
MAJOR JUDICIAL DECISIONS

Jan.–Dec., 2015

1. Constitutional Law

X v. Japan

Supreme Court Grand Bench, December 16, 2015

Case No. (*O*) 1023 of 2014

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Summary:

Article 750 of Civil Code, which stipulates that 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, is constitutional under Article 13, 14 (1), 24 (1), 24 (2) of the Constitution.

References:

Constitution, Article 13, 14 (1), 24 (1), 24 (2), Civil Code, Article 750.

Facts:

The provision of Article 750 of the Civil Code stipulates that 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. In this case, the appellants argue that ①the Provision unreasonably infringes “freedom from being forced to change one’s surname,” which forms part of the personal rights that are guaranteed as constitutional rights, and violates Article 13 of the Constitution, ② the Provision creates gender discrimination in that more than 96 percent of all married couples choose the husband's surname and hence it violates Article 14(1) of the Constitution, ③ the Provision in effect infringes on the freedom to marry by requiring either of the persons who are to marry to change his/her surname in order to submit a notification of marriage and hence it violates Article 24 of the Constitution.

Opinion:

Reserved.

“A name, 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.” “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.” “Consequently, it is inappropriate to discuss whether or not the situation of one's surname being changed in itself infringes personal rights and violates the Constitution, without taking into consideration the specific legal system.”

In the provisions of the Civil Code, the surname “takes on meaning, separately from a given name, as an appellation for a family, which is a constituent of society, as a result of the same surname being used by a married couple and their unmarried children or by an adopted child and his/her adoptive parent(s).” And “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.”” 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.”

“The appeal counsel argues that the Provision creates gender discrimination in that more than 96 percent of all married couples choose the husband's surname and has a negative impact almost only on women, and hence it violates Article 14(1) of the Constitution.” “Article 14(1) provides for equality under the law, and this provision 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. But “the Provision……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.” “Consequently, the Provision does not violate Article 14, paragraph (1) of the Constitution.”

Article 24 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.” However, “Even where persons choose not to marry because they do not agree with any of the particulars of the legal system concerning marriage and the family, the existence of such persons cannot be regarded as the direct grounds for holding that the law is contrary to the purport of Article 24 (1) of the Constitution.” “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 (Act No. 9 of 1898 prior to the amendment by Act No. 222 of 1947) was enacted, and has been established in the Japanese society since then.” “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 addition, as mentioned above, in its purest form the same surname system prescribed in the Provision does not involve in itself gender inequality, and it is left to the free choice of the persons who are to marry to discuss and decide which surname they are to adopt.” “On the other hand, under the same surname system, one of the persons who are to marry must change his/her surname upon 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 a 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. It also seems that some couples choose not to marry, so as to avoid the situation in which either the husband or wife would suffer these 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.”

Editorial Note:

This is the first case in which The Supreme Court form a judgment the

constitutionality of the Provision of Article 750 of Civil Code. This Provision stipulate that a husband and wife shall adopt the same surname. Regarding this Provision, there are some constitutional questions: ①This Provision might violate Article 13 of the Constitution because it stipulates to change surnames, ②This Provision is a vestige of Japanese Family System which puts the man above the woman, so even if this Provision is facially equal, it is a de facto discriminatory provision.

Although the Court holds that this Provision is constitutional, five justices think that this Provision is unconstitutional, and three women justices, all the women justices in the Court, join the opinion which held that this Provision is unconstitutional. The opinion by Justice Okabe is persuasiveness. She holds that even if this Provision was reasonable when it was enacted in 1947, “in recent years, there has been dramatic progress in the advancement of women into society” and “a surname's identification function is becoming more important than ever, and accordingly, the utility and necessity to continue to use the pre-marriage surname are further increasing.” “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.” So “at least by now, it has become unreasonable in light of the requirement of individual dignity and the essential equality of the sexes and gone beyond the scope of the Diet's legislative discretion, and hence it should inevitably be judged to be in violation of Article 24 of the Constitution.”

As such, at least by now, I think it is clear that this Provision compels woman to be at a disadvantage. It is facially equal, but compels woman to be at a disadvantage through the social structure, which is a view that a woman has to adopt a husband's surname when she gets married. This is a vestige of the Japanese Family System.