

Supreme Court en banc Order 2004Seu42 Dated June 22, 2006[Change of Name and Correction of Family Register]

[\[Main Issues\]](#)

[1] The criteria for determining the gender of an individual

[2] The definition of a transsexual and legal evaluation of the gender of a transsexual

[3] Whether the correction of statement on the gender in the family registry should be permitted for a transsexual (affirmative) and effects of such correction

[4] The case reversing the order of the court below that dismissed an application for correction of a family register and a change of name for lack of legal basis, on the ground that there are sufficient reasons for permitting correction of a family register and a change of name since an applicant is obviously a transsexual who can be recognized as a male in light of the ordinary social norm, in the case where a person, who was recorded as a female on the family register, but had the feeling of inappropriateness about being a female and the sense of belonging to the male as the person grew up, has actually lived as a male for a long time upon coming of age, and had sexual reassignment surgeries, to acquire the outer genitals and the bodily appearance of a male, applied for correction of a family register and a change of name

[\[Summary of Decision\]](#)

[1] In the past, a person's gender was determined by the biological factors such as the sex chromosomes and the entailing reproductive and sexual organs. But recently, not only the biological factors but also the psychological and social factors, in other words the individual's own sense of belonging to male or female and the aspect of playing his or her sexual roles which are accepted by the society as matching with his or her gender, including the behaviors, attitudes and characteristic traits, etc, have become recognized as one of the factors that determine a person's gender and thus, a determination of a person's gender should be made after a comprehensive consideration of the biological, psychological and social factors.

[2] The legal gender of a transsexual, at the time of birth, should be evaluated by the biological gender characteristics in light of ordinary social norms, because even a transsexual does have either male or female sex chromosomes and is born with the reproductive and sexual organs that have been formed and developed in accordance with the sex chromosomes, while his or her psychological and social gender cannot be recognized yet. But a transsexual should have the opportunity to be recognized to have the physically changed sex in light of the ordinary social norm according to the criteria for the evaluation of gender, if he or she persistently has the feeling of discomfort and inappropriateness about the biologically assigned gender and the sense of belonging to the opposite sex, has played the role of the opposite sex as he or she grows up after birth, strongly wants to acquire the genitals and other sexual characteristics of the opposite sex, has been diagnosed as having transsexualism by a psychiatrist and received psychiatric treatment and hormone therapy for a long time, which failed to cure the (above) symptoms, rather has been adapted to the opposite sex mentally and socially, thus according to the general medical criteria receives an sex reassignment surgery to acquire the opposite sex's genitals and other bodily characteristics,

furthermore feels satisfied as a person with the changed gender with a solid sexual identity, wears the clothes and hair matching with the changed gender and plays the role of the changed sex in both personal areas such as sexual relationship and social areas such as occupations, accordingly is accepted as the changed gender by people around him or her, and can get social approval of the changed gender because it causes neither a serious change to the relations with other people nor negative effect on the society. And the legal gender of such obvious transsexual should be evaluated as the changed gender, unlike that of the time of birth.

[3] [Majority Opinion] For a transsexual, as the gender at the time of birth is different from the present legal gender, and the statement on his or her gender in the family register cannot announce the true present status relationship, the present legally evaluated gender should be reflected on the family register. The current Family Register Act ("FRA") does not have provisions on the procedures to correct the gender that has been recorded on the family register at the time of birth in accordance with the changed gender. But in consideration of the basic principle of the family register to record the true personal status relationship and (also) other grounds as follows, it is reasonable to permit an obvious transsexual to correct the statement on the gender in the family register in accordance with the procedure stipulated in Article 120 of the FRA; other grounds include (1) a transsexual also should be assured of worthiness and dignity as a human-being, have the right to pursue and be entitled to a life worthy of humans beings, such rights should be protected as long as they are not against the maintenance of law and order or the public welfare; (2) a reason why the FRA does not have the provisions on the procedures for a transsexual to correct the gender on the family register is not because the lawmakers decided not to allow it but because they failed to consider such possibility and necessity at the time of enactment of the law; (3) in interpreting 'there is a statement in the family register which is not permissible by Act ' as one of the causes for the correction of the register provided in [Article 120 of the FRA](#), a case should not be ruled out from that cause, where the statement in the family register becomes apparently impermissible by the current legal system due to changes in the situation such as changes of the law after recording it in the family register, moreover the fundamental purport of the correction procedure of the family register under [Article 120 of the FRA](#) is to correct the statement in the family register which is obviously impermissible by laws or against the truth, according to a simple procedure rather than a court judgment, so considering those aspects in the case where a person is obviously proved a transsexual after examination, it would be reasonable interpretation in accordance with of the purport of [Article 120 of the FRA](#) to make the statement on his or her gender in the family register comply with the changed gender according to the procedure of that Article so that the family register can reflect the true personal status relationship. Where an obvious transsexual is permitted to correct the family register in accordance with the procedure in [Article 120 of the FRA](#) and accordingly the changed gender is recorded on the family register, such permission for the correction of the family register is the decision to identify the true present gender that has been newly evaluated by law following the change of gender, and thus, such permission and a consequent correction of the gender in the family register should not affect his or her existing personal status relationship and the rights and obligations.

[Dissenting Opinion by Justices Son Ji-yol and Park Jae-yoon] Since the case of a transsexual should be distinguished from a case where an erroneous gender is recorded on the family register by an error or a mistake at the time of the birth report

for a person who was born with incomplete sexual characteristics, [Article 120 of the FRA](#), which purports to correct such innate errors in the family register retroactively to the birth date, cannot be applied to that case. The terms "mistake" and "the correction of the family register" stipulated in [Article 120 of the FRA](#) have clear meanings and no room for questions in interpretation exists, and the legislative intent of the FRA was to correct errors or omissions which were existing from the initial recording on the family register. It is obvious that the family register which legitimately reflected the true personal status relationship at the time of the original recording, should not be an object to correct. Since the Majority Opinion would bring the same effect of adding, deleting or modifying some provisions of [Article 120 of the FRA](#), which are clear and plain in their meaning, regardless of the literal (grammatical) interpretation of [Article 120 of the FRA](#) or its legislative intent, it goes beyond the limit of justifiable inferential interpretation. The issue of permitting that the substantial change of the gender for the changes in circumstances after the birth report was filed, unlike the issue of correcting the family register in order to confirm the gender at time of the birth, entails the creation of a new personal status relationship or changes in the existing one, including the consequent legal relations. Therefore, the matter of whether to permit the change of the gender or not and what requirements and procedures are to be needed for the change should be determined in detail not by the FRA but by other substantive laws, and only after the change of gender is effective in accordance with such requirements and procedures, it should be reported and recorded in the family register with the purport of public notice and announcement. On the contrary, permitting a gender change through a simple procedure of correcting the family register while there is no law applicable concerning the requirements and procedures of a gender change, would go beyond the original purpose and function of the system of a family register, which are to provide the public notice and announcement of personal status relationships only. On the other hand, the interpretation made by the Majority Opinion cannot be regarded as being really proper and effective in resolving the new social issue of transsexualism or providing legal remedy to the people who suffer from such an issue. In the current situation, it is more important for the court to point out the urgent necessity for the legal and institutional complementation regarding a change of gender and its criteria to declare that [Article 120 of the current FRA](#) cannot solve this problem, and to urge the National Assembly to gather the public opinion in the society and legislate laws that provide for the requirements, procedures and effects of a gender change, thereby helping create conducive environments where transsexual applicants can be fundamentally and effectively salvaged. In conclusion, it should not be permitted that a transsexual corrects the gender on the family register in accordance with [Article 120 of the FRA](#).

[Supplementary Opinion to the Majority Opinion by Justice Kim Ji-hyung] In the light of the above, if a transsexual can be recognized that his or her gender that was identified and reported at the time of birth does not fit the gender that is confirmed by ordinary social norms through certain courses resulting from the revelation of his or her own sense of gender after birth, changing the gender accordingly should be deemed to be included in the concept of "correction" in [Article 120 of the FRA](#). The nature of the transsexual issue is that their genders were determined and reported just by the biological factors at the time of birth, due to unidentified psychological and social factors, but their genders under the ordinary social norms are confirmed to be the opposite to the reported ones only after a certain amount of time has passed after the

birth, and this is why we need the system of correcting their family registers to settle their problems. It goes without saying that it is ideal to newly establish legislative regulations on the procedures concerning the gender correction of a transsexual, but as it is currently hard to expect any form of visible legislative measures, it would be the best choice not to let the unconstitutional situation continue with the complete legislative loopholes but for the court to examine the specific and individual cases and permit confirmed transsexuals to correct their family registers.

[4] The case reversing the order of the court below that dismissed an application for correction of a family register and a change of name for lack of legal basis, on the ground that there are sufficient reasons for permitting correction of a family register and a change of name since an applicant is obviously a transsexual who can be recognized as a male in light of the ordinary social norms, in the case where a person, who was recorded as a female on the family register, but had the feeling of inappropriateness about being a female and the sense of belonging to the male as the person grew up, has actually lived as a male for a long time upon coming of age, and had sexual reassignment surgeries, to acquire a genital and the bodily appearance of a male, applied for correction of a family register and a change of name

[\[Reference Provisions\]](#)

[1] Article 15 Item 4, Article 49 (2), and Article 120 of the Family Register Act /

[2] Article 15 Item 4, Article 49 (2), and Article 120 of the Family Register Act /

[3] Article 120 of the Family Register Act / [4] Article 120 of the Family Register Act

[Article 15 of the Family Register Act](#) (Matters to be Entered in Family Register)

The following matters shall be entered in the family register:

4. Full name, origin of surname, sex, date of birth and resident registration number of the family head and members;

[This Article Wholly amended by Act No. 4298 of Dec. 31, 1990]

[Article 49 of the Family Register Act](#) (Report on Birth) (2) The following matters shall be stated on the birth report: <Amended by Act No. 3737 of July 30, 1984; Act No. 5545 of June 3, 1998>

1. Name, origin of surname and sex of the child;
2. Whether the child was born in or out of wedlock;
3. Date and place of birth;
4. The names, origins of surname, and permanent domiciles of the child's parents (where the child's father or mother is a foreigner, his or her name and nationality);
5. Name and permanent domicile of the family head in whose family register the child's name is to be entered; and
6. Where a child establishes a new family, the reason and cause thereof and the place where the establishment took place.

[Article 120 of the Family Register Act](#) (Correction of Inadmissible Statement in Family Register) If it is considered that there is a statement in the family register that is not permissible by Act or there is an error or omission in the statement, the interested person may, after obtaining permission from the family court which Has jurisdiction over the place where the family register exists, apply for the correction of the family register. <amended by Act No. 2817 of Dec. 31, 1975>

[\[Reference Cases\]](#)

[1] [2] Supreme Court Decision 96Do791 delivered on June 11, 1996 (Gong1996Ha, 2264) / [3] Supreme Court Order 77Seu12 dated March 7, 1978 (Gong1978, 10740), Supreme Court en banc Order 81Seu15 dated October 10, 1981 (Gong1981, 14451), Supreme Court en banc Order 93Seu14, 15, and 16 dated May 22, 1993 (Gong1993Sang, 1402)

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[Reappellant] Reappellant (Law Firm Chungpoong, Attorney Lee Tae-hwa, Counsel for Reappellant)

[Judgment of the court below] Cheongju District Court Order 2003Ra57 dated July 8, 2004

[\[Disposition\]](#)

The judgment of the court below is reversed and the case is remanded to Cheongju District Court Full Panal Division.

[\[Reasoning\]](#)

The grounds for reappeal are examined as follows.

1. Determination of an individual's gender and gender of a transsexual

A. Including the FRA, the current legal system is based on the premise that all people are either male or female, but does not have specific provisions on the criteria to determine the gender:

Generally speaking, a sperm and an egg get fertilized inside a mother's body, and the embryo has its own sex chromosomes depending on its gender; also forms and develops the inner sexual organs (sex glands) and then the outer sexual organs (genitals) according to the composition of each sex chromosome, and after the baby is born, in the process of growing up, its psychological and mental gender is identical with the biological gender which can be confirmed by the sex chromosomes and the inner and outer sexual organs at the time of birth, and represents either male or female. So in most cases, it does not pose any problem to determine an individual's gender by the sex chromosomes. In reality as well, in the past, a person's gender was determined by the biological factors such as the sex chromosomes and the entailing reproductive and sexual organs. But recently, not only the biological factors but also the psychological and social factors, in other words the individual's own sense of belonging to male or female and the aspect of playing his or her sexual roles which are accepted by the society as matching with his or her sex, including the behaviors, attitudes and characteristic traits, etc, have become recognized as one of the factors that determine a person's gender.

The Supreme Court has already held that a person's gender is determined by the ordinary social norms, in consideration of the composition of the sex chromosomes as a basic factor and all other relevant factors, not only the bodily appearance such as the inner and the outer sexual organs but also the psychological and mental gender and the public's evaluation and attitude towards it (refer to the Supreme Court Decision

96Do791 delivered on June 11, 1996) and made it clear that the determination of a person's gender shall be made after a comprehensive consideration of the biological, psychological and social factors.

B. As seen above, there are multiple factors in determining a person's gender, and it means that there could be cases where each of the above factors might not match one another. In particular, while a person's biological aspect of gender can be confirmed right after his or her birth, it might not be clear at the time of birth if the psychological and social aspects of gender indeed match the biological aspect of gender, and in some cases, the individual's sense of belonging to a particular sexual group and the sexual role is confirmed, in the process of growing up, to be completely different from the biological gender. Transsexualism has attracted academic attention of the medical community only since the 1950s. The World Health Organization (WHO), in its 10th International Classification of Diseases (ICD-10, Year 1994), classified transsexualism as one of the Gender Identity Disorders, and defined it as the desire to live and be accepted as a member of the opposite sex usually accompanied by the desire to make his or her body as congruent as possible with the preferred gender through hormone treatment and surgery, feeling discomfort about one's anatomical gender. The WHO diagnostic system of transsexualism also requires that the transsexual identity has been present persistently for at least 2 years and that the disorder is not a symptom of another mental disorder or a chromosomal abnormality. Meanwhile, the 3rd edition of the Diagnostic and Statistical Manual of Mental Disorder (DSM-III, Year 1980) prepared by the American Psychiatric Association, defines transsexualism as persistent discomfort and sense of inappropriateness about the assigned gender, persistently preoccupied for at least two years with getting rid of his or her primary and secondary sex characteristics and acquiring the sex characteristics of the opposite gender, for the person who reached. The 4th edition of the above manual (DSM-IV, Year 1994) did not use the term 'transsexualism,' instead included it in the category of gender identity disorders, but currently many clinical practitioners use the diagnostic term of transsexualism.

Whether (the cause of) transsexualism is genetic or acquired from social learning has not been identified yet. But in the medical community, there have been results of the research and clinical examination that show that people, who have been diagnosed with transsexualism, received continual treatment and failed, however, to cure the above symptoms, have no choice but to eventually undergo a gender reassignment surgery to have congruent genitals and other sexual appearances with the preferred gender, and that the surgery (sexual organ operation) should be used as the last resort only for people who have been diagnosed by a psychiatrist, received hormone therapy and adapted to the opposite sex mentally and socially, as the operation is irreversible.

C. The legal gender of a transsexual, at the time of birth, is evaluated by the biological sex characteristics in light of ordinary social norms, because even a transsexual does have either male or female sex chromosomes and is born with the reproductive and sexual organ that has been formed and developed in accordance with the sex chromosomes, while his or her psychological and social gender cannot be recognized yet. But a transsexual should have the opportunity to be recognized to have the physically changed gender in light of the ordinary social norms according to the above criteria for evaluation of gender, if he or she persistently has the feeling of discomfort

and inappropriateness about the biologically assigned gender and the sense of belonging to the opposite sex and has played the role of the opposite sex as growing up after birth, strongly wants to acquire the genitals and other sexual characteristics of the opposite sex, then has been diagnosed as having transsexualism by a psychiatrist, and received psychiatric treatment and hormone therapy for a long time, which however failed to cure the (above) symptoms, rather has been adapted to the opposite sex mentally and socially, thus according to the general medical criteria receives a gender reassignment surgery to acquire the opposite sex's genitals and other bodily characteristics, furthermore feels satisfied as a person with the changed gender, with solid sexual identity, wears the clothes and hair matching with the changed gender and plays the role of the changed gender in both personal areas such as sexual relationship and social areas such as occupations, accordingly is accepted as the changed gender by people around him or her, and can get social approval of the changed gender because it does not cause a serious change to the relations with other people nor does it negatively affect the society, And the legal gender of such transsexual (a transsexual stated below means that transsexual) should be evaluated as the changed gender, unlike at the time of birth.

2. Correction of the sex on the family registers for a transsexual

A. The system of family register is a system of registering and announcing the personal status relationship of the citizens of Korea in accordance with the legal procedures. For the family register to duly play its role, the citizens' status relationships should be recorded with no exceptions, and such recorded facts should match the true status relationships. Thus, even though a certain status relationship is recorded on the family register, if there is obvious evidence that the statement of the record does not match the true situation, such record shall be corrected to match the true relationships, so that the family register can announce the true relationships.

To that end, the FRA provides the procedure for correcting the family register. Article 22 of the FRA stipulates that when a family register includes invalid statements or errors or omissions, the head of Si/Eup/Myeon is required to correct the family register in accordance with the legal procedure. Meanwhile, [Article 120 of the FRA](#) stipulates that if it is considered that there is a statement in the family register which is not permissible by act or there is an error or omission in the statement, the interested person may, apply for the correction of the family register after obtaining permission from the court. Article 23 of the FRA stipulates that a family register shall be altered in case of the changes in administrative district, land name or land number. But the FRA does not have provisions on the scope where a family register rectification is permitted and does not have provisions on the procedure for the interested person to apply for to the alteration of a family register.

B. [Article 15 Item 4 of the FRA](#) provides that the gender of a person shall be entered in on the family register and [Article 49 \(2 Item 1\)](#) provides that the gender of a child shall be stated on the birth report, so the gender at the time of birth is entered in the family register. For a transsexual, as the gender at the time of birth is different from the present legal gender the statement on his or her gender in the family register cannot announce the true present status relationships, the present legally evaluated gender should be reflected in the family register.

The current FRA does not have provisions on the procedures to correct the gender that has been recorded in the family register at the time of birth in accordance with the changed gender. But in consideration of the basic principle of the family register to record the true personal status relationship and other grounds as below, it is reasonable to permit an obvious transsexual to correct the statement on the gender in the family register in accordance with the procedure stipulated in [Article 120 of the FRA](#). Other grounds include:

(1) A transsexual also should be assured of human worthiness and dignity, have the right to pursue and be entitled to a life worthy of human beings, and such rights should be protected as long as they are not against the maintenance of law and order or the public welfare (Article 10, Article 34 (1), and Article 37 (2) of the Constitution). Even though a person who is an obvious transsexual should be recognized and legally evaluated as the changed gender in light of the ordinary social norms, because he or she has the persistent feeling of belonging to the opposite sex, has acquired the genital body and appearance congruent with the changed gender through medical treatment and gender reassignment surgery and plays the social role of the changed gender, if the statement of the family register on his or her gender and the resident registration number still show the previous gender, the transsexual might be treated as a socially abnormal person, deprived of opportunities to be employed, which eventually might infringe on his or her fundamental constitutional rights. Meanwhile, the transsexual's future benefits by permitting the correction of the family register, such as the freedom from people's contempt and social disadvantages, the obtainment of social acceptance as a normal member and the legal status for the changed gender, etc, are much larger than the public interest that is gained from not allowing the family register to be corrected, such as the prevention of social disorder. So if an obvious transsexual is not allowed to correct the family register only because of the lack of legal procedural provisions, it would amount to failure to fully realize the abovementioned spirit of the Constitution.

(2) The FRA was enacted on January 1, 1960 as Act No 535 and has been that way without fundamental changes except for the amendments of adjective provisions due to amendments of other substantive laws or changes of administering agencies, and in particular, the basic contents of the provisions on the record of the gender and the reasons for the correction of the family register have never been amended. On the contrary, there have been a great deal of medical studies on the criteria to determine the gender and on the transsexualism, which collectively require a correction of the basic premise of the either-or and invariability of the gender based upon the sex chromosomes. In this regard, the reason why the FRA does not have the provisions on the procedures for a transsexual to correct the gender on the family register is not because the lawmakers did not intend to permit it but because they failed to consider such possibility and necessity at the time of enacting the law.

(3) Among the reasons for correcting the family register in accordance with [Article 120 of the FRA](#), the provision that 'there is a statement in the family register which is not permissible by Act' refers to where the family register contains the statement which is not about the matters to be entered or it is automatically invalid even viewing the record itself, etc (refer to the Supreme Court Order 77Seu12 dated March 7, 1978 et al.), and the provision that 'there is an error or omission in the statement' also refers to

a situation where the family register includes the statement which is not true due to an error or omission at time of reporting or recording, which means that the correction of the family register in accordance with [Article 120 of the FRA](#) is generally understood as the procedure for correcting clerical mistakes that have existed since the time of recording. But in interpreting the provision that 'there is a statement in the family register which is not permissible by Act' as one of the causes for the correction of the family register, it should not be ruled out from that cause when the statement in the family register becomes apparently impermissible by the current legal system due to changes in the situation such as changes of the law after recording it in the family register. Moreover the fundamental purport of the correction procedure of the family register under [Article 120 of the FRA](#) is to correct the statement in the family register which if it is obviously impermissible by law or incompatible with obvious truth, according to a simple procedure rather than a court judgment. Considering those aspects, in the case where a person is apparently proved to be a transsexual after examination, it is reasonable interpretation in accordance with of the purport of [Article 120 of the FRA](#) to make the statement on his or her gender in the family register fit the changed gender according to the procedure of that Article so that the family register can reflect the true personal status relationship.

C. In the case where an obvious transsexual is permitted to correct the family register in accordance with the procedure in [Article 120 of the FRA](#) and where accordingly the changed gender is recorded on the family register, such permission for the correction of the family register is the decision to identify the true present gender that has been newly evaluated by law following the change of gender, so such permission and a consequent correction of the gender in the family register should be interpreted as not affecting his of her existing personal status relationship and the rights and obligations. Meanwhile, a person's name is in many cases one of the basic ways to identify the gender of the person, so when a transsexual makes application for the permission of a change of name as well as the correction of the family register, and the court decides to permits the correction of the family register, then the change of name with the purport to make the name fit the changed gender should also be permitted.

3. Review of this case

According to the records and the reasoning of the court below's judgment, the applicant was born in 1951 (month and day omitted) and recorded as female on the family register, but when growing up, showed temperament and appearance of a male, has suffered confusion in daily lives from the feeling of inappropriateness about the female and the sense of belonging to the male, for example feeling comfortable in male clothing. In her 20s, the applicant left her hometown and lived as a man by mainly engaging in manual labor such as working as a construction worker. She continuously wanted to get a gender reassignment surgery but could not due to tight financial situations. But in July 1992, at the age of 41, the applicant was diagnosed as having transsexualism at (Name of hospital omitted) Hospital of (Name of college omitted) college and had a surgical operation to remove her breasts, uterus and vagina, which was followed by another operation to insert artificial testicles and a penis. Since then, the applicant has been administered with male hormone, which gave the applicant a body and appearance of a man. A psychiatric test result shows that the applicant has a solid sex identity as a male. Also, the applicant has never been legally married, never

given birth to a baby as a woman, and has met a woman who understood the applicant's situation and been living together since the operations, though the applicant does not have the male reproductive function. Moreover, the applicant has no criminal record except for a punishment of a fine due to the violation of the Road Traffic Act, has no record of bad credit standing, which means that there is few possibility for the applicant to commit crimes or engage in illegal activities taking advantage of the correction of the gender on the family register and the change of name.

In summary of those circumstances, the applicant has never been married, has no children, and had the feeling of inappropriateness about being a female and the sense of belonging to the male as growing up, has actually lived as a man for a long time, had sexual reassignment surgeries under a doctor's diagnosis, acquired the genital and the bodily appearance of a man, currently has a firm sex identity of a male, has very low possibility of changing back to the female gender; is recognized as a man in personal and social life, which eventually means that the applicant is obviously a transsexual who deserves to be evaluated as a male in light of the ordinary social norms, so the applicant has sufficient reasons to be permitted to correct her family register and change her name. But the court below dismissed the application in this case for the reasons that there is no ground to permit a transsexual to correct the family register, etc, thus the court below erred in violation of the relevant provisions of the Constitution and the FRA, which has affected the judgment.

4. Conclusion

Therefore, the judgment of the court below is reversed, and the case is remanded to the court below for a retrial and judgment. It is so decided as per Disposition with the assent of all Justices who reviewed the case except for the dissenting opinions of Justice Son Ji-yol and Justice Park Jae-yoon in regards to the correction of the family register.

5. The Dissenting Opinion by Justice Son Ji-yol and Justice Park Jae-yoon is as follows.

A. We agree with the Majority Opinion that the legal and institutional system needs to be complemented so that transsexuals can be assured of human worthiness and dignity, have the right to pursue happiness and be entitled to a life worthy of humans beings, as guaranteed by the Constitution.

But we cannot agree with the conclusion reached by the Majority Opinion to the effect that without a legislative measure on the change of the gender, a change to the opposite gender can be permitted by allowing the correction of the family register in accordance with [Article 120 of the FRA](#).

B. The Supreme Court has so far held that a person's gender is determined by the ordinary social norms, in consideration of the composition of the sex chromosomes as a basic factor and all other factors, not only the bodily appearance such as the inner sexual glands and the outer sexual organs but also the psychological and mental gender, the individual and private sexual roles which he or she plays in social life and the public's evaluation and attitude towards them (refer to the Supreme Court Decision 96Do791 delivered on June 11, 1996). In accordance with that purport, although a person is recorded as a male or a female on the family register through a birth report, if the characteristics of the opposite sex are revealed as growing up after birth that the

person is proved to belong to the opposite gender as a result of a judgment in light of the ordinary social norms based upon the above criteria, that means the gender of the baby was misreported at time of the birth report, and thus such statement in on the family register has been incompatible with the truth since the original recording, so it should be corrected in accordance with [Article 120 of the FRA](#) (for instance, the cases of true hermaphroditism or pseudo- hermaphroditism).

C. But the issue in this case is regarding transsexualism, the symptom of a person who was a complete male or a female at the time of the birth report in light of the biology and the traditional social norms as well, having corresponding sex chromosomes and the inner and outer sexual organs, but in the process of growing up, had the feeling of inappropriateness about the assigned gender and the sense of belonging to the opposite sex, and wants to lead a life of and be recognized as the opposite sex, and to make his or her body fit the opposite sex.

The Majority Opinion, on the premise that the reason why the FRA does not have the provisions on the procedures for a transsexual to correct the gender on the family register is not because the lawmakers did not intend to permit it but because they failed to consider such possibility and necessity at the time of making the law, explains that; even though the correction of the family register in accordance with [Article 120 of the FRA](#) is generally a procedure to correct errors that have existed since the time of recording on the family register, the fundamental purport is to correct the statement in the family register which is obviously impermissible by laws or against the truth, according to a simple procedure rather than a court judgment, so in the case where a person it is obviously proved a transsexual, he or she should be permitted to correct the family register according to the procedures of [Article 120 of the FRA](#).

But the case of a transsexual should be distinguished in following respects from a case where the wrong gender is recorded on the family register by error or mistake at the time of the birth report for a person who was born with incomplete sexual characteristics, so [Article 120 of the FRA](#), which purports to correct such innate errors in the family register retroactively to the birth date, cannot be applied to this case; (1) the identification of the gender at the time of the birth report of was not erroneous, so the initial statement in a transsexual's family register cannot be deemed mistaken either; (2) the determination of a transsexual's gender cannot be made in a biologically clear-cut manner but requires diagnoses by a number of doctors, a process of treatment for a significant amount of time (at least 2 years according to the opinions of the WHO et al. as cited by the Majority Opinion), and a complex and sophisticated process of judgment about some requirements such as 'not negatively affecting or causing serious changes to the status relationship and social life, (3) even if the change of gender is permitted, the previous determination of a transsexual's legal gender and the former statement on his or her gender in the family register is deemed to be right and the change is effective only for the future (even the Majority Opinion recognizes this point).

D. [Article 120 of the FRA](#) stipulates, "If it is considered that there is a statement in the family register which is not permissible by Act or there is an error or omission in the statement, the interested person may, after obtaining permission from the family court which has jurisdiction over the place where the family register exists, apply for the

correction of the family register" and as the Majority Opinion recognizes, a correction of the family register in accordance with the above provision has been understood as a procedure for the case where there has been a statement in the family register from the beginning which is not true, because the report itself was is not compatible with the truth or some errors were committed in the process of recording on the family register in spite of the correct reporting. The terms "error" and "the correction of the family register" stipulated in [Article 120 of the FRA](#) have clear meaning and there is no room for questions in interpretation, and the legislative purport of the FRA was to correct errors or omissions which were existing from the initial recording on the family register; so it is obvious that the family register which legitimately reflected the true personal status relationship at the time of the original recording it cannot be an object for correction, and it is legally natural that such interpretation has been firmly established.

E. The Majority Opinion argues that even though the statement on the family register fits the truth at the point of that time, when the actual state becomes changed later by other situations, a correction needs to be made to the family register in accordance with such change, and explains that a transsexual should be able to correct the family register by the direct application of [Article 120 of the FRA](#) to the case., But in our opinion, [Article 120 of the FRA](#) cannot be directly applied to this case, so the gist of the Majority Opinion can be understood as the permission of the "change" of the statement in the family register for a transsexual by inference interpretation of [Article 120 of the FRA](#). But the Majority Opinion would bring the same effect of adding, deleting or modifying some provisions of [Article 120 of the FRA](#), which is clear and plain in its meaning, regardless of the literal interpretation of [Article 120 of the FRA](#) or its legislative purport, so it goes beyond the limit of a justifiable inferential interpretation, and we cannot agree with such interpretation by the Majority Opinion.

(1) In interpreting a legal provision, the starting point is the literal meaning of the language stipulated in the provision. It is in principle not permitted to go beyond the possible meanings of the provision and create a new meaning. The criminal or tax laws and regulations should not be interpreted inferentially in the fields of criminal law enforcement, and in the interpretation of other private laws, there is room to use inference or broad interpretation in the case where a literal interpretation or a logical interpretation results in something that is severely against the social concept of justice, which is done as an exception, within the scope of the purport of the legislation.

There are cases where an interpretation in accordance with the legislative intent and purpose should be made from a perspective of judicial activism, but there is a fundamental limitation that even inference interpretation, et. cannot go beyond the limit that was set by legislation, and if that limit is passed, that would cause problems of infringing on the legislative power in accordance with the Constitution because it amounts to enacting a new law. In addition, even in the case where the interpretation corresponding to the legislative intent is needed to solve a certain legal problem, the inference interpretation is permitted only when it is effective and proper for the solution of the problem and does not cause any problem to the legal system, so the lawmaker also would be expected to have made a law in accordance with such interpretation. On the contrary, if such an inferential interpretation cannot be an effective and proper means to solve the problem but might rather cause other problems, it is not permitted.

(2) Article 36 of the Constitution provides that "marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of gender, and the state shall do everything in its power to achieve that goal (Paragraph 1); the state shall endeavor to protect motherhood (Paragraph 2)." This shows that marriage and family life on the basis of equality of gender, which is on the premise of the distinction of gender, are the most basic element of the human society and form the foundation of public life in all areas. The Constitution has other provisions that distinguish male and female and that protect female within a certain scope {Article 32 (4) and Article 34 (3) of the Constitution}, and other laws including the Civil Act also have provisions that guarantee different legal status for male and female, within the scope of gender equality stipulated in the Constitution, which also means that the distinction between male and female is a core basis of not only the social life but also many legal relations. It goes without saying that the Constitution and relevant laws are based on the premise that the birth determines the gender of the baby in accordance with traditional biological knowledge and ordinary norms.

But the recognition of gender of a 'transsexual' as defined by the Majority Opinion and the change of gender follow totally different criteria and method from the sexual identification that is the premise of the Constitution and relevant laws, and mean the change of gender from male to female and female to male.

The issue of the change of gender of a transsexual is a new one that was never expected or considered at the time of the enactment of the Constitution or relevant laws. Thus, it is rather natural for our legal system not to have any institutional device to address it. Therefore, it is obvious that [Article 120 of the FRA](#) is not to resolve this issue or similar issues. New issues such as the one involving transsexuals, which have risen from the background of medical and biological development and social studies, should be resolved through new methods and new legislation with the purpose of appropriately regulating the specific issue. As the gender identification is not only the basic element of individual lives but also a core element of public lives in all areas of politics, economy, society and culture, and is closely related to ethical, philosophical and religious thoughts, resolving such fundamental issues should go through collecting the general public's opinions, careful discussions and serious deliberations before the National Assembly decides on the legislation. This is not a simple issue that can be resolved through new or inference interpretation of the correction of the family register; a system put in place to correct obvious errors on the family register.

(3) Under our legal system, creation and change of a personal status relationship is achieved not by the FRA but by other laws such as the Civil Act. The family register in accordance with the FRA is no more than a system that announces such created and changed personal status relationships. It does not fit the announcing and descriptive characteristics of the family register to permit the change of the gender through the procedure to correct the family register.

As seen above, the sexual distinction between male and female has significant meaning in personal, family, social and national aspects, so the issue of permitting the substantial change of the gender for the changes in circumstances after the birth report, unlike the issue of correcting the family register to confirm the gender at time of the birth report, entails the creation or change of a new personal status relationship

and the consequent legal relations. Therefore, the matters of whether to permit the change of the gender or not and what requirements and procedures are to be needed for the change should be determined in detail not by the FRA but by other substantive laws, and only after the change of a gender is effective in accordance with such requirements and procedures, it should be reported and recorded in the family register with the purport of public notice and announcement. On the contrary, permitting a gender change through a simple procedure of correction of the family register, while there is no applicable law about the requirements and procedures of a gender change, would overstep the original purpose and function of the system of a family register which are for the public notice and announcement of personal status relationships only.

(4) [Article 120 of the FRA](#) stipulates on applying for to the correction of the family register through the permission of a family court, and meanwhile, Article 123 stipulates on applying for the correction of the family register by final judgment; the former is only available for the correction of slight matters in light of its procedural simplicity, on the other hand the latter is exclusively applicable for the correction of the matters which can have a serious effect on the family or inheritance legal affairs (refer to the Supreme Court en banc Order 81Seu15 dated October 10, 1981). To judge whether the matter can have a serious effect on the family and inheritance legal affairs or not depends on whether the direct litigation procedure for the issued personal status relationship related to the statements on the family register is regulated on Article 2 of the Family Litigation Act or not. And the matters which are subject to a family law-related litigation under Article 2 of the Family Litigation Act are deemed to have a serious effect, so can only be applied to correction through a final judgment in accordance with Article 123 of the FRA, and the matters which are not subject to a family law-related litigation of Article 2 of the Family Litigation Act can be applied for correction by obtaining a permission from of a court in accordance with Article 120 of the FRA (refer to the Supreme Court en banc Order 93Seu14, 15 and 16 dated May 22, 1993).

As seen above, the point of determining a person's gender or changing the gender is not a simple individual problem but an issue that has direct effect on the relationship with the family and the relatives, and then on the society and the state. Therefore, the matter of changing the gender does have nearly the same significance as the subjects of to a family litigation under Article 2 of the Family Litigation Act. Meanwhile, the procedure for obtaining a court's permission to correct his or her family register on the basis of [Article 120 of the FRA](#) is a non-litigation case where there exists no adverse party, so the court can make a judgment on the permission without examining interested parties including the applicant, and in reality, in most cases, the judgment is made only based upon the various documents submitted by the applicant. Even if there exist other interested parties than the applicant, they are not provided with an opportunity to participate in such a procedure due to those features of the non-litigation, and once the court permits the correction of the family register, it is concluded and final because the FRA does not provide any appeal procedure for the permission the FRA, and the interested parties or the public prosecutors, as representatives of the public interest, do not have a way to appeal against it, which means that the procedure (for the permission of [Article 120 of the FRA](#)) is relatively weak with a point of prudence in comparison to the case of Article 123 of the FRA.

The above mentioned Supreme Court en banc Orders ruled that correction of the family register in accordance with [Article 120 of the FRA](#) is only permitted when such correction is minor one that would not have serious impact on family or inheritance legal status, but the Majority Opinion permits a gender change of a transsexual through a very simple procedure stipulated in [Article 120 of the FRA](#), not even procedure of Article 123 of the FRA, so we cannot agree with the Majority Opinion to permit a gender change through a simple procedure, in consideration of the national and social significance of a gender change and its direct impact on the family and relatives relationship.

(5) Therefore, it is obvious that the broad application of the procedure of correcting the family register, whose original purpose is to correct clerical errors on the family register, to the case of a virtual gender change of transsexuals, goes far beyond the possible meanings of the legal provision and is not permissible as it amounts to inference interpretation against the legislative purport.

F. Meanwhile, is the interpretation made by the Majority Opinion really proper and effective in resolving the new social issue of transsexualism or salvaging people who suffer from such issue? The answer is no.

(1) As seen above, sexual distinction between male and female has a significant meaning in personal, family, social and national aspects, and permitting a gender change means a change to a new personal status relationship, so decision on whether to permit a gender change or not requires a careful approach, and even in case of permitting it a clear provisions on its requirements, procedures and effects should be prescribed by laws. In particular, in consideration of the fact that an application to correct the gender on the family register requires a gender reassignment surgical operation first, personal problems or social side effects resulting from the indefinite requirements and procedures for the correction could be quite serious.

(2) The Majority Opinion does make its own explanation on the criteria and the requirements for the transsexual who is permitted to change the gender in this case. But it is questionable whether the above explanation sufficiently provides for the criteria and the requirements of a virtual gender change case, and it is also questionable whether such criteria will operate properly in actual proceedings.

First, as seen above, requirements for permitting a gender change of a person who received a gender reassignment surgery need to be determined through policy decisions of lawmakers in consideration of comprehensive social issues of not only the person's own right to pursue happiness and his dignity as a human being, but also the traditional marriage and family system, the public opinion on it, etc. In the National Assembly's legislation of such law, specific and detailed requirements should be stipulated, such as the minimum period when the opposite sexual role from at the time of birth has been played, a censorship on the possibility of re-changing the gender, a diagnosis by a psychiatrist and confirmation of the opinions of the family members who will be affected. Furthermore, a systemic device to guarantee that a transsexual can get a gender reassignment surgery or decide to change gender of his or her own free will (for instance, requiring the applicant to have a mental capacity or legal competence enough to make a decision, or in the same context, limiting the age of the applicant over a certain age) must be provided. But it is hard to say that the Majority

Opinion sufficiently explains about such important elements, and it is in fact impossible to set up such requirements and criteria sufficiently and clearly through a court's judgment. In addition, the Majority Opinion, in defining a "transsexual", explains that if a person's gender change would cause serious changes to the other people's status relationship or negative effect on the society, then he or she is not even included in the concept of the "transsexual" admissible to change the gender. Such Majority Opinion is very reasonable and understandable, but the problem is that the Majority Opinion does not provide clear criteria on what case falls under "serious changes to the other people's status relationship" or "negative effect on the society" that does not allow a gender change from the beginning. For instance, if a married person or a person who has given birth to a child, or a person who is concerned to misuse the gender change applies for a family register correction, the court should dismiss such application for the reason that "serious changes to the other people's status relationship" or "negative effect on the society" might be caused, but if the applicant who had already received a gender reassignment surgery without forecasting such results due to unclearness of the requirements will have to go through severe physical and mental trauma (as is the same to the other requirements and in this regard, an active preview needs to be conducted by the court before a gender reassignment surgery).

In the situation where there are no specific legislative actions on the requirements and criteria that are needed to determine a gender change for people who received gender reassignment surgeries, for the court to decide whether to permit gender changes on an case-by-case basis in accordance with [Article 120 of the FRA](#) cannot provide objective and consistent criteria to related parties and courts, and would rather cause legal and social confusion.

(3) Meanwhile, compared to the significance of a gender change of a transsexual, the family register correction procedure of [Article 120 of the FRA](#) is not perfect at all. As seen above, [Article 120 of the FRA](#) is for the correction of relatively simple matters, and there are no provisions on the method and procedure of proving, participation of interested parties, hearing opinions of other interested parties, appeal procedure and reference to agencies concerned, except only for the need to obtaining the permission from a family court. In reality, most family register correction cases only review the written application and the evidentiary documents and do not go through examinations. Even the Majority Opinion hints that it is absolutely necessary to not only go through a strict investigation for fact finding but also to listen to the opinions of psychiatrists, surgeons, family and relatives, to examine if the active and passive requirements for a gender change (albeit unclear) are met or not, and, considering the importance of the case, other procedures such as the interested parties' participation in the procedure and filing an appeal should also be guaranteed, and those procedures should be uniform and forceful. But it is obvious that legal interpretation through judgment of individual cases cannot determine specific procedures. So, if the Majority Opinion is followed, it is confusing for the court to decide what procedure to follow to examine and decide on the requirements of the transsexual, and if different courts follow their own procedures, it will not only cause inconvenience to the parties but it will also tarnish the confidence and authority of the courts and the trials.

(4) Moreover, if a gender change is permitted for a transsexual, the law must have a clear stipulation on the time, effect, method of public announcement of such change,

etc. In accordance with the Majority Opinion, a family register correction of a transsexual does not affect the existing personal status relationship, but it goes beyond the scope of the legal effect expected of the family register correction procedure and there is no way to announce publicly such future effect on the family register. So reading the statements on the family register is not a sufficient method to see if a certain family register correction in accordance with [Article 120 of the FRA](#) is a usual family register correction with retroactive effect or a family register correction with only future effect as in this case. This not only causes significant misunderstanding to third parties who trust records on family registers, but it also creates the applicant's inconvenience that in order to prove to a third party from what point he or she has been a changed gender, the applicant needs to show a judgment document and the certificate of its conclusion as well as the family register.

(5) Meanwhile, to correct a family register and change a resident registration number for a transsexual cannot be a sufficient legal device for a gender change. Although the purport of the Majority Opinion is not clear, it is roughly understood that the opinion is based on the premise that a family register correction also changes all the legal status as well as the rights and obligations, but the grounds for such comprehensive effects of a family register correction are not solid. And if a change of gender does not have a retroactive effect, it is questionable how to regulate the existing legal regulations including the family relations without special legislation. Moreover, certain legal devices are absolutely needed about obligations to correct various public documents according to the gender change and a procedure for it, and about the state and the society's responsibilities to care for the new social life with the new gender.

(6) If a court applies [Article 120 of the FRA](#) to individual cases and permits selectively the corrections of the family registers by judgment for some of those who had gender reassignment surgeries without forming the consensus of the society or a legislative measure that specifies medical and legal requirements, procedures and effects of a gender change, the legitimacy and feasibility of the judgment cannot be fully guaranteed and there could be conflicting judgments, and it is questionable if such device would be sufficient and adequate to the applicant, and the legal effect on the relationships of the applicant and the interested parties is unclear, which severely undermines legal stability. In addition, as a result that court trials on individual cases cannot provide objective and consistent requirements and procedures of a gender change, it is not possible to predict if other transsexuals in similar situations (to the applicant in this case) can be permitted to change their gender, or what procedures they need to take to obtain gain such permission.

Meanwhile, if [Article 120 of the FRA](#) is applied directly or through an inferential interpretation to such an important and sensitive issue as the gender change of a transsexual, which is no more than a makeshift measure rather than a fundamental and reasonable resolution of the problem, it could weaken the social concerns about the necessity of additional legislation, which would block people in similar situations from fundamentally resolving the issue. In this regard, in the current situation, it is more important for the court to point out the urgent necessity for the legal and institutional complementation on a change of gender and its criteria, to declare that [Article 120 of the current FRA](#) cannot solve this problem, and to urge the National Assembly to gather the opinion of the society and legislate laws that provide the

requirements, procedures and effect of a gender change, thereby helping create conducive environment where transsexuals can be fundamentally and effectively salvaged (in such legislative process, negative opinions on the gender change of transsexuals could also be discussed, so that true social integration could be achieved). If such a method is followed, the applicant in this case or other transsexuals might have complaints because they cannot change their gender on the family register right away. However, rather than taking a prompt but legally and systematically insufficient makeshift measure, it would be reasonable to fundamentally resolve this important issue in accordance with a method that takes more time but fits our constitutional order, and such fundamental resolution might be the only solution for transsexuals including the applicant in this case.

G. In conclusion, it cannot be permitted that a transsexual corrects the gender on the family register in accordance with [Article 120 of the FRA](#), and the judgment of the court below of the same purport is justified and the reappeal should be dismissed, and we hereby express our dissenting opinions as we cannot agree with the Majority Opinion.

6. The supplementary opinion to the majority opinion by of Justice Kim Ji-hyung is as follows.

A. Interpreting and applying legal provisions to trials of individual cases are the right mission of a court. A court must follow the principle of presumption of constitutionality in interpreting and applying legal provisions.

The presumption of constitutionality is based upon the legal principle that the Constitution should be the criteria for legal interpretation, and even though any legal provision should not be interpreted inferentially by going beyond the ordinary meaning of language or to the direction that is prohibited by lawmakers in light of the legislative intent or interpreted too broadly to a degree that interferes with the legislative power in the name of that principle, but as long as such limit is observed, the presumption of constitutionality is to interpret the law in the way that fits the Constitution in order to maintain the effect of the law, which is respect for the legislative power and fits the doctrine of popular sovereignty. So, although a legal provision can be interpreted as constitutional by the presumption of constitutionality, if the court gives up on such interpretation, then an unconstitutional legal loophole will remain until a new constitutional law is enacted, which results in the abandonment of the right and the mission of a court.

Thus, it is appropriate to accept the presumption of constitutionality rather than to exclude it for the reason that it is an inferential or broad when it is a reasonable method of interpretation within the boundary of constitutional order.

B. Although there is room to interpret the meaning and the scope of "correction" in [Article 120 of the FRA](#) as the dissenting opinion did, in the light of the presumption of constitutionality, if a transsexual can be recognized that his or her gender identified and reported at the time of birth does not fit the gender confirmed by ordinary social norms through certain courses resulting from the revelation of his or her own sense of gender after birth, changing the gender accordingly should be deemed to be included in the concept of "correction" in [Article 120 of the FRA](#).

There is no reason to view such interpretation as being against the purport of the family register correction system, the reflection of the true personal status relationship. And as the Majority Opinion pointed out in detail, it does not seem that legislators prohibited such interpretation from the beginning. Moreover, if the meaning of "correction" in [Article 120 of the FRA](#) is interpreted as not including the gender change of transsexuals, it leaves room for infringement of the basic rights of transsexuals that are guaranteed by the Constitution. In this regard, I would like to emphasize again that including the gender change of a transsexual in the concept of a family register correction does not constitute interference with the legislative power.

C. The dissenting opinion defines the correction of a transsexual's gender as the "change" from a certain gender to the opposite one, which causes confusion because the dissenting opinion is on the premise that the Majority Opinion permits a gender change of this meaning. In other words, the main logic of the dissenting opinion is that a transsexual is a person who changed the previous gender to the opposite gender, so the transsexual's gender on the family register fit the truth at the time of the record but changed later due to other situations, which is understood to amount to the change of the statement on the family register and goes beyond the scope of a family register correction.

But the Supreme Court decision 96Do791 delivered on June 11, 1996 already ruled that a gender determination needs to take all biological, mental and social elements into consideration and ultimately follow ordinary social norms. A transsexual in its concept is a person who was born with only the biological elements identified but in the process of growing up the mental and social elements, such as his or her own gender and sexual role, developed in different ways from the biological elements, and at a certain point, is recognized by ordinary social norms to have the gender opposite to that of at birth report. So, the nature of transsexuals issue is that their gender was determined and reported just by the biological factors at the time of birth, due to unidentified psychological and social factors, but their gender under the ordinary social norm should be confirmed as the opposite to the reported ones only after a certain while from the birth, and that is why we need the corrections of their family registers to settle their problems. It is an excessive simplification to interpret a transsexual as a person who changed the gender through a gender reassignment surgery, without considering the above dynamic process about gender determination of a transsexual.

D. I completely agree with the part of the dissenting opinion that gender distinction is the basis of social life and legal relations and determining whether a person is a male or a female can have a significant impact on the family, relatives, society and the state. But I cannot agree with the point that the statement on gender in the family register cannot be corrected by the procedure stipulated in [Article 120 of the FRA](#) because of its significance.

The Supreme Court has repeatedly held that "issues which can have a serious effect can only be corrected through a final judgment, in accordance with Article 123 of the FRA." But reviewing more specifically, the Supreme Court en banc Order 93Seu14, 15 and 16 dated May 22, 1993 (as pointed out by the opposing opinion) ruled that "as there is no legal procedure for directly disputing the date and time of death in the Family

Litigation Act or any other law or regulation, the correction of the family register on the matter should be done in accordance with [Article 120 of the FRA](#)."

The Supreme Court en banc Order 81Seu15 dated October 10, 1981 ruled, "correction of the family register in order to merge double registers into one should be permitted as long as it does not have any effect on the personal status relationship," which also permitted a family register correction in accordance with [Article 120 of the FRA](#).

In this case, the trial to judge on the gender of the transsexual is not included in the family litigation cases listed in Article 2 of the Family Litigation Act and also it does not affect the existing legal relationships with its effect only for the future as pointed out by the Majority Opinion. So it is not in conflict with the Supreme Court precedents regarding the scope of the family register in accordance with [Article 120 of the FRA](#).

E. Furthermore, it is hard to agree with the point made by the dissenting opinion that a transsexual's change of gender cannot be permitted in the form of a family register correction because the trial of permission for family register correction is a non-litigation case.

Correcting the gender statement of a transsexual's family register is suitable for a non-contentious litigation procedure without an adverse party rather than an adversary litigation procedure. As it will be seen below, in Japan, one of the countries that have legislations on the change of gender of transsexuals, Article 5 of the Act on Special Cases in Treating Gender of a Person with a Gender (Sex) Identity Disorder regulates a trial to change the gender for a transsexual as one of cases of category A under the Japanese Trial of Family Case Act, while in Korea the equivalent classification for that case under Article 2 of the Family Litigation Act is family non-litigation cases of category D, and the Non-Contentious Case Litigation Act is applied *mutatis mutandis* to the cases as a general rule except for the procedures of the intervention by interested person and examination of concerned party, which are regulated by its special provisions of the Family Litigation Act (Articles 34, 37 and 38 of the Family Litigation Act). Meanwhile, according to the Non-Contentious Case Litigation Act, which is applied *mutatis mutandis* to the family register correction case as seen above and adopts the *ex officio* detection and investigation of evidence, the court *ex officio* detects the facts and investigates the evidence as deemed necessary and can also examine witnesses and expert in accordance with the Civil Procedure Act {Article 97 (1) Item 3 of the Enforcement Rule of the FRA and Articles 10 and 11 of the Non-Contentious Case Litigation Procedure Act}. As pointed out by the dissenting opinion, if the court has only based its decisions on the documents submitted by the applicants, such practice should rather be improved and should not be a ground for dissenting the salvage through a family register correction.

F. The opposing opinion argues that in the current situation where there are no specific legislative actions on active and passive requirements and criteria that are needed to determine a gender change for people who received gender reassignment surgery, for the court to decide whether to permit gender changes in individual cases in accordance with [Article 120 of the FRA](#) cannot provide objective and consistent criteria to related parties and courts, and would rather cause legal and social confusions. It goes on to take an example of a married person or a person who has given birth to a child, it holds that the court should dismiss such application for the reason that "serious changes to the other's legal relationship" or "negative effect to the society" might be caused, but if

the applicant has already received a gender reassignment surgery not predicting such result due to the unclearness of the requirements, such applicant will have to go through severe physical and mental trauma. In other words, the dissenting opinion argues that any family register correction of the gender of a transsexual should not be permitted, but it is hard to understand as well.

First, if only reviewing the example taken by the dissenting opinion, whether the transsexual was married or has children or not should be deemed as only a part of many elements that determine if the person can be recognized by ordinary social norms as a person with a changed gender. So the court should decide whether to permit the correction of transsexual's family register or not, after considering all other situations. As seen below in the legislative examples of the foreign countries that seek legislative solutions to gender changes of transsexuals, for instance Article 8 (1) Item 2 of the Transsexualism Act of Germany, only requires the applicant to be not married at time of the application for a gender change and does not care if the applicant had children during the previous gender. But Article 3 (1) of Japan's Act on Special Cases in Treating Gender of a Person with a Gender Identity Disorder requires the applicant to be not married without children at time of application. So the matter of whether to permit the correction of a transsexual's gender depending on the marital status or children details is up to the legislative power (So, it remains within the scope of the legislative discretion whether to permit a transsexual to change the gender or not according to whether he or she is married or has children or not). Therefore, it cannot be singled out that being married or having children is a reason for not permitting a transsexual to change the family register, as argued by the dissenting opinion, because currently there is no clear legislation on the issue. In consideration of many other situations, if a person, even married or with children, can be viewed as a true transsexual, a family register correction can be permitted, and in the opposing case, a family register correction may not be permitted (if the above viewpoint of the dissenting opinion comes from understanding the Majority Opinion, "if a transsexual is accepted by people around him or her as the changed gender, and gets socially approved with the changed gender because it does not cause a serious change to the relations with other people or have negative effect on the society, a gender change to the new gender should be permitted" as meaning that a transsexual can only be permitted to change the family register "when the person does not cause a serious change to the relations with other people or have negative effect on the society," the purport has been misconceived. The Majority Opinion does not intend to set the above circumstance as one of the conditions for dismissal of a transsexual's application, but to state that if a person is confirmed to be a true transsexual and a family register correction would only have limited effect on the status relationship for the future without causing a serious change to the relations with other people, then that person should be permitted to correct the family register).

Moreover, the Majority Opinion does not intend to state that anybody who receives a gender reassignment surgery should be permitted to correct their family register without restrictions. So what is important is whether a person who received a gender reassignment surgery can be considered as a true transsexual or not, and if a person misjudges himself as having transsexualism although he actually does not, receives a gender reassignment surgery, and the court judges him as not being a true transsexual and does not permit the correction of his family register, it should rather be understood

as the result of a fair legal judgment, and it should not be a justifiable reason to reject even true transsexuals from correcting their family registers, only because such result could traumatize people who received gender reassignment surgery.

G. Generally, to correct the gender of a transsexual on the family register, medical criteria such as the period of having transsexualism, suitability of the gender reassignment surgery, and possibility of returning to the previous gender in the future and legal criteria such as whether the person was legally married as the previous gender, whether the person has children, and what is the minimum age that can apply for the correction need to be clearly defined and applied, so all issues concerning the medical and legal criteria for a transsexual to correct the gender, and the procedure and effect, should most desirably be resolved legislatively through an eventual enactment or amendment of law, and the Majority Opinion obviously agrees with the opposing opinion that for a court to decide whether to permit a transsexual to correct the gender on a case-by-case basis, where there is no legislative measure, is not a sufficient protection for transsexuals.

In the cases of other foreign countries, for instance in Europe, a transsexual did not used to be permitted to change the gender; but almost all European countries currently permit such change through legislation or precedents. In particular, since the Federal Constitution Court precedent in 1978, Germany enacted a law that recognizes gender changes of transsexuals in 1981. It is also noteworthy that the European Human Rights Court reached a unanimous decision to recognize gender changes in 2002. Many states of the United States also have legislation that permits such change. In the case of Japan, lower courts used to have contradicting decisions, but now it is permitted through legislation (the Act on Special Cases in Treating Gender of a Person with a Gender Identity Disorder, which was enacted in 2003 and took effect on July 16, 2004).

In summary, it is the global trend to permit a transsexual to change the legal gender into the opposite one discarding the gender at the time of birth and such trend is gaining persuasiveness in the aspect of legal reasoning.

I am certain that it is not just our court's expectations and hope that Korea should follow such trend by preparing legislative measures so that the rights of transsexuals can be salvaged within the framework of legal stability.

But that does not mean that I agree with the dissenting opinion that the court should not seek any measure to protect transsexuals who suffer from the sexual statement on the family register but should wait until there is legislative actions, on the reason that permitting transsexuals to correct the family register while there are no regulations on the related procedure to correct the sex on the family register is not a proper measure to salvage transsexuals and could rather cause side effects.

It goes without saying that it is ideal to establish legislative regulations on the procedures concerning the gender correction of a transsexual, but as it is currently hard to expect any form of visible legislative actions, it would be the best choice not to let the unconstitutional situation continue with the complete legislative loopholes but for the court to examine the specific and individual cases and permit confirmed true transsexuals to correct their family registers.

H. Therefore, the application to correct the family register in this case, as the applicant is viewed as a transsexual male by ordinary social norms, should be permitted, and I hereby express my supplementary opinion to the Majority Opinions.

Chief Justice Lee Yong-hoon (Presiding Justice)

Justices Kang Shin-wook

Lee Kang-kook

Son Ji-yol

Park Jae-yoon

Koh Hyun-chul

Kim Young-ran

Yang Seung-tae

Park Si-hwan

Kim Ji-hyung (Justice in charge)