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MARRIED COUPLES' SAME SURNAME ISSUE IN JAPANESE FAMILY LAW

日本の家族法における夫婦別氏(別姓)の問題について

Nihon no Kazoku Hō ni okeru Fūfu Betsu Uji (Bessei) no Mondai ni tsuite

Abstract

Despite the traditional postulates of jurisprudence regarding the necessity to introduce flawless bills, each legal system struggles with issues which arouse controversy and become the subject of a lively political and legal debate. Even if the controversy affects millions of people and their private lives, the decision to solve it is limited by government policy. For example, this pattern is reflected in the married couples' same surname issue in Japanese Family Law. Japanese courts investigated it yet did not provide any binding solution. The media have also increasingly raised this problem as an example of a private law defect requiring a fundamental change in the near future. Still, public awareness of the legal controversy is insufficient to overcome it. Even though a large part of Japanese society supports the reform of the married couples' same surname system, the government protects it as an embodiment of Japan's legal tradition and a symbol of family unity. Undoubtedly, the dispute regarding the need to revise Family Law went beyond the legal debate and became a significant political and social issue in the last three decades. Unfortunately, Western legal scholarship is still unaware of this vivid example of the 21st-century rivalry between the liberal/individual and the conservative/collective views in one of the most distinguished private law systems.

KEYWORDS

Japanese Family Law, surname in Family Law, Japan, Family Law

SŁOWA KLUCZOWE

japońskie prawo rodzinne, nazwisko w prawie rodzinnym, Japonia, prawo rodzinne

1. WHAT IS THE MARRIED COUPLES' SAME SURNAME ISSUE IN JAPANESE FAMILY LAW?

The married couples' same surname issue¹ (夫婦別姓の問題, Fūfu Bessei no Mondai) in Japanese Family Law directly results from Article 750 of the Mimpō,² entitled “surname of the spouses” (夫婦の氏, Fūfu no Uji). It states that the spouses choose the husband's or wife's surname after concluding a marriage.³ The construction of this legal norm indicates that the spouses can only choose one surname from the surnames of the husband or wife. Consequently, the newly established family bears the same surname, regardless of whether it is the husband's or wife's surname. Contrary to Polish or Scottish Family Law, Japanese married couples do not have the right to choose a different surname from their spouse. Thus, the system of married couples' surnames established by Article 750

¹ The term literally means “married couples' separate surnames issue” in Japanese, as it calls for introducing a system in which both spouses would be entitled to retain their surnames after entering a marriage. Contrary to this, in Western legal scholarship, the emphasis is put on criticism of the current system of shared surnames. Hence the dispute is more widely known outside Japan as “the married couples' same surname issue”. In the article, the author decided to adopt Western terminology.

² Mimpō (民法) means the Civil Code in Japanese. Family Law, or more precisely, Relatives Law (親族法, Shinzoku Hō), is formally part of the Japanese Civil Code, specifically its Book Four. The systematics of the Japanese Civil Code results directly from the adoption by Japanese legislators at the end of the 19th century of a pandectic systematics similar to the German BGB. Succession Law (相続法, Sōzoku Hō – Book Five of the Civil Code) together with Relatives Law form Family Law (家族法, Kazoku Hō) in Japanese private law system. Whenever the author uses the term “Family Law” in the article, he refers to the Relatives Law in the Japanese legal system.

³ The exact content of Article 750: “Following the regulations related to marriage, the spouses take the husband's or wife's surname”. Mimpō (Meiji 29-nen Hōritsu Dai 89-Gō); Civil Code (Act No. 89 of the 29th year of the Meiji era [1898]). https://elaws.e-gov.go.jp/document?lawid=129AC000000089_20220401_430AC000000059&keyword=民法 (accessed 1 May 2022).

of the Mimpō is based on expressing the same will of both spouses in terms of choosing the surname.

Although Article 750 of the Mimpō does not constitute an independent statutory requirement for contracting a marriage, under separate provisions in Japanese Family Law, the choice of an identical surname is one of the conditions for the recognition of a marriage by the local government and therefore becoming a valid marriage.⁴ It results directly from Article 74 Section 1 of the Family Register Act (戸籍法, Koseki Hō), which stipulates that spouses are required to deliver to the public authority office (Head of the Local City/District Office; 市町村長, Shichōsonchō) a written Notice of Marriage (婚姻の届出, Kon'in no Todokede) containing information of the surname after conducting a marriage. Lack of such information or information inconsistent with Article 750 of the Mimpō (e.g. separate surnames) will result in rejection of the Notice by the office and, consequently, nullity of the marriage.⁵ Such far-reaching consequences related to the submission of an incomplete Notice result from the adoption by the Japanese legislator of the “notification doctrine” (届出主義, Todokede Shugi) in marriage law. Therefore, a valid legal action must be reflected in its notification to public administration authorities.⁶ An expression of this principle is reflected in Article 739 of the Mimpō, which makes the validity of the contracted marriage conditional on meeting the requirements of the Family Register Law in the scope of the Notice discussed earlier. Article 740 of the Mimpō expressly states that if the Notice does not comply with the conditions for contracting a marriage and other statutory formal requirements of the document, it cannot be recognised by the state (受理することができない, Juri suru koto ga dekinai).

Constructed in this way, the requirements of the Notice of Marriage and the potential adverse legal consequences of its invalid submission mean that Japanese jurists noticed the relation between concluding a valid marriage and the spouse's choice of the same surname.⁷

⁴ Koseki Hō (Shōwa 22-nen Hōritsu 224-gō); Family Registration Law (Act No. 224 of 22nd year of Shōwa era [1947]), https://elaws.e-gov.go.jp/document?lawid=322AC0000000224_20220401_503AC0000000042&keyword=戸籍法 (accessed 1 May 2022).

⁵ Similarly, some Japanese legal scholars also emphasise, referring to the judgment of the Supreme Court of 1941, that the Notice recognised by the public administration office has a retroactive legal effect on the marriage, which becomes valid upon its conclusion. F. Tsuneoka, *Kazoku Hō (Family Law)*, Tokyo: Shinseisha, 2020, p. 43.

⁶ Detailed information on the obligations of the spouses related to the Notification of Marriage is available on the official website of the Japanese Ministry of Justice (instructions in Japanese). <https://www.moj.go.jp/ONLINE/FAMILYREGISTER/5-2.html> (accessed 1 May 2022).

⁷ Y. Inubushi, M. Ishii, F. Tsuneoka, T. Matsuo, *Shinzoku * Sōzoku Hō (Relatives and Succession Law)*, Tokyo: Kobundo, 2020, s. 50-51. A. Motoyama, M. Aotake, K. Habu, T. Mizuno, *Kazoku Hō (Family Law)*, Tokyo: Nihon Hyōronsha, 2021, pp. 35-36.

An example of the Notice of Marriage form and its partial translation into English is provided below.⁸ Information on the choice of surname by the spouses is included in Point 4, entitled “Surname of the Spouses after Marriage” (婚姻後の夫婦の氏, Kon’ingo no Fūfu no Uji).

<p style="text-align: center;">婚 姻 届</p> <p>令和元 年 5 月 7 日 届出</p> <p style="text-align: center;">東京都千代田区 長 殿</p>		受 理 令 和 年 月 日 第 号				発 送 令 和 年 月 日 長 印			
		送 付 令 和 年 月 日 第 号							
		書類調査	戸籍記載	記載調査	調査票	附 票	住民票	通 知	

(1)	(よ み か た) 氏 名	夫 に な る 人		妻 に な る 人	
		みんじ 氏	じろう 名	こせき 氏	えいこ 名
	生 年 月 日	平成 2 年 2 月 2 日		平成 3 年 1 月 10 日	
(2)	住 所	東京都千代田区霞が関		東京都杉並区高円寺北	
	(住民登録をして いるところ)	一丁目1番1号		一丁目1番1号	
		世帯主 の氏名 民事 一郎		世帯主 の氏名 戸籍 弘	
(3)	本 籍	東京都千代田区丸の内		東京都千代田区平河町	
	(外国人のときは 国籍だけを書いて ください)	一丁目1番地		一丁目1番地	
		筆頭者 の氏名 民事 一郎		筆頭者 の氏名 戸籍 弘	
	父母及び養父母 の 氏 名	父 民事 一郎	続き柄	父 戸籍 弘	続き柄
	父母との続き柄	母 民事 和子	長 男	母 戸籍 恵	長 女
	(右記の養父母以外にも 養父母がいる場合には その他の欄に書いてください)	養父	続き柄	養父	続き柄
		養母	養 子	養母	養 女
(4)	婚姻後の夫婦の 氏・新しい本籍	<input checked="" type="checkbox"/> 夫の氏	新本籍 (左の図の氏の人すでに戸籍の筆頭者となっているときは書かないでください)		
		<input type="checkbox"/> 妻の氏	東京都千代田区九段南一丁目1番地		
(5)	同居を始めた とき	平成 30 年 12 月 (結婚式をあげたとき、または、同居を始め たときのうち早いほうを書いてください)			
(6)	初婚・再婚の別	<input checked="" type="checkbox"/> 初婚 再婚 <input type="checkbox"/> 死別 <input type="checkbox"/> 離別 年 月 日		<input checked="" type="checkbox"/> 初婚 再婚 <input type="checkbox"/> 死別 <input type="checkbox"/> 離別 年 月 日	
	同居を始める 時の世帯の主な 世帯主の職業	<input type="checkbox"/> 夫 <input type="checkbox"/> 妻	1. 農業だけまたは農業とその他の仕事を持つている世帯		
		<input type="checkbox"/> 夫 <input checked="" type="checkbox"/> 妻	2. 自由業・商工業・サービス業等を個人で経営している世帯		
			3. 企業・個人商店等(官公庁は除く)の常用労働者世帯で勤め先の従業者数が		

The part of the Notice of Marriage (婚姻の届, Kon'in no Todoke) covering information about the spouses' surnames in Point 4 (the husband's name is marked).

⁸ A template of the Notice of Marriage can be found on most local/municipal offices' websites.

2. HISTORY OF THE MARRIED COUPLES' SAME SURNAME SYSTEM

Similar to many other countries, the use of surnames in ancient Japan was generally restricted to the upper-class (公家, Kuge) and warriors (武士, Bushi) and strictly banned among the townsmen (町民, Chōmin) and peasants (農民, Nōmin).⁹ The custom developed in the early Middle Ages. It was affirmed in the Edo era (1603-1868) when the Tokugawa shogunate administration strictly adhered to class divisions and did not influence the natural evolution of private law. The spouses had separate surnames at that time because they “belonged to” a specific family (家, Ie). The surname was an indicator of social position, a fact more important than the conclusion of marriage and establishing a new family. Once married, the woman mostly came directly under the formal protection of her husband as part of his family, yet she kept her surname as proof of descent from a separate home and a symbolic sign of a covenant between two families.¹⁰

As a result of the breaching of strict isolation of Japan from international contacts, which lasted for more than two centuries, the Tokugawa shogunate was overthrown after the violent civil war. In 1868, Meiji Emperor restored his power and called for the thorough reform of the country. The new Japanese government initiated the modernisation and centralisation of the state. Feudalism was abolished, yet about 270 separate clan legal systems could not be removed at once since they had to be replaced with one effective national legal system.¹¹ The Japanese strictly followed the policy of unification of the legal system in the following decades. Surnames have also become the subject of national regulation. In 1870, under the Grand Council of State Edict No. 608, townspeople and peasants were granted the right to use surnames.¹² A year later, universal family registers were established to provide official data on the entire country's population, adopting the principle according to which a household, also described as a family (戸=家, To=Ie), was the basic unit of the administrative records.¹³ In 1875, the Grand

⁹ Read more on the history of surnames in Japan: O. Ōta, *Nihonjin no Sei Myōji Namae: Jinmei ni Kizamareta Rekishi (Japanese Names, Surnames and Family Surnames: History Engraved in a Human)*, Tokyo: Kabushiki Kaisha Yoshikawa Kōbunkan, 2012.

¹⁰ H. Idota, *Edo Jidai no Tsuma no Uji (Wife's Surname in the Edo Era)*, “Nara Hōgakuikai Zasshi” 2000, Vol. 12 (3–4), pp. 67–84.

¹¹ R. Ishii, *Mimpōten no Hensan (Drafting of the Civil Code)*, Tokyo: Sōbunsha, 1979, p. 3.

¹² Meiji 3-nen 9-gatsu, 19-nichi, Daijōkan Fukoku 608-gō “Heimin myōji kyōka rei” (Edict of the Great Council of State No. 608, 19 September of the 3rd year of the Meiji era [1870] “Act Allowing Plebeians to Bear a Surname”), <https://dl.ndl.go.jp/info:ndljp/pid/787950/212> (accessed 1 June 2022).

¹³ K. Kondō, *Fūfu no Uji ni Kan Suru Oboegaki, ichi (Notes on the Surnames of Spouses, part 1)*, “Miyagi Kyōiku Daigaku Kiyō” 2015, Vol. 49, pp. 354–368.

Council of State published Edict No. 22, which introduced the obligation for all plebeians to have surnames to sort out issues related to army conscription.¹⁴

Despite establishing the surname requirement for all citizens, Japan did not have a Civil Code to set the principles for spouses' surnames. Family Law was mainly based on customary law, which varied depending on region and caused significant troubles in unifying the judicial decisions in the whole country. In 1876, the Grand Council of State published the edict upholding the existing spouses' separate surnames system. Except for cases where the wife had to take her husband's surname to have succession rights within her husband's house (夫の家を相続したる, *Otto no ie o sōzoku shitaru*), the women retained their maiden surname defined as "surname of the place of birth" (所生の氏, *Shosei no Uji*).¹⁵

Still, the Japanese legislator perceived establishing the spouses' separate surnames system at the national level as a temporary solution. The Grand Council of State intended to promote a new custom in Family Law, which would introduce the general rule that the wife should have the husband's surname during the marriage.¹⁶ The drafting of the Civil Code began as early as in 1869, but the Japanese jurists encountered many difficulties of a linguistic and substantive nature. The codification project was suspended and resumed several times. Eventually, in 1879, it was entrusted to the French advisor to the Meiji government – G. Boissonade. He soon received the support of the French School of legal jurisprudence graduates, the first generation of Japanese lawyers. Despite the opposition of some Japanese jurists, the draft of the Civil Code prepared under G. Boissonade's supervision, known today as the Old Civil Code (旧民法, *Kyū Mimpō*), was published in two parts in the spring and autumn of 1890. According to the interregnum set by the cabinet, both parts would come into force on 1 January 1893.¹⁷

The Old Civil Code did not explicitly mention the issues related to the wife's obligation to change her name after marriage but did it indirectly. Article 243 of the Code introduced the superior position of the head of the household (戸主, *Koshu*). *Koshu* was automatically the head of the whole family (一家ノ長, *Ikka*

¹⁴ Meiji 8-nen 2-gatsu, 13-nichi, Daijōkan Fukoku 22-gō "Heimin Myōji Hisshō Gimu Rei" (Edict of the Great Council of State No. 22, 13 February of the 8th year of the Meiji era [1875] "Act Imposing the Obligation to Bear a Surname by Plebeians"), <https://dl.ndl.go.jp/info:ndljp/pid/787955/71>, (accessed 1 June 2022).

¹⁵ Y. Sugita, *Fūfu Bessei Hanketsu ni Tai Suru Kōsatsu (Considerations on the Judgment on the System of Separate Surnames of Spouses)*, "Kyūshū Daigaku Hōseigakukai" 2018, Vol. 12, pp. 19–33.

¹⁶ Waga Kuni ni okeru Uji no Seido no Kenkan (The Reform of the Surname System in our Country), online materials of the Japanese Ministry of Justice, <https://www.moj.go.jp/MINJI/minji36-02.html> (accessed 1 June 2022).

¹⁷ More about the codification of Japanese civil law and the Civil Code controversy: M. A. Piegzik, *Civil Code controversy in Japan, 1889–1892*, PhD thesis defended at the Faculty of Law, Administration and Economics of the University of Wrocław, Wrocław 2022.

no chō) composed of his/her spouse and other relatives under his/her authority. The second part of Article 243 stated that “the head of the household and his/her family takes the surname of the house [to which they belong – MAP]” (戸主及ヒ家族ハ其家ノ氏ヲ称ス, *Koshu oyohi kazoku wa sore kazoku no uji o shō su*).¹⁸ Although the Japanese did not specify the gender of the head of the household, this role was traditionally assigned to men since the husband’s entry into the wife’s family was only an exception in old customary law. Thus, for the first time in Japan, the spouses’ surname system was regulated in a codified form. It introduced a patriarchal form of interpreting the family as a wife and other members directly under husband’s authority. Consequently, all family members had to bear the surname of the head of the household. The formal recognition of women as a potential head of the household did not change the nature of the Old Civil Code, which promoted the husband’s supremacy over his wife within the family.

In May and June 1892, the Imperial Diet finally resolved the Civil Code controversy, which turned out to be the defeat of the “decisive” faction to protect the Old Civil Code. The Japanese parliament decided to postpone the entry into force of the Code to introduce comprehensive amendments. Already in 1893, the drafting of the so-called Meiji Civil Code (明治民法, *Meiji Mimpō*), which was to reconcile the positions of three independent schools of legal scholarship in Japan – French, English and German. During the Codes Investigation Committee meetings (the body responsible for reviewing the Code), the concept of introducing the principle of the wife taking the husband’s surname was maintained, as expressed in the Old Civil Code. However, on 21 October 1895, on the 127th meeting of the Committee, one of its members, Yatsuka Hozumi, noticed a discrepancy between customary law applied to the Edict of 1876 and Article 746 of the Meiji Civil Code, which was a copy of the second part of Article 243 of the Old Civil Code.¹⁹ Another Committee member, Masaakira Tomii, a French School representative widely regarded as one of the three fathers of the Meiji Civil Code, answered his doubts and referred to Article 788 of the Meiji Civil Code. He argued that if the wife were to join her husband’s family (=household) through marriage, keeping her maiden surname would greatly inconvenience the whole family. Taking the husband’s name was seen to be a much more natural solution.²⁰

¹⁸ Translation of Article 243, second sentence, based on the original text of the Old Civil Code; <https://law-platform.jp/hist/123028/123028-123098%231/AQDzAQEB#rev-5b0671afea0bef5da7ffbec6> (accessed 1 June 2022).

¹⁹ Contrary to the Old Civil Code, based on the systematics from *The Institutes* of Gaius, the Meiji Civil Code was based on pandectic systematics (introducing the practical division instead of the old logical division), thus referring to the German BGB project. From the Family Law perspective (strictly speaking, Relatives Law), it was separated as Book Four and given a completely different numbering in the Meiji Civil Code.

²⁰ K. Kondō, *ibid.*, p. 360.

Notably, contrary to the Old Civil Code, Article 788 of the Meiji Civil Code mentioned two ways of forming a family: the standard way of “entering the wife into the husband’s family through [ordinary] marriage” (妻ハ婚姻ニ因リテ夫ノ家ニ入ル, *Wsuma wa kon’in ni yorite otto no ie ni hairu*) and the extraordinary “adoption of the husband and son-in-law into the wife’s family (=household)” (入夫及ヒ婿養子ハ妻ノ家ニ入ル, *Nyūfu oyohi mukoyōshi wa tsuma no ie ni hairu*).²¹ Thus, it was apparent that the ordinary marriage resulted in entering the wife into the husband’s family. M. Tomi confirmed this in his statement, referring to the need to revise the centuries-old Japanese tradition of spouses’ different surnames if the wife entered the husband’s family. Other members of the Committee supported his view, and when the Meiji Civil Code entered into force on 16 July 1898,²² the spouses’ same surname system in Japan became a fact.

Another critical stage in the development of Japanese Family Law was the period after the end of World War II. One of the effects of the American occupation was the democratisation and liberalisation of the Japanese legal system. In 1946, the Diet passed the new Constitution, which guaranteed broad civil rights and liberties. Following this fundamental change, in December 1947, the part of the Civil Code concerning Family Law was also revised. The article establishing the wife’s entry into the husband’s family through marriage was entirely removed. The Family Register Law began to regulate the issue of forming a separate family (=household) within the scope of administrative law. As for the norms regulating the spouses’ surnames, the Diet removed Article 746 of the Meiji Civil Code and introduced a new Article 750 to protect the formal equality of wife and husband in the family according to the constitutional principle.²³ Since the post-war times, Article 750 of the *Mimpō* has not changed. The present-day debate on the spouses’ same surname issue concerns the system established more than 75 years ago.

²¹ Own translation of Article 788 based on the original text of the Meiji Civil Code; https://law-platform.jp/hist/129089d/129089_131009/AQMUAQEB#rev=5af95ea7ea0bef26fd8cb48e, (accessed 1 June 2022).

²² Meiji 31-nen 6-gatsu 21-nichi, Hōritsu Dai 11-Gō (Act No. 11 of 21 June of the 31st year of the Meiji era [1898]), <https://hourei.ndl.go.jp/simple/detail?lawId=0000004759¤t=-1>, (accessed 1 June 2022).

²³ Kokuritsu Kōbunshokan: Ref. 御 30627100: *Mimpō no Ichibu o Kaitei Suru Hōritsu*, Goshomei Gempa, Shōwa 22-nen, Hōritsu Dai 222-Gō (Act Amending Part of the Civil Code, Version with Original Signatures, the 22nd year of the Shōwa era [1947], Act No. 222).

3. ALLEGATIONS AGAINST THE MARRIED COUPLES' SAME SURNAME SYSTEM

In the last 30 years, Japanese jurists have published many texts on the flaws of the spouses' same surname system. The article summarises their arguments in several key points and briefly describes them. Their order is not accidental, and it is closely related to the impact on the entire legal system and the rights and liberties guaranteed by the Constitution of Japan.

3.1. INCONSISTENCY WITH ARTICLE 13, ARTICLE 14 PARAGRAPH 1, AND ARTICLE 24 OF THE CONSTITUTION OF JAPAN

According to many Japanese legal scholars, Article 750 of the Mimpō and Article 74 Section 1 of the Family Register Law is inconsistent with Article 13 of the Constitution of Japan, which states that all citizens have the right to respect their individuality

(個人として尊重される, *Kojin to shite sonchō sareru*).²⁴ They argue that despite the legislator's general idea to promote the concept of family unity, the obligation to change surname against the will of one of the spouses to conclude a valid marriage violates the right to protect individual dignity and requires an immediate revision.²⁵ There is no doubt that a surname, which is a personal right subject to legal protection, is a crucial element of a person's identity from the early stage of life.²⁶ The decision to change it should be independent, voluntary and not forced by other legal obligations. The situation in which one of the spouses cannot retain his/her current surname (despite the expressed will to do so) because he/she sacrifices his/her personal rights over the fact of getting married is subject to severe criticism.²⁷

²⁴ Own translation of Article 13 based on the original text of the Constitution of Japan; <https://elaws.e-gov.go.jp/document?lawid=321CONSTITUTION> (accessed 1 June 2022).

²⁵ S. Ninomiya, *Kazoku Hō (Family Law)*, Tokyo: Shinhogaku Library, 2019 (5th ed.), pp. 52-53.

²⁶ A pair of Japanese psychologists conducted empirical research on three separate groups of students over several years, which proved that a significant percentage of respondents identify with their surname and feel attached to it, regardless of their gender and relatively young age. Detailed results of the study, Y. Ōta, Y. Ishino, *Myōji ni Kan Suru Taido to Jiga Dōitsusei, Kazoku Aidentiti, oyobi Dentōteki Kazokukan to no Kanren: Daigakusei ni okeru Myōji no Yakuwari to sono Seisa no Shinrigakuteki Kenkyū (Relationships between Own Surname and Self-Identification, Family Identification and Traditionalist View of the Family: Psychological Research on Students Regarding the Role of Surnames Depending on Gender)*, "Shimane Daigaku Kyōiku Gakubu Kiyō" 2010, Vol. 44, pp. 89-103.

²⁷ Y. Inubushi, M. Ishii, F. Tsuneoka, T. Matsuo, *op. cit.*, p. 51.

Article 14 Section 1 of the Constitution of Japan is also the subject of analysis by Japanese legal scholars. It states that all “citizens are equal before the law and shall not be discriminated in political, economic or social relations because of race, creed, sex, social status or family origin”.²⁸ Even if most couples declare that they voluntarily decided to take the surname of one of them after marriage, the spouses’ same surname system may lead to a situation in which one of the spouses will be forced to change surname to conclude a valid marriage. In such a situation, one of the spouses becomes the aggravated party of the matrimonial contract. Most often, this kind of constraint can be assessed as gender discrimination because mutually excluding options (choosing the husband’s or wife’s surname), motivated by ideological, historical and cultural reasons,²⁹ allows men (the dominant sex in Japanese society) to force women to make important life decisions contrary to their will. Whilst Japanese courts have repeatedly indicated that Article 750 of the *Mimpō* is not a ground for discrimination against any sex (as it does not give either men or women the priority to keep their surnames), it should be noted that this provision has unilaterally discriminatory effects on women in Japan’s social conditions.³⁰ Ministry of Health, Labour and Welfare (厚生労働省, *Kōseirōdōshō*) report of January 2017 confirms this claim and contains historical data on the spouses’ surnames.³¹ The statistical surveys were conducted from 1975 to 2015 at five-year intervals. The data were divided into five categories: (1) couples marrying for the first time, (2) couples in which a man remarries and a woman marries for the first time, (3) couples in which a woman remarries and a man marries for the first time, (4) couples in which a man and a woman remarry, and (5) a summary of all marriages contracted in the year under review. Despite the visible tendency of the increase in the percentage of men taking a woman’s surname after concluding a marriage, women in over 90% of cases take a man’s surname in all indicated categories more often. In 2015, 91% of women took the man’s surname in the category of remarried couples, while among couples getting married for the first time, the number is as high as 97.1%. The average for all four categories is 96% in favour of men, which proves that the spouses’ same surname

²⁸ Own translation of Article 14 Section 1 is based on the original text of the Constitution of Japan; <https://elaws.e-gov.go.jp/document?lawid=321CONSTITUTION> (accessed 1 June 2022).

²⁹ Presented considerations should also not exclude exemptions, i.e., where women force men to change their surnames after getting married. Still, most women must sacrifice their personal rights to conclude the valid marriage. More on the discriminatory nature of spouses’ same surname system: R. Kitahara, *Fūfu Bessei wa naze “Kirarawareru” ka? (Why Are Separate Surnames “Disliked”?)*, “*Chūō Daigaku Shakai Kagaku Kenkyūjo Nempō*” 2016, 21, pp. 243–257.

³⁰ T. Tomita, *Fūfu Bessei Ron Sono Ato: 30-nen no Kiseki (After the Dispute over the Spouses’ Same Surname System: 30 Years of Its Course)*, “*Gyōsei Shakai Ronshū*” 2020, Vol. 32 (4), pp. 169–212.

³¹ Contrary to Japan, no national data on the spouses’ surnames are published in Poland, and details can be found only at regional registry offices.

system in Japan results in the wife taking her husband's surname. The detailed data for the years 1975–2015 are presented in the table below:³²

表6 夫妻の初婚—再婚の組合せ別にみた夫の氏・妻の氏別婚姻件数及び構成割合の年次推移

年次	marriages in total			first marriage for both			remarriage for wife			remarriage for hus.			remarriage for both		
	総数			夫妻とも初婚			夫初婚—妻再婚			夫再婚—妻初婚			夫妻とも再婚		
	in total	husb. surname	wife's surname	総数	夫の氏	妻の氏	総数	夫の氏	妻の氏	総数	夫の氏	妻の氏	総数	夫の氏	妻の氏
昭和50年	941 628	930 133	11 495	822 382	814 565	7 817	33 443	32 255	1 188	49 063	48 196	867	36 740	35 117	1 623
55	774 702	764 362	10 340	657 373	651 022	6 351	33 512	32 314	1 198	44 042	43 175	867	39 775	37 851	1 924
60	735 850	725 010	10 840	613 387	607 202	6 185	32 854	31 708	1 146	43 222	42 211	1 011	46 387	43 889	2 498
平成2	722 138	705 630	16 508	589 886	579 834	10 052	35 567	33 810	1 757	47 586	45 900	1 686	49 099	46 086	3 013
7	791 888	770 908	20 980	646 536	633 437	13 099	40 631	38 423	2 208	53 622	51 453	2 169	51 099	47 595	3 504
12	798 138	774 010	24 128	630 235	616 016	14 219	47 939	45 174	2 765	61 272	58 520	2 752	58 692	54 300	4 392
17	714 265	687 607	26 658	533 498	519 055	14 443	50 578	47 261	3 317	66 193	63 058	3 135	63 996	58 233	5 763
22	700 214	674 580	25 634	520 955	506 740	14 215	49 616	46 656	2 960	65 757	62 597	3 160	63 886	58 587	5 299
23	661 895	636 799	25 096	490 664	477 027	13 637	47 020	43 948	3 072	62 999	59 839	3 160	61 212	55 985	5 227
24	668 869	643 236	25 633	494 749	480 708	14 041	47 168	44 174	2 994	64 622	61 298	3 324	62 330	57 056	5 274
25	660 613	635 432	25 181	487 044	473 486	13 558	46 659	43 635	3 024	64 772	61 602	3 170	62 138	56 709	5 429
26	643 749	618 865	24 884	473 772	460 290	13 482	45 609	42 733	2 876	63 392	60 244	3 148	60 976	55 598	5 378
27	635 156	609 756	25 400	464 975	451 288	13 687	45 268	42 263	3 005	63 588	60 420	3 168	61 325	55 785	5 540
	構成割合 (%) data in %														
昭和50年	100.0	98.8	1.2	100.0	99.0	1.0	100.0	96.4	3.6	100.0	98.2	1.8	100.0	95.6	4.4
55	100.0	98.7	1.3	100.0	99.0	1.0	100.0	96.4	3.6	100.0	98.0	2.0	100.0	95.2	4.8
60	100.0	98.5	1.5	100.0	99.0	1.0	100.0	96.5	3.5	100.0	97.7	2.3	100.0	94.6	5.4
平成2	100.0	97.7	2.3	100.0	98.3	1.7	100.0	95.1	4.9	100.0	96.5	3.5	100.0	93.9	6.1
7	100.0	97.4	2.6	100.0	98.0	2.0	100.0	94.6	5.4	100.0	96.0	4.0	100.0	93.1	6.9
12	100.0	97.0	3.0	100.0	97.7	2.3	100.0	94.2	5.8	100.0	95.5	4.5	100.0	92.5	7.5
17	100.0	96.3	3.7	100.0	97.3	2.7	100.0	93.4	6.6	100.0	95.3	4.7	100.0	91.0	9.0
22	100.0	96.3	3.7	100.0	97.3	2.7	100.0	94.0	6.0	100.0	95.2	4.8	100.0	91.7	8.3
23	100.0	96.2	3.8	100.0	97.2	2.8	100.0	93.5	6.5	100.0	95.0	5.0	100.0	91.5	8.5
24	100.0	96.2	3.8	100.0	97.2	2.8	100.0	93.7	6.3	100.0	94.9	5.1	100.0	91.5	8.5
25	100.0	96.2	3.8	100.0	97.2	2.8	100.0	93.5	6.5	100.0	95.1	4.9	100.0	91.3	8.7
26	100.0	96.1	3.9	100.0	97.2	2.8	100.0	93.7	6.3	100.0	95.0	5.0	100.0	91.2	8.8
27	100.0	96.0	4.0	100.0	97.1	2.9	100.0	93.4	6.6	100.0	95.0	5.0	100.0	91.0	9.0

Statistics on the spouses' surnames in 1975–2015 based on the Japanese Ministry of Labor, Health and Welfare report.

The last allegation to Article 750 of the Mimpō concerns the consistency with Article 24 of the Constitution, which stipulates that “marriage should be based on the free consent of two genders, and the basis of permanent marriage should be the mutual cooperation of spouses with the equal rights of husband and wife”. The second sentence indicates that “concerning the choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters relating to marriage and family, the law should be enacted from the perspective of guaranteeing personal dignity and fundamental gender equality (個人の尊重と両性の体質の平等に立脚して, Kojin no sonchō to ryōsei no taishitsuteki byōdō ni rikkyaku shite)”.³³

³² Ministry of Labor, Health and Welfare report on the demographic activity published in the 28th year of the Heisei era (2018), Marriage Statistics, <https://www.mhlw.go.jp/toukei/saikin/hw/jinkou/tokusyu/konin16/dl/gaikyo.pdf>, (accessed 1 June 2022).

³³ Translation of Article 24 is based on the original text of the Constitution of Japan; <https://elaws.e-gov.go.jp/document?lawid=321CONSTITUTION> (accessed 1 June 2022).

Referring to the above-mentioned discriminatory effect of Article 750 of the *Mimpō*, some Japanese jurists proved that the necessity for spouses to take the same surname contradicts the principle of gender equality in the family.³⁴ Women are much more likely to adopt their husband's surname. Even if the change is based on a voluntary decision, they should not choose between respecting their personal dignity and concluding a valid marriage. Apart from the official data of the Ministry of Labor, Health and Welfare, it should also be noted that this issue concerns, to the same extent, men who, despite the initial unwillingness to change their surnames, eventually decided to take the wife's surname to conclude a valid marriage.

Summarising all the objections to Article 750 of the *Mimpō*, it is worth quoting K. Anbo's and T. Tomonaga's views. They emphasise that having decided to maintain the spouses' same surname system, the Japanese legislator established in Family Law the principle of family protection and the concept of human identity within the family, contrasting with respect for individual rights and gender equality guaranteed by the Constitution.³⁵

3.2. DIFFICULTIES RELATED TO ADMINISTRATIVE PROCEDURES

Concluding a valid marriage in Japanese Family Law is associated with adopting a different surname by one of the spouses. Under the provisions of administrative law, the spouse who changes the surname is obliged to apply for new documents confirming the identity and previously obtained qualifications and acquired rights.³⁶ Such documents include, for example, a passport, driving license, contracts concluded with a bank and insurer, and entries in the land and mortgage register. When applying for a job, a person bearing a changed surname must also obtain new copies of diplomas or certificates confirming a specific education or acquired professional qualifications. K. Yanagi argues that Family Law significantly exposes one of the spouses to the inconvenience of carrying out redundant administrative procedures.³⁷ Considering the complexity of the Japanese bureaucracy and the official position of Prime Minister F. Kishida, who admitted in 2021 that the process of digitisation of public administration

³⁴ Y. Honda, K. Itō, *Kokka ga Naze Kazoku ni Kanshō Suru no ka: Hōan, Seisaku no Haigo ni Aru Mono (Why Does the Nation Intervene in the Family?: A Contribution to Law and Politics)*, Tokyo: Ao Yumi Sha Library, 2017, pp. 120–121.

³⁵ K. Anbo, *Kempō to Kazoku Hō: Fūfu Bessei sei o Daizai ni (Constitution and Family Law: About the Spouses' Separate Surnames System)*, "Hōsei Ronsō" 1999, 36 (1), pp. 68–81, T. Tomonaga, *Kempō dai 24-jō to Kazoku Hō no Kadai (The Issue of Article 24 of the Constitution and Family Law)*, "Kogakkan Daigaku Nihongaku Rongyō" 2017, Vol. 7, pp. 163–184.

³⁶ Couples who had an identical surname before concluding marriage should be excluded from this statement.

³⁷ K. Yanagi (ed.), *Kazoku Hō (Family Law)*, Tokyo: Saganoshoin, 2020 (4th ed.), p. 32.

still requires much attention from the cabinet,³⁸ one cannot deny that procedure of changing the surname is a severe administrative and legal issue significantly affecting private life.

3.3. EXPOSURE TO DISCRIMINATION ON THE GROUND OF MARITAL STATUS

Another negative consequence of maintaining the spouses' same surname system in Japanese Family Law is exposing people to discrimination based on their marital status and limited possibilities to protect the right to privacy. In Japanese society, there is a strong notion that a change of surname (most often by a woman for the reasons mentioned above) directly results from a change in marital status. Keeping important private events such as marriage from co-workers and other contractors is nearly impossible. Similarly, the lack of change of surname in a longer perspective, especially by young unmarried women, may indirectly prove that they do not have a husband. Thus, their marital status is known to everyone. J. Kuroda argues that people who change their surnames and those who do not change their surnames for a long time are equally exposed to unnecessary questions and comments about their private life. As for him, they often become victims of "unnecessary harassment" (いらぬハラスメント, *Iranu harasumento*).³⁹ While there is no guarantee of avoiding "unnecessary harassment" and protecting privacy in a system that allows spouses to bear separate surnames, it is much more difficult to deduce facts from another person's private life just by observing the changing or retaining its surname.

3.4. REFORM OF THE SYSTEM IN LINE WITH THE EVOLUTION OF PUBLIC VIEWS

As emphasised in research on the Japanese legal history, the adoption of the spouses' same surname system at the end of the 19th century and the decision to maintain it during the post-war reform of Family Law was motivated by the protection of traditional values and family unity. Although, in December 1947, the

³⁸ According to the official position of the Japanese Ministry of Internal Affairs and Communications (総務省, *Sōmushō*), due to the COVID-19 pandemic, the process of digitising public administration encountered problems at the fourth and final stage in 2020. See also: *Waga Kuni Dejitaruka Seisaku no Rekishi (History of Digitisation Policy in Our Country)*, website of the Ministry of Internal Affairs and Communications: <https://www.soumu.go.jp/johotsusintokei/whitepaper/ja/r03/html/nd101000.html>, (accessed 1 June 2022).

³⁹ J. Kuroda, *Fūfu no Uji ni Kan Suru – Kōsatsu: Ko no Uji no Henkō o Chūshin ni (About the Surnames of Spouses – Divagations: Emphasis on the Aspect of Changing the Child's Surname)*, "Kokushikan Hōgaku" 2018, Vol. 51, pp. 227-256.

Japanese Diet introduced formal equality between men and women concerning the choice of surnames after marriage as part of the democratisation and liberalisation of Family Law, due to conservative and patriarchal social relations, women are more often forced to adopt their husband's surname. Public surveys conducted regularly by public institutes and private entities show a clear upward trend in Japanese society in support of reforming the spouses' same surname system.

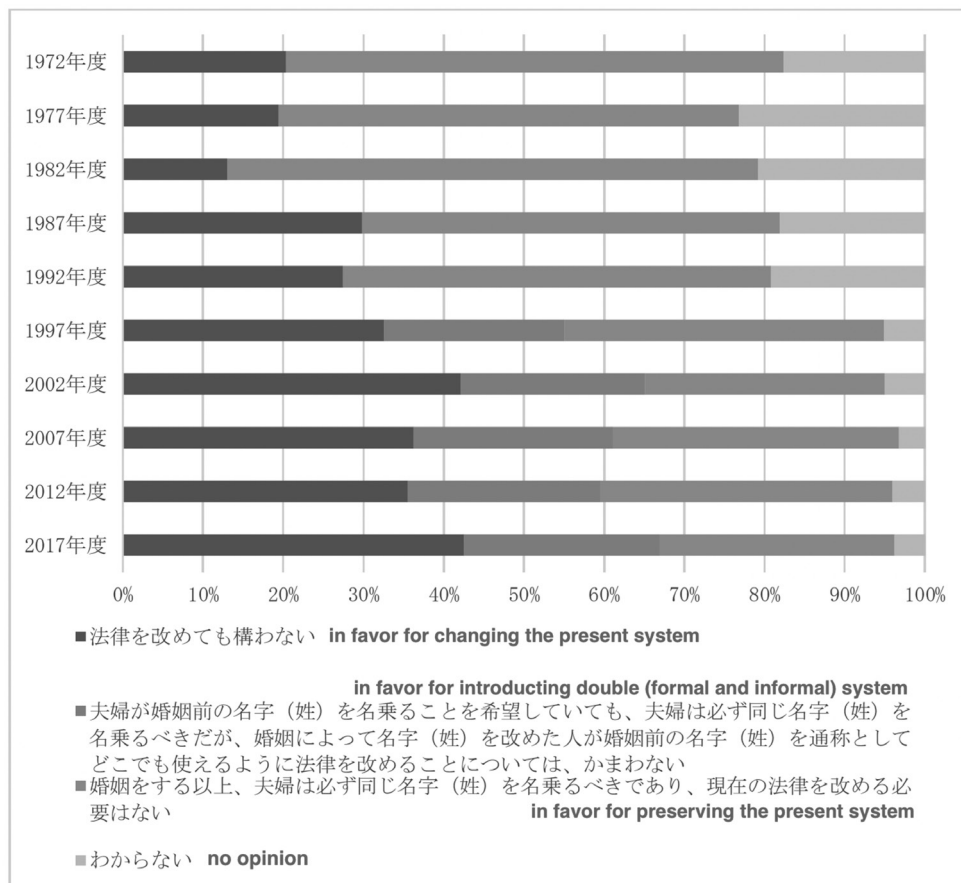


図1：夫婦別姓の法改正に関する意識の変化
(出典：内閣府「家族の法制に関する世論調査（各年版）」)

The results of public opinion polls conducted by the Japanese cabinet in 1972–2017 in support of the reform of the spouses' same surname system. Chart is based on: M. Kamiyama, *Fūfu Bessei – Dōnyū e no Sampi to Seido Riyō Kibō no Kitei Yōin* (Spouses' Separate Surname System – Main Premises for its Application and Arguments for and Against its Introduction), (in:) *Tōhoku Daigakuin Kyōikugaku Kenkyūka* (ed.), *Tōhoku Daigaku Kyōiku Gakubu Kyōikugaku Jisshū Shakai Chōsa no Riron to Jissen Hōkokusho*, Sendai 2019, pp. 66–74.

For example, the data provided by the cabinet for the period from 1972 to 2017 show a significant evolution of the views of the Japanese society. In 1972, about 60% of respondents believed that husband and wife should have the same surname, and only just over 20% of respondents supported the reform of the law towards a more individualised choice of surnames. Almost 20% of responses indicated the lack of a specific position or lack of interest in the subject. For comparison, in 2017: over 40% supported the reform of the spouses' surname system, and 25% believed that spouses should formally bear the same surname, but persons who changed their surname should be legally allowed to use their name before marriage in public and private spheres (a new category of answers, previously not indicated by the respondents), while about 30% of people believed that it was necessary to retain the spouses' same surname system. Less than 5% of responses indicated no clear position or interest in the discussed matter. The chart below presents in detail the data obtained in the years 1972-2017.

Data shows three significant trends in Japanese society. First, the support for a thorough reform of the current system doubled to over 40%, surpassing backing for maintaining the current provisions and becoming the dominant view. Secondly, in the mid-90s, many respondents started to support the spouses' same surname system in the formal sphere (e.g., marriage certificate, family register). Still, they advocated the use of a maiden name in everyday life. Despite their conservative attitude towards formal issues, these people certainly cannot be included among the supporters of the current system, as they see the need to revise Family Law to ensure greater freedom of using surnames. Thirdly, the share of respondents who had no opinion decreased by about five times, and at present, they do not have any influence on the position of other groups. The statistics also show that after more than 40 years of debate on the spouses' same surname issue, 95% of Japanese people can express one of three views.

The latest data from a cabinet survey published in late March 2022 by the public broadcaster NHK (日本放送協会, Nippon Hōsō Kyōkai) shows that 71% of respondents support a full or partial change to the current system, while only 27% are in favour of preserving it.⁴⁰ Therefore, the COVID-19 pandemic did not negatively affect the gradual liberalisation of the views of the Japanese on the spouses' surnames issue, and the majority of society expects the reform of the Family Law to be carried out at an unspecified date.

⁴⁰ NHK News, 25 March 2022, <https://www3.nhk.or.jp/news/html/20220325/k10013551981000.html>, (accessed 1 June 2022).

4. ARGUMENTS OF THE SPOUSES' SAME SURNAME SYSTEM SUPPORTERS

Having analysed the arguments of the spouses' same surname opponents, it is necessary to present the adversary position of the supporters of the current system. Because a few Japanese jurists decided to publish texts advocating Article 750 of the Mimpō, the arguments for retaining it can be found in public statements of politicians, press articles or online sources. The paper covers the most frequently raised legal, political and practical reasons for preserving the law enacted in 1947.

4.1. RESPECT FOR THE LEGAL TRADITION

Supporters of the current system claim that there is a deeply held belief in Japanese society that husband and wife should share the same surname. Although opinion polls show support for the reform of Article 750 of the Mimpō, they argue that it is the embodiment of over a hundred years of legal tradition (我が国の伝統文化, *Waga kuni no dentō bunka*) and one of the unique features of Japanese Family Law that distinguish it from the rest of the world. Indeed, the Meiji government broke the age-old tradition of the spouses' different surnames. Still, the spouses' same surname system had been in force since establishing the codified and unified legal system in Japan. The supporters' reasoning also includes the argument that if the legal tradition regarding the spouses' surname is analysed, one should not consider the duration of the particular system in the legal history but current society's views on what the tradition is. Thus, regardless of the historical and legal arguments, the broad public believes the spouses' same surname system is a Japanese custom.⁴¹

4.2. PROTECTING FAMILY TIES

According to the opponents of introducing the spouses' separate surname system, the reform of Article 750 will weaken the bond between husband and wife and, thus, the erosion of family values in Japanese society in a longer perspective. As they argue, the state's role is to support the family as the basic unit of society. The same surname of both spouses is the apparent evidence of a valid mar-

⁴¹ The debate on the legal tradition concerning the surnames of spouses is presented (in:) K. Murakami, *Nihon Kindai Kazoku Hō Shiron (Debate on the History of Contemporary Japanese Family Law)*, Tokyo: Hōritsu Bunkasha, 2020, pp. VI–X.

riage.⁴² They also claim that using the same surname strengthens a marriage bond (夫婦の絆, Fūfu no kizuna) and a sense of unity in the family (家族の一体感, Kazoku no ittaikan) between a woman and a man. In contrast, using a separate surname promotes extreme individualism and a lack of more profound attachment to the spouse, who is treated only as a partner in a contract relationship. Still, the supporters of the current system do not condemn more progressive social views, as they often compare Japan to the People's Republic of China and South Korea. In both countries, spouses cannot bear the same surname, which proves to some Japanese legal scholars that their neighbours are stuck in the feudal family model.⁴³ Although there is no conclusive scientific evidence confirming a stronger family bond between spouses bearing the same surname than those with a separate surname, this argument is being used by Japanese right-wing politicians as the main advantage of Article 750 of the Mimpō.⁴⁴

4.3. PROTECTING THE CHILD'S BEST INTERESTS

A consequence of the spouses' same surname system in Japanese Family Law is the shared surname of both parents and children born in the marriage. According to supporters of this solution, it positively affects the sense of unity within the family and the child's equal identification with the mother and father. Defenders of the current system claim that although Article 750 of the Mimpō refers to the surname of the spouses, it is also a guarantee of the implementation of the child's best interest principle (子の利益, Ko no rieki). This view is mainly based on the belief that the separate surname of the child and one of the parents may negatively influence the child.⁴⁵ For example, during the maturation process and in contact with peers, the child might not feel belonging to the commonly accepted family model.

Similarly to claims about a stronger bond between spouses sharing the same surname, there is no scientific evidence confirming the negative impact of the separate surname of the child and one of the parents on the child's psychological development. Additionally, the spouses' same surname system makes children born outside of marriage have a surname that differs from one of the parents, which may expose them to unjustified discrimination due to the marital status of their parents. In contrast, if spouses were allowed to choose their surname freely,

⁴² *Ibidem*, p. VI.

⁴³ Sentakuteki Fūfu Bessei Seido no Hōseika Hantai ni kansuru Chinjō (Petition Concerning Objection to the Introduction of the Spouses' Separate Surname System), Petition of the Tokyo Association for the Protection and Future of Japanese Children of 18 May 2011 to the Sumida District Council in Tokyo, https://www.city.sumida.lg.jp/kugikai/sinsa_report/seigan_chinjo/hei-seinijyuninen.files/chinjyou22-8.pdf, (accessed 3 June 2022).

⁴⁴ Opinions of some members of Parliament during their speeches in the Diet. See <https://president.jp/articles/-/42857?page=4>, (accessed 3 June 2022).

⁴⁵ K. Murakami, *op. cit.*, p. VI.

the separate surname of the child and one of the parents would be a social norm sanctioned by the law and thus would reduce the risk of discrimination.⁴⁶

4.4. UNNECESSARY ADMINISTRATIVE AND LEGAL PROCEDURES

Supporters of the spouses' same surname system also argue that couples with separate surnames must consider numerous administrative and legal issues arising after the Family Law reform. These include situations where it will be necessary to prove the marriage or kinship with a child to a public authority or other institution. They mention such examples as obtaining information about the spouse's health (protection of sensitive personal data and personal data in general), applying for a loan or a loan requiring the consent of the spouse (protection against over-credit) and going abroad with a child with a different surname (protection against the abduction of a minor). Since Japanese citizens and residents are not required to have an identity document containing information about their family status or household affiliation (e.g., driving license, passport, residence card), only the public office can issue the document proving a marriage. However, the difficulties presented above are well-known in countries with spouses' separate or mixed surnames system. Japanese attorneys also indicate that the legislator may amend or introduce improvements to administrative procedures in advance.⁴⁷

5. THE DECISIONS OF THE SUPREME COURT

The spouses' same surname issue was also analysed by the Japanese Supreme Court (最高裁判所, Saikō Saibansho), which delivered several decisions on this matter. Even though the system was introduced in the late 19th century and then reformed in 1947, it did not become the subject of judicial complaints until the 1990s. This was directly related to the refusals of the local offices to accept the Notification of Marriage containing information about the spouses' separate surnames. As previously mentioned, the consequence of not submitting the Notice is the nullity of marriage. Couples wishing to conclude a valid marriage and keep their surnames appealed against the decisions of local offices and exhausted the court procedure in lower courts. Thus, the Supreme Court analysed twice the

⁴⁶ Statements of Japanese children about their personal experiences regarding questions about parents' separate surnames, published by the newspaper "Asahi", <https://www.asahi.com/articles/ASP3M4DJHP31DIFI006.html>, (accessed 3 June 2022).

⁴⁷ Advocate Y. Hayashi's article on the advantages and disadvantages of the spouses' separate surname system. <https://www.adire.jp/lega-life-lab/disadvantages-of-surnames-by-couple356/#l-wptoc5>, (accessed 6 June 2022).

spouses' same surname system and its conformity to the Constitution of Japan in 2015 and 2021.

The first of the judgments (ref. number 1023 of 2014) concerned an action brought by five couples seeking damages related to the violation of personal rights in connection with the non-compliance of Article 750 of the *Mimpō* with Article 13, Article 14 Section 1 and Article 24 Section 1 of the Constitution of Japan. The decision was delivered by the full sitting of fifteen judges on 16 December 2015 and found that the questioned provision of Family Law was not unconstitutional. A separate vote supporting the claim of the discriminatory nature of the prohibition on having different surnames was presented by five judges. In the justification of the judgment, it was indicated that the spouses' same surname system aims to establish a family composed of a married couple and children, according to generally accepted social standards (社会の構成要素である家族, *Shakai no kōseiyōsei dearu kazoku*). The Supreme Court also referred to protecting the principle of the children's welfare, who should have the same surname as both parents. Judges, however, recognised a different way of thinking of people with a strong sense of being an individual despite being natural persons who make up a family and thus a specific group distinguished by the same surname. Judge Itsurō Terada also submitted a supplementary opinion that there is already an informal but widely accepted custom of using a maiden name by women in everyday life in Japan. Although the initial claim was rejected, it was repeatedly emphasised that the system of separate names was not recognised as an institution without rationale. After all, the Supreme Court expressed a safe stance that introducing the spouses' separate surname system has not been debated in the parliament. Therefore, the legislative body should be responsible for analysing and changing it.⁴⁸

In the second judgment (special appeal number 102 of 2020, 特別抗告, *tokubestu kōkoku*), the Supreme Court upheld the position of the lower court. It rejected the claim for compensation for damages caused by the local government, which did not recognise the spouses' separate surnames. The verdict was delivered by the entire sitting of fifteen judges on 23 June 2021 and stated that the questioned provision of Family Law was not contrary to Article 14 Paragraph 1, Article 24 and Article 98 Section 2 of the Constitution. The decision followed a claim by three Japanese *de facto* married couples over the Tachikawa City Office's (one of Tokyo's wards) rejection of registration of marriages in which spouses had different surnames. In the justification, the Supreme Court stated that although it is aware of societal changes regarding the spouses' surname issue, there are insufficient grounds for changing the decision from 2015. Four judges

⁴⁸ Heisei 26-nen Dai 1023-gō Songai Baishō Seikyū Jiken; Heisei 27-nen 12-gatsu 16-nichi Daihōtei hanketsu (Case concerning the claim for damages No. 1023 of the 26th year of Heisei era [2014]; Judgment of the full membership [Supreme Court] of 16 December 2015), https://www.courts.go.jp/app/files/hanrei_jp/546/085546_hanrei.pdf (accessed 6 June 2022).

disagreed with this interpretation and expressed the opinion that Article 750 of the *Mimpō* is inconsistent with the Constitution of Japan. The Supreme Court once again stressed that the criticism of the spouses' same surname issue is more political than legal and should be discussed in parliament. Despite rejecting the claim, the judges also stated that the latest judgment should not be treated as imperative to retain Article 750 of the *Mimpō*, as there are no legal obstacles to introducing married couples' separate system in the future.⁴⁹

The Supreme Court judgments of 2015 and 2021 disappointed critics of the current surname system of spouses, who expected support from the Japanese judiciary to protect individual rights guaranteed by the Constitution. Looking through the prism of the lawsuits, the persons challenging the actions of local governments did not change their previous surnames. They decided to live in a *de facto* marriage, which differs significantly in rights and responsibilities from a valid marriage regulated by the Civil Code. In the current situation, however, it has become apparent that the parliament has the most significant influence on revising the system, which is unfavourable for many couples. In practice, the ruling Liberal Democratic Party (自由民主党, *Jiyūminshu-tō*), which has had the majority in the House of Representatives for more than 10 years, may independently reform Family Law.

6. PROSPECTS FOR CHANGE

Although in recent years, the Supreme Court has indicated in its judgments that the spouses' same surname system is not a legal issue that needs to be solved through legislative action, the debate on this matter within the legislature began almost 30 years ago. Already in February 1996, the Legislative Committee (法制審議会, *Hōsei Shingikai*), during its general meeting, presented the "Outline on Civil Code Partial Amendment" (民法の一部を改正する法律案要綱, *Mimpō no Ichibu o Kaisei suru Hōritsuan Yokō*). In the third section (entitled "Surnames of spouses"), paragraph one, the Committee suggested reforming Article 750 of the *Mimpō* and allowing the spouses to have the same surname or keep their surname held before the marriage. The second paragraph also dealt with the child's surname, born in a family whose parents had separate surnames. The

⁴⁹ Reiwa 2-nen Dai 102-gō Shichocho Shobun Fukoku Mōshitate Kyakkan Shimpan ni Tai Suru Kōkoku Kikyaku Kettei ni Tai Suru Tokubetsu Kōkoku Jiken; Reiwa 3-nen 6-gatsu 23-nichi Daihōtei kettei (Case Concerning the Rejection of a Special Appeal of a Judgment Dismissing a Complaint Against the Action of a Local Government Office; Judgment of the Full Sitting [Supreme Court] of 23 June 2021), https://www.courts.go.jp/app/files/hanrei_jp/412/090412_hanrei.pdf (accessed 6 June 2022).

Commission recommended introducing a provision requiring spouses to decide on the child's surname when concluding a marriage. This would be limited to two options – the husband's or the wife's surname. Paragraph four described the plan to amend the provisions on surnames of illegitimate children, adopted children and changing the child's surname, yet the article does not present these proposals.

Additionally, the report contained essential provisions in paragraph twelve, section two, in which the transitional issues regarding the potential reform of Family Law were described. In the first point, the Committee proposed introducing the option to return to the family name of the spouse who changed it because of a marriage. However, this right was limited by four conditions – remaining in a valid marriage, obtaining the spouse's consent and submitting a notification with the declaration to return to the old surname to the local government within one year of the entry into force of the Family Law amendments. The second point stated that the return to the surname before the marriage was possible only through the requirements set by the Civil Code and the Family Registry Law, i.e., submitted as an additional notification after concluding a marriage. The third point regulated the issue of the child's surname, which was identical to a decision to return to a surname before the marriage.⁵⁰

The proposal presented above was the first and the last comprehensive project to revise the spouses' same surname system. Since then, no Japanese government has decided to discuss it in parliament, and the outline has not been submitted to the legislative procedure. According to some Japanese scholars, the government's reluctance resulted from too low public support for introducing the spouses' separate surname system and the fear of strong opposition within the party's conservative wing.⁵¹ It was also believed that there was no need to reform Family Law since the pressure from critics of the existing system would be alleviated by the custom of the unrestricted use of the surname before the marriage (especially the women's maiden name) in everyday life.⁵² Whilst an upward trend in using the maiden name by women in unofficial situations has been noticed since the 1990s, many couples still want to have the guarantee of keeping their surnames and concluding a valid marriage.

In 2010, the Japanese Ministry of Justice conducted a study across nineteen legal systems, finding that three distinct groups of states allow spouses to have separate surnames.⁵³ The first of them, including the United States (based on the

⁵⁰ Mimpō no Ichibu o Kaisei Suru Hōritsuan Yokō, Hōsei Shingikai Sōkai Kettei, Heisei 8-nen, 2-gatsu, 26-nichi (Outline of the Civil Code Partial Amendment, Recommendation of the Legislative Committee General Assembly, 26 February 8th year of the Heisei era [1996], https://www.moj.go.jp/shingil/shingi_960226-1.html, (accessed 6 June 2022).

⁵¹ M. Kamiyama, *op. cit.*, p. 66.

⁵² J. Kuroda, *op. cit.*, p. 229.

⁵³ The subject of the study were the legal systems of the following countries: the United States (Illinois, New York, California, Hawaii, Louisiana), Argentina, Great Britain, Israel, Italy, India,

state of New York), the United Kingdom, Germany and Russia, were systems recognising the option of spouses' separate surnames. The second, including Canada (based on Quebec), South Korea, the People's Republic of China and France, were systems with separate spouses' surnames as the main principle. The third, including Italy, was the system allowing a wife to have a double-barrelled surname, regardless of the husband's surname.⁵⁴ The survey also found that Japan was the only country which required spouses to choose the same surname.⁵⁵

Notwithstanding the Legislative Committee's Family Law revision proposal from 1996 and the Ministry of Justice research from 2010, the Japanese government has made no official declarations to reform the spouses' same surname system. Although the Supreme Court has recently expressed the view that endorsed the discussion on the issue in parliament, the debate was postponed under the pretext of overcoming the effects of the COVID-19 pandemic. However, the spouses' same surname issue remains a fundamental problem for Japanese couples, as evidenced by recent events. On 13 June 2022, Chiyoda Ward Office refused to register the marriage of two famous Japanese film producers, Kiyoko Kashiwagi and Kazuhiro Soda. They married in the United States in 1997 and submitted the Notice of Marriage with two different surnames, which they used abroad.⁵⁶ Whether the couple intends to appeal against the local government's decision is unknown. Still, their experiences remind Japanese politicians that the discussion on reforming the spouses' surname system was not terminated due to the Supreme Court's judgment in June last year.

7. CONCLUSION

The article presented that the spouses' same surname system in Japanese Family Law is an important legal, political and social issue, which remains an entirely open question and heavily depends on the government's action. Despite the introduction of formal equality of men and women in Family Law in 1947, also in the scope of the choice of surnames, Article 750 of the *Mimpō* has an unequivocally discriminatory effect, as it indirectly forces Japanese women to take their husband's surname under the pretext of protecting family ties and legal tradition. The constitutional examination of the Civil Code and the Family Registry Law

Australia, the Netherlands, Canada (Quebec and British Columbia), South Korea, Saudi Arabia, Switzerland, Sweden, Thailand, Spain, People's Republic of China, Germany, Turkey and France.

⁵⁴ Poland has a spouses' hybrid surname system, but the Japanese government did not analyse its legal system.

⁵⁵ The website of the Ministry of Justice regarding the spouses' surname system in Japan: <https://www.moj.go.jp/MINJI/minji36.html> (accessed 6 June 2022).

⁵⁶ <https://www.nippon.com/en/news/kd908968699080638464> (accessed 16 June 2022).

norms did not bring a favourable solution for critics of the current system, mainly because the Supreme Court did not want to take any side in the dispute which was considered a political problem. According to the latest opinion surveys, majority of the Japanese society expects a revision of the spouses' same surname system shortly. Additionally, one cannot deny that the support for the reform will likely grow over time. The Japanese government, formed for many years by the conservative Liberal Democratic Party, has traditionally avoided commitments to prevent criticism of its right-wing electorate. This tactic, effective in the 1990s, may soon become dire.

The discussion on the spouses' same surname system also has undisputed positive aspects. Despite unofficial support for the current system, the Japanese Ministry of Justice provides reliable data and educates society about this issue. Once the information platform was launched, citizens could read about legal provisions, history, public opinion polls, proposed changes and court judgments regarding Japan's spouses' surname system. After reading the platform, one can also have the impression that the cabinet is trying to explain to the more conservative part of Japanese society that the introduction of the married couple's separate surname system will not result in the removal of the spouses' same surname option. Equally important, it wants to clarify that couples with separate surnames will not have fewer rights compared to those with the same surname. The only drawback of the Ministry of Justice platform is that it has not been updated recently and does not mention the Supreme Court's decision of June 2021.⁵⁷

Finally, while anticipating the reform of Japanese Family Law, I am tempted to say that if Article 750 of the *Mimpō* were revised in the future, the spouses could choose the same surname (per the current system) or retain their surnames before the marriage. This solution will be consistent with the proposal presented in 1996. No voices suggested considering other options, such as introducing double-barrelled surnames. Indeed, they have been used for years in many countries and appear to be an attractive alternative. However, double-barrelled surnames would also be a significant issue since the Japanese have never used them. Therefore, the potential change different from the proposal of 1996 would require a much broader interference with Japanese law and culture, which certainly would not help to efficiently reform the current system soon.

⁵⁷ Sentakuteki Fūfu Betsuujī Seido (Iwayuru Sentakuteki Fūfu Bessei Seido) ni tsuite (About the Spouses' Separate Surname System), <https://www.moj.go.jp/MINJI/minji36.html> (accessed 14 June 2022).

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