

## 第 6 回 夫婦同姓（民法 750 条）

### 【課題】

以下の資料を読み、2015 年最高裁大法廷判決の後でなお民法 750 条は女子差別撤廃条約に違反するので適用されないとの主張をするとすると、どのような主張が考えられるか。逆に、そのような主張が訴訟においてなされた場合、国側としてはどう反論することが可能か。両方のあり得る主張につき、それぞれ A4・1 頁以内にまとめること。なお、国側の主張は、「女子差別撤廃委員会の見解に法的拘束力はない」というにとどまらないものとする。

### 1-1. [最高裁大法廷 2015（平成 27）年 12 月 16 日判決](#)

判決（多数意見）は、既に別の機会に読んでいることと思うが、改めて読み直して頂きたい。

### 1-2. 岡部喜代子意見（櫻井龍子、鬼丸かおる同調）

我が国が昭和 60 年に批准した「女子に対するあらゆる形態の差別の撤廃に関する条約」に基づき設置された女子差別撤廃委員会からも、平成 15 年以降、繰り返し、我が国の民法に夫婦の氏の選択に関する差別的な法規定が含まれていることについて懸念が表明され、その廃止が要請されているところである。

### 1-3. 木内道祥意見

我が国が昭和 60 年に批准した「女子に対するあらゆる形態の差別の撤廃に関する条約」に基づき設置された女子差別撤廃委員会からは、平成 15 年以降、繰り返し、我が国の民法に夫婦の氏の選択に関する差別的な法規定が含まれていることについて懸念が表明され、その廃止が要請されるにまで至っている。

[……]

以上を総合すれば、少なくとも、法制審議会が法務大臣に「民法の一部を改正する法律案要綱」を答申した平成 8 年以降相当期間を経過した時点においては、本件規定が憲法の規定に違反することが国会にとっても明白になっていたといえる。

## 2. [女子差別撤廃条約](#)

### 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 a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- [...]
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

## 3. [女子差別撤廃委員会](#)

### 3-1. 2003年國家報告審査最終見解

Report of the Committee on the Elimination of Discrimination against Women, Twenty-eighth session (13-31 January 2003) and Twenty-ninth session (30 June-18 July 2003), [U.N. Doc. A/58/38](#).

371. The Committee expresses concern that the Civil Code still contains discriminatory provisions, including those with respect to the minimum age for marriage, the waiting period required for women to remarry after divorce and the choice of surnames for married couples. It is also concerned about discrimination in law and administrative practice against children born out of wedlock with regard to registration and inheritance rights and the resulting considerable impact on women.

**372. The Committee requests the State party to repeal discriminatory legal provisions that still exist in the Civil Code and to bring legislation and administrative practice into line with the Convention.**

### 3-2. 2009年國家報告審査最終見解

Concluding observations of the Committee on the Elimination of Discrimination against Women: Japan (2009), [U.N. Doc. CEDAW/C/JPN/CO/6](#).

17. The Committee is concerned 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. It notes with concern the use by the State party of public opinion surveys to explain the lack of progress in the repeal of discriminatory legislation.

**18. The Committee urges the State party 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.**

### 3-3-1. 2016 年国家報告審査口頭審理

Summary record of the 1375th meeting, Held at the Palais des Nations, Geneva, on Tuesday, 16 February 2016, at 10 a.m., [U.N. Doc. CEDAW/C/SR.1375](#).

9. **Mr. Bruun** said that the lack of references to the Convention in Japanese case law, coupled with reports that the Supreme Court apparently did not regard the Convention's provisions as being directly applicable or self-executing, suggested that the concerns raised by the Committee in its previous concluding observations about the Convention's status within the legal system had not yet been addressed.

[...]

13. **Mr. Otsuka** (Japan) said that amending the Civil Code was a complicated undertaking, since its provisions related to traditional family relationships and culture in Japan. A clear public consensus was thus needed before such amendments could be introduced. The Government had, however, made progress in certain areas. While the distinction between children born in and out of wedlock persisted, there were no longer discriminatory provisions concerning their inheritance rights. The Government was also currently drafting a bill to reduce the waiting period before remarriage in the light of a recent decision by the Supreme Court. Public opinion remained divided on issues such as harmonizing the ages at which men and women could marry and permitting married couples to use different surnames, and the Government would therefore continue to monitor the debate.

### 3-3-2. 2016 年国家報告審査最終見解

Concluding observations on the combined seventh and eighth periodic reports of Japan (2016), [U.N. Doc. CEDAW/C/JPN/CO/7-8](#).

12. The Committee regrets that its previous recommendations regarding existing discriminatory provisions have not been addressed. The Committee is particularly concerned that:

- (a) The Civil Code maintains discriminatory provisions as it sets different minimum ages of marriage for women and men at 16 and 18 years, respectively;

- (b) The Civil Code still prohibits only women from remarrying within a specified period of time after divorce notwithstanding the decision of the Supreme Court, which shortened the period from 6 months to 100 days;
- (c) On 16 December 2015, the Supreme Court upheld the constitutionality of article 750 of the Civil Code that requires married couples to use the same surname, which in practice often compels women to adopt their husbands' surnames;
- (d) Despite the abolition in December 2013 of the provision that discriminated against children born out of wedlock in inheritance matters, various discriminatory provisions including the provision in the Family Register Act concerning the discriminatory description during birth notification have been retained; and
- (e) There is no comprehensive anti-discrimination law that covers inter-sectional discrimination against women belonging to various minority groups who are frequently subjected to harassment, stigmatization and violence.

**13. The Committee reiterates its previous recommendations (CEDAW/C/JPN/CO/5) and (CEDAW/C/JPN/CO/6) and urges the State party to, without delay:**

- (a) Amend the Civil Code in order to raise the legal minimum age of marriage for women to 18 years to be equal to that of men; and revise legislation regarding the choice of surnames for married couples in order to enable women to retain their maiden surnames; and abolish any waiting period for women to remarry upon divorce;**
- (b) Abolish all discriminatory provisions regarding the status of children born out of wedlock and ensure that the law protects them and their mothers from stigma and discrimination in society; and**
- (c) Enact comprehensive anti-discrimination legislation that prohibits multiple/intersectional forms of discrimination against women belonging to various minority groups, and protect them from harassment and violence, in line with General Recommendation No. 28 (2010) on core obligations of States parties.**