

to formulate and enact implementation plans in line with the basic policy. Articles 12 through 14 define the duties of the director-general of the Environment Agency and the ministers whose responsibilities cover businesses including manufacturing and transport.

**[Comment]**

A feature of this law is that under Article 6 it does not allow the new registration in specified areas of “designated motor vehicles,” or motor vehicles that cannot attain the “specified motor vehicle emission standards,” which are environmental quality standards for nitrogen oxides established by an ordinance of the Prime Minister’s Office, and it gradually prohibits the use of such vehicles currently in use. There are specific designations for geographical areas and vehicles types, thereby making the law an unprecedented and far-reaching measure for preventing air pollution. With regard to motor vehicles currently in use, however, some people have voiced concerns that restricting their use may violate the intent of Article 29 of the Constitution, which guarantees the right to own property.

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## **2. Family Law**

### **An Interim Report concerning the Reexamination of the Marital and Divorce System (an arrangement of issues).**

Published by the Civil Bureau of the Ministry of Justice on December 11, 1992.

**[Background of the Reexamination]**

Since January 1991, the Family Law Subcommittee of the Civil Law Section of the Advisory Committee on the Legal System, an

advisory organ to the Minister of Justice, has been conducting a re-examination of the marriage and divorce systems. An interim report was published in December, 1992.

Although the Family Law Subcommittee had suspended activities following its deliberations concerning amendments to the adoption system (the interim tentative draft was reviewed at 6 *Waseda Bulletin of Comparative Law* 67, and the act amending the adoption system was presented at 8 *Waseda Bulletin of Comparative Law* 17), it resumed discussions on January 29, 1991 to make a general reexamination of the provisions in Volume Four, Chapter Two of the Civil Code, i.e., the provisions dealing with marriage.

The following circumstances were behind the decision to conduct the reexamination: there is widespread interest in a reevaluation of the marriage and divorce systems reflecting recent changes in social conditions, diversification of people's values, and amendments to marriage and divorce law in other states in the last two decades; in September 1987 the Supreme Court ruled that grounds for divorce are to be admitted in certain cases of marital breakdown despite the fact that the request for divorce is made by the guilty spouse (this case was reviewed at 8 *Waseda Bulletin of Comparative Law* 44); and there are calls to introduce a system which will allow spouses to have different surnames.

This interim report is no more than an arrangement of issues, and does not indicate the proposed direction of the amendments. It only points out issues and enumerates the various views concerning them. The Advisory Committee on the Legal System expects to receive opinions from numerous people in various fields as a result of publication. The report is accompanied by reference materials concerning the spousal surname issue.

### ***[Outline of and Comment on the Interim Report]***

The report divided into four parts: (1) issues concerning the formation of marriage; (2) issues concerning the effects of marriage; (3) issues concerning marital property; and (4) issues concerning divorce. Of these, the issues concerning the effects of marriage, particularly issues concerning spousal surnames, attracted considerable

attention, and are given a detailed examination.

## 1. Formation of Marriage

### (1) Formalities of Marriage

The report discusses the minimum ages at which one can marry (Article 731 of the Civil Code), marriages under majority, i.e. twenty years old (Articles 737 and 744 of the Civil Code), and the period of time for which a divorced woman is prohibited from remarrying. The first and the second issues have been discussed in academic circles, and the third is a noteworthy issue on which the Hiroshima High Court ruled in 1991 (see 12 *Waseda Bulletin of Comparative Law* 45)..

Concerning the minimum age at which one can marry, the present law provides that men can marry at eighteen years and older, and women can marry at sixteen years and older. The report reexamines the validity of the difference in ages between the sexes. There are two opinions. The first is that this provision need not be amended because the two years difference arises from the difference in maturation of men and women. The second is that this provision should be amended so as to permit both men and women to marry at eighteen years and older, and to permit marriage at sixteen years and older with the consent of someone who has parental rights (e.g. native parents, adoptive parents, and guardian) or the family court.

Second, the question of whether the present system of parental consent is appropriate is examined. Under the existing system, a person who has reached the minimum age for marriage but has not reached majority needs one's parents' consent to marry. If one of the parents does not or can not consent, however, the other parent's consent is sufficient. A marriage entered into without the consent of a parent, however, cannot be voided.

There are three diverging opinions. The first is that the present system should not be amended. The second holds that consent to marriage should be obtained not from the parents but from a legal representative (one who has parental rights or a guardian), and that a marriage entered into without this consent should be voidable. The third opinion is that even minors should be permitted to marry

without parental consent because minors have sufficient powers of judgment upon reaching a certain age (those supporting the former opinion of the first issue suggest an age of eighteen).

The third issue concerns the appropriateness of the present prohibition against divorced women remarrying for six months after divorce. Concerning this issue too there are three differing opinions. The first is the opinion that this provision should not be amended. The second holds that the period of time for which a divorced woman is prohibited from remarrying should be reduced to one hundred days. The third opinion is that the provision should be abolished because cases of overlapping paternity presumptions are rare, and the provision is over inclusive.

## (2) Void and Voidable Marriages

There are two issues concerning void and voidable marriage. The first is whether the present system, under which a marriage entered into by a divorced woman within six months from the time of the divorce is voidable (see Articles 744 and 764 of the Civil Code), should be maintained or not, and the second concerns the inclusion of an explicit provision stipulating whether, when the spouse of a person who has been declared legally dead remarries and the declaration of legal death is withdrawn, the first marriage should be revived or dissolved. Opinion is divided on both issues between those who favor maintaining the present system and those who advocate amendment.

## 2. Effects of Marriage

### (1) Spousal Surnames

The first issue concerns Article 750 of the Civil Code. Under the present system both husband and wife assume the surname of either the husband or wife in accordance with an agreement made at the time of the marriage, and children assume the surname of their parents. This issue is whether this system should be amended or not.

Those who favor maintaining the present system hold that having the same name gives rise to a sense of unity between husband and wife, and parent and child, and therefore, the present system should be continued from the viewpoint of preserving the welfare of children and avoiding the social confusion which would be brought by

amendment. There are also those who favor permitting spouses to have different surnames. They insist that it is not proper that one spouse must change his or her surname upon marriage, and that women who change their surnames are particularly at a disadvantage when they work out of the home. They also state that if husband and wife assume separate surnames, it does not harm the welfare of children.

There are four diverging viewpoints concerning separate spousal surnames. The first opinion is that a spouse can assume either a common marital surname to be decided at the time of marriage or retain his or her original surname. This preserves the present system of allowing husband and wife to choose a common surname, but also allows, in the case that a common surname is not decided on, a husband or wife to retain his or her own surname by making notification within three months from the date of the marriage. This procedure is similar to that in Article 767 of the Civil Code concerning the resumption of a premarital surname after divorce.

The second opinion is that husband and wife can choose either a common surname or separate surnames in accordance with an agreement made at the time of the marriage.

The third opinion is that if the husband and wife do not agree upon a common surname, they assume separate surnames. Although this view regards the husband and wife deciding on either the husband's or wife's surname as their common marital surname as the standard, it would exceptionally allow them to each retain their premarital surname in cases where there is no agreement.

The fourth opinion regards the husband and wife having different surnames as the standard, and one spouse assumes the other's surname upon marriage only exceptionally.

The report also enumerates other issues concerning cases in which husband and wife assume different surnames. For example, whether, when spouses have assumed a common surname, one spouse can alter his or her surname to assume a separate surname; whether, when spouses have assumed differing surnames, one spouse can alter his or her surname so as to assume a common surname; whether the surname of the child of spouses who assume differing surnames would be settled at the time of birth or after birth; whether the brothers

and sisters can assume differing surnames or not; whether a child can change its surname if its parents assume differing surnames; and whether husband and wife who married under the current system and have already assumed a common surname can later assume differing surnames.

**(2) The Right of Avoiding Contracts between Husband and Wife (Civil Code, Article 754)**

This issue concerns the question of whether it is appropriate that, under the current law, a contract entered into between husband and wife may be avoided by either of them at any time during the subsistence of marriage. Opinion is divided between those favoring retention of the current system and those holding the opinion that this provision should be repealed.

**3. Matrimonial Property System**

**(1) Marital Property Contracts (Civil Code, Article 755)**

This issue concerns the appropriateness of the current system concerning marital property contracts, under which husband and wife who wish to enter into a contract concerning marital property must conclude and register the contract prior to registration of the marriage. Opinion is divided between those who favor the present system and those who support amendment to allow conclusion or alteration of a contract even after registration of marriage.

**(2) Statutory Marital Property System**

The present Civil Code contains no provisions concerning the disposition of property acquired in the name of one spouse during marriage as a dwelling for both spouses. One view holds that in cases where the non-owning spouse actually lives in the dwelling in question, if any contract transferring the dwelling or land on which it is located, rights of rental to the dwelling or land, or superficies is concluded without the consent of the non-owning spouse, it may be avoided by that spouse, and that such avoidance should be enforceable against third parties. The purpose is to maintain stability of dwelling for the non-owning spouse. In contrast to this view, the second opinion is that which holds that such a provision should not be created, since business dealing will become unstable and there is the danger

of the rights of third parties being violated.

#### **4. Divorce**

##### **(1) Divorce by Agreement**

There are two issues concerning divorce by agreement. The first is whether any specific provision on the child-visitation rights of the non-custodial parent following divorce should be established (the current Code has no provision on this matter). One view holds that no provision is necessary; the visitation rights of the non-custodial parent can be established by interpreting “other matters necessary for custody” (Article 766) as including visitation. In opposition to this view others hold that an explicit provision should be provided, as has been done in other states, because visitation rights have recently become a serious problem among divorced couples.

The second issue is whether the provision concerning the distribution of property upon divorce (Article 768) must be amended. Although there are those who believe the present system should be preserved, others believe that since the present provision does not provide definite factors to determine the sum as well as the mode of the distribution, provisions should be established stipulating consideration of the degree to which each spouse contributed to form their property, with equal distribution as the principle.

##### **(2) Judicial divorce**

There are two main issues. The first is whether the present grounds for divorce (Article 770(1) of the Civil Code) should be amended to allow no-fault divorce. There is the opinion that the present act need not be amended, because Article 770(1)(v) of the Civil Code provides a basis for no-fault divorce. Others contend that a new ground, that is, continuous separation of husband and wife for a certain period (for example, five years), should be added.

The second issue concerns Article 770(2). The current law provides that even in cases where any or all of the grounds for divorce mentioned in subparagraphs (i) to (iv) of Article 770(1) exist, the court may dismiss the action for divorce if it deems the continuance of the marriage proper in view of all the circumstances. The point of contention is whether this system should be preserved. Some believe

this system should be preserved, but others assert that it should be amended or abolished, since it confers upon judges wide discretionary powers and may restrict the freedom of divorce.

Some other problems mentioned concerning the proceedings of judicial divorce are, for example, whether the jurisdiction which the district courts have in judicial divorce cases should be transferred to the family courts, and whether district court judges can manage the investigators assigned to the family court in divorce cases.

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### **3. Commercial Law**

#### **Amendments to the Securities Exchange Act and Foreign Securities Firms Act.**

##### ***[Background of the Amendments]***

Recently, among the many laws belonging to corporate law, the Securities Exchange Act has become very important. As is generally known, the securities market in Japan has witnessed unprecedented expansion in recent decades and has established itself as one of the leading markets in the world. Consequently, internationalization (globalization) and liberalization of securities regulation were demanded from all over the world. Also important to the background of the amendments, we must remember, were the continual scandals involving mainly the four major securities firms for loss compensation to certain investors.

##### ***[Contents of the Amendments and Comment]***

(1) Act Amending the Securities Exchange Act and Foreign Securities Firms Act (Ch. 96, 1991).