

**TYING THE KNOT WITH A SURNAME?
THE CONSTITUTIONALITY OF JAPAN’S LAW REQUIRING
A SAME MARITAL NAME**

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This past Valentine season, I learned a new idiom: “tie the knot,” meaning to get married. Coming from Japan, where people sleep on futons, the idiom was interesting to me, as it was said to derive from an old custom of tying the foot of the beds for a husband and wife together with a rope, symbolizing that the rope would strengthen their relationship. This notion of tying a married couple together is featured in a recent decision from the Supreme Court of Japan, *Tsukamoto v. Japan*, in which the majority of the justices held that the law requiring a married couple to use the same surname, either the one of husband or wife, was constitutional.¹ The Supreme Court of Japan endorsed the idea that tying the couple together by sharing a surname was constitutionally valid—for the time being.

I. BACKGROUND OF THE SURNAME CONTROVERSY

According to Article 750 of the Civil Code of Japan,² a marrying couple shall select a surname that they will use after their marriage from either the surname of husband or wife. The Code does not give any other option; in other words, the couple is compelled to share the same surname in the current family law system if they wish legally to marry their partners. It was women in the vast majority of cases that gave up

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1. *Tsukamoto et al. v. Japan*, Saikō Saibansho [The Supreme Court of Japan], Dec. 16, 2015 (Grand Bench). The decision is not reported yet, but the slip opinion is available at http://www.courts.go.jp/app/files/hanrei_jp/546/085546_hanrei.pdf (last visited Mar. 13, 2016). See Krishnadev Calamur, *The 19th-Century Japanese Law on Last Names*, THE ATLANTIC, Dec. 16, 2015, <http://www.theatlantic.com/international/archive/2015/12/japan-last-name/420711/>.

2. See MINPŌ [The Civil Code of Japan] art. 750. It provides: “A husband and wife shall adopt the surname of the husband or wife in accordance with that which is decided at the time of marriage.”

their surname because of alleged gender discrimination in Japan. Although using their maiden name in the workplace has been increasingly recognized, married women are still unable to open a bank account, apply for a passport, or make any formal governmental registration with that maiden name.

More importantly, they cannot register their marriage in their *Koseki*, or the family registration system in Japan, unless either a husband or a wife gives up his or her surname. Not being registered means that any children born of the partnership will be considered born out of wedlock.³ That is not a preferred choice in Japan, where illegitimate children were not entitled to equal inheritance even as of a few years ago, and where they suffer pervasive social stigma.⁴

As more women in Japan have been working outside of the home and developing careers, more Japanese people as a whole, especially among the younger generations, are becoming aware that the same surname system is troublesome to some couples where one partner wants to keep his or her surname. And a considerable number of the people in Japan seem to understand that giving an alternative to some marrying couples is not a bad idea.⁵ Opponents of a separate surname system, mainly led by conservative political leaders in the government, assert that the same surname system is part of Japanese tradition. (It depends, however, on how we define “tradition,” as there is some evidence that a separate name system previously existed.⁶) The opponents criticize the

3. According to a news coverage, one of the plaintiffs had married and divorced her husband three times in order to prevent her three children from being born out of wedlock. See the Mainichi Shimbun, the Hokuriku edition, Mar. 29, 2015, available at [http://mainichi.jp/articles/20150329/dtl/k16/040/193000c_\(website in Japanese\)](http://mainichi.jp/articles/20150329/dtl/k16/040/193000c_(website%20in%20Japanese)) (last visited Mar. 13, 2016).

4. See Saikō Saibansho [The Supreme Court of Japan] Sept. 4, 2013 (Grand Bench), 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [Reports on Civil Cases from the Supreme Court of Japan] 1320 (holding that a clause of the Civil Code which assigns a lesser inheritance to illegitimate child ran afoul of the equal protection of the law prescribed in art. 14 of the Constitution).

5. See, e.g., The poll result: *51 Percent Agrees to Separate Surname, 73 Percent Prefers to Same Surname*, Mainichi Shimbun, Dec. 7, 2015, available at <http://mainichi.jp/articles/20151207/k00/00m/010/084000c> (website in Japanese) (last visited Mar. 13, 2016). The result says that 51 percent of the respondents agree with introducing a separate surname system by choice, while 36 percent, down from 42 in 2009 in the same question, disagree with the introduction. On the other hand, the result also says 73 percent of the respondents would choose the same surname even if a separate surname is legalized.

6. It says in the White Paper on the Health and Welfare of 1998 that: “Same surname system is often considered as a Japanese tradition, but its history is unexpectedly short. They had used separate surnames in the Samurai class, and even after commoners were permitted to have surnames in the early period of the Meiji era, a husband and wife could use a separate surname as seen in the decree of 1876 by the Grand Council of State saying that women shall use their own

separate surname system as triggering more divorce and dissolving the traditional Japanese family.

Over the past few decades, introduction of a separate surname system has been discussed at times in the Diet of Japan, but all attempts were quashed in early phases of legislation. With the exception of one landmark legal settlement in which the parties agreed that the plaintiff, a female professor at a national university, could use her maiden name in her university,⁷ the movement for the optional separate surname system by choice has been unsuccessful. Women like Kaori Oguni are left “agonizing over the prospect of losing her maiden name and with it, she felt, part of her identity.”⁸ Thus, five women decided to bring a lawsuit against the government in 2011, seeking damages inflicted by the legislative nonfeasance which left the Code outdated and constitutionally unjustified.

II. THE CASE

Some of the plaintiffs in the surname case were legally married, and others were in *de facto* marriages. Their situations differed, but they all had one thing in common: they wanted to keep their maiden names in marriage. After two defeats in the lower courts,⁹ plaintiffs made a final appeal to the highest court of Japan. When the third petty bench of the Supreme Court of Japan sent the case to the Grand Bench, plaintiffs, lawyers, law professors, and others who supported the lawsuit thought that the decision would be a bold one.¹⁰

surname even once they marry the other.” The White Paper prepared in Japanese is available here: http://www.mhlw.go.jp/toukei_hakusho/hakusho/kousei/1998/dl/04.pdf (last visited Mar. 13, 2016).

7. This settlement at Tokyo High Court is generally understood as having resulted in a recent trend of women using their former surnames in their workplace. The case was *Kono v. Japan*, and was appealed from the decision at Tōkyō Chihō Saibansho [Tokyo District Court] Nov. 19, 1993, in which the court held that requiring women to use a surname the same as registered in their family registration was reasonable. The district court decision is reported in 1486 HANREI JIHŌ 21.

8. See Elaine Lies, *Debate on Separate Spouse Surnames Heats Up before Japan Court Ruling*, REUTERS, Dec. 10, 2015 (reporting one of the plaintiffs in the case lamenting the loss of her surname), available at <http://www.reuters.com/article/us-japan-surnames-idUSKBN0TU01120151211> (last visited Mar. 13, 2016).

9. See Tsukamoto et al. v. Japan, Tōkyō Chihō Saibansho [Tokyo District Court] May 29, 2013, 2196 HANREI JIHŌ 67, *affirmed*, Tōkyō Kōtō Saibansho [Tokyo High Court] Mar. 28, 2014 (not reported).

10. The Grand Bench shall be held mainly either when the Supreme Court of Japan decides a constitutional issue for the first time, it decides an act, order, or others to be unconstitutional, or it overrules precedents. See SAIBANSHO-HŌ [The Court Act] art. 10.

In the lawsuit, plaintiffs alleged, *inter alia*, that although the Code was unconstitutional under articles 13,¹¹ 14,¹² and 24¹³ of the Constitution of Japan, the Diet of Japan failed to do anything to revise the Code. Plaintiffs argued that the current family registration system did not treat a married couple as an individual respectively and it amounted to violation of article 13 of the Constitution of Japan. Asserting that article 13 of the Constitution protects moral right and that keeping one's surname could be a cognizable legal interest derived from that moral right, plaintiffs contended that the Code was violating the Constitution of Japan by forcing them to share one surname.

However, the Supreme Court of Japan, in a 10 to 5 decision, rejected plaintiffs' claim that a marrying couple had the right not to be compelled to use the same surname. The Supreme Court of Japan reasoned that such right was too abstract to be enforced as a constitutional violation.¹⁴ On the equal protection challenge based on article 14 of the Constitution, the Court held that the Code was consistent with article 14. Plaintiffs pointed out, and the Supreme Court of Japan admitted, that more than 96 percent of married couples selected a husband's surname in their marriage. And plaintiffs alleged gross inequality that could be understandable only as gender discrimination that was attributable to the Code. Nevertheless the Supreme Court of Japan found the Code to be constitutional simply because the Code did not set any preference for the husband's name nor any distinction on its face with regard to the selection of surname.¹⁵

In the main part of the decision, the Supreme Court of Japan held that the Code was constitutionally justified, and that there was no undue burden upon women which would make the current same surname system unconstitutional under article 24 of the Constitution. Referring

11. See KENPŌ [The Constitution of Japan] art. 13. It provides: "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 other governmental affairs."

12. See *id.* art. 14, cl. 1. It provides: "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."

13. See *id.* art. 24. It provides: "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." Clause 2 of article 24 provides: "With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes."

14. See *Tsukamoto*, slip op. at 2-4.

15. See *id.* at 4-5.

to clause 2 of article 24 of the Constitution, plaintiffs denounced the Diet of Japan for failing to pass new legislation that would have given a marrying couple an ability to opt out of the same surname system, even after a substantial number of women had complained about the burden and loss of individual identity. The Supreme Court of Japan, however, found that the Code and its same surname system was consistent with all the articles of the Constitution of Japan upon which plaintiffs challenged, in that sharing surname system has been well established in Japanese society since its adoption in 1898. The Supreme Court of Japan duly admitted that because of the legislative nonfeasance, the burden or distress in giving up one's surname had been experienced overwhelmingly by women, and as such the burden or distress could have restrained some young couples from marriage. The Supreme Court of Japan, however, went on to justify the legislative nonfeasance because of the fact that the government and other major private companies in Japan have been allowing married couples to use their former surname in the workplace, thereby mitigating the degree of burden constitutionally permitted.¹⁶

In the last part of the decision, the Supreme Court of Japan did not hold that the separate surname system by choice, the most viable solution to this alleged gender discrimination, could be constitutionally requested in the current family law system.¹⁷ Instead, it called on the Diet to start discussion introducing a new surname system under which a marrying couple could choose their individual surnames after marriage. By doing so, the Supreme Court suggested that a separate surname by choice would fit well within the current legal system.

All three female justices dissented. The minority opinion agreed to the result of the decision, but disagreed with the majority opinion in terms of the nature of the right to keep one's surname.¹⁸ It held that a Code that gives no option to the couple could be unreasonable under clause 2 of article 24 of the Constitution, even if the clause allows the Diet of Japan great discretion as to how it builds or alters the family law system.

16. *See id.* at 6-10.

17. *See id.* at 10.

18. *See id.* at 11-30.

III. JAPANESE WOMEN AS A DISCRETE AND INSULAR MINORITY

The decision was reported in major newspapers in Japan along the line of ideology, while most of the mainstream papers and other media in democratic countries reported the decision critically. Some newspapers pointed out that although conservative political leaders in the Liberal Democratic Party, the current ruling party in Japan, gleefully welcomed the decision, Shinzo Abe, the prime minister of Japan and the president of the Party as well, would have to be careful in reconciling his women empowerment policy with strong pressure from his political colleagues and supporters outside the Diet who are ideologically right.¹⁹ While the paper rightly acknowledges the current political dynamics and right-leaning atmosphere in Japan, it suggests incorrectly that Abe might be in support of a separate surname option as part of women's empowerment. Abe has been a strong opponent of the individual surname. Condemning the separate surname issue as left-wing, and a dogma of communism, Abe blatantly disregarded the struggle that many women had been enduring for long years.²⁰ Abe did not make any comment on the Supreme Court's decision, but it is consistent with his general views. The Court found that sharing a surname between a husband and wife represents to other people that they are members of the same family; the child whose surname is the same as his or her parents is assumed to have been born in wedlock by other people; each person with the same surname in one family can easily be identified as a member of that unified family; and a child with the same surname as both parents can more easily have the personal identification as a child of not one parent, but of both parents.

These "benefits" noted by the Japanese Supreme Court, were based on, *Ie*, or the family system in Japan. The Meiji Civil Code adopted the idea of *Ie* as a governing principle in its family law system

19. Jonathan Soble, *Japan's Top Court Upholds Law Requiring Spouses to Share Surname*, N.Y. TIMES, Dec. 16, 2015, available at http://www.nytimes.com/2015/12/17/world/asia/japan-court-ruling-women-surnames.html?_r=0 (last visited Mar. 13, 2016).

20. Many advocates including some members in the Diet have criticized Abe for his duplicity since the government openly encouraged more women to work in the labor force, reduced by a rapidly aging society, implicitly suggesting that women provide economic and tax support for the nation. Katsuya Okada, then president of the Democratic Party, recently dredged up Abe's remarks in an interview that had taken place when the Liberal Democratic Party was not in the government. See Sankei Shimbun, Feb. 29, 2016, available at <http://www.sankei.com/politics/news/160229/pl1602290013-n1.html> (website in Japanese) (last visited Mar. 13, 2016).

in 1898, under which a wife was required to use the same surname of the *Koshu*, or the family head, who, with very limited exceptions, was only a male member of the family.²¹ Moreover, the female members in a family were subordinated to the male members in many aspects of her legal rights. The idea of *Ie* had been largely dismantled when Japan introduced the idea of gender equality and revised the relevant part of the Civil Code after World War II. It is arguable that the same surname system is a vestige of the old *Ie* system, and in that sense, it is fair enough to say that the Supreme Court thought that such an old idea had been reasonably justified in modern Japan. The Abe administration, in this political and legal background, would find no immediate reason to introduce a separate surname system by choice, which would keep women who need the choice a “discrete and insular minority” in Japan in its notoriously male-dominated society.²²

IV. GET MY NAME BACK!

Despite the pessimism evoked by the Supreme Court’s decision, it is also true that Japan has been gradually changing over past the few decades in regards to gender equality. Japan has been in an economic slump for twenty years, and more and more women have chosen to work after their marriage to support their households due to the recession. They are no longer economically dependent upon their

21. See MEIJI MINPŌ [The Meiji Civil Code] art. 746 (providing a family head and the member of the family shall use the surname of the family) and item 2 of art. 970 (providing a male comes first in succession of the right to be the family head when a male and a female in the family are in the same degree of kinship).

22. United States v. Carolene Products Co., 304 U.S. 144, 154 n.4 (1938) (identifying minority groups worthy of constitutional protection as “discrete and insular”). See generally The Global Gender Gap Report 2015, World Economic Forum (Japan ranks 101st out of 145 countries, the lowest tier among high income countries), available at <http://www3.weforum.org/docs/GGGR2015/cover.pdf> (last visited Mar. 13, 2016); *The Best and Worst-Place to Be a Working Women*, ECONOMIST, Mar. 3, 2016 (Japan ranks third from the lowest in index for women and work out of 29 countries of the OECD), available at <http://www.economist.com/blogs/graphicdetail/2016/03/daily-chart-0> (last visited Mar. 13, 2016). The OECD publishes data on gender equality, and Japan ranks the lowest in female share of seats in national parliaments during 2013-2015 out of 45 countries. The data is available at <http://www.oecd.org/gender/data/female-share-of-seats-in-national-parliaments.htm> (last visited Mar. 13, 2016). The latest report on women discrimination published on March 7, 2016, by the Convention on Elimination of all Forms of Discrimination against Women (CEDAW) also shows international concerns of discrimination against women in many areas including the same surname issue. The report is available at http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/JPN/CEDAW_C_JPN_CO_7-8_21666_E.pdf (last visited Mar. 13, 2016).

husbands, but are contributing as independent financial providers. A separate surname system by choice would better correspond to this emerging norm and those women who hope to play their own economic role in the marriage partnership. Prime Minister Abe alleged that we should “get Japan back” from the recession in the election campaign of 2012. Ironically enough, after the decision, more than one woman decided to divorce on paper to “get her name back.”²³ The Supreme Court of Japan upheld the government position that sharing a surname was critical to tying the knot. While maintaining a strong marital relationship and love can be a great thing, the question is whether it is appropriately a matter for government coercion. I suggest it is not.

23. See Fujiko Sakakibara (lead plaintiff’s counsel), Comment on the Supreme Court decision, Jan. 6, 2016, at http://www.asahi-net.or.jp/~dv3m-ymsk/16_1_8_1.pdf (last visited Mar. 13, 2016).