existing, it is appropriate that, even where reexamination of the original petition is necessary, the Supreme Court requires the third party to join in the action as a first step to revisiting res judicata.

(April 28, 2016)

2. Supreme Court judgement on the constitutionality of Article 750 of the Civil Code, which requires a husband and wife to adopt the surname of either spouse at the time of marriage.
Supreme Court Grand Bench, December 16, 2015, 69 (8) MINSHU 2586

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1. Introduction

On final appeal in this case, the appellants alleged that Article 750 of the Civil Code, stipulating that "a husband and wife shall adopt the surname of the husband or wife" at the time of their marriage (hereinafter referred to as "the Provision"), breached the Constitution.

Since Japan has no way to ask the court directly whether a statute is unconstitutional, the claimants sought damages against the state under Article 1, paragraph (1), of the State Redress Act. Their claim is that the state failed to take legislative measures to amend or abolish the Provision, and this must be illegal under the Act.

This article provides the outline of the facts and the summary of the judgement. Then it shows the background of the case and makes a brief commentary about the judgement.

2. Outline of the facts

Under the Provision, a couple is not allowed to marry if they do not choose a surname from the surname of either of them. The form for

notification of marriage requires them to check off the box for husband's surname or wife's surname, to decide which name will be used after their marriage. Two of the claimants in this case tried to submit the notification of marriage without checking either of the boxes, and this was not accepted. The other three were already married and had adopted the husband's surname at the time of their marriage. However, they have continued to use their original surnames informally in their social life.

The appellants claimed that, because the Provision violated Article 13 and Article 24 of the Constitution and the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the law should be reformed to let a couple marry without changing their surnames and to let a couple use their original surnames lawfully in their public life. The lack of exceptions to the same-surname system is not reasonable, and thus this system goes beyond the scope of the legislative discretion. The Diet has failed to take legislative measures for a long period of time without legitimate grounds, so this legislative inaction should be assessed as illegal in the context of the application of Article 1, paragraph (1), of the State Redress Act.

Tokyo District Court denied their claim because it did not find that Article 13 of the Constitution, which guarantees personal rights, covers the right of couples to use their original surnames after marriage. Similarly, Tokyo High Court dismissed the appeal on the grounds that "freedom from being forced to change one's surname" has not yet been recognized as a personal right guaranteed by the Constitution. Moreover, said the High Court, freedom to marry without any restriction is not guaranteed by Article 24 of the Constitution, which states: "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."

The claimants' arguments on final appeal were: ① The Provision unreasonably infringes "freedom from being forced to change one's surname," which is a part of personal rights, and violates Article 13 of the Constitution; ② More than 96 percent of all married couples choose the husband's surname and this has a negative impact almost exclusively on women, which means that the Provision creates gender discrimination and violates Article 14, paragraph (1), of the Constitution; ③ The Provision substantively infringes on freedom to marry and undermines individual

dignity, so that it violates Article 24 of the Constitution; and ④ The Diet failed to construe the CEDAW properly, thus breaching Article 98, paragraph (2), of the Constitution.

This case attracted wide attention because it was the first case for the Supreme Court to consider whether the Provision is constitutional.

3. The Supreme Court judgement

The Court ruled against the appellants, ten to five. It is notable that all three female judges (Justice OKABE, Justice SAKURA and Justice ONIMARU) concluded that the Provision was unconstitutional.

The majority opinion is summarized as follows.

(1) Regarding Article 13 of the Constitution

Surnames are regulated by the law as part of the legal system concerning marriage and family. Accordingly, the personal right to a surname should be understood on the basis of a legal system that is established in line with the spirit of the Constitution. It is inappropriate to discuss this proposition—that one's surname being changed infringes personal rights and violates the Constitution—without taking into consideration the specific legal system.

A "surname has a meaning, separately from a given name, as an appellation for a family, which is a constituent of society. …Since a family is a natural and fundamental unit of persons in society, it may be reasonable to determine a single surname, which forms part of an appellation for an individual, as an appellation that is connected with the unit to which the individual belongs."

"The situation discussed in this case is one where either a husband or wife changes his/her surname upon choosing to change his/her personal status by marriage at his/her will, and in such situation, neither of them is forced to change his/her surname against his/her will."

"A surname…as an appellation for a family, …one could say that it is contemplated from its nature that a surname would reflect a certain personal status such as a parent-child relationship and could possibly be changed along with a change in the personal status, such as marriage."

In light of factors including the nature of a surname under the current legal system as explained above, "freedom from being forced to change one's surname" at the time of marriage cannot be regarded as part of

personal rights that are guaranteed as constitutional rights. The Provision does not violate Article 13 of the Constitution.

(2) Regarding Article 14 of the Constitution

The Provision "literally does not prescribe discriminatory treatment by law based on gender, nor does the same surname system prescribed in the provision, which requires a married couple to use the same surname, involve in itself gender inequality in form. Although it is found that the overwhelming majority of married couples in Japan choose the husband's surname through the discussions between the persons who are to marry, this cannot be regarded as the consequence arising directly from the substance of the Provision. Consequently, it does not violate Article 14 paragraph (1) of the Constitution."

(3) Regarding Article 24 of the Constitution

Article 24, paragraph (1), of the Constitution is "interpreted as clearly stipulating that matters such as whether to marry or not, and whom and when to marry should be left to the decisions made by the parties freely and equally." The Provision stipulates only an effect of marriage and does not prescribe any direct restriction on marriage. Even if persons choose not to marry because they do not agree with the legal system concerning marriage and the family, it cannot be regarded that the Provision imposes a restriction on marriage in a way of ignoring the purpose of Article 24, paragraph (1), of the Constitution.

Article 24, paragraph (2), of the Constitution provides that the laws concerning to the matters of marriage and the family "shall be enacted from the standpoint of individual dignity and the essential equality of the sexes." It leaves primarily to the Diet's reasonable legislative discretion to establish specific systems.

The legal system requiring a married couple to use the same surname was introduced in 1898 under the Former Civil Code (Act No. 9 of 1898, amended by Act No. 222 of 1947). Since then, this system has been established in Japanese society. "As mentioned above, a surname has a meaning as an appellation for a family, and under the current Civil Code, a family is regarded as a natural and fundamental unit of persons in society and it is therefore found to be reasonable to determine a single appellation for each family."

"A husband and wife, by using the same surname, publicly indicate to

others that they are members of one unit, i.e., a family, and this functions to distinguish them from others. In particular, as an important effect of marriage, a child born to a married couple shall be a legitimate child who is subject to joint parental authority exercised by the husband and wife, and it may be meaningful to some extent to secure a framework wherein such a child uses the same surname as that used by his/her parents in order to show his/her status as a legitimate child. It may also be understandable that one would find it meaningful for individuals who form a family to feel that they are members of one unit by using the same surname. Furthermore, under the same surname system, a child would be able to benefit more easily from using the same surname as that used by his/her parents."

"On the other hand, it cannot be denied that a person who is to change his/her surname would feel a loss of identity or suffer disadvantages. … Moreover there is a fact that some couples choose not to marry to avoid these disadvantages. However, recently it has become popular to use a pre-marriage surname as a by-name, and this can reduce such disadvantages to some degree."

Taking all these points into consideration, the same-surname system introduced by the Provision "cannot be found to be unreasonable immediately in light of the requirement of individual dignity and the essential equality of the sexes. Consequently, the Provision does not violate Article 24 of the Constitution."

As the appellants claim, there could be other systems, such as an optional separate-surname system allowing a married couple to use separate surnames if they choose. However, which system to adopt is must be discussed and determined by the Diet.

4. Discussion

(1) Background of the judgement

As the court said, the same-surname system has been established in Japanese society since the Former Civil Code was enacted in 1898. However, discussions to repeal the system started as early as the late 1940s. In fact, the same-surname system, as introduced by the Former Civil Code, was not only for the spouses but also for the other members of the household-the so-called "IE". IE had to had one surname and the one

who belonged to the IE had to use the IE's name. Only the family members could belong to the same IE, and it was prohibited to use other than the IE's surnames. In those days, the individual surname is not separated from IE's surname. So for example, when a person moved one IE to another IE due to the marriage, then his/her surname changed to the new IE's name.

Now, this IE system no longer exists. Because it delegated great power to the head of the household, who was typically male, the other family members were always exposed to the risk of abuse of the head's power. Under this system, spouses were not equal and individual dignity was not guaranteed. After World War Ⅱ, Japan decided to abolish this notorious IE system. Accordingly, arguments were put forward in the Legislative Council to abolish the same-surname system as well. From back then, there have been strong opinions expressed to introduce separate surnames for married couples. Although the Provision ended up as part of the current Civil Code, the surname is not the IE's name anymore. In the academic field at least, there is no dispute that a surname has become just an appellation for an individual, apart from a household's name.

From the 1970s, as the opportunities of women have gradually expanded, the problem of the same-surname system has become widely known to the public. Some couples began to use original surnames as bynames or abandon marriage to avoid the effect of the Provision. In the late 1980s, a spouse appeared who sought court permission to submit the notification of marriage lawfully without choosing a single surname; this ended unsuccessfully. Finally, in 1996, the Legislative Council as well proposed that the Provision be reformed to allow spouses to choose separate surnames. However, this attempt too failed, and the provision is still valid after 20 years.

These were the circumstances under which this case was brought to the Supreme Court for the first time. People who desired the law reform had high expectations for the Court. They expected that the Court might make a decision as liberal as one it made two years earlier, in 2013. In that decision, the Court held that the Provision stipulating that "the share in inheritance of a child out of wedlock shall be one-half of the share in inheritance of a child in wedlock" infringed Article 14, paragraph (1), of the Constitution (Supreme Court, Grand Bench, September 4th, 2013, 67

(6) Minshu 1320). It seemed that the Court was trying to reflect the changes in the relationship of the family to the law, and this was true to some extent. On the same date that the case discussed herein was determined, the Court held that the part of the Article 733(1) of the Civil Code, prohibiting women from remarrying for a period over 100 days, had come to violate Article 14, paragraph (1), or Article 24, paragraph (2), of the Constitution (Supreme Court Grand Bench, December 16th, 2015, 69 (8) Minshu 2427). However, when it came to this case, the Court dismissed the claim from the people who desire the law reform.

Why did the Court reach such a conclusion? One possibility, it is said, is that if the Court had decided the Provision was unconstitutional, this would have caused some difficulties in practice. Until the Diet complete the law reform, it is unclear whether the local officer can accept the notification of marriage without placing a check mark in the surname box. If the form is accepted that way, then what will happen to the children's surname? Or rather, if the Provision is repealed, this may eliminate the grounds to accept a notification of marriage from a couple who want to use same surname as now. In this context, in a sense it is understandable that the Court would prefer to pass the problem to the Diet.

(2) Commentary

Even so, the Court mentioned some reasoning that are difficult to agree with. First, one of the reasons to reinforce its decision of non-violation of Article 13 of the Constitution is that the Provision does not force people to change their surname. Under the provision, the Court stated, neither a husband nor a wife is forced to change their surname against their will. It is a result and effect of their choice to marry. Therefore, if people want to keep their original surname, they may simply choose to remain unmarried.

However, under the current law system, this argument is difficult to accept. There is no alternative but to change one of the other surnames if couples want to marry. Effects brought about by marriage are too significant to ignore. For example, de facto married couples are not allowed to inherit each other's estate without a will, and they have to pay 20 percent extra tax to inherit, compared with legally married partners. Moreover, they are not qualified to get the spousal tax deduction. Nor are they allowed, at the time of separation, to gain a part of their partner's

employee pension. In addition, a child between legal married couple is called "legitimate child" whereas a child between de facto married couple is called "illegitimate child" or "child born out of wedlock". Indeed, after the judgement of the Supreme Court mentioned above (supra, 67(6) MINSHU 1320), one of the decisive differential treatments between these two types of child have eliminated, however there are still exist— i.e., the procedure to deny parent-child relationship.

To avoid these disadvantages or differences, a couple must select legal marriage and, to do so, one of them must change his/her surname. In this context, it is difficult to conclude that the Provision does not force people to change their surnames.

Second, the Court dismissed the claim, under Article 14 of the Constitution, that there is discrimination through gender inequality in form. Yet, even though the Provision does not literally prescribe discriminatory treatment based on gender, more than 96 percent of married couples choose the husband's surname. As the Court acknowledged, the one who has to change the surname "would feel a loss of identity due to the change of the surname or suffer disadvantages in that such change would make it difficult to maintain the person's credit, reputation, fame, etc., as an individual, which have been established through the use of his/her pre-marriage surname." Now, in almost all of the cases, wives are taking on these burdens. Thus, even though there is no discriminatory treatment in form, the Court should have considered this argument more thoroughly. "Substantive equality" is one of the most important requirement from the CEDAW; according to this treaty, it is not enough to guarantee "formal equality." Focusing on the bias seen above, the current same-surname system seems incompatible with this principle. It was disappointing for the appellants that the Court did not address this problem directly.

Third, in regard to reasonableness of the Provision, the Court was satisfied that it is sufficiently reasonable in accordance with the "individual dignity" and "the essential equality of the sexes," and thus the Legislature acted it within its discretion and the provision is constitutional. There are some questions that can be raised about this reasoning.

First, it was surprising when the Court explained that "since a family is a natural and fundamental unit of persons in society, it may be reasonable

to determine a single surname, which forms part of an appellation for an individual, as an appellation that is connected with the unit to which the individual belongs." This way of thinking should have been abandoned in the law reform of the late 1940s. A surname is supposed to be no more than an appellation of individual. Indeed, in most families, the members have a shared surname; however, this is just a result of adopting the same-surname rule not only for spouses, but also for parent and child. These are separate rules; and, unlike the rule of same surname for spouses, there is an exception to the rule for parent and child. For example, when a mother remarries and decides to use her new husband's surname, she must take a special procedure to change her child's surname as well. If that step is not taken, then family members will have separate surnames even though they are living together. Although they have different surnames, they indeed belong to the same family unit. At least in this case, it is hard to describe a surname as "an appellation that is connected with the unit to which the individual belongs." Therefore, to explain the surname's function as intended for the appellation of the unit where the individual belongs does not seem sufficient to prove that the Provision is reasonable.

Second, the Court corroborates its assertion about the reasonableness of the same-surname system by using the example of a legitimate child, which one can hardly accept. A legitimate child under Japanese law is a child born to a married couple and distinguished from a child born out of wedlock. According to the Court, since one of the important effects of marriage is to create such a legal relationship between father and child, it may be meaningful to secure a same-surname framework for a parent and child "in order to show his/her status as a legitimate child." However, this decision seems incompatible with other recent Supreme Court judgements. As mentioned above, in a recent prior case, the Court decided that the provision distinguishing the share in inheritance between legitimate and illegitimate children was unconstitutional. In that decision, the Court explained that "even if the legal marriage system itself is entrenched in Japan, it is now impermissible…to cause prejudice to children by reason of the fact that their mother and father were not in a legal marriage when they were born -a matter that the children themselves had no choice or chance to correct. Rather, it can be said that a notion that all children must be given respect as individuals and that their rights must

be protected has been established" (supra, 67(6) MINSHU 1320 at 1330). The Court reached that decision on the ground that the recognition of society has changed to respect for "individuals" in the family. Compare that to the same-surname judgement, where the Court's decision seems to putting much more value on the unit than the individual. In the context of the current trend of promoting less distinctive treatment between legitimate and illegitimate children, is it necessary to show their legal relationship explicitly to others by using the function of surname? Without depending on such a function of surname, the legal relationship can be found in a family registration. Is the reasonableness of single appellation, which shows that the family members belong to the same "unit," so absolute that it may not allow any exceptions? These questions are not answered enough through the judgement.

Finally, let us look at the discussion about a byname. The majority opinion says that the use of a byname may "mitigate serious disadvantages that people would suffer from being forced to change their surname upon marriage"; thus, the current law does not necessarily need reform. However, using a byname is not a perfect way to resolve the problem. As Justice Okabe suggests in her opinion, there is no rule about a byname and thus it is unclear when and to what extent its use will be allowed; also, it may "raise a new question as to the identity between the byname and the name on the family register." Here the explanation of the majority opinion seems to lose its coherence. If a husband and wife can use a different surname through use of a byname, then what is the reasonableness of forcing spouses to use the same surname under the Provision? What happens to the importance of "publicly indicate to others that they are members of one unit" and having "functions to distinguish them from others"?

5. Conclusion

As seen above, even if there is a ground for the Court to pass the problem to the Diet, we can point out some questions about its reasoning. Unlike other problems about family law, we in Japan seldom refer to foreign countries' law in regard to the surname system. This is because surnames are treated as a unique system connected to the family registration system. However, we should no longer avoid thinking of the

advice from the United Nations Committee on Elimination of Discrimination Against Women—i.e., that the Provision is incompatible with the CEDAW. Almost all of the countries that once had a same-surname requirement for spouses have changed the law so that couples can select separate surnames as well. Of course, we should carefully look at the background of the system in our country, but it is also important to know of the arguments put forth in those foreign countries and see how the law reforms were made. The discussion should continue until the law is reformed in Japan.

*The English translation of the judgement is available on the web site of the Supreme Court of Japan,
http://www.courts.go.jp/app/hanrei_en/detail?id=1435>[2017/3/1].

(March 28, 2017)

3. The case in which a part of Article 733(1) of the Civil Code, stipulating a prohibition period for remarriage specific to women, was ruled as unconstitutional. Final ruling on December 16, 2015 Supreme Court Civil Casebook (Minshu), Vol. 69, No. 8, p. 2427

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On December 16, 2015, the Supreme Court judged the constitutionality of two provisions of the Civil Code. One judgment, which will be addressed here, was that Article 733(1) of the Civil Code violates the Constitution; the other judgment was that Article 750 of the Civil Code, which stipulates that spouses must make their surnames the same upon marriage, does not violate the Constitution.(※Please see the article above for details of this latter judgment.)