2. Family Law

1. Surnames of a married couple

According to the current Civil Code, the principle is that the married couple choose either the husband's or the wife's surname as their common name upon marriage (Article 750). Therefore, couples must agree to choose either name and must use the same name during marriage. Under the Meiji Civil Code, it was taken for granted that the wife went into the husband's Family (*iye*), and took the husband's name (former Articles 788 and 746). Moreover, it was not until the Edo Era that the common people were able to name themselves with surnames, for surnames were a privilege of the *bushi* class. The Meiji government allowed all citizens to have surnames in order to establish a Family Registration System (*koseki*), which was a system that enabled the government to make a list for drafting and taxing and to maintain public order. A surname is an indication of a paternal lineage and is thought to be something inherited from their parents; therefore, wives used their maiden names as their surnames until the middle of the Meiji Era. The Meiji Civil Code became effective in the year Meiji 31 (1898), and an individual's surname became the name of the whole family. Even though the patriarchal family system (*iye* system) is abolished under the current Civil Code, there are many theories pertaining to the characteristics of a person's name. For example, one way of defining names is to think that names are a way of calling an individual, a way of differentiating an individual's identity from that of another in the society. On the other hand, some may think that names are a way of calling members of a family that lives together. According to the principle that married couples take common surnames, or parent and child use the same surnames, this allows the reinforcement of family unity, which is rooted in the people's consciousness and traditional feelings. Furthermore, surnames are the basis for the unique Family Registration System in Japan, which makes it convenient to tell who belongs in the same family. However, just because the feudalistic and patriarchal family law has long supported the Family Registration System,

and the system has actually been a governmental merit and administrative convenience, it seems odd that the special law referring to the Family Registration System preempts the basic Civil Code.

Currently, the percentage of wives changing their names to their husband's upon marriage has risen to 97–98%, indicating that it is the women who change their names. The existing law which requires the same name for the parents and the children, works to maintain the child's well-being and avoid any confusion in society. This has been done in the same way for a long time, therefore many strongly insist that it should not be changed. But according to the social economic survey done by the Ministry of Health and Welfare, 67% of recently married couples both work and women have become more active outside the home. Changing their names because of marriage may become an obstacle in many ways. In other words, for women who have their own careers and social status, changing their surnames may give the image that they are subordinate to their husbands. Women whose names are socially stable have to go through the process of informing others that their names have changed. In a lawsuit concerning the right to be named in his or her mother tongue, the Supreme Court made a decision saying one's name is "the basis for being recognized as an individual, and it reflects the individual's identity and makes up the person's personality as well" (Supreme Court Decision of February 16, 1988. 42-2 *Minshū* 27). The Court admitted that a name has a strong relationship between a person and how he/she lives. Furthermore, looking from a comparative law perspective, there are not many countries that enforce a common surname upon a married couple. For example, in England and the U.S.A., people are allowed to name themselves in any way unless it harms a third person and it does not matter if a women uses the husband's surname or her maiden name. Also in Sweden, Australia, Russia and China, people are free to use any name, though in Korea it is a principle to have separate surnames because of the Confucian concept of surnames. In Switzerland and Germany, one can add one's name to the spouse's by hyphenating. In Germany, there is a recent revision where the spouses will hold on to their original surnames and only in exceptional instances will couple choose common surnames.

In the 1985 revised Family Registration Law, it says, due to the increase in interracial marriage, if a Japanese spouse marrying a non-Japanese wants to change his or her surname to the spouse's name, they can do so by submitting a notice within 6 months from the day of their marriage (Article 102 (2)). As a result, one can choose either to use a former name or change to the other spouse's surname in a case of an interracial marriage. This points out that it is possibly bureaucratically efficiency to have separate surnames upon marriage. The strong tie between couples or families does not grow based on the written statements on the record. Therefore, there is no reason to cling to the traditional *iye* system and it is necessary to change our consciousness from the Family Registration System. It is advisable that we adopt a system in which we can choose the desired surname for an individual.

In this case, there are three options to be considered. One is being able to freely choose either to use the same or different surnames; a second is that the couple takes the same surname but the use of different names is possible (and the one who does not wish to use the partner's name uses his or her former name); and the last is that the couple takes different surnames but same names are also possible. In each case, when a couple uses different surnames, the problem is the children's surname and the family registration system, i.e. whether to put the couples with different surnames in the same family registration or not.

Indeed, the Family Law Subcommittee was long undecided about whether to make the principle that couples take a common surname or not, what to do with the Family Registration System and the children's surname. The proposed measures given at the Civil Law Division of the Legislative Council were: Alternative A — the principle is that the couples take the same surname but can choose to use different names (the child's surname is decided upon marriage); Alternative B — the principle is that the couple takes different surnames but use of the same names is also possible (the child's surname is decided upon the child's birth); Alternative C — the couple takes identical surnames but can also use a birth name upon request (the child's name is the couple's surname). In Alternative B, there is a

possibility that brothers and sisters in the same family would have different names, and Alternative C offers the same thing as the current Civil Code, in that one can use his or her birth name (can be called by their former name) just by reporting upon marriage to reduce any inconvenience. All three alternatives approve the use of different surnames by married couples.

In September 1995, the Family Law Subcommittee, Civil Law Division of the Legislative Council proposed the revised Alternative A in the interim report to introduce the option of surname choices in marriage. Under the proposed system, brothers and sisters of the married couple will have the same surname. Spouses who married before the Civil Code Revision and who are willing for one to revert to a maiden name can apply within a year of the enactment of the law.

2. Grounds for divorce

In a decision of the Supreme Court on September 2, 1987, the precedent was changed for the first time in 35 years. The Court approved a divorce from a responsible spouse if the couple has been living separately for a reasonably long period, has no dependent child, and if there is no severe psychological, social, or economic hardship upon the other spouse after the divorce (Supreme Court Decision of September 2, 1987. 41-6 *Minshū* 1423). Since then additional, precedents have been accumulated which allow divorce when the two have been living apart from each other for eight years, with no dependent child, and if the spouse is willing to pay his share for the living expenses during the marriage and with a fair property division (the wife gets half of the accumulated property) between them (Supreme Court Decision of November 8, 1990. 43 *Katei Geppō* 72).

The current Civil Code, Article 770 (1) (v) regulates the general grounds for divorce as "no reasonable prospect of a reconcilation" and states the principle of fault as a ground for divorce. There is an argument going on whether to permit incompatibility and loss of love, although it is difficult to tell if one of those can be the main reason to terminate a marriage. This is a problem especially when the decision is due to the subjectivity of the judge, and when the case causes unwanted exposure of the couple's private life which may lead

to ugly emotional conflicts. Due to these circumstances, from the late 1960's to the 1970's, the length of separation as a no-fault ground for divorce has been considered in many Western countries. For example, in many states in the United States of America, six months or one to two years of separation is required, in Sweden, six months; in Germany, three years; in England, five years; in France six years of separation is sought to be the time span for the indication of the breakdown of a marriage. It is necessary to legalize the ground for divorce upon the length of separation in Japan as well. In relation to this, even though there is an irretrievable breakdown of the marriage according to Article 770 (2) of the current Civil Code, or a ground for divorce is proven, when a continuation of a marriage is proven to be possible, discretion can be invoked by the court so that a divorce suit is dismissed. However, the judicial discretion in granting a divorce is too broad and the freedom to divorce may be limited in this way so it should be abolished. The exceptional hardship clause is seldom invoked in most Western countries. Therefore, it is not really necessary to provide a written provision for it as well.

Thus, in the revised proposed measures, it is clear that the breakdown of marriage when there is no chance of reconcilation will be the cause for divorce, along with the addition of the objective criterion of "living apart for five years or more". Nonetheless, the Court of Justice has reserved an article which allows the dismissal of the divorce only when either spouse or the child suffers an exceptional hardship, either psychologically, socially or economically. If separation for a limited time would automatically result in divorce, it would be allowing a unilateral divorce, which is not acceptable in the current political situation or social standards. But if the purpose of keeping the legal marriage is only to reinforce the gurarantee to support the spouse and the child, there seems to be no merit in keeping the ostensible marital relationship. In September 1995, the Civil Code panel submitted an interim report permitting "living apart for five years or more" as a ground for divorce, but at the same time applying a good faith clause to prevent a selfish and irresponsible divorce in which a husband has deserted and neglected his wife.

3. Revisions concerning equal share of inheritance between legitimate child and illegitimate child

The proviso to Article 900 (iv) states that an illegitimate child, which is a child born between an unmarried couple, receives only one-half of what a legitimate child would receive under intestacy. The discrimination in inheritance has occurred ever since the former Civil Code, saying that respect and encouragement of legal marriage is the reason. In the 1979 tentative plan for the amendment of the Civil Code concerning succession, the statutory share of inheritance between a legitimate child and an illegitimate child was made equal. According to the public opinion poll which was held in March of the same year by the Prime Minister's Office, many opposed the plan and supported to maintain the present law. Therefore, the attempt to reform was shelved when the Civil Code was amended in 1980. In Western countries, judgments and laws have equalized the inheritance right between legitimate and illegitimate children. Also in Japan, a judgment was made (Tokyo High Court Decision of June 23, 1993. 1465 *Heiji* 55) "the proviso to Article 900 (iv) of the Civil Code lacks in accuracy and does not actually aid in limiting illegitimate children nor does it actually have any relationship in the protection of legal marriage or family." It also declared that it is unconstitutional under Article 14 (1) of the Constitution. In July 1995, the Grand Bench of the Supreme Court held that the proviso to Article 900 (iv) of the Civil Code was not an invidiously unreasonable discrimination against illegitimate children and that it was constitutional.

In the tentative plan for revision of the Inheritance Law, it is now viewed that inheritance rights of legitimate and illegitimate children are equal and the rights of illegitimate children should be protected without any discrimination. The panel on the Civil Code will formulate its final proposals next January for a report. Based on the advisory panel's report, the Justice Ministry is expected to submit its draft for a revised Civil Code regarding Marriage and Divorce Law to the Diet during the next ordinary session convening in January 1996.

Prof. MASAYUKI TANAMURA