14.1_Ota_vFINAL.pdf.

alternative gender, and who has been medically diagnosed in such respects by two or more physicians generally recognized as holding competent knowledge and experience necessary for the task.

Article 3: Procedure to Change the Treatment of Gender

1. The Family Courts are authorized to adjudicate a change in the handling of gender upon the application of a person with Gender Identity Disorder who fulfills the following requirements:

- i. The person is 20 years or older;
- ii. The person is not presently married;
- iii. The person does not presently have a minor child;
- iv. The person does not have gonads or permanently lacks functioning gonads; and
- v. The person's physical form is endowed with genitalia that closely resemble the physical form of an alternative gender.

2. In making an application as provided for in the previous section, an applicant must submit medical certification indicating the applicant's status as a person diagnosed with Gender Identity Disorder as provided for in Article 2 above and other matters as may be provided for by Ordinance of the Ministry of Health, Labour, and Welfare, including but not limited to the progress or results of any medical treatments.

Article 4: Statutory Handling of People Adjudicated to have Changed Their Gender

1. People who are adjudicated to have changed their gender, except as may be specifically provided otherwise in the laws, are regarded as having changed to an alternative gender in the application of the Civil Code (Law No. 89 of 1896) and all other laws and regulations.

2. Except as may be specifically provided otherwise in the laws, the provisions in the previous section shall not affect personal status and/or any rights and obligations arising prior to the adjudication of having changed one's gender.

Article 5: Application of Domestic Relations Trial Act

In the application of the Domestic Relations Trial Act (Law No. 152 of 1947), the adjudication of a person's change in gender is regarded as a listed matter included in Article 9, Section 1 thereof.