2014 (O) 1023

Date of the judgment (decision)	2015.12.16
Case Number	2014 (O) 1023

Reporter	Minshu Vol.69, No.8
Title	Judgment concerning Article 750 of the Civil Code and Article 13 of the Constitution
Case name	Case to seek damages
Result	Judgment of the Grand Bench, dismissed
Court of the Second Instance	Tokyo High Court, Judgment of March 28, 2014
Summary of the judgment (decision)	1. Article 750 of the Civil Code does not violate Article 13 of the Constitution. 2. Article 750 of the Civil Code does not violate Article 14, paragraph (1) of the Constitution. 3. Article 750 of the Civil Code does not violate Article 24 of the Constitution. (There are a concurring opinion, opinions and a dissenting opinion concerning 3.)
References	(Concerning 1 to 3) Article 13, Article 14, paragraph (1), Article 24 of the Constitution, Article 750 of the Civil Code Constitution Article 13 All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs. Article 14

	(1) All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin. Article 24 (1) Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. (2) With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes. Civil Code Article 750 A husband and wife shall adopt the surname of the husband or wife in accordance with that which is decided at the time of marriage.
Main text of the judgment (decision)	The final appeal is dismissed. The appellants of final appeal shall bear the cost of the final appeal.
Reasons	Concerning the reasons for final appeal argued by the appeal counsel, SAKAKIBARA Fujiko, et al. I. Outline of the case 1. In this case, the appellants of final appeal allege that the provision of Article 750 of the Civil Code, which stipulates that a husband and wife shall adopt the surname of the husband or wife in accordance with that which is decided at the time of marriage (hereinafter referred to as the "Provision"), violates Article 13, Article 14,

paragraph (1), and Article 24, paragraphs (1) and (2), etc. of the Constitution, and accordingly, they seek damages against the appellee of final appeal under Article 1, paragraph (1) of the State Redress Act, on the grounds of the illegality of the appellee's legislative inaction, that is, its failure to take legislative measures to amend or abolish the Provision.

2. The outline of the facts legally determined by the court of prior instance is as follows.

(1) At the time of her marriage with P p, Appellant X1 (surname) x1 (given name) (her name is indicated as "P x1" in the family register), decided to adopt the surname of her husband,, but she has continued to use "X1" as her by-name.

(2) Appellant X2 x2 and Appellant X3 x3 decided to adopt the surnames of their husbands at the time of their marriages, and they divorced by agreement. Then, they submitted notifications of marriage again, which were not accepted due to the failure to choose the surname to be used after marriage.

(3) At the time of her marriage with Q q, Appellant X4 x4 (her name is indicated as "Q x4" in the family register) decided to adopt the surname of her husband, but she has continued to use "X4" as her by-name.

(4) At the time of marriage with R r, Appellant X5 x5 (her name is indicated as "R x5" in the family register) decided to adopt the surname of her husband, but she has continued to use "X5" as her by-name.

II. The reason for final appeal arguing that the Provision violates Article 13 of the Constitution

1. The appeal counsel argue that the Provision

unreasonably infringes "freedom from being forced to change one's surname," which forms part of personal rights that are guaranteed as constitutional rights, and violates Article 13 of the Constitution.

2 (1) A name, from the viewpoint of society, functions to identify an individual by distinguishing him/ her from others, and at the same time, from the viewpoint of the individual, it is the basis for a person to be respected as an individual and the symbol of his/her personality. In this respect, a person's name should be held to form part of personal rights (see 1983 (O) No. 1311, judgment of the Third Petty Bench of the Supreme Court of February 16, 1988, Minshu Vol. 42, No. 2, at 27).

(2) However, a surname forms part of the legal system concerning marriage and the family and its particulars are regulated by law. Accordingly, the particulars of the abovementioned personal rights concerning a surname should not be given a single constitutional meaning, but should be understood specifically only on the basis of a legal system that is to be established in line with the spirit of the Constitution.

Consequently, it is inappropriate to discuss whether or not the situation of one's surname being changed in itself infringes personal rights and violates the Constitution, without taking into consideration the specific legal system.

(3) The provisions concerning the surname under the Civil Code include the following. A person acquires his/her surname at the time of birth by adopting the surname of his/her parents if the person is born in wedlock, or the surname of his/her mother if the person is born out of wedlock (Article 790 of the Civil Code). At the time of marriage, either a husband or wife shall take a new surname by adopting the surname of

the spouse (the Provision), and at the time of divorce or rescission of marriage, a husband or wife who has taken a new surname by marriage shall revert to his/her pre-marriage surname (Article 767, paragraph (1), Article 771, and Article 749 of said Code). In addition, an adopted child shall take a new surname at the time of adoption by adopting the surname of his/her adoptive parent(s) (Article 810 of said Code), and shall revert to his/her surname used before adoption, by reason of dissolution of the adoptive relationship or recession of adoption (Article 816, paragraph (1) and Article 808, paragraph (2) of said Code).

These provisions can be interpreted as presenting a conception regarding the nature of a surname to the effect that while a surname has a meaning as an appellation for an individual as in the case of a given name, it takes on another meaning, separately from a given name, as an appellation for a family, which is a constituent of society, as a result of the same surname being used by a married couple and their unmarried children or by an adopted child and his/her adoptive parent(s). Since a family is a natural and fundamental unit of persons in society, it may be reasonable to determine a single surname, which forms part of an appellation for an individual, as an appellation that is connected with the unit to which the individual belongs.

(4) The situation discussed in this case is one where either a husband or wife changes his/her surname upon choosing to change his/her personal status by marriage at his/her will, and in such situation, neither of them is forced to change his/her surname against his/her will.

A surname has a meaning as an appellation for an individual, and in combination with a given name, it functions to identify an individual in society by distinguishing him/her from others.

Considering this, allowing a person to determine or change his/her surname based only on his/her will does not suit the essential nature of a surname, but rather, requiring a surname to be determined or changed according to certain uniform criteria cannot be held to be an unnatural approach for handling a surname. In light of the fact that, as mentioned above, a surname has a meaning, separately from a given name, as an appellation for a family, which is a constituent of society, one could say that it is contemplated from its nature that a surname would reflect a certain personal status such as a parent-child relationship and could possibly be changed along with a change in the personal status, such as marriage.

(5) In light of factors including the nature of a surname under the current legal system as explained above, "freedom from being forced to change one's surname" at the time of marriage cannot be regarded as part of personal rights that are guaranteed as constitutional rights. The Provision does not violate Article 13 of the Constitution.

3. Having said that, since a surname, in combination with a given name, functions to identify an individual by distinguishing him/her from others, and it is the basis for a person to be respected as an individual and indicates the individual's personality in whole as mentioned above, it cannot be denied that a person who is to change his/her surname would feel a loss of identity due to the change of the surname or suffer disadvantages in that such change would interfere with the function of being distinguished from others and identified or affect the person's credit, reputation, fame, etc. as an individual, with such function or credit, etc. having been established through the use of his/her pre-marriage surname. In particular, as more people tend to marry later in recent years and they

establish their reputation and make achievements while using their pre-marriage surnames for a longer period of time, it is easy to assume that more people are suffering disadvantages resulting from changing their surname upon marriage.

It would be excessive to argue that the interest, etc. in maintaining, even after marriage, an individual's credit, reputation, fame or the like that have been established before marriage can be regarded as part of personal rights that are guaranteed as constitutional rights, but as explained below, it can at least be regarded as a personal interest that should be taken into consideration when discussing a desirable legal system concerning marriage and the family, including the handling of a surname. Said interest may be a matter that should be taken into consideration when examining whether or not the Provision goes beyond the scope of the legislative discretion permitted under Article 24 of the Constitution.

III. The reason for final appeal arguing that the Provision violates Article 14, paragraph (1) of the Constitution

1. The appeal counsel argue that the Provision creates gender discrimination in that more than 96 percent of all married couples choose the husband's surname and has a negative impact almost only on women, and hence it violates Article 14, paragraph (1) of the Constitution.

2. Article 14, paragraph (1) provides for equality under the law, and this provision should be interpreted as prohibiting discriminatory treatment under the law unless such treatment is based on reasonable grounds in line with the nature of the matter. This is case law established by the Supreme Court (see 1962 (O) No. 1472, judgment of the Grand Bench of the Supreme

Court of May 27, 1964, Minshu Vol. 18, No. 4, at 676, 1970 (A) No. 1310, judgment of the Grand Bench of the Supreme Court of April 4, 1973, Keishu Vol. 27, No. 3, at 265, etc.).

We examine the Provision from this standpoint. The Provision, which stipulates that a husband and wife shall adopt the surname of one of them, leaves it to the persons who are to marry to discuss and decide which surname they are to adopt. It literally does not prescribe discriminatory treatment by law based on gender, nor does the same surname system prescribed in the Provision, which requires a married couple to use the same surname, involve in itself gender inequality in form. Although it is found that the overwhelming majority of married couples in Japan choose the husband's surname through the discussions between the persons who are to marry, this cannot be regarded as the consequence arising directly from the substance of the Provision.

Consequently, the Provision does not violate Article 14, paragraph (1) of the Constitution.

3. Having said that, in view of the situation in which the overwhelming majority of married couples have chosen the husband's surname, attention should be paid to whether or not such tendency is derived from the free choice in the true meaning of the persons who are to marry. If these couples have been subject to any influence caused by a sense of discrimination or discriminatory customs that exist in society, it would suit the purport of Article 14, paragraph (1) of the Constitution to eliminate such influence to ensure substantial equality between a husband and a wife. This point should be regarded as a matter that should be taken into consideration when discussing a desirable legal system concerning marriage and the family, including the handling of a surname, and it may also be

necessary to pay attention to this point when examining whether or not the Provision goes beyond the scope of the legislative discretion permitted under Article 24 of the Constitution, as shown below.

IV. The reason for final appeal arguing that the Provision violates Article 24 of the Constitution

1. The appeal counsel argue that the Provision in effect infringes freedom to marry by requiring either of the persons who are to marry to change his/her surname in order to submit a notification of marriage, and that, even taking into consideration the existence of the Diet's legislative discretion, the Provision infringes individual dignity, and hence it violates Article 24 of the Constitution.

2 (1) Article 24, paragraph (1) of the Constitution provides, "Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis." This provision is interpreted as clearly stipulating that matters such as whether to marry or not, and whom and when to marry should be left to the decisions made by the parties freely and equally.

The Provision stipulates, as an effect of marriage, that a husband and wife shall adopt the surname of one of them, and it does not prescribe any direct restriction on marriage. Even where persons choose not to marry because they do not agree with any of the particulars of the legal system concerning marriage and the family, the existence of such persons cannot be regarded as the direct grounds for holding that the law that prescribes such legal system imposes a restriction on marriage that is contrary to the purport of Article 24, paragraph (1) of the Constitution. The fact that any of the particulars of a legal system serves as a de facto restriction

on marriage may be a matter that should be taken into consideration when examining whether or not the Provision goes beyond the scope of the legislative discretion in determining the particulars of a legal system concerning marriage and the family.

(2) Article 24, paragraph (2) of the Constitution provides, "With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes."

Matters concerning marriage and the family are specified by related legal systems, and in this respect, how to design such legal systems takes on an important meaning. Article 24, paragraph (2) of the Constitution leaves it primarily to the Diet's reasonable legislative discretion to establish specific systems, and it further indicates the legislative requirement or guideline that laws to specify such matters should be enacted from the standpoint of individual dignity and the essential equality of the sexes, also on the premise of paragraph (1) of said Article, thus defining the limits to the Diet's discretion.

In light of the fact that Article 24 of the Constitution indicates the legislative requirement or guideline regarding legislative action that should originally be carried out while considering various factors, such requirement or guideline is not satisfied only by enacting a law that does not unreasonably infringe personal rights that are guaranteed as constitutional rights, and that assures gender equality in form. Rather, said requirement or guideline demands that a law should be enacted while giving due consideration to, inter alia, respecting personal interests which cannot be regarded as rights that are directly guaranteed by the Constitution, assuring

substantial gender equality, and preventing any particulars of the marriage system from in effect imposing unreasonable restrictions on marriage. In this respect as well, Article 24 of the Constitution can be considered to give a guideline that could limit the legislative discretion.

3 (1) Matters concerning marriage and the family should be decided while taking into consideration various factors in the social situation including the national traditions and the people's sentiments, and by making a comprehensive assessment with a focus on the overall rules in terms of the relationships between husbands and wives and between parents and children of the times. In particular, personal interests which cannot be regarded as rights that are directly guaranteed by the Constitution, and substantial equality, may have various contents, and how to realize them should be decided based on how they are related to the social conditions, the situations of people's lives, the form of the family and other factors of the times.

(2) Given this, although it goes without saying that the Diet must not take legislative measures that violate Article 13 of the Constitution by unreasonably infringing personal rights that are guaranteed as constitutional rights, or legislative measures that violate Article 14, paragraph (1) of the Constitution by prescribing unreasonable discrimination, in view of the fact that, as explained in (1) above, it is left to the Diet's examination and determination of various aspects, to decide what legislative measures to take in response to the requirement and guideline under Article 24 of the Constitution, it is appropriate to construe that when the legal provision that prescribes a legal system concerning marriage and the family does not violate Article 13 or Article 14, paragraph (1) of the Constitution, determination as to whether or not said provision can also be accepted as being

also in compliance with Article 24 of the Constitution should be made by examining the purpose of the legal system and the influence that may be derived from adopting the legal system, and by considering whether or not the provision in question should inevitably be deemed to be unreasonable in light of the requirement of individual dignity and the essential equality of the sexes and be beyond the scope of the Diet's legislative discretion.

4. From this viewpoint, we examine whether or not the Provision complies with Article 24 of the Constitution.

(1) A. The same surname system wherein a married couple uses the same surname was introduced as a legal system in Japan in 1898, when the Former Civil Code (Act No. 9 of 1898 prior to the amendment by Act No. 222 of 1947) was enacted, and has been established in the Japanese society since then. As mentioned above, a surname has a meaning as an appellation for a family, and under the current Civil Code, a family is regarded as a natural and fundamental unit of persons in society and it is therefore found to be reasonable to determine a single appellation for each family.

A husband and wife, by using the same surname, publicly indicate to others that they are members of one unit, i.e. a family, and this functions to distinguish them from others. In particular, as an important effect of marriage, a child born to a married couple shall be a legitimate child who is subject to joint parental authority exercised by the husband and wife, and it may be meaningful to some extent to secure a framework wherein such a child uses the same surname as that used by his/her parents in order to show his/her status as a legitimate child. It may also be understandable that one would find it meaningful for individuals who form a family to feel that they

are members of one unit by using the same surname. Furthermore, under the same surname system, a child would be able to benefit more easily from using the same surname as that used by his/her parents.

In addition, as mentioned above, in its purest form the same surname system prescribed in the Provision does not involve in itself gender inequality, and it is left to the free choice of the persons who are to marry to discuss and decide which surname they are to adopt.

B. On the other hand, under the same surname system, one of the persons who are to marry must change his/her surname upon marriage, and hence it cannot be denied that a person who is to change his/her surname would feel a loss of identity due to the change of the surname or suffer disadvantages in that such change would make it difficult to maintain the person's credit, reputation, fame, etc. as an individual, which have been established through the use of his/her pre-marriage surname. In view of the current situation in which the overwhelming majority of married couples choose the husband's surname, it is presumed that women are more likely to suffer the abovementioned disadvantages. It also seems that some couples choose not to marry, so as to avoid the situation in which either the husband or wife would suffer these disadvantages.

However, the same surname system does not prohibit people from using their pre-marriage surname even as their by-name after marriage. Recently, it has become popular among members of the public to use their pre-marriage surname as their by-name after marriage. The abovementioned disadvantages can be eased to some degree as such use of the pre-marriage surname as the by-name after marriage becomes popular.

C. Taking all these points into consideration, the same surname system introduced by the Provision does not permit a married couple to use separate surnames, but, given the circumstances as described above, this system cannot be found to be unreasonable immediately in light of the requirement of individual dignity and the essential equality of the sexes. Consequently, the Provision does not violate Article 24 of the Constitution.

(2) The appeal counsel, while considering the same surname system as a restriction, points out room for adopting a less restrictive surname system (for example, a system generally referred to as an optional separate surname system which allows a married couple to use separate surnames if they so choose). The determination made in (1) above does not mean to judge such a system to be unreasonable. As mentioned above, the implementation of the same surname system largely depends on how the public considers the marriage system including the legitimacy system and a desirable manner of determining the surname. How this type of system should be designed, including the circumstances concerning these matters, is a matter that needs to be discussed and determined by the Diet.

V. Other reasons for final appeal

The other reasons for final appeal argue violation of Article 98, paragraph (2) of the Constitution and insufficient reasons for the judgment, but they are in effect assertions of unappealable violation of laws and regulations, and none of these reasons for final appeal can be regarded as a reason for final appeal permissible under Article 312, paragraph (1) or paragraph (2) of the Code of Civil Procedure.

VI. Conclusion

For the reasons explained above, the legislative inaction in taking legislative measures to amend or abolish the Provision is not assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act. The determination of the court of prior instance that dismissed the appellants' claims can be affirmed. The appeal counsel's arguments cannot be accepted.

Therefore, the judgment has been rendered in the form of the main text by the unanimous consent of the Justices, except that there is a dissenting opinion by Justice YAMAURA Yoshiki. There are also a concurring opinion by Justice TERADA Itsuro, and opinions by Justice SAKURAI Ryuko, Justice OKABE Kiyoko, Justice ONIMARU Kaoru, and Justice KIUCHI Michiyoshi, respectively.

The concurring opinion by Justice TERADA Itsuro is as follows.

In light of the arguments on the issue of constitutionality presented in the opinions by Justice OKABE Kiyoko and by Justice KIUCHI Michiyoshi, I give some comments to provide a detailed explanation of the statements in Section IV.4. of the majority opinion.

In this case, the appellants allege that it is unreasonable to not legally accept the existence of a husband and wife who use separate surnames, while legally accepting the existence of a husband and wife who use the same surname. By so alleging, they point out that it is unfair that a desirable option is not on the menu of legal relationships and emphasize a defect in the current system. By its nature it is difficult for the court to take an active action to adjudicate this kind of allegation in the constitutionality

review.

(1) How people will build relationships with each other and live their lives in such relationships are matters that they should be allowed to decide freely. Such freedom can be deemed to be supported under Article 13 of the Constitution. On the other hand, when viewed as a legal system, the relationship of a married couple constitutes part of the family system even though it involves only two persons in form, and it is generally deemed to have an influence not only on third parties who are close to the couple but also on a wide range of people in society. The current Civil Code defines the relationship of a husband and wife in such manner that whether a man and a woman are legally married makes a difference, in terms of the formation of a parent-child relationship, status in inheritance, and liability in transactions arising in daily lives. Due to such nature as a legal system and the fact that families consisting of married couples and their children exist as fundamental elements of society, a married couple, as a legal framework, is made into a standardized form, as in the case of other family relationships, so that other people in society can recognize the relationship of a married couple as not being so complicated. Accordingly, the current Civil Code tends to restrain itself from allowing the relationship of a married couple to be changed based on the free will of the parties, which may differ among individuals. Such a cautious stance toward allowing legal relationships to be changed based on the will of the parties is also found with other legal systems for civil affairs, such as the corporation (company) system and the trust system. However, this stance seems to be more intense with regard to the family system, probably because consideration is given to the fact that this system is involved in society in general to a greater extent.

(2) Marriage under the current Civil Code has a meaning and effects beyond the level of a relationship between the parties alone, as it is related to the relationships of inheritance (Articles 890, 900, etc.) and the relationships in transactions arising in daily lives (Article 761). The most characteristic feature of marriage as a system established for a man and woman is the legitimacy system (Article 772 et seq.). The legitimacy system has a great significance as an effect of the marriage system (Note). The prevalence of the view that a married couple and their legitimate children form the basis of a family relationship under the Civil Code, may be attributed to the understanding of this structure. Granting the status of a legitimate child that is thus connected with the marriage system may not be deemed to be inevitable but can hardly be judged to be unreasonable from a historical or sociological viewpoint, and it is fully compliant with Article 24 of the Constitution. The provisions concerning the surname of a husband and wife seem to reflect the fact that a legitimate child is considered to be an existence that has a strong relationship with the husband and wife to the extent that he/she has the same surname as that used by the husband and wife (Article 790, paragraph (1)). This point is mentioned in the majority opinion (however, also as mentioned in the majority opinion, this is not the only proof of the reasonableness of the provisions concerning the surname). In the course of designing a system under the requirement of making one that is not complicated but standardized, it is not an unreasonable approach to assume a pillar of the system that generates a legal effect and design other parts of the system while pursuing the consistency with this pillar. In consideration of this, given the situation in which the majority in society accept the system of the surname to be used by a married couple that has been thus designed, I do not find much room to suspect the reasonableness in regarding this system as a

principle.

(Note) See my concurring opinion attached to the decision of the Supreme Court that addressed the application of the provisions concerning the presumption of legitimacy to the child conceived by a wife of a person who has received a ruling of a change in the recognition of the gender status from female to male under the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (2013 (Kyo) No. 5, decision of the Third Petty Bench of the Supreme Court of December 10, 2013, Minshu Vol. 67, No. 9, at 1847 (pp. 1852 et seq.)). The systems of presumption of legitimacy and rebuttal of presumption of legitimacy are premised on the view that a child conceived by a wife shall be presumed to be a child of her husband unless the husband refutes the presumption. This indicates that marriage has a meaning that when a wife gives birth to a child, it is impossible for a man other than her husband to claim, against the will of the husband, that the man is the father of the child by reason of acknowledgment. Such effect that can be described as the core of the effect of legal marriage is extensive in society, and because of this, it is inevitable that legal marriage takes a rigid form.

(3) It is easy to see that in terms of legal relationships concerning a family as well, people tend to feel constrained due to a standardized system as they seek more diversified forms of relationships, and to that extent, I can understand the opinions and dissenting opinions attached hereto that found it reasonable to provide an option as people wish, while taking into consideration such tendency. However, when discussing whether or not the current system is unreasonable from the aspect of judicial review, there are some problems to overcome in order to draw a positive conclusion directly from that

tendency.

The first obstacle is that, as mentioned above, there is a dynamic in this area that is negative toward making a system complicated by making it dependent on an agreement between the parties. It should be noted that while some point out that the forms of actual families consisting of a husband and wife and of parents and children in Japan have originally been diversified among regions, the marital relationships and parent-child relationships have been standardized in legal terms. Although some also point out that other countries tend to make more flexible laws, the appropriate level of flexibility largely depends on the assessment of how the respective societies view it. The next question is whether it is unreasonable to provide no option. An accurate assessment cannot be expected unless an option is specified while taking into consideration the consistency with the overall system and the practical validity of the option. The issue of how to define the relationship between a husband and wife who use separate surnames on the premise of the connection with a legitimate child under the current system would unavoidably remain open to debate. For example, opinions are divided over the issues regarding how to make the separate surname system compatible with the legitimacy system, such as the handling of the surname of a child born to a husband and wife who use separate names (in fact, when making a report on the marriage system in 1996, the Legislative Council seems to have faced difficulty in reaching a consensus on how to handle the surname of such a child). It is therefore impossible to eliminate undetermined elements in terms of what kind of system should be brought to discussion as a possible option to be adopted. As mentioned above, it is too much to say that the marriage system should necessarily be connected with the legitimacy system under the current law, and it may be

possible to devise a new system that is separated from the legitimacy system. However, the approach of making an assessment while taking into consideration this kind of idea goes far beyond the scope of review by the judiciary. In addition, in terms of a reasonable surname system, although it is based on the Civil Code as mentioned above, it will become more appropriate as it is studied from a broad perspective in light of its meaning in social life, while taking into account its essential nature as indicated in the majority opinion. The study in this direction would inevitably be more policy-oriented, questioning the methods of seeing various circumstances in social life beyond the bounds of said Code.

Bearing in mind a comprehensive study under various conditions as described above, except when the respective conditions can be said to be objectively clear to the greatest extent, it is difficult to find, within the framework of judiciary, that the lack of an option is unreasonable. Rather, it seems to be a more suitable solution in line with the nature of the matter to leave this issue to a national debate, that is, to the democratic process, and decide on a reasonable system through an extensive study. This approach does not involve such situation in which fair consideration through the democratic process cannot be expected (e.g. an option is related to the customs shared only by a specific minority). Some point out that the current law provides an option to maintain the surname despite the changes in the personal relationship by taking as an example the system of allowing the continued use of an adopted surname [even] after divorce (Article 767, paragraph (2) of the Civil Code), but we must not overlook the developments that led up to this achievement, i.e. said system was introduced by the legal amendment to provide a new option as a result of the discussions in the Diet on a reasonable system for handling the

surname after divorce. This fact can be described as proving the correctness of the understanding presented in the majority opinion with respect to the nature of the issue.

The opinion by Justice OKABE Kiyoko is as follows.

I agree with the conclusion of the majority opinion that the final appeal should be dismissed, but I cannot agree with the explanation given therein that the Provision does not violate the Constitution. I give some comments on this point.

1. Whether the Provision complies with Article 24 of the Constitution

(1) Whether the Provision complied with Article 24 of the Constitution at the time of the amendment to the Civil Code in 1947

As stated in the majority opinion, a surname has a meaning as an appellation for an individual, and in combination with a given name, it functions to identify an individual in society by distinguishing him/her from others. The personal relationships between a husband and wife and between parents and children are the most fundamental forms of social relationships in human society and have an important role. The use of the same surname as a sign to represent these relationships is generally considered to be a reasonable system. Such use of the same surname is also beneficial in that the personal relationships can be ascertained from the surname to some extent in social life and that the surname represents a unit of a married couple and their minor children who are living together.

The same surname system was implemented under the Meiji Civil Code (Act No. 9 of 1898 prior to the amendment by Act No. 222 of 1947)

in a manner such that in most cases, the wife became a member of her husband's family upon marriage and adopted her husband's surname, which was the name of her husband's family. Even at the time of the amendment to the Civil Code by Act No. 222 of 1947, bearing in mind the form of a family consisting of a married couple and their minor children, the standard type of modern family life was considered to be one wherein the wife stays at home and engages in doing housework and raising children. There was no idea that any problem existed with the practice whereby, upon marriage, the husband would maintain his surname and the wife would adopt her husband's surname. Actually, in most families, the husband earned a livelihood while the wife supported him and engaged in doing housework and raising children, and therefore the change of the wife's surname rarely caused any particular problems. The Provision is meaningful in prescribing equality in form in that a husband and wife leave their own families and form an independent legal unit, and discuss and decide which surname they are to adopt, and in this respect, the Provision was reasonable when it was enacted in 1947. Consequently, the Provision complied with Article 24 of the Constitution at the time of enactment,

(2) Whether the Provision currently complies with Article 24 of the Constitution

A. However, a long time has passed since the enactment of the Provision, and in recent years, there has been dramatic progress in the advancement of women into society. Not only the number of women who work before marriage but also the number of women who continue to work after marriage have increased. In addition to engaging in domestic work to support their husbands, women now work by acting as independent legal parties and entering into contracts with individuals, companies,

organizations and other counterparties, or by running business entities and carrying out economic activities, and while doing so, they have more opportunities to take part in activities that require them to have more contact broadly with society. Under such circumstances, when women change their surname from the one used before marriage to the one adopted upon marriage, it has become difficult for them to be identified as the same individuals before and after the change of the surname. It is a publicly known fact that there has been a growing desire among women to continue their lives in social and economic places, while continuing to use their pre-marriage surname after marriage. Difficulty in being identified does not merely cause inconvenience. For example, if a woman who has accumulated business results before marriage changes her surname upon marriage, she might be unable to receive evaluation based on such results due to such change in the appearance of her name. In addition, due to the change of the surname upon marriage, a woman who has obtained a patent before marriage and also obtained another patent after marriage might not be identified as the same person, or the papers written by a woman before and after marriage might not be recognized as having been written by the same person. It is easy to presume that these possible situations could affect women's legal interests, including their business achievements, results, etc. Considering that the primary function of a surname is the identification function, it should be said that sufficient reasonable grounds exist for women to wish to continue to use their pre-marriage surname in order to avoid any interference with their identification resulting from the use of a new surname they have taken upon marriage. It is becoming more reasonable and necessary for women to continue to use their pre-marriage surname for the purpose of maintaining their identification as more women tend to maintain

their pre-marriage social life after marriage, owing to the measures to encourage women to play more roles in society and to help them to keep working while taking care of their home. It should be said that in today's society, where globalization is ongoing and a person's name is becoming more worldwide as it can be searched on the Internet, etc., a surname's identification function is becoming more important than ever, and accordingly, the utility and necessity to continue to use the pre-marriage surname are further increasing. The Committee on the Elimination of Discrimination against Women, which was set up under the Convention on the Elimination of All Forms of Discrimination against Women that Japan ratified in 1985, has expressed its concern repeatedly since 2003 concerning the fact that Japan's Civil Code contains discriminatory provisions concerning the choice of a surname to be used by a married couple, and has been requesting Japan to abolish these provisions.

B. A surname, in combination with a given name, is used as a sign to identify an individual, but it is not merely a sign. As a surname changes along with a change in the personal relationships, it also represents the individual's backgrounds, attributes, etc., such as his/her blood relationships or family, ethnicity, origin, and other factors involved in his/her personal relationships. Because of this, either the husband or wife who has changed his/her surname might eventually feel a loss of identity. In view of the fact that, in reality, more than 96% of married couples choose the husband's surname upon marriage, it can be said that the interference with a surname's identification function and the burden of feeling a loss of identity mentioned above, which have grown in recent years, occur on the part of the wife in most cases. Although the decision to adopt the husband's surname may be made through the discussions between the

persons who are to marry, the phenomenon of as many as 96% of married couples choosing the husband's surname can be said to be attributed to various factors, i.e. women's vulnerability in terms of their social and economic positions as well as in terms of their position at home, and other kinds of actual pressure on them. Even when the wife's decision to adopt her husband's surname was based on her own will, in actuality, she might have made that decision under the influence of inequality and the power balance. Assuming so, if no exception is made to the same surname system due to lack of consideration to that point, only women, in most cases, would experience the reduction in the surname's identification function, which supports the basis for individual dignity, and only women would have to feel a loss of identity. Such a system cannot be regarded as a system established from the standpoint of individual dignity and the essential equality of the sexes.

C. As the interference with a surname's identification function and the burden of feeling a loss of identity caused by the change of the surname have become greater, some couples choose not to marry, so as to avoid the situation in which either the husband or wife would suffer these disadvantages.

The Provision stipulates, as an effect of marriage, that a husband and wife shall adopt the surname of one of them. However, it is provided that marriage shall take effect upon notification pursuant to the Family Register Act (Article 739, paragraph (1) of the Civil Code), and the surname to be adopted by a married couple is one of the mandatory matters to be stated in a notification of marriage (Article 74, item (i) of the Family Register Act). Consequently, at present, the requirement of choosing the surname to be adopted by a married couple exists as an unreasonable requirement imposed on the

formation of marriage and restricts freedom to marry.

D. The majority opinion seeks grounds for the reasonableness of this requirement in the fact that a surname is an appellation for a family, which is a natural and fundamental unit of persons in society, and emphasizes, inter alia, the surname's function to publicly indicate that the persons who use the same surname are members of a family and thus identify them, and the significance of letting them have the feeling of being members of a family. I do not have an objection to these points, but they cannot be the grounds for not making any exceptions at all. Today, when the form of a family has diversified due to the increase in the numbers of divorces and remarriages, the tendency not to marry or marry later, and aging of population, it is inappropriate to place too much emphasis on the meaning or function of a surname as an appellation for a family. Contrary to the explanation given in the majority opinion, not all families consist only of married couples and their legitimate children. Although I agree that the Civil Code considers a unit of a married couple and their legitimate children as a basic form of a family, I would say that it does not preclude the emergence of other forms of families. Exceptional types of connection between a family and a surname already exist. The majority opinion also states that the abovementioned disadvantages resulting from changing one's surname can be eased to some degree as the use of the pre-marriage surname as the by-name after marriage becomes popular. However, the by-name is used only for the sake of convenience. There is no rule that specifies matters concerning the use of a by-name, such as whether or not the use of a by-name is permissible and for what purposes it may be used, and at present, a by-name has a flaw as it cannot be used in official documents. Moreover, the use of a by-name may raise a new

question as to the identity between the by-name and the name on the family register. In the first place, the use of a by-name is the proof of the fact that the change of a person's surname upon marriage causes interference with the person's identification. In view of the fact that some people hesitate to marry in an attempt to avoid this, the complete ban on a married couple using separate surnames cannot be deemed to be reasonable, even though the abovementioned disadvantages have been eased to some degree through the use of a by-name.

E. For the reasons stated above, the Provision has gradually become less reasonable along with the changes in society after the amendment was made to the Civil Code in 1947, and at least by now, it has become unreasonable in light of the requirement of individual dignity and the essential equality of the sexes and gone beyond the scope of the Diet's legislative discretion, and hence it should inevitably be judged to be in violation of Article 24 of the Constitution.

2. Illegality of the legislative inaction in taking legislative measures to amend or abolish the Provision

(1) As mentioned above, the Provision, at present at least, is in violation of Article 24 of the Constitution. Nevertheless, the Provision does not seem to have been judged by the Supreme Court or lower courts to be contrary to Article 24 of the Constitution so far. Furthermore, in 1994, the Counsellor's Office of the Civil Affairs Bureau of the Ministry of Justice published the "Draft Outline of the Amendment to the Civil Code Regarding the Marriage System, etc." based on the deliberation at the Personal Status Law Subcommittee of the Civil Law Committee of the Legislative Council, and then having further studied this draft, the Legislative Council submitted to the Minister of Justice a report titled

"Outline of a Bill for Partial Amendment to the Civil Code" in 1996. These drafts of legal amendments contained the proposal to amend the Provision to introduce a system generally referred to as an optional separate surname system. However, although this proposal was accompanied by an explanatory note that the time has come to introduce a legal system to protect personal interests in an individual's surname, it does not seem to have been prepared as a result of the discussion that was held on the premise that the Provision was unconstitutional. Matters concerning marriage and the family are matters for which the task to establish a specific system addressing them should be left primarily to the Diet's reasonable legislative discretion. In light of this, given the circumstances where no judicial ruling was issued to point out the question of unconstitutionality in the Provision, it is difficult to say that it was obvious that the Provision violates Article 24 of the Constitution.

(2) According to the above, the Provision now violates Article 24 of the Constitution, but when viewed in the context of the application of Article 1, paragraph (1) of the State Redress Act, it cannot be said that even though the Provision restricts, without reasonable grounds, any rights or interests that are constitutionally guaranteed or protected and thus obviously violates provisions of the Constitution, the Diet has failed to take legislative measures such as amending or abolishing the Provision for a long period of time without legitimate grounds. Consequently, in my view, the legislative inaction in question should not be assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act, and in conclusion, the final appeal should be dismissed.

Justice SAKURAI Ryuko and Justice ONIMARU Kaoru agree with the opinion by Justice OKABE

Kiyoko.

The opinion by Justice KIUCHI Michiyoshi is as follows.

The appellants have raised the question of how constitutional issues concerning the family, such as the right to one's name viewed as a personal interest, substantial gender equality, and freedom to marry, are related to a surname to be used by a married couple. All these issues are important. When examined from the perspective of the constitutionality of Article 750 of the Civil Code, the system that requires a married couple to adopt the same surname upon marriage is considered to be against individual dignity and the essential equality of the sexes provided in Article 24 of the Constitution. As I dissent from the majority opinion on this point, I give some comments in the section below.

1. Purport of Article 24 of the Constitution

Article 24, paragraph (1) of the Constitution provides for freedom to marry and equality of rights between a husband and a wife in marriage, stipulating that matters such as whether to marry or not, whom and when to marry should be left to the decisions made by the parties freely and equally. Paragraph (2) of said Article, on the premise of paragraph (1), defines the limits to the legislative discretion in establishing legal systems concerning marriage.

The Provision, without exception, would cause either of the persons who are to marry to maintain his/her surname upon marriage and cause the other to change his/her name. This infringes equality of rights between a husband and a wife in marriage provided in Article 24, paragraph (1) of the Constitution. However, since equality of rights between a husband and a wife is not something that does not permit any

constitutional restrictions at all, the question is whether the restrictions imposed by the same surname system remain within or go beyond the scope of the discretion allowable under Article 24 of the Constitution.

2. Infringement of interest due to the change of the surname

The marriageable age is 18 for men and 16 for women. However, as represented by the rule that minors shall be deemed to be adults if they enter into marriage, the majority of the parties to marriage have already become social beings based on their pre-marriage lives in society, or in other words, they have already been recognized and perceived as individuals by society.

When a man and woman among such persons choose to be united by marriage, if either of them is unable to continue to use his/her surname, that would be an extreme restriction on his/her social life.

When a person's existence is socially recognized, the person is usually distinguished from others by a pair of items, i.e. the person's occupation or affiliation and surname, or the person's residence and surname.

The change of the surname is a change of only a half of a person's name, which consists of a surname and a given name and serves as the primary representation to recognize an individual. However, on the premise that a person is recognized by a pairs of items such as his/her occupation or affiliation and surname, or his/her residence and surname, the change of the surname has greater impact than 50% impact, as a person whose surname has changed might be recognized as another person.

For a person, the recognition of his/her existence

in society is an important interest that deserves protection, and the loss of such interest constitutes grave infringement of interest. The party who is forced to change their surname due to the same surname system would suffer such infringement of interest.

3. Reasonableness of the same surname system

As stated in the majority opinion, whether or not the restrictions imposed by the same surname system on constitutional rights and interests are permissible should be determined by examining whether or not such restrictions are unreasonable in light of the requirement of individual dignity and the essential equality of the sexes provided in Article 24 of the Constitution and go beyond the scope of the Diet's legislative discretion.

What is important in this context is that the reasonableness which matters here is not the reasonableness of the use of the same surname by a married couple but the reasonableness of the measure to make no exceptions to the rule requiring a married couple to use the same surname, and that when the reasonableness of the legislative discretion is questioned, it is not sufficient that reasonableness is found with regard to the use of the same surname by a married couple but reasonableness must be found with regard to the measure to make no exceptions to the rule requiring a married couple to use the same surname.

4. Changes in personal relationships and a surname

The principle under the Civil Code that a person's surname shall change along with a change in his/her personal relationships is not in itself unreasonable. However, this principle is not stipulated in the Constitution, and hence, maintaining this principle in the case of marriage

as well cannot in itself be considered to be an interest that must be protected without condition.

It cannot be said that the principle that a person's surname shall change along with a change in his/her personal relationships is consistently applicable under the Civil Code. The system of allowing a person who took a new surname upon marriage to continue to use that surname after divorce was introduced through the amendment to the Civil Code in 1976 and the system of allowing a person who took a new surname upon adoption to continue to use that surname after dissolution of an adoptive relationship was introduced through the amendment to said Code in 1987. Under these systems, persons whose personal relationships have changed due to divorce or dissolution of an adoptive relationship may, at their choice, continue to use the surnames that they took upon marriage or adoption. These amendments were made with an awareness of the underlying problem with the same surname system, that is, as individuals engage in social activities more vigorously, those who have maintained their identity in social life by means of their pre-marriage surname would suffer a great disadvantage from the change of the surname. The amendments were designed, while leaving said problem in relation to marriage unsolved for the time being, to give relief from the disadvantage that individuals would, upon divorce, lose the recognition in society that has been established during their married life.

5. Legal meaning and effect of a surname

Under the Civil Code prior to the 1947 amendment, a surname was linked with joining or leaving a "family," and various legal effects were connected with joining or leaving a "family." Through the 1947 amendment, however, the

traditional family system was abolished, and the current Civil Code as amended does not give any legal effect to a surname in terms of inheritance or parental authority. The current Civil Code gives a legal effect to a surname only in terms of assumption of rights relating to rituals.

The benefit of the use of the same surname is now sought in such matters as the sense of unity as a family, other than a legal effect.

The majority opinion finds the same surname system to be reasonable on the grounds that it is meaningful for individuals to form a family and feel that they are members of one unit by using the same surname. I have a different view on this point.

We must consider anew whether people really feel that they are members of a family or they are a husband and wife or parents and children because of using the same surname, and whether they need to use the same surname in order to feel that way. At least, it cannot be said that people cannot feel that they are a husband and wife or parents and children without using the same surname.

I stated earlier that a person is socially recognized usually by an appellation that consists of a pair of items, such as his/her occupation or affiliation and surname or his/her residence and surname. However, between a husband and wife or parents and children, individuals are recognized by their given names, not by their surname. Normally, a husband and wife or parents and children do not call each other by their surname. This is not because a husband and wife or parents and children have the same surname, but because they have a relationship of calling each other by their given names, which will remain unchanged even when a husband and wife use separate surnames.

A surname's function of public indication and identification means that the use of the same surname by a man and woman indicates to society that they are a married couple, and if they have a minor child, the use of the same surname by the married couple and the child indicates to society that they have a parent-child relationship. A surname does have such a function, and it should not be judged to be unreasonable. However, the use of the same surname does not prove a marital relationship or parent-child relationship, but it indicates a marital relationship or parent-child relationship only to the extent that a third party would presume such relationship or the likelihood thereof.

There is possibility that the use of the same surname by a married couple (and by parents and child) may give an impression to a third party that they are a husband and wife or the parents and child of a family, or help them feel that they are a husband and wife or the parents and child of the same family. This is a benefit of the use of the same surname by a married couple.

However, the question is not the reasonableness of the use of the same surname by a married couple but the reasonableness of the measure to make no exceptions to the rule requiring a married couple to use the same surname.

While the use of the same surname by a married couple can only bring about the benefit mentioned above, there are no grounds for arguing that a married couple who choose not to use the same surname is more likely to break up or have difficulty in raising their child. Hence, from the perspective of the benefit of the use of the same surname by a married couple, reasonableness cannot be found with regard to the measure to make no exceptions to the rule

requiring a married couple to use the same surname.

6. Relationship with the legislative discretion

Since marriage and the choice of surname upon marriage are to be institutionalized by law, these matters are necessarily subject to the discretion of the legislative body. The scope of this discretion is defined by the power to choose one from among several reasonable systems. A system that makes exceptions to the rule requiring a married couple to use the same surname may take various forms (although only one proposal was described in the amendment bill outline in 1996, several proposals had been discussed). How to make exceptions to the rule is a matter that falls within the scope of the legislative body's discretion.

The majority opinion proposes the use of the by-name as an alternative measure to mitigate serious disadvantages that people would suffer from being forced to change their surname upon marriage, without reforming the current system that makes no exceptions to the rule requiring a married couple to use the same surname. However, as there is no legal system that allows the use of the by-name, whether or not a person's by-name is accepted depends on the decision of the other person, and therefore a person who has taken a new surname would have to confirm with what the other person would think about the use of the by-name. This is a major flaw of the use of the by-name as a system of an individual's appellation. On the other hand, if the use of the by-name is institutionalized by law, this would result in creating a surname with a completely different nature. Apart from the issue of whether or not the creation of such new surname is appropriate, it goes without saying that the availability of the by-name cannot be the grounds for the

reasonableness of the same surname system unless the use of the by-name is institutionalized by law.

Consequently, even taking into consideration the Diet's legislative discretion, the lack of exceptions to the same surname system cannot be deemed to be reasonable, and thus this system goes beyond the scope of the legislative discretion.

7. Child raising and the use of the same surname by a married couple

The majority opinion states that the use of the same surname by a married couple can indicate that a child born to them is their legitimate child, and that a child would benefit from using the same surname as that used by his/her parents. This statement is made while assuming a married couple and their minor child [as a unit].

The notion that a married couple and their minor child form a fundamental unit in society is not in itself wrong. However, a married couple may break up, and their child's surname would be different from that of their parents unless the divorced parent chooses to continue to use the surname that was taken upon marriage. The same surname system may guarantee that a child is raised by the parents who use the same surname, but this is limited to the case of a child whose parents maintain their marriage.

When the interests of a child is concerned, it is necessary to consider to what extent the use of the same surname by a married couple is helpful for raising their minor child.

Raising a minor child is important from the perspective of maintaining society, and the rights and responsibilities thereof are primarily vested in and imposed on a child's parents. However, the responsibilities for raising a minor child may not

be assumed only by the married parents, but also by divorced parents, parents in de facto marriage or unmarried parents. In fact, raising of a minor child must be performed properly even when the child's parents are not married, whereas even a married couple could have difficulty in raising their minor child in some cases when a dispute arises between them.

In terms of the responsibilities and obligations for raising a minor child, whether or not the parents are married and whether or not the parents use the same surname do not matter. Now we need a system for ensuring that raising of a minor child is in effect properly performed, and the use of the same surname by a married couple is not helpful for raising of a minor child.

8. Whether or not the legislative inaction disputed in this case is illegal under the State Redress Act

The Provision violates Article 24 of the Constitution, but when viewed in the context of the application of Article 1, paragraph (1) of the State Redress Act, it cannot be said that even though the Provision restricts, without reasonable grounds, any rights or interests that are constitutionally guaranteed or protected and thus obviously violates provisions of the Constitution, the Diet has failed to take legislative measures such as amending or abolishing the Provision for a long period of time without legitimate grounds. Consequently, the legislative inaction disputed in this case cannot be assessed as illegal.

The dissenting opinion by Justice YAMAURA Yoshiki is as follows.

Contrary to the majority opinion, I consider that the Provision violates Article 24 of the Constitution, and the legislative inaction, that is, the failure to take legislative measures to amend

or abolish the Provision, should be assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act, and in conclusion, the judgment in prior instance should be quashed and the case should be remanded to the court of prior instance to have it calculate the amount of damage sustained by the appellants. I explain the reasons for my opinion below.

1. Whether the Provision complies with Article 24 of the Constitution

As to the question of whether the Provision complies with Article 24 of the Constitution, I agree with the opinion by Justice OKABE that the Provision violates said Article.

2. Illegality of the legislative inaction in taking legislative measures to amend or abolish the Provision

(1) Changes in the social structure

As stated in the opinion by Justice OKABE, since the end of the war, the advancement of women into society has become remarkable, and not only the number of women who work before marriage but also the number of women who continue to work after marriage have increased. As people tend to marry later, the disadvantages resulting from changing one's surname---in that such change would interfere with the function of being distinguished from others and identified, or affect the credit, reputation, fame, etc. as an individual, while such function or credit, etc. having been established through the use of his/her pre-marriage surname---have increased to an extreme level.

In this respect, the following descriptions were included in the "Draft Outline of the Amendment to the Civil Code Regarding the Marriage System, etc." published in 1994 by the Counsellor's Office

of the Civil Affairs Bureau of the Ministry of Justice based on the deliberation at the Personal Status Law Subcommittee of the Civil Law Committee of the Legislative Council: "…looking at the realities of marriage under this provision, the overwhelming majority of married couples choose the husband's surname, and contrary to the principle provided by law, it has become a social fact that women change their surname upon marriage. Because of this, since around 1975, when the advancement of women into society became remarkable, calls for the introduction of the (optional) separate surname system were raised mainly from women who were engaged in activities in society, arguing that for women, the change of the surname upon marriage caused considerable disadvantages and inconvenience to their occupational and social activities." Thus, the abovementioned disadvantages that had increased along with the changes in the social structure in Japan were also recognized within the government.

(2) Legislative movements in Japan

Following these changes in the social structure, various studies were conducted in Japan toward amending the Provision to respond to such changes.

As a result, in the abovementioned "Draft Outline of the Amendment to the Civil Code Regarding the Marriage System, etc.," and the report titled "Outline of a Bill for Partial Amendment to the Civil Code" that the Legislative Council prepared through further studying the draft outline and submitted to the Minister of Justice in 1996, a proposal was made to amend the Provision to introduce a system generally referred to as an optional separate surname system.

This proposal was not prepared on the premise that the Provision was unconstitutional. However,

in addition to the comment pointing out that the Provision caused disadvantages and inconvenience mainly to women as mentioned above, the proposal was also accompanied by the following explanatory notes: "In consideration of the growing awareness of individual dignity that has recently been seen in Japan, the time has come to introduce a legal system to protect personal interests in an individual's surname"; "the use of separate surnames by a married couple is not contrary to the substance of or ideals for a marital relationship or parent-child relationship, and this is clear from the mere fact that many countries around the world have already introduced systems for allowing a married couple to use separate surnames." It can be said that behind this was a clear awareness of the problems with the Provision, under which either a husband or wife would have to change his/her surname upon marriage, in term of personal interests and substantial equality between a husband and wife.

Although said proposal was finally not submitted to the Diet, similar proposals for amendment of the Civil Code have subsequently been submitted to the Diet in succession. At the Diet sessions, questions have repeatedly been raised with regard to the introduction of an optional separate surname system.

The abovementioned changes in the social structure seem to have further progressed since 1996, but even now, no measure has been taken to amend or abolish the Provision.

(3) Movements outside Japan

Looking at movements outside Japan with regard to legal systems concerning the surname to be used by a married couple, the following circumstances can be pointed out.

Many countries around the world allow a married couple to choose to use separate surnames in addition to using the same surname, although the underlying legal systems concerning marriage and the family differ among these countries. Countries such as Germany, Thailand, and Switzerland, which previously required a married couple to use the same surname, have recently introduced separate surname systems. At present, the same surname system that makes no exceptions can virtually be found only in Japan.

The Committee on the Elimination of Discrimination against Women, which was set up under the Convention on the Elimination of All Forms of Discrimination against Women that Japan ratified in 1985, has expressed its concern repeatedly since 2003 concerning the fact that Japan's Civil Code contains discriminatory provisions concerning the choice of a surname to be used by a married couple, and has been requesting Japan to abolish these provisions.

(4) Conclusion

Taking all these matters into consideration, it can at least be said that by the time when a considerable period had passed since 1996, when the Legislative Council submitted to the Minister of Justice the report titled "Outline of a Bill for Partial Amendment to the Civil Code," it had become obvious to the Diet that the Provision violates constitutional provisions. Moreover, although the amendment to the Provision had already been proposed in 1996, even now, no measure has been taken to amend or abolish the Provision, such as introducing an optional separate surname system.

Consequently, at present, the legislative inaction in question is assessed as illegal in the context of the application of Article 1, paragraph (1) of the

	State Redress Act, because the Provision restricts, without reasonable grounds, any rights or interests that are constitutionally guaranteed or protected and thus obviously violates provisions of the Constitution, and yet, the Diet has failed to take legislative measures such as amending or abolishing the Provision for a long period of time without legitimate grounds. Furthermore, it cannot be denied that the legislative inaction in question was attributed to negligence. It should be held that as a result of such legislative inaction, the appellants suffered mental distress, and therefore I consider that their claim for state compensation on the grounds of the legislative inaction that is thus illegal should be upheld.
Presiding Judge	Justice TERADA Itsuro Justice SAKURAI Ryuko Justice CHIBA Katsumi Justice OKABE Kiyoko Justice OTANI Takehiko Justice OHASHI Masaharu Justice YAMAURA Yoshiki Justice ONUKI Yoshinobu Justice ONIMARU Kaoru Justice KIUCHI Michiyoshi Justice YAMAMOTO Tsuneyuki Justice YAMASAKI Toshimitsu Justice IKEGAMI Masayuki

	Justice OTANI Naoto Justice KOIKE Hiroshi

(This translation is provisional and subject to revision.)