On character of the Family-name
in the Private International Law
in Japan

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Even today, it is an important and yet difficult subject to comprehend a last name within the meaning of family law. It is particularly difficult in public relation incidents such as international marriage and international adoption, both of which are on increasing trend in recent years.

Regarding the last name and its registration of a Japanese spouse or an adopted child of a foreigner, the character of the last name as prescribed in the law governing the application of the private international law (Law concerning the Application of Law in General=Hōrei) differs from that of the substantive law, i.e., civil law and its procedural law, i.e., the Family Registration Act. Therefore, such in incident yields both domestic and foreign "two names" for the person concerned, creating an inconvenience to his private international life and thereby making it even more difficult for us to characterize the last name. This problem takes root in that the actual practice of registration sticks so much to the personal jurisdiction, treating the last name as a system of the Family Registration Act and that the application of proper law is not seriously considered. Unless contradictory to laws, today’s family law should be handled in the way that one can enjoy his private international life without being restricted by provisions of domestic laws and technical obstacles.

Although a variety of theories have been known concerning the character of the last name prescribed in civil law, they can be classified into two broad theories. One is to simply understand it an individual’s name and the other, in addition
to the naming function, recognizes it as a means of identifying a certain substantiality such as a unit of a family living together or an identify of blood relationship. The former, having entirely excluded the concept of "house (Family=IHE)" prescribed in the old law, pursues an individual's personal dignity and substantive equality of both sexes as stipulated in the constitution. The latter perceives the function of the last name an organizational standard unit in the Family Registration Act recognizing the still prevailing consciousness of unity toward one's family or origin.

There does not exist any controversial opinion that a last name combined with a first name would differentiate an individual from others. At the same time, a particular last name differentiates itself from other families, and it also suggests a relationship with a particular person. For example, it shows a relationship of a man and wife, a parent and child, a brother and sister, identifying them from the same family or the same registration. Therefore, in one sense, this concept conformes to the current law which observes the principle of the same and unchangeable last name for a man and wife or a parent and child.

Any clearly stated rules and regulations are not existent in the law governing the application of laws concerning the last name; however, here again the last name bears a dual function of both "name" and "status." Therefore, decision of applying proper law to treat the last name in the private international law divides its theory into two depending on which of these functions is considered more important.

1. Existing Theories of the Private International Law

There has been an argument regarding the decision on the application of proper law to select a last name in case of international marriage. The one theory understands the last name one of the effects on one's status resulted from marriage; therefore, according to the law governing the application of laws as set forth in the Article 14, the husband's law of the domicile should be considered the proper law. While the other theory regards the last name as an independent personal right,
i.e., naming right, and in the absence of domestic rules and regulations governing the application of laws, it should stand to reason of the jurisdiction based on the nationality of the person concerned. In other words, the last name should be based upon the law of the domicile of the person concerned.

As a general principle, the former "theory of effectuation" admits that the last name should in principle base upon the law of personal jurisdiction respecting his or her independent personal right, i.e., naming right. However, when a change of the last name is necessitated due to one's status change as in the case of marriage, the proper law should be pursued from a viewpoint of one's relationship with others just as the married couple bear duty of living together and right and duty of supporting. It is an easy way to decide the proper law and furthermore, it not only respects one's status but also conforms to the substantive law, i.e., civil law in which the last name of a married couple is regulated in the article concerning the effects of marriage (Article 750).

The other "theory of personal right" criticizes the above in that the last name should become permanently effective at the time of marriage and therefore, it should not be fluctuated by the change of nationality. It is not desirable from a standpoint of naming (unchangeable name). Since the proper law regarding the effectuation (Article 14 of the law governing the application of laws) admits one to change his last name, the subject of the last name has to be comprehended differently whenever the husband's nationality changes after marriage.

"Theory of personal right" states that the last name should be established at the time of marriage and that it does not result from one's marital status. It cannot base upon any other laws except the law of the domicile of the person concerned. Aside from the argument whether it is appropriate to follow the husband's law of the domicile, this view does not accurately grasp the problem of deciding the proper law to establish the last name for a married couple. According to this theory, it leaves a question which law of the domicile should be applied...... is it of the husband or of the wife? If both are applicable, is there a cumulative application of both laws of domiciles? Furthermore, if the last name of either husband or wife has to be changed, this matter has to depend on the application to proper law. Supposing there exists a cumulative application of both laws of the
domiciles, what happens if either one of the laws does not permit a change of the last name? If the husband's law of the domicile is applied, the wife's last name should be changed, and the husband's last name should be changed if the wife's law of the domicile is applied. In these cases, there is no way to find a satisfactory solution.

In addition to these two theories, there is a separate theory. Since there is no clearly stated regulations within the law of application concerning the last name, this theory has tried to view this matter from the law of application and has concluded that the current law cannot induce any solution to this problem. On the assumption of "proper law for family," this theory attempts to consider the last name a type of family name and doubts the last name being the naming right. Since the reason to secure the last name within the meaning of civil law is to regulate one not to hold any other last name, which in turn prohibits others to hold his last name, thus granting him an exclusive use of that last name. Therefore, this theory perceives that the last name is a necessitated means of personalizing one from others. As a result, in the law governing the application of laws, the last name should be defined that it is a way to differentiate a particular family from other families and that it should base upon the "law of personal jurisdiction of a representative of one family." Then the representative of the family should be decided by interpreting the unstated regulations of the law governing the application of laws, and the decision of the last name for a man and wife should follow the husband's law of the domicile. It is certainly not adequate to understand the last name a general personal right as we do not have a definite statement like BGB Article 12, particularly within the meaning of family law. Even if we consider the last name an independent right to name oneself, this is contradictory to the case that the change of the last name has to be decided by proper law when one's status changes by marriage. In spite of the legitimacy of this theory which states that the last name represents the "family name," a question remains unsolved regarding the decision of the representative of the family. If the representative is freely selected among the family, the proper law for that decision has to be sought. As the last name is the family name, it can be said that the decision of the last name for a man and wife is treated as an
effect of marriage. From a legislative point of view, it is appropriate to employ
the policy of unchangeable last name to maintain a systematic order for full
names; however, it is not appropriate to separate the effect of marriage while
admitting the change of last name caused by one’s status change.

2. Actual Practice of Registration

In spite of the dispute within the meaning of the private international law how
to decide the proper law for the last name in public relation incident, actual
practice of registration pays no attention to this problem. The Family Registration
Act itself has a local effect. Regardless of the nationality of the person concerned,
it is applicable to his status effected in Japan. However, as to the last name, the
nature being characteristic to our Family Registration Act, a foreigner who does
not have his domicile of origin in this country is not effected by this Act.
Therefore, regulations as prescribed in the civil law and this Act do not apply to
him. Consequently, the last name of a Japanese woman married to a foreigner
bears her maiden name regardless of the interpretation of the private international
law.

Furthermore, she is not required to register her new last name induced by her
husband’s law of the domicile. The judicial precedent states “The Family
Registration Act treats the last name according to the regulations of the civil
law. Therefore, when the registration is made in accordance with the individual’s
name as stipulated in the foreign law (or a traditional usage), there are cases
which are impossible to settle.” For that reason, this Act does not admit the
change of the last name and forces one to merely record the fact of marriage
(date, place and the full name of the spouse) in the column of one’s status.
Such a practice of registration fails to properly evaluate the importance of
relationship between the contravention of regulations, i.e., civil law and the
Family Registration Act. The Family Registration Act performs its rule if it
correctly reflects a procedural law of the civil law which conforms to the law
governing the application of laws. Regulations of the Family Registration Act are
not set forth with an assumption on public relation incidents and there are
obviously some technical obstacles; however, these cannot become the justification to exclude an application to the law governing the application of laws. Defining that the Family Registration Act is a particular system for our registration, it is illogical to reject the change of the last name for the reason that the marriage happens to be of two nationalities while a new registration is accepted for the marriage between two Japanese persons. This system will result in various inconveniences to the person whose last name remains unchanged after marriage. It is also inappropriate from a standpoint that the last name of the adopted Japanese child to a foreigner remains unchanged according to the Article 18, Item 3 of the Family Registration Act and that the adoption is simply recorded in the column of one’s status. It is desirable that at least a new registration for the person concerned should be implemented in such public relation incidents. Certainly, a registration system works as a procedural law of the civil law to identify an individual’s status; however, at the same time, as a ledger of Japanese nationality, it has an auxiliary function of Nationality Law. In that sense, it reflects an effect of the Administration Act; however, the Family Registration Act should be comprehended as regulations of the administrative family law.

3. Customary Practice

The current private international life requires that the last name should identify one's status of certain family relationship in addition to the personal name. It has become a law of customary practice that a spouse -- a wife in many cases -- of a Japanese whose last name has been changed by marriage indicates her relationship with her husband by adding her maiden name beside the new last name and thereby trying to personalize herself. It has also become a customary usage that the person whose last name has been changed -- in many cases a woman -- uses her husband's foreign name and adds his last name by her maiden name on the registration. Social consciousness toward the last name weighs importance to one's status, which is quite common in our country, too. The actual suits for securing her husband’s last name incidentally identify the existent inconvenience she is facing in her daily life.
4. Judicial Precedents

All the judicial precedents reveal that the last name of internationally married couple is decided according to the Article 14 of the law governing the application of laws. The first case was decided on December 28, 1956 by the Kyoto District Court. The decision of the court states, "Each country's precedents of legislative law differs greatly regarding the decision of the last name for a couple whether it should conform to that of husband or of wife, or each one should hold the unchanged last name after marriage. Therefore, in case of international marriage like this case, the problem of proper law should be considered from the effects on one's status by marriage; that is, the last name should be decided by proper law, in this case, the husband's law of the Nationality." The judgment clearly states that the actual change of the last name has been effected and that it is "an registrative error" even if this change is not reflected upon the registration. There has not been a contradictory decision of the court to this judgment which admits the popularly prevailing view. Regarding the change of the last name which does not accompany one's status, there is a decision that the last name is a kind of personal right and therefore, it should be ruled by the person's law of the Nationality, which also reflects a common opinion.

As mentioned before, there is no way to reflect upon the actual registry of our country the last name admitted for change by the proper law in accordance with the Article 14 of the law governing the application of laws. However, there is a case of judgment to exclude this inconvenience in that it granted the change of the last name according to the Article 107 of the Family Registration Act. That is the case of February 5, 1958 decided at the Tokyo Domestic Relations Court. It is the case of a Japanese woman who married to a foreigner. According to her husband's law of the Nationality (the law of Portugal) which is decided to be the proper law of th law governing the application of laws, it is possible for her to hold the husband's last name and as long as she wishes, the change of her last name should be approved. Since the actual practice of registration does not approve such a change, the court has applied the Article 107 of the Family Registration Act in this case to change her Japanese name to the last name of her foreign
husband. If this appeal is rejected, her right to hold the last name induced by the proper law as well as the law governing the application of laws must be unnecessarily impeded within the current practice of registration. Moreover, this appeal has to go over complicated steps to obtain an irrevocable judgment according to the Family Causes Proceedings Act. Therefore, this judgment can be evaluated as an appropriate approach to what the last name should be. All the preceding judgments before this case did not approve any change of the last name which has already been effected by the law governing the application of laws, although the registry does not reflect this change. Comparing to these precedents, this decision of the Tokyo Domestic Relations Court can be greatly appreciated aside from the argument whether this case correctly applies for “unavoidable circumstances.”

5. On character of the Family-name in the Private International law

(1) As has been clarified by the views regarding the decision of proper law to select the last name for a married couple within the meaning of private international law, the character of the last name weighs more importance to its indication of relationship with others, i.e., one’s status, than to the function of one’s name. Comparing the characters of the last name’s naming function and the status function, the former can never be neglected even though the latter weighs more importance. Therefore, it is anticipated that in the future, the function of the latter will be weakened as the establishment of personality and the need for constancy of orderly full names will be necessitated. However, the character of the last name cannot be explained only with the function of “naming for an individual” as generally stated in the civil law. If the last name can be grasped simply as a means to name person, it can be comprehended to be a particular code to differentiate one from others. If that is so, without minding complicated public relation incidents, it would be more convenient if one is governed by rule or custom of the country where he leads his life. In other words, if the last name is regarded as a personal input code for computers, having multiple last names cannot cause much inconvenience to our daily social life. Such can be understood
as the same condition as we have different code numbers for an identity card, a driver’s license, a bankbook, etc. and therefore, it is not of very much importance.

However, from what we have been reviewed before, it is not only permissible but difficult to perceive the last name as a technical concept of a procedural law.

Relationship of one's status is authenticated by registration. The Family Registration Act applies to every Japanese wherever his location is and everyone is registered on the registry of city (ward,) town and village of his legal domicile and any change of his status is reflected upon this registry. On the other hand, compilation of the registry for a foreigner has never been attempted. In that sense, it can be said that the last name is of particular characteristics to our country. However, a foreigner living in Japan has not only have a duty to submit a notification of birth or death, but he is required to submit notifications of a marriage, a recognition and an alliance in accordance with the civil law, i.e., the Family Registration Act if the proper law for such a status change is governed by Japanese laws. Then, the full name of a foreigner who is required to submit such a notification, must be assumed that his last name be comprehended as a particular personal function and that it is not treated as a system for the registration of status in his home country. The registration system is not a unique system only existent in our country.

It is nothing wrong that the last name has a public function to play a role as a code for public records. Therefore, it can become a rationale to reject one to change his name freely. but it cannot be the rationale to reject the change of last name which is necessitated by the regulations set forth in laws. Change of status is nothing of particular matter for public relations and the concept of the last name there of is of substantive nature which should supersede the procedural regulations.

An attempt to find a common character of the last name for three law structures, i.e., the law governing the application of laws, civil law and the Family Registration Act needs as a premise to solve the problem of relationship of the law governing the application of laws (private international law) as a superior rule over the substantive private law as well as the decision of judicial character in relation to the private international law.
The private international law is not the law to directly rule the relationship of rights and duties, but is the law to indirectly designate one national law in order to maintain a judicial order in relation to the private law for public relation incidents. However, the regulations set forth in the law governing the application of laws act theoretically as a base for application to any private laws in addition to the laws for public relation incidents. In this sense, the substantive law as a proper law should consider the decision of judicial character prescribed in the law governing the application of laws, while the private international law should be discussed without the substantive law.

Theoretically, the decision of judicial character of the private international law should not be made by the proper law, i.e., the substantive law or by a decision of Court, but it should be voluntarily decided from a viewpoint of private international law within the whole structure of that law.

In current practice, however, it is quite difficult to decide the judicial character without considering the substantive law and moreover, this subject should be treated for the proper settlement of public relation incidents in relation with the private international law and the substantive law.

Taking these views in mind, the last name can be conceived as a particular personal function which possesses both naming and status functions. In other words, the last name is a part of social system in any countries and with its judicial character, it organizes a concept of relationship such as a man and wife, a father and mother, and a brother and sister. Simultaneously it can be said that it is a man's natural generic character. If the perception of the last name is such, the decision of proper law to govern the last name of a married couple should follow the Article 14 of the law governing the application of laws, considering it one of the effects resulted from marriage. This concept then becomes more appropriate when the last name is comprehended to be "a family name."

(2) The change of the last name resulted from one's status change by international marriage can be settled by determining the nature of the last name within the structure of our national law. The civil law of Meiji era has grasped the last name as a name for "a house (Family") which composes a family system and entrusted the registry with an administrative function to control the nation, which has made

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the Family Registration Act "specific to our country." This character still exists in spite of the efforts to exclude the family system from family law during the past 20 and more years after the War. Additionally, a general opinion of the civil law does not consider the relationship with the law governing the application of laws, which should be the base to be applied to the civil law. Therefore, the structure of family law in which the status relations between Japanese people has been put in order does not work in the status related to public relation incidents and the private international life is considered an exceptional case. Therefore, the person concerned is hardly put under the protection of laws.

However, in the current society of highly developed international private life, the problem of the last name can no longer be treated within a system of one country. As a means of identifying an individual, there is a need for accepting an internationally common concept without adhering to the literal registered name. It is not always correct to consider the literal name of the registry the general name in the private international life. The last name of a foreigner, which becomes a matter of discussion and which is decided by the proper law of the law governing the application of laws should be treated as the last name of our country. It is not important whether the last name equals to the registered name, but it suffices the purpose if it is of a public nature in terms of his law of the domicile. In this sense, the last name is based upon the law of the domicile of the person concerned, leaving aside a question whether it represents a personal right. This becomes a premise for the decision of proper law to treat the change of one's status in public relation incident, because in every country, the last name represents a particular individual when combined with the first name.

Regarding the opinion that the last name has a character of "family name," there has recently arisen a view to admit the separate last names for a man and a wife. In public relation incident, there is a case that a change of the last name (both in registration and in actual social life) is not effected by marriage. In the future, it is possible that the last name will be considered a naming for an individual if the need for consistency of full names is further strengthened. However, it is still not the time to regard the last name as merely a personal special function.

It is desired that the proper law should be decided within the meaning of private
international law in that the character of the last name is fully understood and that it will be smoothly reflected upon one's registration.