those who live outside Japan had been under challenge in some lawsuits. The judgment of the Supreme Court of March 30, 1978 (32 (2) Minshu 435) decided that those who entered Japan illegally and were present in Japan were entitled to the benefits under the Act on Medical Treatment etc. of the Atomic Bomb Survivors. Also, the judgement of the Supreme Court of November 1, 2007 (61 (8) Minshu 2733) declared that the Ministry's interpretation that the right to receive health management allowance was lost when an atomic bomb survivor left Japan was illegal.

After these judgements, the Ministry of Health, Labour and Welfare had been providing allowances but denied payment of medical expenses. The legality of such a denial was the issue of this case.

This judgement found that foreign atomic bomb survivors are entitled to the payment of medical expenses of general diseases for two reasons. One is the textual interpretation, which is that Art. 18 of the Act does not require an atomic bomb survivor to have residence in Japan or to be present in Japan to be entitled to the payment of medical expenses for general diseases. Second is a teleological interpretation, that the denial of payment of medical expenses for general diseases if one gets medical treatment outside Japan would be contrary to the objective of the Act to provide assistance to atomic bomb survivors for the purpose of giving relief to them while focusing on their uncommon health conditions.

After the judgement, the Ministry revised its Ministry order for the Act to designate the place to submit the application, in order to enable the payment of the medical expenses of general diseases.

3. Family Law

Xs v. Japan
Supreme Court G.B., December 16, 2015
Case No. (*O*) 1023 of 2014
1401 Hanrei Taimuzu 84

Summary:

Article 750 of the Civil Code does not violate Articles 13, 14, paragraph

1, and 24 of the Constitution (There are a concurring opinion, opinions and a dissenting opinion concerning the constitutionality of Article 24).

Reference:

Constitution, Articles 13, 14 (1), 24; Civil Code, Article 750

Facts:

In this case, the appellants allege that the provision of Art.750 of the Civil Code, which provides 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 (hereinafter referred to as "the Provision"), violates the rights protected under Arts.13, 14 (1), 24 (1), (2), etc. of the Constitution, and thus claimed for compensation of damages under Art. 1 (1) of the State Redress Act, on the grounds of the illegality of the appellee's legislative inaction to amend or abolish the Provision. Three of five appellants decided to adopt the surname of the husband in the registration; however, they have continued to use their original surname in practice. Two of the appellants decided to adopt the surname of the husband on their marriage and later divorced by agreement, then again submitted their marriage with notifications designating no specific surname. The notifications were not accepted due to the failure to choose the surname. Appellants insisted that they had felt losses of identity, consistent credibility and continuity of their professional outcomes due to the change of the surnames, and otherwise suffered disadvantages by not being legally married to avoid those losses. Appellants originally reasoned their claim as that 1) the Provision unreasonably infringes on the "freedom from being forced to change one's surname", that is guaranteed as the right related to personality itself under Art. 13 of the Constitution, which comprehensively protects the right to the pursuit of happiness and supplementarily guarantees the rights and freedoms which the Arts. 14 and following provisions do not provide, 2) the Provision prevents the appellants from exercising the "freedom to marry" guaranteed as a human right under Art. 24 (1) of the Constitution, where choosing one surname is formally required at the time of marriage, and the Provision leads to substantial unequality which does not comply with Art. 24 (2) requiring "the essential equality of the sexes" in legislation referring to the fact that

more than 96% of married couples have adopted the husband's surname, and 3) the Provision clearly violates (b) and (g) of Art. 16 (1) of the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter referred to as "CEDAW"). At final appeal, the appellants additionally mentioned 4) the Provision violates Art. 14 (1) of the Constitution which provides equality under the law from the perspective of indirect discrimination and disparate impacts where the Provision substantially imposes disadvantages arising from the change of a surname upon women in most marriages.

Opinion:

The final appeal shall be dismissed.

Regarding Art. 13 of the Constitution, a name has the social function to identify an individual by distinguishing a person from others, while it also has functions for individuals as the basis for a person to be respected as an individual and as the symbol of his/her personality. In this perspective, a person's name should be held to form part of personal rights. However, a surname apart from a given-name forms part of the legal system concerning marriage and the family. Hence the particulars of the personal rights concerning a surname should be defined only by examining related legal systems, and should not be given a single constitutional meaning without considering those systems. Looking over the provisions concerning a surname under the Civil Code, a surname is placed as an appellation for a family which is a constituent of society. Since a family is a natural and fundamental unit in society, it may be reasonable to determine a single surname which represents the unit that an individual belongs to. The situation discussed in this case is one where either a husband or wife changes his/her surname at marriage with his/her own will, thus neither of them could be said to be forced to change his/her surname against his/her will. On the other hand, considering the function of a surname, allowing a person to determine or change one's surname based solely on their own will does not suit the essential nature of a surname. Changes of a surname along with a change of a civil status are originally implied in the system, thus "freedom from being forced to change one's surname" at the time of marriage cannot be regarded as part of the rights guaranteed

under the Constitution. Hence the Provision does not violate Art. 13. In consideration of the private functions of a surname, however, it cannot be denied that there are disadvantages that a person suffers due to the change of a surname, specially where the average age of marriage has increased. Though it would be excessive to argue that maintaining those interests is part of the personal rights guaranteed as constitutional rights, it can be regarded as a personal interest that should be taken into account when discussing a desirable legal system concerning marriage and the family. This aspect shall be examined in the discussion about the scope of legislative discretion allowed by Art. 24.

Regarding Art. 14 (1) of the Constitution, which 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, the Provision leaves the choice of a surname to the consultation between the persons who are to marry. Since the Provision does not formally prescribe discriminatory treatment based on gender by itself, the virtually unequal occurrence which the appellants alleged cannot be regarded as the consequence arising directly from the substance of the Provision. Hence, the Provision does not violate Art. 14 (1) of the Constitution. However, in regard to the actual situation, a certain attention should be paid to whether or not such a tendency is derived from the truly free choice of both of the parties in a marriage. It would suit to the purport of Art. 14 (1) of the Constitution to eliminate such an influence to ensure substantial equality and this should be taken into account when seeking a desirable legal system; thus this aspect shall be concerned in the discussion of legislative discretion allowed by Art. 24.

Art. 24 (1) of the Constitution stipules at that matters such as whether to marry or not, whom and when to marry, should be left to the decision made by the parties freely and equally. The Provision stipulates the choice of a surname not as a requirement to marry, but as an effect of marriage. Even where some persons choose not to marry because of disagreement with any particulars of the legal system concerning marriage and the family, the Provision cannot be regarded as a direct restriction on marriage. The de facto restriction on marriage by the legal system shall be concerned in the discussion of the scope of legislative discretion. Art. 24 (2) leaves it to the Diet's discretion to reasonably legislate specific

systems, as well as defines the limits of such discretion with requiring appropriate consideration for the dignity of the individual and the essential equality of the sexes in conjunction with para. 1. This indicates that Art. 24 requires the legislature to prevent unreasonable de facto restrictions on marriage and to assure substantial gender equality practically, as well as to give a certain respect for personal interests which cannot be regarded as rights that are directly guaranteed by the Constitution. Given the above, where the provision prescribing a legal system concerning marriage and family does not violate Arts. 13 and 14 (1), the purpose of the legal system and the influence that may be derived from adopting the legal system should be examined to determine whether the provision is also in compliance with Art. 24, with consideration of whether or not the provision 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. Examining the constitutionality of the Provision from this viewpoint, it is reasonable to determine a single appellation for each family since a surname has a meaning as an appellation for a family, which is a natural and fundamental unit of persons in society. By using the same surname, a husband and wife are distinguished from others and publicly indicate that they are members of one unit. In particular, as an important effect of marriage, a child born in wedlock shall be a legitimate child who is subject to joint parental authority exercised by the husband and wife, and it may be meaningful to secure a framework wherein such a child uses the same surname as his/her parents in order to show his/her status as a legitimate child. It may also be understandable that the individual would feel that he or she was a member of a family unit by using the same surname as her/his family. The same surname system does not prohibit people using their pre-marriage surname as a by-name, and this can ease the disadvantages arising from the change of a surname to some degree. Consequently, the system introduced by the Provision cannot be found to be unreasonable in light of the requirement under Art. 24, and thus the Provision does not violate Art. 24.

Accordingly, the legislative inaction in taking measures to amend or abolish the Provision is not assessed as illegal in the context of the application of Art. 1 (1) of the State Redress Act. The other reasons for

final appeal are not admissible, since the filed arguments assert only a violation of laws and regulations which is not permissible as a reason for final appeal under Art. 312 (1), (2) of the Code of Civil Procedure.

Editorial Note:

Art. 750 of Civil Code provides that the adoption of one surname shall be made by agreement, but more than 96% of married couples have chosen to adopt the husband's surname. Despite of the fact that the Provision is placed as an effect of marriage in the Civil Code, this requirement to change a surname functions as a condition to establish legal marriage since Art. 739 of Civil Code prescribes that marriage comes into effect upon written notification pursuant to Art. 74 (1) of the Family Registration Act which requires compulsorily to designate a surname to be adopted in the entry. In the Japanese legal system, accordingly, one of the parties in a marriage must weigh the relative merits/demerits and choose either being married or keeping their original surname, so the appellants in this case constructed a concept of "freedom from being forced to change one's surname" at the time of marriage. Considering Art. 13, though the Court admitted that a surname had significance for an individual as a symbol of one's personality and thus forms part of personal right, the Court explained that particulars of such personal rights could only be grasped in the relation of certain specific laws, and the social functions of a surname to represent a family unit an individual belongs to and the nature of a surname not to allow a person to change one's surname only by one's own will were found according to existing regulations. Adopting one surname at the time of marriage was therefore determined as reasonable, thus the Provision was concluded to be constitutional. However, what the appellants refer to in this case is a continuous use of their original surname, and not to arbitrary choose a surname, and the reasoning concerning the nature of a surname mentioned above should be seen as not fully justifying the system, especially where the system excludes any exception of continuous use of a pre-marriage surname. It could be said that continuous use of a pre-marriage surname is rather appropriate to ensure to identify a person in a society. Furthermore, it could contradict the Court's opinion referring to Art. 14 (1) which indicates the existence of the intervention of one's own will in the choice of a surname. As the

reasoning from the social functions seemed to be not sufficient, what eventually the Court devotedly emphasized was to maintain the surname as "an appellation for a family".

To fully understand the function of a surname as an appellation for a family, the transition of Japanese Civil Law and the civil registration system should be mentioned. In the prewar age, before the amendment in 1889, the old Civil Code Art. 746 had prescribed that the householder and his family shall use the surname of the house (IE), and a surname was evidently an appellation of a family. In most of the cases under the old Civil Code, wives entered the house by their marriage and accordingly adopted the appellation of a family, which was the surname of the husband, thus such change of a surname was not controversial. The concept of the house (IE) is, however, conciously removed from the current Civil Code, which even no longer clarifies the concept of a family, but rather prescribes each interpersonal relationship, such as a parent-child relationship and a relationship between spouses, stipulating rights and obligations between those individuals. Accordingly, the function of a surname as an appellation of a family may seem to be intentionally excluded from the current Civil Code. On the other hand, the Japanese Family Register still symbolically holds the "family" unit structure. Though an Individual Number system for social security and taxation based on resident registration was introduced in January 2016 for administrative purposes, the civil status of each Japanese national is still managed on this Family Register, and the registry is composed of family units, which namely combine the head of a family who is assigned e.g. at the time of marriage based on a chosen surname, and his/her spouse and their child(ren) who have the same surname as the head. The Family Register Act itself is procedural law and therefore does not prescribe the substance of what a family should be; however, this family register system still drives a strong normative consciousness as a presentation of a family which is authorized officially. If the Court declared that the Provision was unconstitutional and thus allowed each spouse to choose to continue using their original surname, it certainly would have had a big impact on detailed systems related to surnames, such as the family registration, but this concern must be charged to legislators. The Court should have found a more convincing reason to adhere to the family based unit which appears within legal systems by the same surname

system, especially as the personal interests of individuals are restricted. Because of its equivocal nature, though it is widely found in precedent cases, the contents and precise value of the concept of personal rights, and also the criteria to recognize a right as part of personal rights guaranteed under the Constitution or/and the Civil Code, are still unclear. The Court described that personal rights were, unlike so-called inherent rights, established along with specific legal systems, and thus should be examined whether the existing legal systems were reasonable. It could be said that since the Court has avoided examining the significance of a personal interest with sticking to systematic discussions, it decreased its authority compared to the legislature. In addition, where the Court mentioned that there is an intervention by parties' intention in a change of a surname to a certain extent by reasoning that marriage should be formed/avoided at their own will, the Court might have failed to examine whether the husband or the wife willingly lost/kept his/her original surname, since appellants had alleged their actual either-or situation. No reason was mentioned for the prevention of intervention of one's will to keep their original surname.

Art. 14 (1) has been interpreted as basically covering, at least as a judicial norm, only formal equality by its termination of "equality" since it is impossible to prevent actual discrimination by taking a result-oriented approach. This case followed this criterion. The precedents accept the distinctions if it is for modifying actual unequalities and policy means and legislations to accomplish those modifications can be approved as reasonable. As cited above, the Court's opinion does not sufficiently pursue the reasonability of legal systems, and the adequacy should be also questioned where one of the spouses undeniably loses his/her original surname which forms a personal interest, under the name of formal equality. Regarding the fact that more than 96% of married couples have adopted the husband's surname, it is said that it should be appropriate to regard this fact as being caused by virtual psychological pressure rather than as an incidental result, and if we deem it to be a residual consciousness from the prewar family system, this fact must be understood as contradicting the fundamental principles of the Constitution which pursue gender equality and abolished the former family system. To interpret Art. 14 as incapable to judicially impugn indirect discrimination

and disparate impacts, such as shown in this case, could be also questioned from the fundamental principles.

Several theories have deemed Art. 24 a provision to substantiate the contents of Art. 13 and Art. 14 into a family sphere and to have no utility to be theoretically defined by particular rights which the provision guaranteed in itself. Contrarily the Court showed its attitude to understand Art. 24 as a clause which had a particular role to define the limits of the Diet's discretion by requiring its reasonable legislation to ensure personal interests and substantial gender equality which could not be regarded as rights that were directly guaranteed by the Constitution. The Court dismissed appellants' argument that the Provision directly infringed freedom to marry guaranteed under Art. 24 by reasoning that the Provision stipulates the adoption of one surname as an effect of marriage and not as a condition to marry which directly restricted freedom to marry. In the Court's opinion the term "marriage" in Art. 24 was interpreted as a representation of the marriage which was already supposed to be restricted by subordinate laws and regulations, therefore again the appellants' arguments were not deemed as a direct restriction on the human rights guaranteed by the Constitution. Consequently, the question was left to an examination of whether the legislature transgressed its scope of discretion. To determine the legislation as unconstitutional under Art. 24, the Court mentioned that the Provision should be determined to be unreasonable in light of the requirements under Art. 24 and be beyond the scope of the Diet's discretion, by examining the purpose of the legal system and the influence that may be derived from adopting the legal system. This is coherent with a traditional moderate scrutiny criterion, the least rigorous criterion to exam constitutionality from a rationality based perspective which admits constitutionality when the purpose of the legistation and its means are not significantly irrational, and this paved the way for the particular use of Art. 24. Enphasizing again the significance of the surname system with this screening, the Court let the legislature handle a broad authority to make a comprehensive assessment on various contents, such as social conditions, national traditions and people's sentiments, and therefore the grave task to protect the personal interests of minorities behind those sentiments was left to the legislature, who has balked at reconsidering traditional family norms for long time.

During the examinations under Art. 24, the Court mentioned there was a certain meaning of maintaining a system to grant a child the same surname as both his/her parents so to indicate to others his/her legitimacy. This may raise a question about the consistency with the Court's precedent cases in 2008 concerning denization and in 2014 concerning the share in succession which diminished the privilege of a legitimate child against a child born out of wedlock (see the Supreme Court, G.B., judgment of June 4, 2008. Kagetsu Vol. 60, No. 9, at 49; the Supreme Court, 1st P.B., judgment of July 17, 2014. Minshu Vol. 63, No. 6, at 547). If the advantage of using the same surname as parents is recognized by the Court, it could mean to admit the disadvantages of not only a child born out of wedlock, but also a child using a different surname from his/her parent on account of divorce, de facto marriage, etc. and it should be questioned from the perspective of the interests of the child. In recent years, the presumption of legitimacy has been emphasized as the most important effect of marriage. However, its importance for the interests of the child should be found in expediting the settlement of a stable father-child relationship, and the legitimacy shouldn't be deemed as giving a privilege to a legitmate child apart from a child born out of wedlock; a parent is never exempt from his/her responsibility for the child by using a different surname from his/her child, and this responsibility should be basically charged on parents regardless of his/her marital status. Thus the Court has failed to sufficiently explain the relationship between the interests of the child and the system to adopt one surname at the time of marriage. Even if there is a systematic reason to encourage the adoption of one surname between spouses and a child, a more compelling explanation should have been presented for where a child using a different surname from a parent is euphemistically left to suffer disadvantages. Matters which may be supposed to occur with the introduction of a less restrictive system, such as the selection of a child's surname, this should be dealt with by the legislature.

Lastly, it should be also mentioned that there was no reference to CEDAW in the Court's opinion. Though initial and previous judgments discussed the issues on the convention, the Courts dismissed the appellant's arguments by reasoning they were unappealable. As mentioned above, recently the Court has diminished the difference

between a child born in wedlock and one born out of wedlock, and especially in the case of 2014, the Court ventured to assess the constitutionality of a clause in question from the aspects of comparative law and international human rights standards, which had been seen as less decisive compared with the rigid criteria of the raditional assessment of constitutionality. Since the 2014 decision was supposed to bring reflective considerations for international standards of human rights and comparative law and to improve human rights standards in Japan, the Court's ignorance of the international point of view could be seen as a retrogression, or even as arbitrary, as the Court only addressed the absence of the discriminatory character of the Provision and thus avoided directly opposing international criticism. This Court's attitude also contradicts another Court's judgement which was made on the same day, concerning the period to prohibit remarriage which was imposed only upon women, since several remarks were made on comparative law in this case (see the Supreme Court, G.B., judgement of December 16, 2015. Hanrei Taimuzu Vol. 1421, at 61).

The Court appended that this opinion did not prevent legislation of a less restrictive surname system, such as one allowing a married couple to use separate surnames if they so choose. On the other hand, such a system is still not realized, nevertheless the introduction of it has been discussed since 1954 by the legislative council. The Court's modest decision would barely have a sufficient influence on the Diet to spontaneously work on this issue, and here the role of the judiciary, which is supposed to be independent from the legislature, should be reconsidered. Though actually a surname used to be connected with joining and leaving a household and a number of legal effects were stipulated based on it, according to the opinion by Justice KIUCHI, Art. 24 of the Constitution was inserted aiming at the abolition of this household system, and most of the legal effects, including inheritance of parental authority, are separated from a surname today, except for the very venial area concerning assumption of rights relating to worship. Accordingly, the reason of maintaining the current surname system should be found in other than legal effects. The Courts mentioned the sense of unity as a family to explain necessity of persisting in the system. However, providing exceptions for choosing different surnames will not harm that sense held

by who want to gain it by adopting the single surname. It was mentioned that the current surname system prevents people who are unwilling to change his/her surname marrying. Denial of the sense of unity which the latter person wants to realize by legal marriage cannot be justified. In addition, the reasonability of legislation to exclude any exception was not pursued in this case. Despite the fact that the Court assumed the disadvantage from changing a surname could be eased by using a by-name, use of a by-name has no legal foundation, and thus provides no legal certainly. Usability of a by name does not grant reasonability to the legislature still avoiding any exception to the system. Moveover, international marriage does not lead to adopting a surname, since the family register only handles Japanese nationals. The current attitude shown by the Court to persist the family norms peculiar to Japanese nationals seems to be highly exclusive. This case revealed the Court's attitude to hesitate to mend the family norms which are based on legal marriage and the legitimacy of the child, and the approach from the respect of the individual in a family unit shown in case 2014 was retreated. Though there is no clear statement of why the court should have avoided intervening in the traditional family norms, a risk of a persisting "normative" family structure, which could entrap people out of this structure as deviant and blindly bury individuals into the collectivity of a family, must be recognized.

4. Law of Civil Procedure and Bankruptcy

X v. Y
Supreme Court 1st P.B., November 30, 2015
Case No. (*ju*) No.2146 of 2014
69 (7) Minshu 392

Summary:

In a case where the first instance makes a judgment that a litigation had been closed upon the Settlement having been reached and only the defendant filed an appeal against the judgment, while the plaintiff filed