

7. International Law and Organizations

X 1-5 v. the State

Supreme Court of Japan, December 16, 2015

Case No. 2014 (O) 1023

MINSYU, Vol. 69, No. 8, p. 2586

Summary:

The Court dismissed the claim of unconstitutionality of Article 750 of the Civil Code, which requires the couple to adopt the same surname at the time of marriage, with Articles 13, 14, and 24 of the Constitution of Japan. In reaching this conclusion, the Court simply disregarded pertinent international human rights law, particularly, the Convention on the Elimination of All Forms of Discrimination against Women.

Reference:

Articles 13, 14 and 24 of the Constitution of Japan; Article 750 of the Civil Code; Convention on the Elimination of All Forms of Discrimination against Women

Facts:

The Appellants suffered social disadvantages by changing their surnames at the time of their marriage in accordance with Article 750 of the Civil Code (the Provision) (“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”). They sought damages against the appellee of final appeal under Article 1 (1) of the State Redress Act, on the grounds of the illegality of the appellee’s legislative inaction, that is, its failure to take legislative measures to amend or abolish the Provision.

Opinion:

The final appeal is dismissed.

1. The Final Appeal Arguing the Violation of Article 13 of the Constitution

Having overviewed the provisions concerning the surname under the Civil Code, they can be interpreted as presenting a conception that a surname takes on another meaning, separately from a given name, as an appellation for a family, which is a constituent of society. Since a family is a natural and fundamental unit of persons in society, it may be reasonable to determine a single surname, which forms part of an appellation connected with the unit to which the individual belongs. Furthermore, one could say that it is contemplated from its nature that a surname would reflect a certain personal status such as a parent-child relationship and could possibly be changed along with a change in the personal status, such as marriage. In conclusion, “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, and thus, the Provision does not violate Article 13 of the Constitution.

An individual’s credit, reputation, fame or the like that have been established before marriage can be regarded as a personal interest that should be taken into consideration when examining the legislative discretion permitted under Article 24.

2. The Final Appeal Arguing the Violation of Article 14 of the Constitution

Article 14, paragraph (1) provides for equality under the law, and prohibits discriminatory treatment under the law unless such treatment is based on reasonable grounds in line with the nature of the matter.

The Provision leaves it to the persons who are to marry to decide which surname they are to adopt, and therefore, does not prescribe discriminatory treatment by law based on gender. Since the same surname system prescribed does not involve in itself gender inequality in form, the Provision does not violate Article 14 of the Constitution.

The point to ensure substantial gender equality by eliminate influence caused by a sense of discrimination or discriminatory customs existing in society, should be taken into consideration when examining w the legislative discretion permitted under Article 24.

3. The Final Appeal Arguing the Violation of Article 24 of the Constitution

Article 24 (2) of the Constitution leaves it primarily to the Diet's reasonable legislative discretion to establish specific systems, and indicates the legislative requirement or guideline that laws to specify such matters should be enacted from the standpoint of individual dignity and the essential equality of the sexes.

While guidelines that could limit the legislative discretion under Article 24 include personal interests and substantial equality, the matters concerning marriage and the family should be decided by taking into consideration various factors in the social situation. Thus, we must consider whether 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.

The same surname system is still found to be reasonable under the current Civil Code to determine a single appellation for each family as a natural and fundamental unit of persons in society. It does not prohibit people from using their pre-marriage surname even as their by-name after marriage. The same surname system introduced by the Provision thus does not violate Article 24 of the Constitution.

The implementation of the same surname system largely depends on how the public considers the marriage system and a desirable manner of determining the surname. How this type of system should be designed is a matter that needs to be discussed and determined by the Diet.

Editorial Note:

As the background of the present judgment, it should be reminded that the Committee on the Elimination of Discrimination against Women (CEDAW), set up under the Convention on the Elimination of All Forms of Discrimination against Women that Japan ratified in 1985, has repeatedly expressed its concern regarding discriminatory provisions in the Civil Code including the choice of surnames for married couples (3rd Concluding Observation). Notwithstanding the international pressure, the Supreme Court retreated to the domestic safe havens by invoking the legislative discretion doctrine (but see the individual opinion by Justice

Kiyoko Okabe (para. 1-(2)-A) and the dissenting opinion by Justice Yoshiki Yamaura (para. 2-(3)), explicitly referring to CEDAW's recommendations).

The apathy that the Court showed toward international law in the present case is in sharp contrast to its own two epoch-making precedents concerning children born in wedlock, in which the Court reinforced constitutional rights by relying on international human rights law to balance with legislative discretion (the 2008 *Nationality Act* judgment (MINSYU, Vol. 62, No. 6, p. 1367) and the 2013 *Inheritance* judgment (MINSYU, Vol. 67, No.6, p. 1320)). Contrary to the precedents friendly to international law, the *Surname* judgment was a lamentable retrogression from the healthy interaction between constitutional and international human rights norms. Due to the *Surname* judgment's apathy to international law, the open-minded decisions in *Nationality Act* and *Inheritance* might be regarded just as mere "cherry-picking" instances in which the Court refer to only legal sources favorable to its reasoning.