Happy Family? In Pursuit of Happiness in Japan

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In 1946, the right to the pursuit of happiness, along with other fundamental rights, was bestowed upon the Japanese people by the new Japanese Constitution. Article 13 of the Constitution states:

> 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.

In previous studies, the present author has examined aspects of the right to life[1] and the pursuit of happiness[2] in Japan. In this paper, we continue the theme of the pursuit of happiness under the Japanese Constitution. Specifically, we examine the pursuit of happiness in the home domain, and in respect of one hierarchical relationship within the family institution: the husband/wife relationship. By focusing on the position of the wife in the unequal husband/wife hierarchical relationship in the domestic arena, we delineate the nature of gender inequality in the Japanese home, an inequality which can—and does—act

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[1] On the right to life under the Japanese Constitution, see Noel Williams, 'The Right to Life Under the Japanese Constitution', a paper delivered at a Nissan Institute Seminar held at the Nissan Institute of Japanese Studies, the University of Oxford, 17 May 1991; *The Right to Life Under the Japanese Constitution*, D.Phil thesis, the University of Oxford, 1992; *The Right To Life in Japan* (London and New York, 1997); 'The Right to Life in Japan', a paper delivered at the Institute of Legal Studies, Daito Bunka University, Tokyo, 17 December 1997; 'The Right to Life in Japan', *Daitō Bunka Daigaku hōgaku kenkyūjō hō* (Bulletin of the Institute of Legal Studies, Daito Bunka University), no. 18 (1998), pp.13-16; 'The Right to Life in Japan', *Daito Law Forum* (Institute of Legal Studies, Daito Bunka University), no.1 (2001), pp.20-23. On the right to life in the Japanese corporate context, see 'Death in the Corporate Setting in Japan', a paper delivered at a conference on 'Death, Afterlives and Other Realms' held at the Centre for the Study of Japanese Religions, the School of Oriental and African Studies, the University of London, on 7 December 1999; 'Death in the Corporate Setting in Japan', *Daito Law Forum*, no.1 (2001), pp.5-14

[2] On inequalities in the Japanese corporate context which act as potential barriers to the pursuit of happiness of certain individuals in companies, see Noel Williams, 'Inequalities in the Japanese Workforce: Gender, Political Creed, and the Right to Life', *Daitō Hōgaku* (Journal of Law and Politics, Law Faculty, Daito Bunka University), vol.37 (2001), pp.1-81; Noel Williams, 'Death in the Corporate Setting in Japan' *op. cit.*

as a barrier to disturb and prevent the wife's pursuit of happiness as an individual.

The first part of the paper attempts a brief historical introduction to the matter in hand, focusing attention on events leading up to the drafting of the final version of the provision on gender equality in marriage and the family in the present Constitution. The second part of the paper focuses on the inequalities in the formalities of marriage and divorce. Three issues, in particular, are discussed. First, the requirements for marriage and remarriage. Second, the question of the use of surnames in marriage and on divorce. Third, the distribution of matrimonial property on divorce. The final part of the paper looks at the matter of the control or dominance of the husband over the wife. Two issues are discussed: control over the woman to deny her 'reproductive freedom', i.e. abortion; and domestic violence, including marital rape. Given the limitation on space, the issue of the control of the husband over the wife will be discussed in the next issue of this journal.

Gender inequality in the family: a historical overview

At the centre of the traditional family system was the *ie*, or household, which some authors, including the jurist Hozumi Yatsuka (1860-1912), claim was adopted from the family system of the *bushi*, or warrior, class of the Tokugawa period (1600-1868),[3] and which was formally incorporated as a legal institution in the Civil Code. The *ie* institution acted as a unit for registration.

At the core of the *ie* was the institution of *koshu*, the head of the household,

[3] This view that the *ie* system was modelled on the family system of the *bushi* class was adopted by *inter alios* the legal academic Hozumi Yatsuka (1860-1912), who was a member of the committee which investigated the legal codes in its deliberations on the Civil Code. Hozumi, for example, observed: 'the customs of farmers should not be taken as customs. The customs of samurai and the nobility should be followed' (quoted in Hirano Yoshitaro, *Nihon shihonshugi shakai to hōritsu* [Tokyo, 1971], p.91, translated by Ami Searight in Toshitani Nobuyoshi, 'The Reform of Japanese Family Law and Changes in the Family System', *U.S.–Japan Women's Journal English Supplement*, no. 6 [1994], pp.66-82, at p.68). This view, however, has its critics. Toshitani Nobuyoshi, professor emeritus of Tokyo University, for example, has noted: 'The *ie* of the Meiji family law is nothing but a reformulation of the *ko* (household or residential unit) of the [*koseki seidō*] family registration system. . . The customs that underlay [the Meiji Civil Code] were an accumulation of precedents from the practical administration of the register. Thus, the *ie* can be said to represent the new organizing principle of the Meiji government's top-down policies to accommodate modernization': 'The Reform of Japanese Family Law and Changes in the Family System', *ibid.*, p.68. Toshitani believes that 'Hozumi Yatsuka's view probably had a minor influence on Meiji family law in its final form'. For a historical introduction to the *ie* in English, see Murakami Yasusuke, '*Ie* Society as a Pattern of Civilization', *Journal of Japanese Studies*, vol. 10, no. 2 (1984), pp.281-363. On the history of the *ie* in Japanese, see *inter alios* Ishii Ryōsuke, *Ie to koseki no rekishi* (A history of the household and the family register) (Tokyo, 1981); Nakamura Kichiji, *Ie no rekishi* (A history of the household) (Tokyo, 1957).

who was empowered with *koshuken*, powers of the head. Contrary to the generally accepted viewpoint that the head's powers over family members was absolute, they were, both in law and practice, limited.[4] It is interesting to note that the position of household head was not confined to males, for females could occupy the position. Where the *koshu* had no son to succeed him (either because no son had been born to him or, if a son had been born, he had died without leaving an heir), the head of the household's eldest daughter became *koshu*.[5] As *koshu*, she possessed the same powers over the household as did her male counterpart. A female *koshu* retained her position in marriage unless the husband expressed an intention to the contrary.

What we see in respect of the traditional household is a system which operated to secure its perpetuation down the generations. It did not, however, put *male* succession to the headship as its overriding priority. Rather, the idea of the continuation of the household took precedence over that of domination by its male members.[6]

The paramount importance attached to the perpetuation of the household can also be observed in the way the *ie* institution accepted non-agnatic adoption. This idea was not confined to Meiji family law, however, but can be traced back to earlier periods in Japanese history. We see this in seventeenth—and eighteenth—century Japan, for example, despite inflexible Confucian dogma on the matter

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[4] See further J. Mark Ramseyer, *Odd Markets in Japanese History: Law and Economic Growth* (Cambridge, 1996), pp.80-108. An example of the household head's limited power was in respect of the dismissal of a family member from the family register where it was deemed necessary for the benefit of the household. Disobedience to the head in this respect could lead to the head refusing that member financial support: Civil Code 1896, articles 747, 749. Decisions of the courts made it clear that the head's power to expel was limited. In a 1901 decision, the Supreme Court (7-10 *Daihan minroku* 801) ruled:

> A family head's power under s. 749 is the power to do what is necessary to order the affairs of his house. In exercising that power, a head must operate within the realm dictated by the Code's legislative purpose. He does not have an unlimited right to exercise that power [to expel members]. He cannot exercise his power without reason, in other words, solely on a whim.

(quoted in J. Mark Ramseyer *ibid.*, p.84). In a 1926 Yamagata District Court decision (2550 *Hōritsu shinbun* 11), the Court ruled:

> A head does not have an absolute right to remove a family member from the registry. Instead, he may exercise his right only when necessary to maintain the peace and order of the house. As a result, he may not remove a member when he has no proper reason to do so. He may not remove someone when he acts only on his own emotions or in his own self-interest.

[5] Civil Code 1896, articles 970, 974.

[6] Tanaka Hideo, 'Legal Equality Among Family Members in Japan: The Impact of the Japanese Constitution of 1946 on the Traditional Family System', *Southern California Law Review*, vol. 53 (1980), pp.611-43, at p.623, note 38.

prohibiting non-agnatic adoption. The practice of Japanese Confucianism of this period proved more pragmatic, and the scholar of Japanese Confucianism I.J. McMullen[7] has demonstrated that, in its organization, the preservation of the *ie's* social role down the generations was more important than agnatic descent. In early Meiji Japan, there were commentators who voiced their opposition to the practice of non-agnatic adoption, but to no avail. These, like their predecessors in the Tokugawa period, were unable to modify to any significant extent a practice which had become an integral part of the workings of Japanese society.

Within the household, members were expected to behave in accordance with the dictates of Confucian norms. They were to uphold, for example, the principle of filial piety, an important element in Confucianism. As the present author has noted elsewhere,[8] the essential inequality in law between lineal ascendants and descendants, first institutionalized in law in the *ritsuryō* codes of seventh-century Japan, continued to form an important core of Japanese legal thought, surviving as it did even into modern Japanese law. There was heavier punishment imposed for certain crimes committed by lineal descendants against their lineal ascendants than those involving crimes committed by non-related persons. Until very recently, different punishments were imposed in law for the crimes of murder and injury resulting in death depending on whether the victims were lineal or non-lineal ascendants.

Even if male dominance was not the ultimate goal of the legislation, it cannot be denied that, in practice, male dominance was clearly very much the order of the day. With the exception of the case where the female occupied the position of *koshu* in the event of there being no male in the family to succeed to the headship of the *ie*, the woman's legal powers were limited. The wife, for example, while allowed to enter into contracts involving domestic affairs (although only in the capacity as agent of her husband),[9] was barred from entering into employment contracts, borrowing money, acting as guarantor, giving or receiving

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[7] I.J. McMullen, 'Non-Agnatic Adoption: A Confucian Controversy in Seventeenth-and Eighteenth-Century Japan'. *Harvard Journal of Asiatic Studies*, vol. 35 (1975), pp.133-89, at p.135.

[8] Noel Williams, *The Right to Life in Japan op. cit.*, pp.51-70.

[9] Civil Code 1896, article 804.

gifts, or suing without the husband's consent.[10] Where the wife owned property which could be shown not to belong to the *koshu* (in accordance with article 743(2) of the 1896 Civil Code), it was to be administered by the husband.[11]

The *koshu* (either male or female), the head of the household, stringently controlled the household through his or her control of the family property and the behaviour of its members so as to protect intact the family and its structure down the generations. The *koshu*, to use Inoue Kyoko's terminology, was a 'caretaker',[12] who was to protect the *ie's* property for future generations.

Thus the traditional household system was, in essence, as we have already noted, an institution concerned foremost with maintaining its social, or external, role down through the generations. In other words, continuity of the household itself was the primary goal of the household. Everything else was of secondary consideration. This is why non-agnatic adoption, and the permitting of women to perform the role of househead, for example, were allowed when there was a danger that the household could not continue in the event of childless marriages, or marriages where all the children were girls. Likewise, the entrusting of the governance of the household in the hands of its head in respect of all important matters relating to the family institution can be viewed in this light: the tight control of the institution to enable it to survive intact down the ages.

Having said this, the set-up within the household was such that, in practice in the great majority of cases, the institution was characterized by gender inequality, for its head was invariably male. The practical effect of vesting enormous power of control over the household in the hands of its head, given that the position was normally filled by males, was to create an imbalance of power in gender relations within the family domain.

This was particularly so in respect of the husband/wife relationship. The wife would thus be totally reliant on the husband in all important matters, especially in relation to money matters. Even when she owned property separate from the *koshu*, the husband was granted power to administer her property.

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[10] *Ibid.*, articles 14-18.

[11] *Ibid.*, article 799.

[12] Inoue Kyoko, *MacArthur's Japanese Constitution: A Linguistic and Cultural Study of Its Making* (Chicago, 1991).

The lowly position of the woman in relation to her husband found in Meiji family law and practice reflected Japan's on-going dependence (albeit to a modified degree) on Chinese Confucian values and dogma, a process of assimilation which dates back to the foundation of the *ritsuryō* state in Japan and its adoption of the principles found in the *lü-ling* text. The Code was not, of course, the primary source of gender inequality in premodern Japan. In a sense, the position of the woman in Meiji Japan was even lower than that of her counterpart under the native Japanese family system. Yōko Williams has pointed out two characteristic features of the early native Japanese family system which demonstrate the extent to which the Japanese had modified the Chinese model to suit the social reality in Japan. First, unlike the family system of the *lü-ling* Code, its early native Japanese counterpart displayed a matrilocal dimension, as illustrated by the marriage between Emperor Nintoku and his sister from a different mother, Princess Yatsuta.[13] Second, and an aspect which particularly concerns us here, the relationship between the man and woman within the family. Of the relationship in China, she observes:[14]

> Under Confucianism, as found incorporated in the *lü-ling* legislation, the morality of the family was based on a system where the woman's status and title were totally dependent on the status of the husband. Through marriage, she became to belong to her husband's *sō* (kin), which included all the branches of the male line from the same ancestor (and excluding the female line). The woman could belong to the *sō* only through marriage, not birth.

In Japan, however:

> If the Japanese *ritsuryō* regulations followed the principles laid down in the *lü-ling*—to the effect that the woman's property belonged to her

[13] Yōko Williams, *Tsumi in Early Japan*, D. Phil. thesis, the University of Oxford (1998), pp.193-4. This study is being published in book form by Rout ledge as *Tsumi – Offence and Retribution in Early Japan* (September 2002).

[14] *Ibid.*, p.194.

husband—, this principle was not, however, always put into practice. We see examples of the woman claiming ownership of land, slaves, and titles in the same way as did the man. Thus in the case of Fujiwara Fuhito's wife, Tachibana Michiyo, for example, on her death, her own personal name and title—and not those of her husband's—were recorded for the purpose of ownership when part of her estate was contributed to the Hōryūji temple. This demonstrates that, in practice, the rights of the woman were not necessarily less than those of the man's.

While the native Japanese family system in practice 'remained relatively unaffected by the Chinese Confucian ideal expressed in the *lü-ling*',[15] the same could not necessarily be said of the family system operating in Japan in the Meiji period, particularly in respect of the man/woman relationship.[16]

Within fifty years of the incorporation of the system in the Civil Code of 1896, it was abolished by the postwar legislative reforms in favour of its more Western, democratic successor. Let us now turn our attention to the issue of gender equality in marriage and family matters in the light of these reforms in postwar Japan.

With the task of drafting a Japanese Constitution in the aftermath of Japan's surrender to the Allied forces, the responsibility for drawing up an initial draft on women's rights was delegated to Beate Sirota,[17] an analyst[18] in the GHQ, General Headquarters of the Supreme Allied Command in Tokyo. Sirota offers us the following insight into how she became to be offered the task of drafting the

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[15] *Ibid.*, p.195.

[16] For an interesting firsthand account of the lowly position of women in Meiji Japan as seen through the eyes of one foreign lady resident in Japan, see Alice Mabel Bacon, *Japanese Girls and Women* (Boston and New York, 1892).

[17] For a recent discussion between Beate Sirota Gordon and Doi Takako on *inter alia* Beate Sirota's role in the making of article 24 of the Constitution, as well as her early life in Japan, see Doi Takako and Beate Sirota Gordon, *Kenpō ni danjo byōdo kisōhiwa* (Unknown episodes in the drafting of the gender equality provisions in the Constitution) (Tokyo, 1996). For Beate Sirota Gordon's own writing on this, and other subjects, see Beate Sirota Gordon, *The Only Woman in the Room: A Memoir* (Tokyo, 1997). Gordon's most recent comment on her role in drafting the women's rights section was her lecture given at the Association for Asian Studies' meeting in Chicago in March 1997. This can be found in printed form under the title 'Celebrating Women's Rights in the Japanese Constitution', published in *U.S. –Japan Women's Journal English Supplement*, no. 14 (1998), pp.64-83, at pp.65-76.

[18] Beate Sirota Gordon, *The Only Woman in the Room: A Memoir ibid.*, p.96. On her passport, however, only the word 'expert' appeared. Gordon explains: 'I went to the State Department to get my passport, and under "occupation" on the application form I wrote "research expert." When I got my passport they had forgotten the "research," and under "occupation" it just said "expert."': 'Celebrating Women's Rights in the Japanese Constitution' *op. cit.*, p.69.

provision on women's rights (as well as the provision on academic freedom):[19]

> The practical business of producing a draft required each committee to divide up the work that fell to it. The matter was sometimes decided quite summarily. "'You're a woman; why don't you write the women's rights section?", Col. Roest said to me. I was delighted. "I'd also like to write about academic freedom," I said boldly. "That's fine," Roest smiled. I had been given a plum, and here I was already demanding another. But I welcomed the responsibility, feeling all the more committed.

A similar description can be found in her 1997 lecture to the Association for Asian Studies:[20]

> We left the conference room, and Colonel Kades came to each of our little divisions to tell us what we would work on, and my division was told that we would work on the civil rights. Colonel Roest and Dr. Wildes and I sat down, partly in shock, and then they said, "Well, we have to divide the work." They said, "You're a woman, so why don't you write about the women's rights?" I said, "Wonderful, I'd love to, but I also want to write about academic freedom." And they said, "Okay, that's fine, you write about academic freedom also."

The draft provisions were presented to the Steering Committee on February 8 1946. A general statement on rights within the family is found in article 18:[21]

> The family is the basis of human society and its traditions for good or evil permeate the nation. Hence marriage and the family are protected by law, and it is hereby ordained that they shall rest upon the undisputed legal and social equality of both sexes, upon mutual consent

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19 Beate Sirota Gordon, *The Only Woman in the Room : A Memoir op. cit.*, p.106.

20 Beate Sirota Gordon, 'Celebrating Women's Rights in the Japanese Constitution' *op. cit.*, p.70.

21 Beate Sirota Gordon, *The Only Woman in the Room : A Memoir op. cit.*, p.116.

> instead of parental coercion, and upon cooperation instead of male domination. Laws contrary to these principles shall be abolished, and replaced by others viewing choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family from the standpoint of individual dignity and the essential equality of the sexes.

Sirota also presented in her draft for consideration by the Steering Committee additional provision of a concrete nature relating to the family and its social welfare (as well as on academic freedom). The former are found in articles 19-25 of her draft, and the latter, in article 17.[22] With the exception of article 18, no articles relating to the family were taken up for inclusion in the final version of the Constitution as none were considered suitable to be included in such a

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[22] These draft articles can be tabulated as follows:

Article	Provision
17	Freedom of academic teaching, study, and lawful research are guaranteed to all adults. Any teacher who misuses his academic freedom and authority shall be subject to discipline or dismissal only upon the recommendation of the national professional organization to which he belongs or in which he has a right to membership
19	Expectant and nursing mothers shall have the protection of the State, and such public assistance as they may need, whether married or not. Illegitimate children shall not suffer legal prejudice but shall be granted the same rights and opportunities for their physical, intellectual and social development as legitimate children.
20	No child shall be adopted into any family without the explicit consent of both husband and wife if both are alive, nor shall any adopted child receive preferred treatment to the disadvantage of other members of the family. The rights of primogeniture are hereby abolished.
21	Every child shall be given equal opportunity for individual development, regardless of the conditions of its birth. To that end free, universal and compulsory education shall be provided through public elementary schools, lasting eight years. Secondary and higher education shall be provided free for all qualified students who desire it. School supplies shall be free. State aid may be given to deserving students who need it.
22	Private educational institutions may operate insofar as their standards for curricula, equipment, and the scientific training of their teachers do not fall below those of the public institutions as determined by the State.
23	All schools, public or private, shall consistently stress the principles of democracy, freedom, equality, justice and social obligation; they shall emphasize the paramount importance of peaceful progress, and always insist upon the observance of truth and scientific knowledge and research in the content of their teaching.
24	The children of the nation, whether in public or private schools, shall be granted free medical, dental and optical aid. They shall be given proper rest and recreation, and physical exercise suitable to their development.
25	There shall be no full—time employment of children and young people of school age for wage—earning purposes, and they shall be protected from exploitation in any form. The standards set by the International Labor Office and the United Nations Organization shall be observed as minimum requirements in Japan.

Table 1: Sirota's Draft of Provisions Relating to the Family, Social Welfare and Academic Freedom

fundamental legal document.[23]

Article 18 of Sirota's draft—the only provision relating to the family to have been warmly received by the Steering Committee—is identical in substance to

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[23] Sirota's memoir includes the following description of the Steering Committee's rejection of articles 19-25 of her draft:

The three-man committee read my text in silence, while I sat with the palms of my hands beginning to get damp. The reaction came quickly and quietly . . . Col. Kades raised his eyes from the draft and looked at me. "Concrete measures of this sort may be valid," he said, "but they're too detailed to put into a constitution. Just write down the principles. The details should be written in the statutes. This type of thing is not constitutional material." I argued that the bureaucrats who would be assigned to write those statutes for the Civil Code would undoubtedly be so conservative they could not be relied on to extend adequate rights to women. The only safeguard was to specify these rights in the constitution. But it was no use: the committee continued to insist on wholesale cuts. Feeling out-numbered, I nevertheless tried again. "Colonel Kades, social guarantees are common in the constitutions of many European countries. I believe it's particularly important to include this sort of stipulation here because up to now they had no such thing as civil rights." Roest lent me his support. "It's true," he said, "— legally women and children are the equivalent of chattel in today's Japan. At a father's whim, preference may be given to an illegitimate child over a legitimate child. When the rice crop's bad, some farmers actually sell off their daughters." "But even if we do put in rights for expectant and nursing mothers and adopted children," Swope objected, "conditions won't improve unless the Diet enacts the laws that will implement them." To this, Wildes replied: "That's true. But we can make certain that the Japanese government is committed to doing that. It's absolutely necessary. Infringement of civil rights is an everyday affair in Japan. There's a word for 'people's rights' in Japanese, but 'civil rights' doesn't exist." Before I could add anything to this, Rowell cut in. "It isn't the Government Section's job to establish a perfect system of guarantees," he said categorically. "If we push hard for things like this, we could well encounter strong opposition. In fact, I think there's a danger the Japanese government might reject our draft entirely." Flushed and agitated, Dr. Wildes resumed the argument. "We have the responsibility to effect a social revolution in Japan, and the most expedient way of doing that is to force through a reversal of social patterns by means of the constitution." In answer to this seemingly unanswerable claim, Rowell said: "You cannot impose a new mode of social thought on a country by law." Even though it was apparent to everyone that GHQ was changing many of the old ways of Japan, we had no effective counterargument to this. Much of what I wanted to say remained unspoken. It was like being in court, but a military, not a civil, court, and the Steering Committee ultimately had the upper hand.

(Beate Sirota Gordon, *The Only Woman in the Room: A Memoir op. cit.*, pp.114-6).

The following description can be found in her lecture to the Association for Asian Studies:

We went into the Steering Committee meeting, and they looked at my draft. I think it was Commander Hussey who said, "My God! This is more than there is in the United States Constitution!" And I said, "Well, that's not very difficult since the word 'woman' isn't even mentioned in ours!" And then Colonel Kades said, "Yes you know we are sympathetic towards women's rights and also social welfare rights, but they really don't fit into a constitution." . . They did say that the reason for not putting in any social welfare rights was that it was not fitting for a constitution, that it would be in the *minpō* (civil code) later on, and that they would see to it that it would be in the civil code. So I made a whole speech about how the bureaucrats who were going to write the civil code would not do this. And they said, "Well, we are going to be here, the Occupation forces will still be here, and we will see to it that they are included.". . However, I realized after the discussion went on with the Steering Committee that here were these important people, like Colonel Kades and Hussey and Rowell, who had so much more power than I had... I realized that if they at least left in the most important women's rights, which they did, I must be satisfied. But I was so emotionally involved that I cried right during the Steering Committee session. Colonel Kades tells me that I cried on his shoulder. Now I don't remember that. I remember that I cried, but not on his shoulder. At that time, although I admired him tremendously, I was terribly disappointed that he was not supporting me in the fight for social welfare rights. . . I still regret that so much was left out. I chided Colonel Kades recently, when we were in Tokyo together and were on a talk show on TV. They asked me what I thought about the elimination of my social welfare articles, and I said it was a terrible mistake, and Colonel Kades said it was not.

(Beate Sirota Gordon, 'Celebrating Women's Rights in the Japanese Constitution' *op. cit.*, pp.72-3).

For Sirota herself, who had laboured hard to have welfare provisions for women and children included in the Constitution, this proved to be a 'major disappointment': *The Only Woman in the Room: A Memoir op. cit.*, p.116. 'To this day', Sirota writes, 'I believe that the Americans responsible for the final version of the draft of the new constitution inflicted a great loss on Japanese women.' (*ibid.*, p.118).

article 23 of the 'MacArthur Constitution', the draft of the Constitution drawn up by the Occupational forces,[24] although some of the wording was subject to revision. By article 23 of this draft:

> The family is the basis of human society and its traditions for good or for evil permeate the nation. Marriage shall rest upon the indisputable legal and social equality of both sexes, founded upon mutual consent instead of parental coercion, and maintained through cooperation instead of male domination. Laws contrary to these principles shall be abolished, and replaced by others viewing choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family from the standpoint of individual dignity and the essential equality of the sexes.

The provision in its draft form clearly shows a desire on the part of some of the American drafters to rid the family of male domination, replacing it with genuine gender equality, a more advanced state of affairs than which actually existed in the United States at that time, either in law or practice.

Article 23 of the American draft of the Constitution was approved by the Japanese contingent at a joint session meeting between the Americans and Japanese on 4 March, though not without protest. Sirota recollects the difficulty in persuading the Japanese side to agree to her proposals on marriage:[25]

> It was not until 2:00 A.M. that the civil rights section came under consideration. Everyone was tired. Nevertheless, to my great surprise,

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[24] This draft can be found in Inoue Kyoko, *MacArthur's Japanese Constitution: A Linguistic and Cultural Study of Its Making op. cit.*, pp.303-14.

[25] Beate Sirota Gordon, *The Only Woman in the Room: A Memoir op. cit.*, pp.123-4. In her 1997 lecture, Gordon notes: 'Colonel Kades had his psychological antennae out—he was very sensitive to people—and when, at two o'clock in the morning—can you imagine? we had started at ten a.m.!—we came to the women's rights, and the Japanese started to fight about the women's rights as dramatically as they had for the emperor, Colonel Kades, learning that the arguments would take another eight hours, turned to the Japanese, pointed to me, and said, "Miss Sirota has her heart set on the women's rights. Why don't we pass them?" I don't know whether it was shock or whatever, but they passed them. And so we could go on to the next items.'

(Beate Sirota Gordon, 'Celebrating Women's Rights in the Japanese Constitution' *op. cit.*, pp.74-5).

the Japanese started to argue against the article guaranteeing women's rights as fiercely as they had argued earlier on behalf of the Emperor. This article, they felt, was 'inappropriate' for the Japanese. Although I had been fighting sleep, I snapped awake when I heard these arguments.

The Japanese had taken a liking to me, probably because I was a fast interpreter. Col. Kades, ever sensitive to nuances in people's feelings, thought to take advantage of this to forestall further argument.

'This article was written by Miss Sirota,' he announced. 'She was brought up in Japan, knows the country well, and appreciates the point of view and feelings of Japanese women. There is no way in which the article can be faulted. She has her heart set on this issue. Why don't we just pass it?'

There was a stunned silence from the Japanese, who had known me only as an interpreter. But to my delight the ploy succeeded.

'All right,' they said, 'we'll do it your way.'

Article 23 of the 'MacArthur Constitution' was to become, in its final form, article 24 of the present Japanese Constitution, but only after being the subject of intense debate in its passage through both parliamentary chambers.[26]

Article 24 contains the essence of the Constitution's stance on gender equality in the family context. Article 24 reads:

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.

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[26] For an useful discussion in English on the debate regarding article 24 of the Constitution in both House of Representatives and House of Councillors, see Inoue Kyoko, *op. cit.*, pp.238-65.

Article 24 reiterates in concrete form in the family context the principle of equality under the law found in article 14 of the Constitution which states *inter alia* that 'there shall be no discrimination in political, economic or social relations... because of . . . sex'. The provision of article 24(1) in respect of the property rights of spouses is reiterated as a general principle for all individuals in article 29, which provides that the right to own and hold property is inviolable, to be defined by law in conformity with the public welfare.

In order to implement the provisions relating to gender equality laid down in the new Constitution, it was necessary to abolish many of the existing family law provisions and draft new provisions to introduce the sweeping changes which the Constitution demanded be made to the traditional family system and the relationship between the sexes within the family. Alfred Oppler, chief of the courts and law division of the government section of the Tokyo General Headquarters, who was closely involved in the process of legislative reforms, offers the following first hand account of the relationship between the legal reforms and the decline of the *ie* system:[27]

> the existing Civil Code embodied the old house system and was obviously in sharp conflict with Article 24 of the Constitution. After the latter had come into effect, the system was, at least legally, doomed to elimination or emasculation. One may say that the real decision was already made with the enactment of the Constitution. Still, when the very broad principles of Article 24 had to be implemented in the law of the land, particularly in a revised Civil Code, there remained definite possibilities of nuances. Realizing the sensitivity of this private family sphere, we assisted in the drafting of this aspect of the reforms in a carefully restrained manner, limiting ourselves to informative advice when such was requested. While we never urged the complete abolition of the house system, we watched with eager interest how the Japanese would adjust it to the principles of the Constitution. They did a more thorough job than we had expected.

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[27] Alfred Oppler, *Legal Reform in Occupied Japan: A Participant Looks Back* (Princeton, New Jersey, 1976), pp.116-7.

The thoroughness by which the Japanese dismantled the traditional household system can be seen from the provisions of the revised Civil Code. Article 2(1) explicitly laid down that:

> this Code shall be interpreted consistent with the principles of individual dignity and the fundamental equality of the sexes.

The provisions dismantling the system and improving the legal status of women included:

1 the termination of the special powers vested in the head of the *ie*.
2 the freedom for adults to choose their own partners in marriage without the need to obtain the consent of the head of the household.[28]
3 the right of wives to manage and dispose of property freely.[29]
4 equality of rights in divorce between the husband and wife.[30]
5 revision of the law of succession to allow either the husband or wife to claim part of the property of a deceased spouse on his/her death.[31]
6 parental power over children to be exercised jointly by the father and mother.[32]

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[28] Whilst Japanese law now, generally speaking, allows the parties to marriage to choose their own partners, some restrictions are still maintained in law. Thus article 743 of the Civil Code places restriction on marriage between relatives (relatives being defined by article 725 as consisting of one of the following: relatives by blood up to the sixth degree of relationship; spouses; or relatives by affinity up to the third degree of relationship). Article 735 prohibits marriage between lineal relatives by affinity. Article 736 prohibits marriage between adopted child or family member and parent by adoption or lineal ascendant.

[29] Provisions relating to the matrimonial property system can be found in book 4, chapter 2, section 3 of the Civil Code. See articles 755-62.

[30] Provisions relating to divorce can be found in book 4, chapter 2, section 4 of the Civil Code. See articles 763-71.

[31] Provisions relating to succession can be found in book 5, chapter 3 of the Civil Code. The principle governing succession by the spouse is found in article 890, which reads thus: 'The spouse of a *de cujus* becomes, in every case, a successor. In the case where any person is to become a successor in accordance with the provisions of articles 887 to 889 (which deal with succession by the child of the *de cujus* and succession by lineal ascendants and siblings respectively), the spouse shall rank equally with such person.'

[32] Parental rights provisions are to be found in book 4, chapter 4 of the Civil Code. The general principle relating to persons with parental rights is found in article 818, which reads as follows: '1 A child who has not yet attained majority is subject to the parental rights of its father and mother. 2 If such child is adopted, it is subject to the parental rights of its parents by adoption. 3 When a father and mother are married to one another, they shall jointly exercise parental rights. But if either the father or the mother is unable to exercise parental rights, the other parent shall exercise them.' Determination of the person with parental rights on divorce is governed by article 819.

Commenting on these reforms in the Civil Code, Oppler observed:[33]

> These. . . show that the radical revision of the Civil Code, with its sociological implications, represents a very important—if not the most important—part of the reform legislation, since it affects the intimate life of every Japanese man and woman. While not perfect, the reform surpassed our hopes, and appeared quite apt to open the way to a freer individual in a freer society.

Let us look at the present state of family law and practice which affects the 'intimate life of every Japanese man and woman' in order to assess the extent to which gender inequality in this domestic domain has lessened.

Marriage and divorce

(a) Formal requirements for marriage and remarriage

The first aspect which can be identified relates to the requirements for marriage and re-marriage. These are found in chapter 2, section 1(1) of the present Civil Code. While certain of the provisions do, on the surface, adhere to the principle of gender equality, others do not.

Of the former, we can note as examples article 732 and 737. Article 732, which prohibits bigamy, for example, notes:

> A person who has a spouse may not contract an additional marriage.

By article 737, which concerns the marriage of a minor:

> 1 A minor child must obtain the consent of his or her father and mother in order to marry.
> 2 If either the father or mother does not give consent, the consent of the other parent alone shall be sufficient.
> 3 The same shall also apply, if either the father or mother is unknown,

[33] Alfred Oppler, *Legal Reform in Occupied Japan: A Participant Looks Back op. cit.*, p.119.

or is dead or is unable to declare his or her intention.

If in these provisions we see no distinction being made in respect of gender, this is not the case with articles 731 and 733. Article 731, governing the minimum age for marriage, notes:

> A man may not marry until the completion of his eighteenth year, nor a woman until the completion of her sixteenth year.

Where there is contravention of this article, for example, an application may be made to the Court for an annulment of the unlawful marriage 'by either party thereto, any of each party's relatives or a public prosecutor'. By article 745:

> 1 No application may be made for the annulment of a marriage contracted in contravention of the provisions of Article 731, if the person who was not of marriage age has attained the requisite age.
> 2 A person married under the marriageable age may still apply for the annulment of the marriage during a period of three months from his attainment of the requisite age, unless he has ratified it after having attained the requisite age.

Article 731 as it stands is clearly a provision contrary to both the letter and spirit of the equality under the law constitutional provisions in that it specifically lays down different minimum ages for the marriage of minors based on gender. Whilst it is possible to reduce the age difference found in article 731 in practice through the employment of the provisions of article 745, this does not, of course, resolve the basic gender discrepancy enshrined in article 731.

Article 731, however, has been viewed by the government as not constituting discrimination for the purpose of article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women on the ground that the difference in ages laid down in article 731 is based on the difference in physical maturity: men

mature less quickly than women.[34] It is also defended in the light of similar provisions found in other legal systems.

The Japanese Civil Code's provision on time for remarriage found in article 733 also exhibits differential treatment based on gender. Article 733 reads:

> 1 A woman may not remarry unless six months have elapsed from the day of the dissolution or annulment of her previous marriage.
> 2 Where a woman is pregnant from before the dissolution or annulment of her previous marriage, the preceding paragraph shall cease to apply as from the day of her delivery.

In addition to the provision of article 744(1), allowing application for annulment by either party, their relatives, or public prosecutor, article 744(2) lays down:

> In the case of marriage contracted in contravention of the provisions of . . . article 733 the spouse of the former spouse of the party may also apply for its annulment.

The provision is silent as to the time of the remarriage of the former husband.

The reason why the drafters of the Civil Code included article 733 in the Code is clear from the provision itself: it was to ensure that, where the woman was pregnant at the time of the dissolution or annulment of the marriage—whether the fact of her pregnancy was known to her (or her husband) or not—the child's paternity, once the child is born, would be clear.

This is important from the standpoint of the registration of the child and its surname in the *koseki*. In Japanese civil law, a child conceived during marriage is presumed to be the husband's child;[35] and a child born 200 days or more after the formation of marriage or within 300 days from the dissolution or annulment of marriage is presumed to have been conceived during the marriage itself.[36] In

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34 Minutes of the Committee of Foreign Affairs, House of Representatives, 102nd Session, no. 15 (24 May 1985), p.18.

35 Civil Code, article 772(1).

36 *Ibid.*, article 772(2).

both cases, there is a presumption of legitimacy, and the child so recognized by its father acquires the status of a legitimate child by reason of the marriage of its biological parents.[37] The child can also be recognized by the father (or mother) where it is not legitimate.[38] Where the husband denies that the child conceived during marriage, or born 200 days or more after the day of marriage or within 300 days from its dissolution or annulment, is legitimate, article 774 allows such denial of legitimacy (provided such an action of denial is brought within one year from the time the husband became aware of the birth of the child).[39] The acquisition or lack of acquisition of the status of legitimate child affects the surname to be taken by the child, for by article 790:

1 A legitimate child assumes the surname of its father and mother. If, however, before the birth of the child its father and mother have divorced, the child assumes the surname of its father and mother at the time of the divorce.
2 An illegitimate child assumes the surname of its mother.

The constitutionality of article 733 of the Civil Code has been questioned in the courts on the grounds that it constitutes an infringement of articles 14 and 24 of the present Constitution—articles which, we remember, stress the principle of equality of the individual and the equality of individuals in marriage respectively—, and of international law.

In a case heard by the Hiroshima District Court in 1991 (1375 *Hanrei jihō* 30), affirmed by the Hiroshima High Court,[40] the plaintiff argued that article 733 was unconstitutional as against these provisions in the light of provisions to the contrary in international law instruments, in particular articles 2, 15, and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women, and article 23 of the International Covenant on Civil and Political Rights, instruments of international law ratified by Japan (see table 2 below).

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[37] *Ibid.*, article 779.
[38] *Ibid.*, article 777.
[39] *Ibid.*, article 774.
[40] Hiroshima High Court decision of 28 November 1991.

Convention on the Elimination of All Forms of Discrimination Against Women, article 2.	States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.
article 15(1)	States Parties shall accord to women equality with men before the law.
article 16(1)	States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on the basis of equality of men and women: (a) The same right to enter into marriage.
International Covenant on Civil and Political Rights, article 23.	Provides *inter alia* the right of men and women of marriageable age to marry, and places a responsibility on party states to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.

Table 2: Relevant provisions of international law instruments and the issue of the constitutionality of article 733 of the Civil Code.

The Court, however, dismissed the plaintiff's claim based on these provisions, arguing that none of the relevant provisions of the international law instruments prohibited treating men and women differently in respect of the waiting period for remarriage.

Both the court at first instance and the appellate court dismissed the plaintiff's claim which was based on these provisions, arguing that none of the relevant provisions of the international law instruments prohibited treating men and women differently in respect of the waiting period for remarriage.

Both article 733 and the decision of the Court have been criticized by academics.[41] While the provision of article 733 has been perceived as helping to prevent confusion as to paternity, thereby protecting the interests of the child, the usual practice for couples to live separately for some time before divorce, and improvements in the technology to determine paternity, in effect, point to the identity of the father of a child conceived during this one hundred days as being the new husband. Six months, it has been argued, is too long a waiting period; one hundred and one days, it has been suggested, would suffice.

The decision of the courts is based on the claim that nothing specifically relating to the waiting period before marriage can be found in the provisions. Whilst this is, of course, true in substance, it does appear to go against both the spirit and letter of the legislation, as evidenced by article 2 (f) and article 16(1) (a) of the Convention on the Elimination of All Forms of Discrimination Against Women, for example.

The matter has attracted international attention. In its consideration of Japan's report on its treatment of women to the Committee on the Elimination of Discrimination Against Women, Japan's stance on the matter of retaining article

41 See, for example, Nakagawa Jun, 'Saikon kinshi kikan goken hanketsu ni tsuite' (On the decision to uphold the constitutionality of the waiting period for remarriage), *Hōritsu jihō*, vol. 63, no. 5 (1991), pp.62-7, at p.62; Iwasawa Yūji, 'The Impact of International Human Rights Law on Japanese Law: The Third Reformation for Japanese Women', *The Japanese Annual of International Law*, no. 34 (1991), pp.21-68, at pp.61-2. See also Iwasawa Yūji, *International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law* (Oxford, 1998), pp.241-2.

733 was criticized by several members of the Committee. In her reply on behalf of the Japanese government, the Japanese representative observed:[42]

> the six-month period was too long. . . The article would be reviewed in the future.

As early as 1985, government officials stressed during a debate on the Convention in the Diet that, although the provision did not infringe the Convention, there might be a review of the provision in the future.[43] The issue was included in the Ministry of Justice's advisory committee's agenda to look into various aspects of the Civil Code.

(b) Surnames

Let us now turn to another contentious issue in Japan in respect of gender equality: the question of different surnames for the husband and wife in marriage and on divorce.

The surname taken by the husband and wife on marriage is governed by the Civil Code. By article 750:

> Husband and wife shall assume the surname of the husband or wife in accordance with the agreement at the time of the marriage.

The question of the surname of husband and wife in marriage has been the subject of intense debate in recent years. Whilst the provision of article 750 does not differentiate between the husband and wife in respect of the surname taken by the couple—it allowing the surname of either the husband or wife to be used as the couple's surname—, the current legal position has increasingly been under attack in some quarters for allowing only one surname to be used by the couple; it does not allow the spouses to take separate surnames during the marriage. When a couple marry, one of the partners must give up his or her former surname and

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[42] CEDAW/C/SR (1988), p.109.

[43] Minutes of the Committee of Foreign Affairs, House of Councillors, 102nd Session, no.16 (6 June 1985), p.8.

take the surname of the other partner (in accordance with the agreement reached on the matter by the mutual consent of the parties).

The major criticism levied against the provision lies in how it is taken up in practice. Whilst the law allows either the husband's or wife's surname to be adopted by the couple in marriage, in practice some 98 per cent of couples take the husband's surname. Put another way, in 98 cases out of 100 the woman changes her pre-marriage maiden name to that of her new husband's surname. What we thus have, argue many scholars, from a purely statistical point of view, is a gross imbalance in favour of the taking of the husband's surname on marriage. This state of affairs is of fairly recent origin in Japan, and does not reflect, for example, the practice of women of aristocratic birth, or those belonging to the warrior classes, in Japanese history prior to the Meiji Restoration.

If the revised Civil Code now leaves the husband and wife to decide whose surname will be adopted in marriage, the reality of the situation in contemporary Japan, it is often argued, differs little from the situation in Meiji Japan in respect of the taking of the husband's surname on marriage. Whilst the *ie* household now no longer exists from the point of view of the legal system, the inability, or lack of desire, of the wife to keep her maiden name in the great majority of cases suggests, at least in this regard, the continuation of the spirit of this traditional system.

How is the issue of surnames in marriage provided for in the Civil Code viewed by the courts? Two telling cases have come before the courts in recent years. The first case, heard before the Gifu Family Court in June 1989 (41 *Katei saiban geppō* 116), involved a claim by a married couple to have their marriage registered without electing one surname (as required by article 750 of the Civil Code) as this provision, they argued, infringed both articles 13 and 24 of the Constitution. The Court refused the plaintiffs permission to instruct the local registrar to accept registration, arguing that the requirement of article 750 of the Civil Code was based on a need to safeguard the notion of family in the institution of marriage, and the recognition by society of the couple as a married couple.

The theme of family unity and the need for social recognition of the couple as married was reiterated by the Tokyo District Court in November 1993 (1486 *Hanrei jihō* 21).[44] This case concerned the continued use of a woman's maiden name at work, even though she had adopted the surname of her husband on marriage in accordance with article 750. The case involved the scholar Sekiguchi Reiko, a university teacher at a national university, who had been refused permission by her university to use her maiden name in all matters relating to her work. The Court dismissed her claim that this refusal was an infringement of her constitutional rights, and those rights granted to her in international law—the right to privacy (article 12 of the Universal Declaration of Human Rights), and the right to self-determination (article 1 of the International Convention on Civil and Political Rights)—and argued that the provision of a shared surname in marriage was reasonable and gave married couples a sense of unity, and that the accepted convention—the wife taking her husband's surname on marriage—was recognized by society.

Despite the defeat in the courts, the plaintiff's effort brought the issue to public attention, and debate continued on the issue in the politico-legal arena throughout the 1990s. Particular mention can be made of the Ministry of Justice's establishment of a Legislative Council Committe in January 1991, whose task was to look at various aspects of the law relating to the family in the Civil Code. The question of surnames in marriage thus fell within its area of concern. In July 1994, the Ministry of Justice announced its thinking on the matter. It put forward three possible solutions, these being:[45]

1 Keeping to the principle of article 750 of the Civil Code (requiring a common surname in marriage), the couple would also be able to retain their separate surnames.
2 The couple would retain their separate surnames in principle, but be allowed to take a common surname instead if they so chose. The

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[44] See further, Tessa C. Carroll, 'By Any Other Name: Marriage and Names in Contemporary Japan', *Japan Forum*, vol. 8, no. 1 (1996), pp.67-86, at pp.67-8.

[45] *Ibid.*, p.70.

surnames of any children born would be decided by the married couple.

3 Keeping to the principle of article 750 for the purpose of law, the spouses would be given the right to use their pre-marriage surnames for practical purposes.

In 1995, the Legislative Council agreed to allow spouses to use separate surnames, if they desired, with the proviso that any children born to the marital union were to take the surname of one of the spouses, chosen by the couple at the time of marriage.

These suggestions for reform of the law remain merely suggestions at present as the conservative arm of the Liberal Democratic Party has repeatedly rejected any reform in this area.

In a defence of this conservative stance, supporters of the position could advance the argument that the situation in Japan in this respect is no different from that of most Western countries. While Japan is an exception in East Asia in this regard, in the West it has long been the custom for women to adopt their husband's surname on marriage. That 98 per cent of Japanese spouses share the husband's surname is, in Western historical and contemporary terms, not particularly unusual.

This does not, however, do away with the issue of choice, and a more radical view on this matter has favoured the continued use of the woman's maiden name in marriage if the woman so wishes. Western scholars holding this view include Tessa Carroll, who argues that if Japan is to truly shift away from a situation where 'identity (is) . . located in the role one fulfils and one's group' to that of 'a personal and consistent identity as an individual',[46] then changes need to be made to current law in Japan so as to permit partners to express their individual identities through separate surnames if so desired by the individuals concerned. A change in the law to this effect might both validate and give further encouragement to the present practice of many companies and institutions that allow women who have adopted their husbands' names on marriage to continue

[46] *Ibid.*, p.83.

to use their maiden names at, and in connection with, work, for example.

While many academics argue that the practice in Japan in respect of surnames in marriage is unfair to the woman, lawyers of this persuasion have gone one step further and have drawn attention to the possibility of this obviously unequal practice (purely in statistical terms) actually being an infringement of international law. Although article 750 of the Civil Code can be said to be in compliance with article 16(1)(g) of the Convention on the Elimination of All Forms of Discrimination Against Women, which guarantees 'the same personal rights as husband and wife, including the right to choose a family name', the practice whereby 98 per cent of married couples choose the husband's surname can, it has been argued, be taken as indicative of failure to implement to the full article 2(f) of the Convention, which requires states:

> to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

Such a high percentage—98 per cent—must surely be taken as indicating a discriminatory custom or practice for the purpose of article 2(f), and Japan must end such practice, argue scholars such as Iwasawa Yūji.[47] It is an argument along such lines directed at stressing an infringement of the Convention, and not the Japanese Constitution, which is seen as having the better chance of success.[48] If the Japanese authorities are to be made to safeguard the right of each spouse to retain the use of his/her original family name, then further effort is needed to encourage compliance.

We also see the perpetuation of the spirit of the traditional family system and of the unequal relationship of the wife in the domestic sphere in the legal provision governing the resumption of the former surname upon divorce. By article 767 of the Civil Code:

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47 Iwasawa Yūji, *International Law, Human Rights, and Japanese Law op. cit.*, p.235.

48 This is the case even given the general view that international law has had limited influence to date on the process of improving women's rights in the home arena in Japan.

1 A husband or a wife who has changed his or her surname by reason of marriage resumes, upon divorce by agreement, the surname which he or she had before the marriage.

2 A husband or wife who has resumed his or her former surname in accordance with the provisions of the preceding paragraph may maintain the surname he or she had at the time of the divorce, by notification thereof in accordance with the provisions of the Family Registration Law, effected within three months from the date of the divorce.

Tanaka Hideo,[49] notes that paragraph (1) constituted one 'vestige of the old value system' in family law and related areas.

Paragraph (2) of article 767, added to the law as an amendment in 1976, now offers the spouses a choice in the matter of surnames on divorce. This amendment to the law was brought about after pressure during 1975—the 'International Women's Year'—for legal reform of the Civil Code to ensure a fairer deal for women in gender relations. The provision, however, has had no substantial effect on women's practice. In 1983, for example, 33 per cent of all divorce applications were filed in this manner;[50] by 1993, this had only risen to 36.3 per cent.[51]

The issue of surnames in marriage (and, to a lesser extent, on divorce), and the inequalities in the formal requirements for marriage and remarriage looked at above, while viewed by some commentators as clearly symbolizing the oppression of the woman by the man and thus a restriction on her pursuit of happiness in the family arena, is objectively much less important a barrier to her pursuit of happiness than are other, more significant, aspects of gender relations inside and outside marriage.

One issue having greater priority in terms of its impact on women, its social

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49 Tanaka Hideo, 'Legal Equality Among Family Members in Japan: The Impact of the Japanese Constitution of 1946 on the Traditional Family System' *op. cit.*, p.633.

50 Kinjō Kiyoko, 'Legal Challenges to the Status Quo', in Kumiko Fujimura—Fanselow and Kameda Atsuko (eds.), *Japanese Women: New Feminist Perspectives on the Past, Present, and Future* (New York, 1995), pp.353-63, at p.358.

51 Takahashi Kikue *et al.*, *Fūfū bessei e no shōtai* (An invitation to separate names for spouses) (Tokyo, 1996), new ed., p.116.

importance, and the weight given it within Japan, as well as on their pursuit of happiness, is the distribution of matrimonial property on divorce (and death), an issue which goes to the very heart of the woman's economic survival in the aftermath of divorce (and the death of the husband). Let us now turn briefly to this matter.

c) The distribution of matrimonial property

In the Civil Code, the law is gender—neutral in respect of divorce settlement and inheritance share, as it is in respect of matrimonial property generally. In respect of divorce, claim for the distribution of property is governed by article 768, which reads as follows:

1 A husband or wife who has effected divorce by agreement may claim a distribution of property from his or her spouse.
2 If no agreement is reached or possible between the parties with respect to the distribution of property in accordance with the provisions of the preceding paragraph, either party may apply to the Family Court for measures to take the place of such agreement, except, however, after the lapse of two years from the time of divorce.
3 In the case mentioned in the preceding paragraph, the Family Court shall determine whether any such distribution is to be made or not and, if it is to be made, the sum as well as the mode of the distribution, taking into account the sum of such property as has been acquired by co-operation of the parties and all other circumstances.

Article 768 applies equally to divorce by agreement and judicial divorce.

While the legal provisions themselves are gender neutral, courts are asked to decide matters relating to the sharing of the matrimonial property, and must balance the interests of the spouses. In doing so, there is invariably bias in favour of one of the spouses. When asked to decide how the divorced wife should be

treated financially on divorce, the courts have tended to favour the view that she should receive sufficient minimum payment to protect her standard of living in line with that which an average woman of her background could consider to be sufficient. The courts have tended to reject the view that the divorced wife should be treated identical to that when she was married.

Statistically, whilst there are no figures for settlements in cases of divorce by agreement—and the overwhelming majority of divorces fall into this category—, there are figures for cases of divorce by arbitration or judicial procedure. These show how little the divorced woman receives. In 1991,[52] for example, 16,617 cases of divorce ended up in the courts. Of the 9,475 cases where claim for property or compensation for damage was made, 4,172 were settled with the divorced wife receiving less than 2 million yen, an insufficient sum, some commentators have argued, given her financial needs. The divorced wife can expect to receive much less than half share of the property. Whilst the woman can seek compensation for damages from the courts for psychological suffering should the settlement prove to be too little, it is questionable whether women in general can benefit substantially from this option.

Bias in favour of the divorced husband at the expense of the divorced wife in the matter of divorce payment stems largely from the unique legal structure of divorce payments operating in Japan. This system consists of the notion of separately-owned property of the wife and husband in the Japanese matrimonial property system found in article 762 of the Civil Code. By this article:

1 Property belonging to either a husband or wife from a time prior to the marriage and property acquired during the subsistence of the marriage in his or her own name constitutes his or her separate property.

2 Any property in regard to which there is uncertainty whether it belongs to the husband or the wife, is presumed to be property in their co-ownership.

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52 Mizuno Noriko, 'Grounds for Divorce in Japanese Law and Mechanisms of Divorce Payment Obligation', Japanese Reports for the XIVth International Congress of Comparative Law (International Centre for Comparative Law and Politics, University of Tokyo) (Tokyo, 1995), pp.89-102, at pp.100-101.

This element of the system penalizes women in practice. Nevertheless, given the even worse position of the woman in the immediate postwar years, it should be recognized that the divorced woman can, generally speaking, expect to receive a more equitable divorce settlement, reflecting the greater value now attached to the wife's contribution to the marriage.

That the value of the wife's role in the household has increasingly been recognized by Japanese law since the War can also be seen in respect of the woman's share of inheritance on the death of her husband. In an important amendment to the Civil Code in 1980, the woman's share of inheritance was increased from one-third to one-half when both spouse and child are joint heirs;[53] where the deceased's spouse and lineal ascendants are joint heirs, the woman's share was raised from one-half to two-thirds (and the lineal ascendant's share was reduced from one-half to one-third);[54] and where the deceased's spouse and siblings are joint heirs, the woman's share was raised from two-thirds to three-quarters (and the share given to the siblings reduced from one-third to one-quarter).[55] While the legal provision itself is gender—neutral, the effect of increasing the spouse's share of the inheritance has been particularly beneficial to women for they, in a large number of cases, have relied on their husbands' income for economic survival in marriage. On the death of the husband, it is equally, if not more, important for her to obtain financial security now that there is no income—earner to support her.

In the next section, we turn our attention to examine two other issues relating to gender inequality in the family, issues which many scholars, including legal scholars, point to as exemplifying gender inequality in the private sphere of activity which has repercussions on the woman's pursuit of happiness within that domain: male control over what is often termed 'female reproduction', and domestic violence.[56]

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53 Civil Code, article 900(1).

54 *Ibid.*, article 900(2).

55 *Ibid.*, article 900(3).

56 For a recent article on spousal violence, particularly in relation to divorce, in English, see Keiko Irako, 'Spousal Violence as a Cause of Divorce in Japan', Daito Law Review (Daito Bunka University Law School),vol.1(2005),pp.57-69