〔Article〕

Family Law Reform through Constitutional Litigation?:

The Persistence of Fossilized Rules and Challenges for the Japanese Supreme Court* †

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Ⅰ. Introduction

"Relict species" is a fascinating concept even to outsiders to biogeography. The Amami black rabbit, or *Pentalagus furnessi*, for example, is said

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to have begun to inhabit the Japanese Archipelago more than several million years ago, when it was connected to the Eurasian continent. Having a stocky body and ears much smaller than those of other leporids, this primitive rabbit is generally considered to be an example of a living fossil. Today it lives on two tiny subtropical islands in the southwestern part of Japan, long after its closely related species died out in mainland Asia.

A phenomenon similar to this occasionally takes place in the world of law as well. Unlike the chubby rabbit living in the deep forest, however, fossilized rules unreflective of social progress often have a serious negative impact on people's lives, particularly when they concern family law matters.

When outdated statutes are in conflict with constitutional norms, the judiciary is expected to nullify them. This paper is an attempt to assess the significance of two recent Japanese Supreme Court decisions, whose focal point was the justices' preparedness to invalidate obsolete statutory provisions relating to marriage, originally imported from, but now defunct in continental European countries. Although the Japanese Supreme Court's jurisprudence has been traditionally characterized by judicial self-restraint, there appear to be signs of change in a direction that is more in line with the egalitarian trend of the times. The justices' growing sense of obligation to fulfill a constitutional mandate to secure equality may have far-reaching implications for a variety of future cases involving minorities, such as when the issue in question is about same-sex marriage.

Ⅱ. Anonymous v. Japan – Remarriage Prohibition Case (2015)

Let us start by exploring the first case, *Anonymous v. Japan*,[1] which concerns the constitutionality of Article 733 of the Japanese Civil Code.[2]

1 Judgment of December 16, 2015, Saiko Saibansho [Supreme Court], 69-8 Minshu 2427 (Japan).

2 At the time of the litigation, Article 733 of the Japanese Civil Code provided

This provision prohibited women from remarrying within six months following the dissolution of their former marriage. Because of this restriction, the plaintiff in this case had to wait for six months before she remarried; accordingly, she sued the Japanese government based on the National Compensation Act,[3] seeking damages for emotional distress caused by the infringement upon her freedom to marry. The National Compensation Act is a statute that obligates the government to compensate an individual victim when a public employee intentionally or negligently inflicts damages on the victim while performing duties as a public employee.

The Supreme Court dismissed the plaintiff's claim, but it held that Article 733 was inconsistent with Article 14, Section 1, of the Japanese Constitution,[4] which is a general provision for equality before the law, as well as Article 24, Section 2,[5] which protects the equality of the sexes in marriage.

According to the majority (comprising thirteen out of fifteen justices), the legislative purpose of Article 733 is to prevent overlapping presumptions of paternity. Under another provision of the Civil Code, Article 772,[6] a husband is presumed to be the father of a child delivered by his wife if that child is born at least 200 days after the beginning of

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that "[a] woman may not remarry unless six months have passed since the day of dissolution or rescission of her previous marriage." Minpo (Civil Code), Law No. 9 of 1898, art. 733 (Japan).

3　Law No. 125 of 1947 (Japan).

4　"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." CONST. OF JAPAN, art. 14, sec. 1.

5　"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." CONST. OF JAPAN, art. 24, sec. 2.

6　Article 772, Section 2, of the Japanese Civil Code provides that "[a] child born after 200 days from the formation of marriage or within 300 days of the day of the dissolution or rescission of marriage shall be presumed to have been conceived during marriage."

their marriage; in addition, the ex-husband is presumed to be the father of a child delivered by his ex-wife if that child is born within 300 days after the dissolution of their marriage.

The aforementioned majority points out that that purpose here is a valid one, in the sense that it contributes to the interests of the child by definitively identifying the father, who is legally and financially responsible for his or her support. However, in order to avoid the overlapping presumptions, clearly, 100 days should suffice: the former marriage ends, and for 300 days thereafter, the ex-husband is presumed to be the father of a child delivered by his ex-wife; the ex-wife gets married to a new husband, and the presumption that the new husband is the father begins when 200 days have passed. So, the gap is just 100 days. Accordingly, Article 733 is against Articles 14 and 24 of the Japanese Constitution, as the restriction of remarriage beyond 100 days is unrelated to the legislative purpose and is therefore unreasonable.

According to the majority, the Japanese Parliament is given a certain amount of discretion under Article 24, with regard to what constitutes the legal basis for marriage as well as any associated statutory details; however, Article 733 must be seen as an example of abuse of legislative discretion, in light of the fact that Article 24, Section 2, directs the Parliament to pay utmost attention to individual dignity and gender equality.

The majority ultimately denied the plaintiff recovery, because the National Compensation Act only applies in exceptional circumstances with respect to legislators' negligence. Specifically, in order to recover damages under the National Compensation Act, the plaintiff must demonstrate that the Parliament has neglected its duty to amend or repeal a provision for a long time without any justification whatsoever, despite the fact that it has been obvious that such legislative inaction is inconsistent with the Constitution.

The Court concluded that no claim for damages could be made against the government in this case, for it cannot be said that the legislators continued to neglect their duty to rectify the provision even though it

was evident that Article 733 was against the Constitution, because, before this case, the Supreme Court had never suggested that it was unconstitutional.

As for the two justices who did not join the majority, one justice, Justice Onimaru, wrote an opinion concurring in the judgment only, stating in strong words that Article 733 is unconstitutional in its entirety. She only supported the majority's conclusion on the basis that the plaintiff in this case did not satisfy her burden of proof, required under the National Compensation Act. The other justice, Justice Yamaura, dissented, and maintained that the plaintiff's claim for damages should actually be sustained.

Justice Yamaura's dissenting opinion seems particularly persuasive, in that he points out that the Japanese Civil Code, including the prohibition of remarriage for women, was enacted in 1898, when only around 10% of the population had the right to vote, and those were only men satisfying certain property requirements. Japanese legislators' predominant concern at that time was to preserve the integrity of family lines, which was repeatedly made explicit during contemporary parliamentary debates on the legislation. His dissent also emphasized that Germany and France had already abolished similar restrictions in 1998 and 2005, respectively. These were the restrictions that Japan had imported, so to speak, when it instituted its Civil Code.

In addition, Justice Yamaura notes that today there are other ways to achieve the stated legislative purpose other than to restrict the women's right to remarry, because, unlike in 1898, which was decades before DNA's structure was even confirmed, technologies have already been well established and are now readily available to identify the father of a child. The interests of those children born in such rare circumstances, pregnant women contemplating remarrying, could easily be protected through a specifically designed procedure which the Parliament should set up, he argues.

The administration and the Parliament responded to this Supreme Court decision quite quickly. The Cabinet immediately submitted a bill to

amend Article 733, and the Parliament passed it in June 2016.[7] However, the media and academia are critical of this statutory change, since the amended Article 733 still prohibits remarriage for 100 days and the restriction only applies to women. Most scholars of constitutional law, as well as family law, seem to agree more with the concurring opinion of Justice Onimaru or the dissenting opinion of Justice Yamaura.

Currently, under the amended Article 733, Japanese women are still required to apply for an exemption, submitting certificates provided by medical doctors to the municipal office verifying that they are not pregnant, if they want to remarry within 100 days of the dissolution of their former marriage. It is questionable that such a requirement is rationally related to the legislative purpose, especially where the applicant submitting a certificate is over a certain age, has previously undergone a sterilization operation, or wants to remarry with her ex-husband (there have been such cases).

Ⅲ. Anonymous v. Japan – Mandatory Common Surname Case (2015)

The Supreme Court decision discussed above, however, can be seen as a partial victory for lawyers and activists trying to reform archaic rules of Japanese family law in terms of gender equality. The second case, which was handed down on the same day in December 2015, has brought even more severe criticism from experts as well as from the general public.

This case, also called *Anonymous v. Japan*,[8] was brought to court by four women, all of whom have de facto husbands, and one unmarried couple. Three of the women decided not to register their marriage from the beginning, whereas two of them legally registered their marriage at

7 The amended Article 733 of the Japanese Civil Code currently in place reads, "A woman may not remarry unless 100 days have passed since the day of dissolution or rescission of her previous marriage."

8 Judgment of December 16, 2015, Saiko Saibansho [Supreme Court], 69-8 Minshu 2586 (Japan).

first, but later divorced on paper, in order to use their maiden names. They continue to live with their "ex-husbands" still today. This anomalous situation came into existence because Japan has a statutory requirement that a married couple must have a single common surname as provided in Article 750 of the Civil Code.[9] The plaintiffs challenged the constitutionality of this provision and sought damages for emotional distress pursuant to the National Compensation Act.

The Supreme Court dismissed the plaintiffs' claim for damages, and this conclusion was supported by fourteen out of fifteen justices; only Justice Yamaura, apparently the most liberal jurist on the bench, would have allowed the award of damages in this case. However, with regard to the constitutionality of Article 750, the justices' opinions were divided ten to five.

The majority rejected all of the plaintiffs' constitutional arguments, stating (1) that the right not to be forced to change one's name is not part of the right to pursue happiness under Article 13 of the Japanese Constitution,[10] which is a general provision usually considered to protect all the rights not specifically enumerated in other parts of the Constitution but essential to personal autonomy and dignity, (2) that Article 750 is not discriminatory and therefore not against Article 14, because its text is gender neutral and the choice is up to each couple, and (3) that whether to amend or repeal this provision is left to legislative discretion under Article 24, Section 2, for it is not irrational to omit direct action, since surnames have the function of demonstrating the commonality of family members and since the disadvantages of changing surnames are actually decreasing these days as more and more companies, schools,

9　Article 750 of the Japanese Civil Code 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."

10　"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." CONST. OF JAPAN, art. 13.

and organizations allow people to use surnames of their own choice in their everyday lives as opposed to their legal names.

Justice Okabe, who was a family law professor before joining the bench, did not join the majority and wrote a powerful concurring opinion, which read more like a dissenting opinion. Two of her colleagues, both of them female, joined her view. This was a time when there were three female justices on the Japanese Supreme Court for the first time in its history; that was a four-year period from 2013 to 2017 – currently, there is once again only one. In this case about the mandatory common surname rule for married couples, all three female justices on the bench were united in the same opinion, which attracted a lot of media attention when the decision was announced.

Justice Okabe, joined by her colleagues Justices Sakurai and Onimaru, points out at the outset that even if surnames generally have an important social function, it does not follow that there are exceptional circumstances where having different surnames would serve the couples' interests better, and therefore whether to have common surnames or not should be left to each couple. She also notes that the Committee on the Elimination of Discrimination against Women repeatedly expressed concern about this discriminatory provision of the Japanese Civil Code. In light of the increase of the number of women working outside the home, she argues, it is high time that the Japanese Parliament adopted a statutory framework, whereby couples wishing to have different surnames are able to do so, and that to keep the rule enacted more than 100 years ago in this respect must be seen as an abuse of discretion on the part of the Parliament.

Justice Kiuchi wrote a separate opinion concurring in the judgment only, maintaining that Article 750 was unconstitutional, and severely criticizing the majority for concentrating their attention on whether the common surname rule had a rational basis in general, when the focus of analysis should have been on the rationality or irrationality of not permitting any exception to that rule under any circumstances. Justice Yamaura dissented, arguing that there was a sufficient showing of

negligence on the part of the legislators.

We may at this stage ask the following question: why has such an inflexible provision not been deleted from the Civil Code in the first place? In Japan, generally speaking, most bills of importance are written by bureaucrats along the lines suggested by the Legislative Council and then submitted to the Parliament. The Legislative Council is a consultative body attached to the Ministry of Justice; it is composed of prominent law professors and experienced practitioners. However, with regard to family matters, because of the unyielding opposition from conservative lawmakers, efforts for legal reform have often been unsuccessful, as was the case with the proposal to introduce an option for couples to choose different surnames. The Legislative Council made such a recommendation in 1991, but there has been no movement on the political front since then.

In light of this situation, we might think that the Supreme Court would have stepped in here, taking various societal factors into consideration. Emphasizing the neutrality of the text in the face of social reality in which 96 to 97% of married couples choose the surnames of husbands does not seem to be a sophisticated way to justify the mandatory rule permitting absolutely no exception, any more than the "separate but equal" doctrine justifies a segregated education system.[11]

On the other hand, the Japanese Supreme Court has recently made a small but important move in a positive direction: in 2017, its secretariat, which is responsible for court administration in general, started to allow judges of all levels of courts across Japan to use their maiden names when they sign orders or judgments. And finally, in 2018, Justice Miyazaki, previously an attorney in private practice, was appointed to the Supreme Court, becoming the first Supreme Court justice in Japanese history to use her maiden name on the bench.[12] So, within the judiciary, shifts are occurring.

11　*See* Brown v. Board of Education, 347 U.S. 483 (1954).

12　*Newly Minted Japanese Supreme Court Justice Will Issue Rulings Under Maiden Name, Breaking with Long Tradition*, JAPAN TIMES, Jan. 10, 2018.

Ⅳ. Japan as a "Mixed Jurisdiction" : The Continental Mindset and a US-Style Judicial Review

The following section, then, will consider some basic features of Japanese law – which may have affected the reasoning and outcomes of these cases – as well as the kinds of challenges the Japanese legal system, particularly the Japanese Supreme Court, needs to address in the near future, with respect to the tension between fossilized provisions of family law and the commands of the Constitution, especially the guarantee of equality in Article 14.

Japan created its modern legal system following the continental European model in the nineteenth century, but its constitution was completely revised under American influence in 1946. Japanese public law is mostly Anglo-American, whereas private law generally follows the French and German models, but within each sphere of law, oftentimes we can see a variety of elements which have different historical origins. From the perspective of comparative law, then, Japan is often considered to be a "mixed jurisdiction,"[13] for its legal system is built upon the dual foundations of Anglo common-law and continental civil-law materials.

Furthermore, the system of judicial review was introduced to Japan after the Second World War. Article 81 of the Constitution of Japan provides that the Supreme Court has the power to determine the constitutionality of any statute or governmental action,[14] and Article 98, Section 1, declares in turn that law or governmental action that is contrary to the constitution shall have no legal force or validity.[15] The

13 For details about the concept of "mixed jurisdictions" or "mixed legal systems," *see* Jacques du Plessis, *Comparative Law and the Study of Mixed Legal Systems, in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 477, 480-86 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

14 "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act." CONST. OF JAPAN, art. 81.

15 "This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof,

present Constitution has an extensive list of individual rights and liberties, thanks to the efforts of U.S. legal advisors working under General Douglas MacArthur, the Supreme Commander for the Allied Powers, whose intention was to dismantle the traditional authoritarian regime of Japan, which had existed under the previous constitution.

The American legal advisors also directed Japan to revise family law provisions in its Civil Code, and of course the Japanese Parliament essentially followed their advice. That was a time when Japan was under the occupation of the Allied Powers. For example, the requirement that a household must designate one person as the head of the house was abolished in 1947, together with related provisions, because it was considered to be incompatible with Article 24 of the Constitution. However, some outdated provisions went unnoticed and unchanged, and they remain in force today.

Now, although, as a matter of legal structure, it has been possible, and in fact obligatory, for the Japanese judiciary to step in to invalidate a law or governmental action infringing upon a claimant's individual rights and liberties for the past seventy-plus years, the mentality and culture of the legal profession have not changed remarkably. The traditional mode of thinking, according to which judges were regarded as neutral interpreters of the law, as opposed to policymakers with a unique mission to implement values, persisted for quite a long time. Perhaps as a result of this, the Japanese Supreme Court has been extremely reluctant to exercise the power of judicial review. It has held statutory provisions unconstitutional only ten times since its creation in 1947.

Having said that, the Supreme Court seems to be becoming more attentive to its mission and less timid with time. Three of the ten decisions declaring the unconstitutionality of statutes were handed down in the last eleven years. And all of them, in fact, were cases where obsolete statutory provisions related to family matters were rendered

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contrary to the provisions hereof, shall have legal force or validity." CONST. OF JAPAN, art. 98, sec. 1.

null and void.

For example, in a case decided in 2008,[16] the Supreme Court declared a provision in the Nationality Act unconstitutional under Article 14, Section 1, of the current Constitution, as well as in contravention of the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. The invalidated provision in the Japanese Nationality Act had denied citizenship to illegitimate children born to non-Japanese mothers and acknowledged by Japanese fathers *after* they were born. Many of these children's mothers were women from Southeast Asia, as was the case with the plaintiffs. In holding that such discriminatory treatment is no longer allowed, the Supreme Court placed much emphasis on the rapid progress of globalization, referring to the increase in the number of international marriages and cohabitations. The statutory scheme was struck down as not rationally related to the governmental interest of limiting nationality to those with a strong connection with Japan.

This was followed by another decision in 2013,[17] in which the Supreme Court held that a rule of inheritance provided in the Japanese Civil Code, giving illegitimate children a lesser share of their parents' estate than their half-siblings, was also inconsistent with Article 14, Section 1, of the present Japanese Constitution. So, the Japanese Supreme Court seems to be taking an active role in constitutional decisionmaking little by little. The two Supreme Court cases decided in 2015 – the remarriage prohibition case and the mandatory common surname case – should probably be analyzed in this context.

16 Anonymous v. Japan, Judgment of June 4, 2008, Saiko Saibansho [Supreme Court], 2002 Hanrei Jiho 3 (Japan).

17 Anonymous v. Anonymous, Judgment of September 4, 2013, Saiko Saibansho [Supreme Court], 67-6 Minshu 1320 (Japan).

V. Disadvantages of a Unitary Legal System and Ways to Overcome Them: Judiciary as a Defender of Discrete and Insular Minorities?

On the other hand, in addition to the strong tradition of judicial self-restraint, there is another factor within the Japanese legal system, which might work as a disadvantage from the viewpoint of the protection of human rights. Japan is not a federal system like the United States or Canada, nor is it part of a supranational union like the Council of Europe, with an independent court which is responsible for evaluating cases pertaining to human rights. So, Japan lacks the multi-layered structure usually found in other developed countries. This may further explain why its Supreme Court has not been very active in implementing the Constitution, for comparing practices between states, as well as having dialogues between domestic and international courts, typically gives the judiciary an opportunity to reexamine its position and often leads to more expansive protection of individual rights and liberties.

Recent Supreme Court decisions, however, seem to show that the justices are becoming more and more outward-looking and closely watching the international trend, which might make up for the disadvantage of Japan being a single, unitary legal system. The emergence of subtle judicial activism seems to be connected to the arrival of a new generation of Supreme Court justices, who typically tend to take international law and other countries' law into consideration when making important value judgments. Many of these justices may have been influenced by their experience of studying abroad.

Articles 733 and 750, the two provisions we have seen, are in fact the provisions that the United Nations Human Rights Committee and the Committee on the Elimination of Discrimination against Women have repeatedly recommended that Japan should repeal. In the remarriage prohibition case, this fact was noted only by Justice Yamaura's dissenting opinion, but it is almost certain that there was a serious discussion as to this point among justices, since the lower court's decisions cited these

international committees' recommendations, and the plaintiff's lawyer, Mr. Sakka, put emphasis on these recommendations in his appellate brief. Most probably, the reason the majority did not mention them at all is because, if they were to follow the recommendations, they would have to strike down the prohibition of remarriage in its entirety, not just the portion beyond 100 days. In the mandatory common surname case, both Justice Okabe's concurring opinion and Justice Yamaura's dissenting opinion highlighted the importance of these international committees' recommendations.

Another source of hope, so to speak, can be found in the fact that the justices of the Japanese Supreme Court are not only paying attention to international law and foreign law, but seem to have internalized, to some extent, the concept of the judiciary as a defender of discrete and insular minorities, who lack sufficient numbers to seek redress through the political process. This probably helps to explain the conclusions they reached in the cases concerning the rights of illegitimate children.

We can see the reverberation of this concept in the mandatory common surname case as well, specifically in the concurring opinion of Chief Justice Terada. Chief Justice Terada joined the majority opinion in full, but he wrote a separate opinion from the viewpoint of the separation of powers. In the concluding paragraph, usually conservative Chief Justice Terada makes an interesting statement with potentially far-reaching implications; he argues that the matter concerning Article 750 is best left to the Parliament, because with respect to the mandatory common surname policy, there is no special factor which makes a fair and impartial examination of the matter by the democratic process difficult, unlike other disputes where a specific minority group is involved. Logically, it follows that the Supreme Court should not hesitate to intervene, or at least should be more active in checking unconstitutional practices, when the rights of minority group members are at risk. This may be a sign that some justices in the mainstream are prepared to undertake a more active role in cases involving sexual minorities, such as when the issue in question is about same-sex marriage.

Ⅵ. Concluding Observations

Unfortunately, it seems undeniable that oddities and ironies are still everywhere in the domain of Japanese family law. Mr. Sakka, who was the lawyer for the plaintiff in the remarriage prohibition case, is now challenging the mandatory common surname rule in a new case with a new strategy: he focused on the fact that, when a Japanese person gets married to a citizen of another country in Japan, both of them can retain their surnames, and he is arguing that the present Japanese law is actually discriminatory against Japanese citizens. This is just one of many peculiarities that show that plenty of work to modernize the rules remains to be done in Japan, particularly with respect to equal protection of rights and freedoms.

The Japanese Supreme Court's cautious incremental approach is sometimes frustrating, but there are indications that the justices are making more and more efforts to adjust the law so that it conforms with international standards. Whether reformers' hopes for equality will be fulfilled or not of course remains to be seen, but precisely because it does, open discussion and constant reevaluation of the current state of affairs will continue to be of immense value, as they are usually the key to making change happen in the face of inertia from outdated legal frameworks.