Journal of Korean Law | Vol. 18, 59-81, December 2018

Why does Surname Matter? Past, Present, and Future Prospect of Family Law from a Gender Perspective in Japan*

*Kyoko Ishida***

Abstract

On December 16, 2015, the Supreme Court Grand Bench of Japan ruled on constitutionality of a single surname system among married couples for the first time. The court ruled that it is *constitutional even though it is typically the woman (wife) – 96% in 2015 – who gives up her maiden surname and changes it to the man's (husband's) surname in the family registry. Accordingly, Japan is still a unique modern state in that its national law obliges a married couple to have a single surname, even now in 2018. In this article, I discuss the history of Japanese law governing surnames after the Meiji Restoration in 1868, amendment of and deliberation on the single surname rule by 2018, and the Supreme Court Judgment on the constitutionality of enforcing the single surname rule for married couples. I argue that "the value of Japanese family" has systematically oppressed women's status for a long time since modernization, and the single surname rule has effectively worked as a tool to enforce this mechanism. However, currently people's attitude toward introduction of selective different surname system seems to be changing, and more people support introduction of this system. This may trigger to increase the number of people who doubt the reasonableness of current single surname system with no exception. Continuous effort to educate people – from elementary school to leadership positions – is necessary in order to make the Diet to finally introduce a selective different surname system in the future.*

* This paper is based on the manuscript I presented at the international conference "'Surname Issues' in Emerging Feminist Jurisprudence in East Asia" supported and organized by Asia-Pacific Law Institute and Institute for Gender Research at Seoul National University (Seoul, Korea) on November 24, 2017. I would like to thank Professor Hyunah Yang (Director, Institute for Gender Research) who practically organized this conference, presenters and discussants, Professor Chao-ju Chen at National Taiwan University, Judge Seung-Yi. Oh at Inchon District Court, Professor Eun-kyung Bae at Seoul National University, Professor Yang-Hee Hong at Hanyang University, and Ms. Hong Chan-sook at the Institute for Gender Research, and those who supported administration of the conference. I was privileged to receive many fruitful comments and advice at the conference. The author owes the whole responsibility as to any mistake that may be included in this work.

** Associate Professor, Waseda Law School

KEY WORDS: Japan, Gender, Surname, Family Law, Japanese History

Manuscript received: October 21, 2018; review completed: November 15, 2018; accepted: November 28, 2018.

I. Introduction

Japan is a unique modern state in that its national law obliges a married couple to have a single surname, even now in 2018. Typically, it is the woman (wife) —96% in 2015— who gives up her original surname and changes it to her husband's surname in the family registry,[1] which imposes on her huge burdens both emotionally and practically. On December 16, 2015, the Supreme Court Grand Bench heard the first constitutional case on whether this single surname rule for married couples violated Articles 13 (the right to pursue happiness), 14 (equality under the law), and 24 (the equal rights of husband and wife) of the Constitution of Japan.[2] While all three female justices and two of the male justices wrote dissenting opinions, the majority, who were all male, ruled that the law was constitutional.[3] In

1) Ministry of Health, Labor, and Welfare, *Heisei 28 nendo Jinko Dotai Tokei Tokushu Hokoku Konin ni kansuru chosa gaikyo* (*Summary of Marriage Statistics from Specified Report of Vital Statistics in FY2016)(in Japanese*), available at: http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/tokusyu/konin16/dl/gaikyo.pdf (last accessed October 21, 2018).

2) Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2586 (Japan).

3) English version of this judgment is available at the website of Supreme Court Japan at http://www.courts.go.jp/english/ (last visited October 21, 2018). On the same day, the Supreme Court also ruled on another important gender issue in the Constitution; the marital moratorium for only women after divorce. Under former Article 733 of the Civil Code, women were prohibited from remarriage after divorce for 180 days whereas there was no such prohibition against men. As to this point, the Supreme Court ruled that "the part of the provision of Article 733, paragraph (1) of the Civil Code, which prohibits women from remarrying for a period exceeding 100 days, had come to violate Article 14, paragraph (1) and Article 24, paragraph (2) of the Constitution." Accordingly, Article 733 is revised and now the prohibition period was shortened into 100 days and the prohibition is not applied when the divorced woman is not pregnant. There are several comments about these decisions in English, *see, e.g.*, Koji Higashikawa, *Tying the Knot with a Surname? The Constituinality of Japan's Law Requiring a Same Marital Name*, 7 ConLawNOW 51 (2015); di Sara De Vido, *Women's*

this article, I discuss the history of Japanese law governing surnames after Meiji Restoration in 1868, the discussion to introduce a selective different surname system, and the Supreme Court Judgment on the constitutionality of enforcing the single surname rule for married couples. Through the discussion below, it is obvious that "the value of Japanese family" has systematically oppressed women's status for a long time since modernization. The single surname system has been a powerful tool to maintain this system. In order to remove this systematic oppression against women in Japanese society, we need first to increase the number of people who doubt the reasonableness of the current system, and thereby push the Diet to introduce the selective different surname system for married couples..

II. Brief History of Law Governing Surnames in Japan

1. Implementation of the First Modernized Family Law – Establishment of the IE System

The modern legal system in Japan began with the Meiji Restoration of 1868. In 1889, the Meiji Constitution was promulgated. Although the old class distinctions (warriors, farmers, artisans and tradesmen in descending order of rank) were abandoned and all citizens were given equal educational opportunity, the legal status of men and women was clearly distinguished at that time.[4] For example, civil rights, including the right to vote, were not granted to women. Although the political campaign for female enfranchisement became active during the 1920s, it was only after WWII that Japanese women obtained an equal legal status with men and allowed to vote. It is notable that the modern institutional regime of Japan started with the legal and systematic subordination of women to men.

Human Rights in Japan:Two Recent National Judgments Under the Lens of International Law, FEDERALISMI.IT – FOCUS HUMAN RIGHTS, n.2, 2016 (2016); Yoichiro Tsuji, *Decisions That Declared Laws Unconstitutional and Their Impact on Japanese Families*, J. Int'l & Comp. L. 139 (2017).

4) As to the status of Japanese women at that age, *see,*Hiroko Tomida, *The Association of New Women and its Contribution to the Japanese Women's Movement*, 17(1) JAPAN F. 49, 49-51 (2005).

As to the legal regulation about the surname system, it was the year of 1870 that the government issued the Order Allowing Ordinary People to Have a Surname (*Heimin Myōji Kyoyōrei*) for the first time.[5] Until that time, surnames were only allowed among the privileged class (i.e., *samurai* (warrior) class) as a general rule. To strengthen the authority of central government, especially for the military draft, all citizens were forced to adopt a surname in 1875.[6] However, the government policy in 1870s was not so clear with regard to a married couple's surname. There is a record that Ishikawa Prefecture made an inquiry to the Home Ministry whether the married woman should change her surname to her husband surname or maintain her maiden surname.[7] Then the Home Minister could not answer the inquiry by itself and referred to the Grand Council of State. Before modernization, there was a long history among those allowed surnames for the wife to retain her maiden name even after she married.[8] Accordingly, to avoid social confusion, the Grand Council of State (*dajōkan*) responded to the inquiry from the prefecture in 1876 that married couples should maintain their original surnames.[9] Namely, at the very beginning of the legal system that enforced all citizens to have a surname, the government first choose the system that both husband and wife maintain their original surnames even after marriage.

This government policy was officially overturned in 1898 by the Meiji Civil Code, although, interestingly, there was no specific provision for married couples' surnames as it exists in the current Civil Code. However, the Meiji Civil Code established the *IE* (family) system (家制度), in which the *ko-shu* (householder) (戸主) was the head of the family, whose members included his spouse, blood relations, and relatives by marriage.[10] The Code stipulated that "The head and all members of the household use the surname of its family," namely, the head's (householder's) surname.[11]

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5) Dajokan Fukoku [Grand Council Proclamations] 1870, No. 608 (Japan).

6) Dajokan Fukoku [Grand Council Proclamations] 1875, No. 22 (Japan).

7) Hirofumi Itoda, *Fufu no Uji o Kangaeru* [Thinking about the surname of married couples]. *Sekai shisōsha*, 2004, 52.

8) Itoda, *supra* note 7, 50.

9) Dajokan Shirei [The Directive of Grand Council of State] Mar. 17, 1876 (Japan).

10) Minpō [Civ.C.], Law No. 9 of 1898, art. 746, para. 1 (Japan).

11) Minpō [Civ.C.], Law No. 9 of 1898, art. 746, para. 2 (Japan).

Here, the surname became the umbrella term for all household members, or the family unit. In addition, the Meiji Civil Code provides that once a woman married, she becomes legally incompetent to do important juristic acts such as trading real property or forming contract.[12] A wife was supposed to "enter into" the household of her husband (*tsuma wa kon'in ni yorite otto no ie ni hairu*) and become a belonging of her husband.[13] Accordingly, once a woman married, she became a part of her husband's family unit and was forced to change her surname into her husband's surname. This was the origin for the modern Japanese legal system enforcing a single surname for married couples.

The householder was the head of the family, reflecting a patriarchal structure, in which the head decided on family members' marriage, residence, and membership. Generally, the householder was a man (born inside wedlock, namely "*chakushutsu*" (legitimate) in Japanese), who was succeeded by his eldest son. Under the Code's provisions on family, there was a term called *Fu-ken* (the right of the father or household) (父権), so the father's right controlled everything in the household. It was natural that, once married, a woman became unfit to perform such legal undertakings as the disposition of property by herself without consent of her husband.[14] It was supposed that a woman's role was to bear and raise a son to become the successor of the householder. It was symbolic that adultery (sexual intercourse outside of marriage) was penalized, as a general rule, only when committed by women.[15] This was because women were treated as their husband's property, and adultery committed by a man – regardless of whether he was married or not – was regarded as illegal only when the woman he had an affair was married – i.e., that man infringed the property of *her* husband.

It is important to note, however, that under the prewar regime the order of the *IE* system prevailed over the order of gender. When there was no

12) Minpō [Civ.C.], Law No. 9 of 1898, art. 14 (Japan).

13) Minpō [Civ.C.], Law No. 9 of 1898, art. 788, para. 1 (Japan).

14) Minpō [Civ.C.], Law No. 9 of 1898, art. 14-18 (Japan). This rule also contributed to extremely small number of female lawyers and no female judges and prosecutors before the end of WWII.

15) Keihō [Pen. C.], No. 36 of 1880, Article 353.

male successor, a woman could be a householder, and once that happened, all family members including men had to obey the female householder; the *IE* system could thus oppress not only women but also men for the sake of the family as a collective entity.[16)]

Nonetheless, it is fair to say that the prewar legal system, which Japan adopted as a symbol of modernization for the first time, authorized the unequal treatment of men and women. People's mindset about the gender order, in which men controlled women, was also created by the implementation of such a legal system. The single surname rule for married couples was also introduced along the same lines — the wife becomes part of her husband's family unit by changing her surname to her husband's one, being subordinated by her husband.

2. *The End of World War II and Adoption of the New Constitution*

After WWII, a new Constitution was adopted in 1947, which provided the right to pursue happiness in Article 13, equality under law in Article 14, and equal rights of husband and wife under marriage in Article 24.[17)] Notably, Paragraph 2 of Article 24 states that "with regard to the choice of

16) Japan was supposed to be one big family under this regime, mythologizing the Emperor as the living god (*arahito gami*). Meiji Constitution of 1889 provided that "the Empire of Japan is ruled by emperors from the unbroken Imperial Family" (Article 1) and "the Emperor is the head of state of the country, and controls the right to rule depended on the articles of this Constitution" (Article 4).

17) Nihonkoku Kenpō [Kenpō] [Constitution], art.13, 14, 24. Articles 13, 14, and 24 of the Constitution state respectively as follows:

> Article 13. All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.
>
> Article 14. All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.
>
> Article 24. 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.
>
> With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertai14.ning to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

spouse, property rights, inheritance, choice of residence, divorce, and other matters pertaining to marriage and the family, *laws shall be enacted from the standpoint of individual dignity and the essential equality of both sexes*" (emphasis added by the author).

Accordingly, the government rushed to amend family laws that were incompatible with the concept of the new Constitution. In December 1947, the current family law (the Civil Code Book IV and V) was established, abolishing the household system. The government, however, maintained the family registry system (*koseki*) (戸籍制度). Article 750 of the Civil Code (Act No. 89 of 1896) states that "a husband and wife shall adopt either the husband's or wife's surname in accordance with what is decided at the time of marriage." A legally married couple then establishes a new family registry. The Family Register Act states that "a family register shall be created for each unit consisting of a husband and wife, and any children thereof with the same surname."[18] Thus, a married couple with their unmarried children is the family unit, and all members must have the same surname, which is called the principle of the same surname within the same family registry. Although the *IE* system was abolished, the link between surname and the family registry was even strengthened because it is still the surname that is the umbrella of the registered family unit which is the basis of almost all administration of government welfare system, private sector's benefit program and social activities of Japanese people.[19]

18) Kosekiho [Family Register Act], Act No. 224 of 1947, art. 6.

19) Yuko Inufushi, *Fufuno uji ni kansuru minpokaisei – fufu douji no gensoku kara sentakuteki fufu besseie* [Amendment of the Civil Code regarding the surname of married couples – From the principle of single surname to selective different surname], Nihon bengoshi rengokai ed., *Kongaishi Sentakuteki Fufubessei o kangaeru*, (2011), 31.

III. Amendment of and Deliberation on the Single Surname Rule: the long-shelved bill to amend the Single Surname Rule

1. 1976 Amendment of the law governing married couples' surname

There has been one amendment made to the surname rule since the current family law was established: an amendment regarding the surname of divorced couples in 1976. Under the original scheme, when a marital relationship ended due to death of one spouse, the surviving spouse could choose whether to retain their current surname or revert to using the one before they married.[20] However, Article 767 provided that "in the case of divorce by an agreement, the surname of a husband or wife who has taken a new name by marriage shall revert to the surname used before their marriage."[21] As already stated, since it was the wife who changed her legal surname for most of married couples, it was the woman who had to revert to her maiden name after divorce. This put a tremendous burden on divorced women: for example, in the workplace, she had to virtually "announce" that she had divorced through changing her surname again even though her ex-husband did not need to owe such an administrative and psychological burden and could maintain his privacy. Or sometimes the child who was in custody of a divorced mother maintained her ex-husband's surname. Then the mother and her child had a different surname, which created various social difficulty for the mother and the child in a society that maintained the principle of "the single surname for a family unit." Accordingly, in order to improve the status of divorced women after the action plan at the UN Decade for Women was adopted in 1975, an amendment of the Civil Code was made in order to allow divorced women to continuously use their ex-husband's surname after the time of divorce by submitting a notification pursuant to the Family Registration

20) Minpō [Civ.C.], Act No. 89 of 1896, art. 750, para. 1; Kosekiho [Family Register Act], Act No. 224 of 1947, art. 95.

21) Minpō [Civ.C.], Act No. 89 of 1896, art. 771, art. 767, para. 1

Act within three months of the divorce.[22] Although this resolved the practical problems that divorced women typically faced, it was notable that it did not change the principle that a person's surname must revert upon divorce—the amendment simply allowed the *use* of their surname at the time of divorce.

2. *Deliberation and proposal to introduce a selective different surname system*

Deliberation by the government on the different surname rule for married couples began in the 1990s.[23] In 1991, the Legislative Council of the Ministry of Justice started a Study for Amendment of the Whole Marriage and Divorce System (*Kon'in oyobi rikonseido zenpan no minaoshi no tameno kentōsagyō*). Its subcommittee published an interim report in 1992 that raised the issue of whether the current law should be maintained or amended so that married couples could have different surnames.

Finally, the Civil Law Division of the Legislative Council submitted an outline of proposed bill called "Proposal to Amend a Part of the Civil Code" to the Minister of Justice in 1996.[24] This bill included an amendment to Article 750 that proposed: (1) a married couple should be able to choose to either share a single surname or keep different surnames, and (2) if the couple decided to retain their own surnames respectively, they should agree at the time of their marriage on which surname should be used for

22) Minpō [Civ.C.], Act No. 89 of 1896, art. 771, art. 767, para. 2. As to the background discussion regarding this amendment, *see,* Kashimi Kawaguchi, *Kojin no sonchō to fūfu no uji* (Respecting individuals and the surname of married couples), 101 The Waseda study of politics and public law 1-2 (2013).

23) *See,* Inufushi, *supra* note 15, 35. *See also,* Shin Ki-yong, *The personal is the political: Women's surname change in Japan,* 8.1 J. Kor. L. 161, 176-178 (2008).

24) This proposal is available even today (Japanese only): http://www.moj.go.jp/shingi1/shingi_960226-1.html (last visited October 21, 2018). It is notable to state that this proposal by the Legislative Council included not only introduction of the different surname system for married couples, but also equal distribution of inheritance among legitimate and illegitimate child. As to legal discrimination of illegitimate child, the Supreme Court finally overruled its 1995 Grand Bench decision in 2013 and decided that former Article 900, item (4), providing that division of inheritance for an illegitimate child shall be half of the legitimate child, was unconstitutional under Article 14 of the Constitution of Japan which provides equality under the law.

their children. The Council provided three reasons for this proposal: (1) people's values had diversified, and many people wished to keep different surnames upon marriage; (2) the law should protect a person's right over their own surname; and (3) many foreign countries allowed married couples to keep different surnames without violating the essential value of the spousal and parent–child relationship.[25)]

However, the bill has been shelved for over twenty years. On publication of the bill, many conservative groups opposed the amendment to the single surname rule, alleging that different surnames within a family unit violated the harmony of family life, or even destroyed the "traditional value of the Japanese family.[26)]" When the Democratic Party won the election to become the ruling party in 2009, despite proposing legislation on the selective surname system for married couples in its manifesto, it could not even

25) Inufushi, *supra* note 20, 35.

26) For example, in the 173th Session of House of Councilor in 2009, two petitions were submitted that opposed to introduction to the different surname system by members of Liberal Democratic Party. One of which stated as follows:

> The Minister of Justice and the Minister of Gender Equality expressed their desire to submit to the ordinary Diet session a bill to revise the Civil Code, for the purpose of introducing the selective different surname system for married couples. However, public opinion on this issue is divided, and national consensus has not yet been reached. Today, family relations (Kizuna) are diluted such as by increase in divorce and child abuse, in addition to changes in the environment surrounding families such as a decrease in cohabitation of three generations. The national sentiment that respects the values of traditional families is also insisted. Originally, the Civil Code is a fundamental legal system for protecting families, protecting couples' relationships, parent-child relationship, etc. so that a stable family life can be carried out. If a different surname system for married couples is introduced, it will lead to a dilution of the sense of unity of the married couple and lead to the formation of a social system that makes divorce easy. Furthermore, it can result in allowing different surnames between parent and child siblings, brothers and sisters, which could result in a scratch on the heart of such children. It could leave a big problem in the future of our country. While there are voices calling for the use of maiden name from some working women, there is no need to revise the Civil Code because it should be resolved by dealing with operational aspects of each field etc. Accordingly, in regard to partial revision of the Civil Code which allows to adopt different surnames for married couples selectively that have a serious effect on the marriage system and family structure, we urge you not to introduce it in a brief manner. (Petition by Ms.Haruko Arimura at Liberal Democratic Party, available at http://www.sangiin.go.jp/japanese/joho1/kousei/seigan/173/yousi/yo1730273.htm (last visited October 21, 2018), translated by the author).

submit the bill to the Diet for deliberation during its time in government.

IV. Supreme Court Judgment of December 6, 2015— Constitutionality of the Single Surname Rule for Married Couples

The following part discusses the Supreme Court Grand Bench Judgment on December 6, 2015, which ruled that the single surname system for married couples in the Civil Code is constitutional, including how the majority analyzed the current state and how the dissenting opinion argued for the party.

1. Background

Five parties were involved in this important case: three were legally married but used their maiden names; two, who were divorced by agreement but had retained their ex-husband's surname, had submitted notifications of a second marriage without choosing the surname they would use thereafter, which was not accepted by the local government. The plaintiffs argued that Article 750 of the Civil Code, which imposes to choose *one* surname upon marriage, violated Articles 13, 14, and 24 of the Constitution, and sought damages from the government under the State Redress Act on the grounds of illegality. This lawsuit was actually an administrative litigation against the national government claiming that it had failed to take legislative measures to amend Article 750 of the Civil Code in the twenty years since the Legislative Council had submitted the proposal for a bill to allow the selective different surname system for married couples.

The case was first filed at Tokyo District Court in 2011, which had dismissed the case in 2013. The plaintiff then appealed, but Tokyo High Court again dismissed the case in 2014. The case was finally brought before the Supreme Court, where the Grand Bench passed judgment in 2015.[27)]

27) All materials regarding this litigation are available on the internet (in Japanese only) at http://www.asahi-net.or.jp/~dv3m-ymsk/saibannews.html (last accessed October 21,

2. Ruling of the Supreme Court

The majority of the justices – ten justices out of fifteen, all male – ruled that Article 750 of the Civil Code was constitutional, giving their reasoning for each article as follows:[28)]

1) Constitutionality of Article 750 under Article 13 (Right to pursue happiness)

The Supreme Court ruled that Article 750 does not violate Article 13 of the Constitution, right to pursue happiness, based on the following reasons.

> A name, from the viewpoint of society, functions to identify an individual by distinguishing him/ her from others, and at the same time, from the viewpoint of the individual, it is the basis for a person to be respected as an individual and the symbol of his/her personality. In this respect, a person's name should be held to form part of personal rights (see 1983 (O) No. 1311, judgment of the Third Petty Bench of the Supreme Court of February 16, 1988, Minshū Vol. 42, No. 2, at 27).
>
> However, a surname forms part of the legal system concerning marriage and the family and its particulars are regulated by law. Accordingly, the particulars of the abovementioned personal rights concerning a surname should not be given a single constitutional meaning, but should be understood specifically only on the basis of a legal system that is to be established in line with the spirit of the Constitution.[29)]

2018). The Supreme Court of Japan is divided into three petty benches. However, it opens the Grand Bench when (1) the Supreme Court rules on constitutionality of particular provision of law or regulation for the first time, (2) the Supreme Court announces that particular provision of law or regulation is unconstitutional, or (3) when the Supreme Court changes the past case law. Article 10 of the Court Act (Law No. 59 of 1947).

28) Although the translation of judgment text is basically cited from the Supreme Court website, citation page hereinafter is based on the original Japanese text in the Case Law Reporter (*Minshū*) because English translation does not have page number.

29) SAIKŌ SAIBANSHO [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2586, 2589 (Japan).

While the Supreme Court admits that a person's name (surname plus first name) forms a personal right (*jinkaku ken*/人格権), following the past precedent, it rules that a *surname* forms part of the legal system; thus, it is not necessarily unreasonable if their surname needs to be changed according to law. The Supreme Court values the family as a social unit and rules that a surname was originally intended as the family name, independent from the first name of an individual. This analysis is highly criticized by legal scholars.[30] While one of the fundamental principle under the Constitution of Japan is respecting fundamental human rights of individuals, the analysis of the Supreme Court seems to subordinate individual's right to his or her full name (including surname) into the national legal system.[31]

2) Constitutionality of Article 750 under Article 14 (Equality under the law)

The Supreme Court also ruled that Article 750 does not violate Article 14 of the Constitution, the equality under the law, stating as follows.

The Provision, which stipulates that a husband and wife shall adopt the surname of one of them, leaves it to the persons who are to marry to discuss and decide which surname they are to adopt. It 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.[32]

This interpretation of Article 14 of the Constitution itself was not so surprising for the legal community. Based on the standard understanding,

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30) *See, e.g.,* Shuhei Ninomiya, *Fūfu dōuji o kyōsei suru minpō 750 jō no kenpō tekigōsei* [Constitutionality of Article 750 of the Civil Code which imposes single surname system for married couples], Shihō hanrei remākusu, Vol.53, 58 (2016); Kazuyuki Takahashi, Fūfu Bessei Soshō Dōuji Kyōsei Gōken Hanketsu Ni Mirareru Saikōsai no Sikou Yōsiki [Perspective of the Supreme Court in the Same Surname Decision], 879 SEKAI [WORLD] 144, 144 (2016).

31) Ninomiya, *supra* note 31, 61.

32) Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69 Saikō Saibansho minji hanreishū [Minshū] 2586, 2590-2591 (Japan).

the Supreme Court rules that Article 750 does not violate Article 14 of the Constitution because it does not involve gender inequality in the text of law.[33] For a long time, at least as a judicial norm, Article 14 pays attentions only to formal equality, not substantive one.[34] The Supreme Court did not therefore consider any substantive inequality to exist in the single surname rule, regardless of the fact that more than 96% of married couples choose the husband's surname.

3) Constitutionality of Article 750 under Article 24 (Equality of husband and wife under marriage)

Finally, the Supreme Court also ruled that Article 750 does not violate Article 24, equality of husband and wife under marriage, for the following reasons.

> The same surname system wherein a married couple uses the same surname was introduced as a legal system in Japan in 1898, when the Former Civil Code … was enacted, and has been established in the Japanese society since then. 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.
>
> … On the other hand, under the same surname system, one of the persons who are to marry must change his/her surname upon

33) Yoshihide Hata, *Saikōsai heisei 37 nen 12 gatsu 16 nichi daihōtei hanketsu* [The Supreme Court Grand Bench Decision on Devember 16, 2015], Jurisuto No.1490, 97,99 (2016).

34) For example, the leading case, judgment of the Grand Bench of the Supreme Court of May 27, 1964, Minshū Vol. 18, No. 4, at 676, 1970 (A) No. 1310, ruled that Article 14 should be interpreted as prohibiting discriminatory treatment *under the law* unless such treatment is based on reasonable grounds in line with the nature of the matter (emphasis added by the author).

> marriage, and hence it cannot be denied that a person who is to change his/her 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. In view of the current situation in which the overwhelming majority of married couples choose the husband's surname, it is presumed that women are more likely to suffer the abovementioned disadvantages.
>
> … However, the same surname system does not prohibit people from using their pre-marriage surname even as their by-name after marriage. Recently, it has become popular among members of the public to use their pre-marriage surname as their by-name after marriage. The abovementioned disadvantages can be eased to some degree as such use of the pre-marriage surname as the by-name after marriage becomes popular. Taking all these points into consideration, the same surname system introduced by the Provision does not permit a married couple to use separate surnames, but, given the circumstances as described above, this system 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.[35]

The Supreme Court states the standard for review under Article 24 (2) as "examining the purpose of the legal system and the influence that may be derived from adopting the legal system, and by considering whether or not the provision in question should inevitably be deemed to be unreasonable in light of the requirement of individual dignity and the essential equality of the sexes and be beyond the scope of the Diet's legislative discretion."[36] Valuing the function of using a single surname for married couples, the Supreme Court decided that the system was still not unreasonable. It is

35) Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69 Saikō Saibansho minji hanreishū [Minshū] 2586, 2594-2596 (Japan).

36) Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69 Saikō Saibansho minji hanreishū [Minshū] 2586, 2594 (Japan).

notable that, while the Supreme Court admitted that women are more likely to suffer from the single surname system, the Court points out that using their maiden name as a by-name can ease disadvantages typically faced by married women. When this judgment was given in December 2015, the Japanese judiciary did not allow married judges to issue judgments using their premarital surname, forcing many female judges to change their professional name.[37)]

While the Supreme Court ruled that the single surname system did not violate Article 24, it is notable that, at the very last text, the Supreme Court also stated that this ruling does not mean "the adopting a less restrictive surname system (for example, a system generally referred to as an optional separate surname system which allows a married couple to use separate surnames if they so choose)" is unreasonable.

> The implementation of the same surname system largely depends on how the public considers the marriage system including the legitimacy system and a desirable manner of determining the surname. How this type of system should be designed, including the circumstances concerning these matters, is a matter that needs to be discussed and determined by the Diet.[38)]

Accordingly, the Supreme Court left the decision on whether to introduce an optional separate surname system to the Diet.

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37) The Justice at the Supreme Court was not exceptional at that time. Justice Sakurai used her maiden name before being appointed to the Supreme Court at the administrative branch, but she had to change her surname to the name on the family registry upon appointment. The Supreme Court decided to allow all judges in Japanese courts to use their premarital surname in issuing orders or judgments from September 2017. Asahi Shimbun, Yutaka Chiba, *Saibankan kyūsei shiyō mitomeru hanketubun nado no bunsho saikōsai* [Supreme Court announces that judges are now allowed to use premarital surname in issuing documents including judgments], 38 (Morning ed.), June 29, 2017.

38) Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69 Saikō Saibansho minji hanreishū [Minshū] 2586, 2595-2596 (Japan).

3. Five Dissenting Opinions

Five out of fifteen justices gave dissenting opinions for this judgment.[39] Three of them —Justices Okabe, Sakurai, and Onimaru— were female, and all female judges in the Supreme Court. They pointed out that the value of the surname for a family unit did not justify excluding all exceptions, especially in contemporary diverse society, and that Article 750 of the Civil Code was unconstitutional considering the current situation in which women were forced to change their surnames. Justice Okabe states as follows:

> Although the decision to adopt the husband's surname may be made through the discussions between the persons who are to marry, the phenomenon of as many as 96% of married couples choosing the husband's surname can be said to be attributed to various factors, i.e. women's vulnerability in terms of their social and economic positions as well as in terms of their position at home, and other kinds of actual pressure on them. Even when the wife's decision to adopt her husband's surname was based on her own will, in actuality, she might have made that decision under the influence of inequality and the power balance. Assuming so, if no exception is made to the same surname system due to lack of consideration to that point, only women, in most cases, would experience the reduction in the surname's identification function, which supports the basis for individual dignity, and only women would have to feel a loss of identity. Such a system cannot be regarded as a system established from the standpoint of individual dignity and the essential equality of the sexes.[40]

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39) Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69 Saikō Saibansho minji hanreishū [Minshū] 2586, 2601-2615 (Japan).

40) Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69 Saikō Saibansho minji hanreishū [Minshū] 2586, 2603-2604 (Japan). Justices Sakurai and Onimura also joined with this opinion.

Justice Kiuchi also dissented, arguing that Article 750 of the Civil Code violated individual dignity and essential equality of both sexes as guaranteed by Article 24 of the Constitution and therefore unconstitutional. He first states that the single surname system with no exception is unreasonable after abolishing IE system in 1947. He also doubt the effectiveness of "by-name" to cure disadvantages that married women have to face. He states:

> However, as there is no legal system that allows the use of the by-name, whether or not a person's by-name is accepted depends on the decision of the other person, and therefore a person who has taken a new surname would have to confirm with what the other person would think about the use of the by-name. This is a major flaw of the use of the by-name as a system of an individual's appellation. On the other hand, if the use of the by-name is institutionalized by law, this would result in creating a surname with a completely different nature. Apart from the issue of whether or not the creation of such new surname is appropriate, it goes without saying that the availability of the by-name cannot be the grounds for the reasonableness of the same surname system unless the use of the by-name is institutionalized by law.[41)]

Justice Yamaura was the only one to argue that the government's failure to amend Article 750 of the Civil Code since 1996 constituted an illegality, and thus the government should offer compensation under the State Redress Act. He completely granted plaintiff's claim, and points out that it is the state's failure not to legislate a selective surname system after the Legislative Council's proposal in 1996. He points out the movement outside Japan:

> Many countries around the world allow a married couple to choose to use separate surnames in addition to using the same surname, although the underlying legal systems concerning

41) Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69 Saikō Saibansho minji hanreishū [Minshū] 2586, 2610-2611 (Japan).

> marriage and the family differ among these countries. Countries such as Germany, Thailand, and Switzerland, which previously required a married couple to use the same surname, have recently introduced separate surname systems. At present, the same surname system that makes no exceptions can virtually be found only in Japan.[42)]

The difference of dissenting opinions from the majority is that they point out the single surname system *with no exception* is unreasonable. According to dissenting justices, there is no reasonable reason that all married couples must choose single surname today. While the majority also states that the Supreme Court does not say "selective different surname system" is unreasonable, they leave the issue to the Diet even after twenty years inaction against the proposal by the Legislative Council.

V. Discussion: Should the Family Regime Supersede Personal Right?

Although it is the wife in 96% of married couples who had to change her surname upon marriage, the Supreme Court ruled that the provision did not violate both the principle of equality under law and the principle of equality under marital relationship. Moreover, while using a premarital surname as a by-name is not permitted on a bank account, driver's license, medical insurance, professional license certificate, passport and so on, the Supreme Court stated that a by-name could ease the current disadvantages imposed mainly on women by Article 750 of the Civil Code. The Supreme Court also declared that a surname and an individual name are different: the former possessing legal institutional value and the latter forming a personal right. Why did the Supreme Court issue such a ruling?

From the Supreme Court's perspective, Japanese family law was not yet free from the *Ie* system.[43)] Once the Meiji Civil Code was adopted, a wife

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42) Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69 Saikō Saibansho minji hanreishū [minshū] 2586, 2614 (Japan).

43) This point has been long discussed by feminist theorists. *See,* e.g., Ki-young Shin, *supra*

was *allowed* to use her husband's surname and become part of her husband's family unit. Even after the current Civil Code was adopted after WWII, the family registry system survived.

Japanese society and people's mindset have changed little since adaptation of the Meiji Civil Code regarding the meaning of marriage, and thus 96% of married couples used the husband's surname. The value of family, which to a great extent supports gender discrimination, is still entrenched in society: when the husband changes his surname upon marriage to his wife's surname, people ask, "What's happened to your marriage?" Such overwhelming discrimination has been existed in Japanese society and the Diet has shelved the proposal by the Legislative Council for twenty years relying on such public environment. The Supreme Court did not try to remedy inequality in society solely respecting the current judicial norm which has been also developed in gender discriminatory environment.

The Court's ruling on Article 13 of the Constitution demonstrates the supremacy of the value of family over the individual. Despite noting two dimensions to the surname—name of the family and name of an individual—the Supreme Court denied the personal rights of the surname. Thus, the family unit held priority over individuals, resulting in men taking priority over women.

The Court's ruling on Article 24, however, seems to give a little hope to the future. Even though the Court ruled that current situation involving the single surname system did not violate the constitutional requirement of equality of both sexes under marital relationship, the court admitted that the current system forces many disadvantages on women's side. The Court also finds that even if a selective different surname system is introduced, it is not unreasonable. Simply, the Court left this issue to the Diet after giving many clues to doubt to the public regarding the reasonableness of forcing the single surname system with *no* exception.

On the other hand, people's attitude towards this issue seems to have

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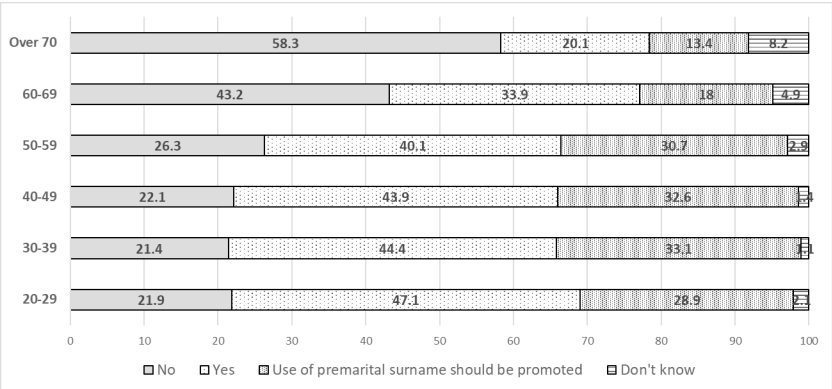
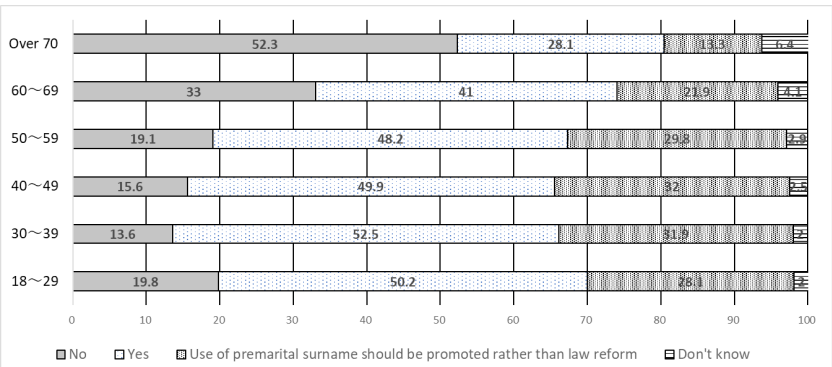
note 24; Ki-young Shin, *Fufubessei movement in Japan: Thinking about women's resistance and subjectivity,* 2 Frontiers of Gender Studies Journal 107 (2004); Kimiko Tanaka, *Surnames and gender in Japan: Women's challenges in seeking own identity,* 37 Journal of Family History 232 (2012).



Source: National Survey on Surname System, 2012.

Figure 1. Do you support the amendment of Article 750 for a selective surname system?



Source: National Survey on Surname System, 2017.

Figure 2. Do you support the amendment of Article 750 for a selective surname system?

been changing. Figures 1 and 2 show the result of the national survey on amending Article 750 of the Civil Code to introduce a selective surname system for married couples in 2012 and 2017. As Figure 1 shows, even as of 2012, while more of the younger generation supported an amendment, over half of those respondents aged over 70 opposed it; this may reflect how the household system is deeply embedded in older generations. Actually the result of survey in 2017 shows this tendency clearer. In both generation

between age 18-29 and age 30s, more than 50 percent of respondents support the amendment of Article 750. Then as a national policy, the government should take into account how the younger, not yet married, generation thinks about the rulings on legal marriage.

Unfortunately, the World Economic Forum's Global Gender Gap Index ranked Japan 114th in 2017: the ratios of female Diet members are still only 9.3%. The female legal profession is still very small portion: 18.4% in lawyers, 23.5% in prosecutors, and 26.2 % in judges.[44] As both the legislature and judiciary are still dominated by men who have never experienced the disadvantages of the single surname system, a barrier exists to changing the single surname rule.

Nonetheless, it is a strong supporting point that people's attitude toward this issue is changing; i.e., the voter's voice to doubt current system is becoming stronger. To strengthen this tendency is educating people— both men and women— to weaken the tendency that subordinate individual dignity over "the value of the Japanese family" and to enhance an inclusive sense of value, among not only elementary school children but also those in leadership positions. Such an intervention will result in an increasing number of women moving into leadership positions, thereby the Diet finally becomes unable to escape to introduce the selective different surname system, as proposed by the Legislative Council twenty years ago.

V. Conclusion

In this paper, I discussed Japan's single surname system for married couples, which was adopted when the Meiji Civil Code was established in 1898. Although it is over 100 years old, it is not a *traditional* Japanese system at all. It was introduced upon modernization along with other mechanisms that subordinated women to men. Even though the constitutional reform occurred upon the end of WWII and the basic principles that respects individual human rights was introduced, the single surname system under the family registry has functioned as an effective tool to maintain the

44) Nihon Bengoshi Rengokai [Japan Federation of Bar Association], Bengoshi Hakusho 2017 Nen Ban [Attorney Whitepaper 2017], 48 (2017).

gender discriminatory society. While the Supreme Court ruled that the single surname system for married couples are constitutional this time, the Court left some clues for future discussion in both the Diet and court rooms. Currently people's attitude toward introduction of selective different surname system seems to be changing, and more people support introduction of this system. This may trigger to increase the number of people who doubt the reasonableness of current single surname system with no exception. Continuous effort to educate people – from elementary school to leadership positions – is necessary in order to make the Diet to finally introduce a selective different surname system in the future.