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Women's Human Rights in Japan: Two Recent National Judgments Under the Lens of International Law

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Introduction

The Japanese Supreme Court has recently adopted two judgments with regard to women's rights, one of which, in particular, will determine a significant change in Japanese legislation in the months to come. On 16. December 2015, the Supreme Court confirmed, in the case **最大判平成** 27 **年** 12 **月** 16 **日平成** 26(**才**)1023, that Article 750 the Civil Code did not infringe the principle of non-discrimination enshrined in Article 14 of the Constitution. The provision requires married couples to choose either the wife's or the husband's surname as family name. On the same day, the Court argued, in another landmark judgment, **最大判平成** 27 **年** 12 **月** 16 **日平成** 25(**才**)1079, that the remarriage moratorium enshrined in Article 733 of the Japanese civil code, which prohibits a woman to remarry unless six months have passed since the day of

* Articolo sottoposto a referaggio.

dissolution or annulment of her previous marriage[1], was partially contrary to Article 14 of the Constitution.

This article is aimed to first analyse Japan's international legal obligations, and some provisions of the Japanese civil code, regarding women's rights which are relevant for the decisions at issue (para. 1); secondly, to briefly illustrate the two judgments rendered by the Japanese Supreme Court (para. 2); thirdly to consider them under the lens of international law (para. 3). We will argue that, despite the reasoning of the Supreme Court, the provision of the civil code providing for the same surname for a married couple seems contrary to the well-established principle of non-discrimination at the international level. Although the wife and the husband can choose the surname they prefer, the majority of couples in Japan choose the husband's surname[2], because the role of man as breadwinner is still deeply rooted in that society, as well as in many Western ones[3]. This is the reason why some couples prefer not to get married, in order not to make a choice on the surname, and married women use pseudonyms to continue their job with their maiden names[4].

We will suggest in the following pages two possible options in order to combine the respect for a well-rooted practice in the society with the principle of non-discrimination. For this purpose, we will compare the situation in Japan with two cases decided by the European Court of Human Rights. The first option is that husband and wife can freely choose to have a joint surname or to keep their own surnames as argued by the European judges in 2004, in the *Ünal Tekeli v Turkey* case[5]. The second solution is to envisage a system of derogation to the general rule, as emerged from the *Cusan and Fazzo v Italy* case decided in 2014 by the European Court of Human Rights[6].

As for the other judgment, we will respectfully contest the proposal of the Japanese Supreme Court, endorsed by the Japanese Ministry of Justice and the Japanese Parliament more recently, of reducing the period of the remarriage moratorium from six months to 100 days, since it does not concretely eliminate discrimination against women.

[1] Period of Prohibition of Remarriage
Article 733 (1) A woman may not remarry unless six months have passed since the day of dissolution or rescission of her previous marriage. (2) In the case where a woman has conceived a child before the cancellation or dissolution of previous marriage, the provision of the preceding paragraph shall not apply from the day on which she gives birth.

[2] 95 per cent according to the statistics by the Ministry of Internal Affairs and Communications.

[3] Some authors argue that it is a *de facto* discrimination: see M. TSUJIMURA, *Women's Rights in Law and Praxis*, in Y. Higuchi (ed.), *Five Decades of Constitutionalism in Japanese Society,* Tokyo, 2001, pp. 162-164.

[4] L. WHITE, *Challenging the Heteronormative Family in the Koseki*, in D. CHAPMAN, K. J KROGNESS, *Japan's Household Registration System and Citizenship,* London, 2014, p. 247.

[5] *Ünal Tekeli v Turkey,* Application no 29865/96, Judgment of 16 November 2004.

[6] *Cusan and Fazzo v Italy*, Application no 77/07, Judgment of 7 January 2014.

1. Japan's International Legal Obligations and some Provisions of Domestic Law with Regard to Women's Rights

Japan is party to a number of international human rights instruments. Japan has ratified both the 1966 International Covenant on Civil and Political Rights, and the 1966 International Covenant on Economic Social and Cultural Rights[7], which ensure in their common Article 3 the equal right of men and women to the enjoyment of all rights set forth in the conventions. Furthermore, as of 25 June 1985, Japan is party to the 1979 International Convention on the Elimination of Discrimination against Women (CEDAW), which defines 'discrimination against women' at its Article 1 as follows:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

States are obliged to condemn discrimination against women in all its forms by, *inter alia,* embodying the principle of non-discrimination in the Constitution and other appropriate legislation, and by taking all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women[8]. With regard to marriage and family relations, States must ensure 'the same personal rights as husband and wife', including 'the right to choose a family name, a profession and an occupation'[9]. Japan also bears the obligation, by virtue of the aforementioned conventions, to submit reports to the Committees established by the conventions themselves[10], containing information on the measures adopted at national level to implement the treaty provisions. However, since Japan has not acceded either the optional protocols to the international Covenants or the optional protocol to the CEDAW, the UN Committees are not competent to receive individual complaints against the State.

Shifting to the domestic legal system, it should be acknowledged at the outset that the principle of non-discrimination is enshrined in Article 14 of Japanese Constitution, which reads as follows:

[7] Japan ratified the International Covenants on 21 June 1979.
[8] Article 2, letters a and f.
[9] Article 16, para. 1, letter g.
[10] UN Human rights committee, Committee on economic social and cultural rights, Committee on the elimination of discrimination against women.

"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"[11].

Therefore, this provision is in line with the legal obligations stemming from the CEDAW and the International Human Rights Covenants.

As far as the judgments under analysis are concerned, two provisions of the Japanese civil code deserve closer scrutiny. The first one is Article 733, according to which a woman is forbidden to remarry within six months of the dissolution or annulment of her prior marriage. No similar restriction is envisaged for men's remarriage. The Supreme Court upheld the provision in 1995 arguing that it could not be considered unconstitutional since its purpose was to prevent paternity disputes[12]. The provision must be read in conjunction with Article 772, para. 1, which provides for the presumption according to which a child conceived by a wife during marriage is the child of the husband; and with Article 772, para. 2, under which a child born within 300 days of the divorce shall be presumed to have been conceived during marriage[13]. As outlined by an author, this provision was considered by the Court to provide 'a reasonable basis for the distinction between sexes'[14]. Nonetheless, the application of the provision raises some concerns. In cases of domestic violence, which is a worrying phenomenon in every country in the world[15], it might occur that a woman escaping from a violent husband decides not to register her child to avoid that he or she be considered as the child of the former husband.

The second provision which is relevant for our purposes is Article 750 of the Japanese civil code, which provides that a couple shall adopt the husband or the wife's surname according to the decision taken at the time of the marriage. This apparently neutral provision on the basis of sex entails several consequences. In the past, if a couple refused to get married in order not to choose one name or the other, the children of the couple were registered in the *Koseki* (the Japanese

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[11] http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html

[12] Supreme Court,
最判平成7年12月5日(5. Dec 1995)
平成4年（オ）255

[13] Presumption of Child in Wedlock
Article 772 (1) A child conceived by a wife during marriage shall be presumed to be a child of her husband. (2) A child born after 200 days from the formation of marriage or within 300 days of the day of the dissolution or rescission of marriage shall be presumed to have been conceived during marriage.

[14] C. GOODMAN, *The Rule of Law in Japan*, The Hague, p. 130. According to S. MATSUI, *The Constitution of Japan. A Contextual Analysis*, Oxford and Portland, 2011, p. 180, the Supreme Court has proved to be 'quite tolerant of the unequal treatment of women'.

[15] In Japan, according to a survey by the National Police Agency on violence between the sexes (2014), 23.7 % women and 16.6 % men said they were victims of domestic violence (1401 women and 1272 men answered to this survey). The data are only partially reliable, since the phenomenon often goes underreported.

family registry) as illegitimate, because born out of the wedlock. In the following years, by virtue of the battle over civil rights undertaken in the Nineties by Tanaka Sumiko e Fukukita Noboru and many associations[16], Japan has experienced a systematic change in the way births are registered[17]. Yet, *Koseki* continues to represent 'Japaneseness, family membership', and even though the law is neutral, 'common practice leads a high number of women changing their names in marriage': this process has been defined as 'heteronormativity', a word that identifies something that is rooted in nature, 'given' and deemed as inevitable[18].

The civil society has extensively asked the government to change the law in order to avoid any form of discrimination on the basis of sex. Furthermore, at the international level, the Committee on the elimination of discrimination against women has stressed that Japanese provisions constitute a violation of the UN CEDAW. For example, in the 2009 concluding observations with regard to Japan, the Committee expressed its concern about the fact that:

despite its recommendation in its previous concluding observations, discriminatory legal provisions in the Civil Code with respect to the minimum age for marriage, the waiting period required for women before they can remarry after divorce and the choice of surnames for married couples have yet to be repealed. It is further concerned that children born out of wedlock continue to be discriminated against through the family registry system and in provisions on inheritance[19].

It then urged the government 'to take immediate action to amend the Civil Code with a view to setting the minimum age for marriage at 18 for both women and men, abolishing the six-month waiting period required for women but not men before remarriage and adopting a system to allow for the choice of surnames for married couples'.[20]

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[16] In 1985, Tanaka Sumiko and Fukukita Noboru, not married, went to Musashino municipal offices in Tokyo to complete the birth registration of their daughter. Tanaka Sumiko then discovered that the character 'ko' was used, hence making her daughter as illegitimate. See L. WHITE, *Challenging the Heteronormative Family, op.cit.,* pp. 239-240.

[17] Article 900 of the Civil Code, which provided that '(iv) if there are two or more children, lineal ascendants, or siblings, the share in the inheritance of each shall be divided equally; provided that the share in inheritance of an child out of wedlock shall be one half of the share in inheritance of a child in wedlock, and the share in inheritance of a sibling who shares only one parent with the decedent shall be one half of the share in inheritance of a sibling who shares both parents,' was repealed in 2013 by the Ministry of Justice after the Supreme Court's judgment of 4 September 2013(最判平成 25 年 9 月 4 日平成 24(ク)984, Minshu vol.67 No.6 p.1320).

[18] See in this sense, L. WHITE, *Challenging the Heteronormative Family, op.cit.,* pp. 240-246.

[19] CEDAW, Forty-fourth session 20 July-7 August 2009, Concluding observations of the Committee on the Elimination of Discrimination against Women, CEDAW/C/JPN/CO/6, para. 17.

[20] Ibid., para. 18.

2. The Japanese Supreme Court Judgments of 16. December 2015

Against this backdrop, let us now turn to the judgments under analysis. The first case, 最大判平成 27 年 12 月 16 日平成 26(オ)1023, was filed in 2011. The plaintiffs argued that Article 750 of the civil code amounted to gender discrimination, and that it constituted a violation of personal dignity and the freedom to marry[21]. The judges acknowledged that in Japanese society, 95 per cent of the couples have chosen the husband's surname as family name and that many women experience a sense of loss of identity in accepting their husband's name[22]. Presiding Justice Itsuro Terada posited that sharing a single family name is a system 'deeply rooted in [the] society' and is meaningful in that it 'enables people to identify themselves as part of a family in the eyes of others'. Furthermore, the Court admitted to be aware of the fact that companies allow women to use their previous surname as alias in order to avoid any inconvenience with the pre-marriage activity in the 63 per cent of the cases. Nonetheless, the Court, by a vote of 15 to 5, upheld the provision, arguing that the parties can, on an equal footing, choose the surname they want for their family; in other words, the provision enshrined in the civil code cannot be considered as discriminatory. Judge Terada further pointed out that the disadvantages linked to the change of surname are mitigated by the practice of using the maiden name in the workplace. Therefore, the Court eventually rejected the applicants' request for 6 million Yen compensation. It is interesting to note that all the three women judges of the Supreme Court voted against the decision.

The second judgment, decided by the Supreme Court on the same day, marks a significant step forward in the promotion of women's rights in Japan. The case originated from two lawsuits filed by a woman from Okayama Prefecture, who divorced from her husband in March 2008 and had to wait until October to marry her current husband. The first lawsuit concerned Article 733 of the civil code, which, as we said, prohibits women from getting remarried within six months of the dissolution of the marriage. She argued that the provision was discriminatory, because only applicable to women, and asked for 1,650,000 Yen of compensation. The second lawsuit regarded Article 772 of the civil code, according to which if a child is born within 300 days of the divorce, the child will be considered as the legitimate son or daughter of the previous husband. The woman had a daughter from her current husband within 300 days of the divorce, and the

[21] T. OSAKI, *Japan's top court upholds same-name rule for married couples, overturns remarriage moratorium for women,* Japan Times, 16 December 2015, available at http://www.japantimes.co.jp/news/2015/12/16/national/crime-legal/japans-top-court-strikes-rules-divorcee-remarriage/#.VoJiod8vdE5

[22] Supreme Court, 最大判平成27年12月16日平成26(オ)1023, p.18 l.11.

local government did not recognise the child as being his legitimate child. Therefore, the couple could not register her.

The judges explained that issues related to marriage and family evolve over time and interpretation given by the courts should vary accordingly, taking into account different factors, including tradition[23]. In the case at issue, the Court was asked to assess whether or not the distinction between men and women – the remarriage moratorium being applicable only to the latter - was based on rational grounds. The purpose of Article 733 of the civil code was to pursue the best interest of children, indeed. Since, as we said, Article 772 provides for the presumption that a child conceived by a wife during marriage is the child of the husband, the remarriage moratorium clarifies who should be considered the legitimate father of the child. However, technology has developed since the adoption of the civil code and the DNA test is able to determine who the biological father of a child is. Therefore, the judges argued, the ban represents an 'excessive restriction' on women's freedom of marriage. However, as posited by Judge Terada, a ban reduced to 100 days would pose no constitutional problem, since, according to Article 772, para. 2, a child born within the first 300 days after a divorce is a descendant of the former husband (first presumption), while a child born at least 200 days after the second marriage is deemed to be that of a new partner (second presumption). Therefore, in order not to have paternity disputes, it is necessary to avoid any overlapping in the legitimate claims of the former and the current husband. 100 days is precisely the period after which the two presumptions do not overlap.

3. The National Decisions Under Scrutiny: An International Law Perspective

From the analysis above, one should first ask: is the argument of the Supreme Court with regard to the couple's surname acceptable from an international law perspective? As we said at the beginning of this note, indeed, the UN Committee on the elimination of discrimination against women has urged the Japanese government to change this provision of the law. Despite the majority of judges of the Supreme Court argued in favour of the constitutionality of the civil code provision, we might respectfully counter-argue that Article 750 cause a *de facto* discrimination against women[24]. It is true that the husband and the woman are on an equal footing in choosing the surname of the couple; however, women are induced to accept the husband's surname since this is common practice, well established and accepted in Japan.

[23] Supreme Court, 最大判平成27年12月16日平成25(オ)1079, p.3 l.14.
[24] M. TSUJIMURA, *Women's Rights in Law and Praxis*, *op.cit.*, pp. 162-164.

Discrimination is hence rooted in the society and cannot change without a deep intervention in the social and cultural patterns of conduct of men and women. According to Article 5 of the UN Convention on the Elimination of discrimination against women, States parties are required to: *modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women* (letter a).

It does not mean that the 'tradition' should be completely left behind. Within the European system of protection of human rights, two judgments rendered by the European Court of Human Rights are of particular interest for our purposes. In the *Ünal Tekeli v Turkey* case, the applicant challenged the prohibition on women, included in Turkish law, to use their surnames as the family name. The government argued that the provision reflected the importance of granting family unity through the husband's name. Referring to several international legal instruments, the Court argued that Turkey was in breach of its obligation under Article 14 of the European Convention on Human Rights (non-discrimination), since 'the objective of reflecting family unity through a joint family name could not provide a justification for the difference in treatment on grounds of sex'[25]. European judges explained that family unity can be reflected also by choosing the wife's surname or a joint name decided by the couple[26].

In another case, decided by the Court on 7 January 2014, the applicants, Cusan e Fazzo, a married couple, asked to enter their daughter born in 1999 on the civil register under her mother's family name, namely Cusan[27]. The request was dismissed and the child was registered under her father's surname, Fazzo, as it is common practice in Italy. All the appeals against the decision were dismissed, although the Constitutional Court acknowledged in 2006 that this practice, which is implicit from a number of articles of the Italian civil code taken together, was based on a patriarchal conception of the society[28]. The couple filed a complaint with the

[25] *Unal Tekeli, cit.*, para. 68.

[26] *Ivi,* para. 64.

[27] See, for reflections on the judgment, V. BARSOTTI et al. (eds), *Italian Constitutional Justice in Global Context*, Oxford, 2015, p. 138, and; M. CALOGERO, L. PANELLA, *L'attribuzione del cognome ai figli in una recente sentenza della Corte europea dei diritti dell'uomo: l'affaire Cusan e Fazzo c. Italia*, in *Ordine internazionale e diritti umani*, 2014, p. 222 ss.; C. Pitea, *Trasmissione del cognome e parità di genere: sulla sentenza Cusan e Fazzo c. Italia e sulle prospettive della sua esecuzione nell'ordinamento interno*, in *Diritti umani diritto internazionale*, 2014, 225 ss.; S. DE VIDO, *Giurisprudenza della Corte Europea dei Diritti Umani*, in *Libro dell'anno del Diritto*, Treccani, Roma, 2015, pp. 760-762

[28] Italian Constitutional Court, 6 February 2006, no. 61, para. 2.2: 'a distanza di diciotto anni dalle decisioni in precedenza richiamate, non può non rimarcarsi che l'attuale sistema di attribuzione del cognome è retaggio di una concezione patriarcale della famiglia, la quale affonda le proprie radici nel

European Court of Human Rights. The Court found that the Italian practice was in violation of the principle of non-discrimination taken together with Article 8 of the European Convention on Human Rights (respect for private and family life), but it also added that: *It was possible that the rule that the father's surname be handed down to legitimate children was necessary in practice, and was not necessarily incompatible with the Convention, but the fact that it was impossible to derogate from it had been excessively rigid and discriminatory towards women*[29].

In other words, the practice might be necessary, because of the longstanding tradition rooted in Italian society, but derogations should be admitted and be easily obtained.

Turning to the case of Japan, we might argue that even though in everyday life women can maintain their maiden surname as alias, this does not fulfil the principle of non-discrimination as encompassed in international human rights conventions. Therefore, an amendment to the law should be envisaged. It should not be conceived as a radical change of the existing law; the new law could allow the husband and the wife to either choose one of the surnames, as provided by current Article 750 of the civil code, or, as a derogation, when the spouses are willing to do so, to maintain their maiden surnames. A second option would be to provide three different possibilities at the time of the marriage as alternatives: the man's surname, the woman's surname, or both. These options will meet both the conservative concerns and the trend to modernisation determined by the increasing role of women in the society. It is evident that the transition would not be easy. However, as acknowledged by the European Court of Human Rights, although the 'important repercussions which a change in the system […] will inevitably have', the society 'may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the name they have chosen'[30].

The second judgment on remarriage moratorium is, on the contrary, a landmark decision which has already determined some modifications in Japanese legislation. Soon after the decision, indeed, the Minister of Justice Mitsuhide Iwaki pledged a swift legal revision. The Minister issued a notice to its regional bureaux in Japan according to which women wishing to remarry 100 days after a divorce – as suggested by the Court itself - should be allowed to do so[31]. On 8 March, the Japanese cabinet approved the revision of the remarriage law, which was then submitted by the

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diritto di famiglia romanistico, e di una tramontata potestà maritale, non più coerente con i principi dell'ordinamento e con il valore costituzionale dell'uguaglianza tra uomo e donna'.

[29] *Cusan and Fazzo, cit.,* para. 67.

[30] *Ünal Tekeli, cit.*, para. 67.

[31] T Osaki, *Japan's top court upholds same-name rule for married couples, overturns remarriage moratorium for women.*

Minister of Justice to the Parliament. The Japanese civil code was eventually amended on 1. June 2016[32].

Notwithstanding the impact of the judgment on Japanese legislation, one cannot but notice that women – and not men - still face a prohibition to remarry. The period of time has been only shortened. Is this remarriage moratorium legitimate under the lens of the principle of non-discrimination? We might doubt this is the case. The issue here is extremely sensitive. If, on the one hand, the best interest of the child to be registered and be considered born within the deadlock must be taken into account, on the other hand women's autonomy and self-determination cannot be simply ignored. The reduction from six months to 100 days *might* reduce paternity disputes, but at the expenses of women's right not to be discriminated against. Our conclusion is supported by the most recent report of the UN Committee on the Elimination of Discrimination against Women, which recommends to Japan 'to […] abolish any waiting period for women to remarry upon divorce'[33].

A proposal to reconcile the traditional views supported by the Japanese Supreme Court and the position of the UN Committee could be to rely on what the mother says about the paternity of her child; and, only in cases where the former husband disagrees, the judge can order a prenatal or postnatal paternity testing.

4. Concluding Remarks

Although one of the judgments under analysis confirmed the legitimacy of the civil code provision on the choice of the couple's surname, the two decisions taken together re-opened the debate on gender equality in Japanese society. Discrimination is rarely enshrined in a specific domestic legal provision, however it can exist *de facto* due to traditions, cultural patterns of society, and can be a consequence of the application of the law[34].

Under an international law perspective, it can be argued that the evolution of women's rights in many countries, including Japan, has been influenced by international human rights law. The

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32 http://www.moj.go.jp/MINJI/minji04_00059.html

33 Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of Japan, CEDAW/C/JPN/CO/7-8, 7 March 2016, para. 13. This is the reason why a clause has been incorporated in the revision of the Japanese Civil Code allowing for a review of the system in three years' time.

34 See for example the current debate on the new identification numbers in Japan, and the risk that women victims of violence will not be able to escape from their violent husband. Japan Times, *Women on the run from domestic violence fear cracks in My Number system,* available at http://www.japantimes.co.jp/news/2015/10/16/national/social-issues/women-run-domestic-violence-fear-cracks-number-system/#.ViDkZiuU1-w

obligations stemming from international conventions and the reports issued by UN bodies have played a major role in raising awareness of women's rights and in inducing countries to amend their legislation. Civil society has further contributed to promote gender equality. This pressure from the bottom combined with international support must however meet the will of the legislative and executive powers of the country to mark significant changes.