

## Legal Pluralism and the 'Rule of the Country' under Art 40 of Japanese Private International Law (summary)

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Under modern western legal systems, the role and the function of religious laws and customary laws were minimized. Western countries have maintained the legal monism of state laws. The principles underpinning the modern western legal system were the fruits that came from the struggles to acquire rights and freedom, by people who shared a common background of region, history and Christianity. Western colonial powers realized the need for flexibility when introduced western legal systems into non-western colonies, however, it soon became obvious that the western legal system could not fully replace indigenous laws. The reality of legal plurality varies within each society. In South Asia, for example, Indian indigenous laws had been maintained since ancient times. They grew without any authorization by the state and now coexist with foreign laws, such as Islam and the western legal system. English common law was broadly introduced as the general law which covers all inhabitants, but the British could not sweep away personal laws. Even the post-colonial Indian government does not emphasize the unification of civil law in accordance with western principles, despite the Constitution mandating that a uniform civil law be established in 1950. Demands to respect personal laws as a method to secure the rights and identities of minors divide and modify the appearance of legal plurality. At the same time, judicial activism promotes reinterpretation in pursuit of ideal personal laws. Such changes often reflect the social and political background of each country, therefore Pakistani case laws was able to achieve reforms of Islamic family law more positively than India.

Globalization requests both western and non-western countries to recognize and adjust to the reality. Personal laws do not derive from the authority of the state, but they have been officially or unofficially recognized for their normative functions in each state. And even when such a state does not apply those laws officially in their court system, the laws remained, binding the objective members of the communities. The social and political background of the time are reflected in personal laws, and they often remain unwritten. It is common for people to be uninterested in other personal laws unless they are negatively impacted by them. Therefore, courts face difficulties in grasping the nature of the legal

plurality of an another country. Article 40 of the private international law of Japan (Act on General Rules for Application of Laws) is a rule to decide the national law of a person who belongs to a country or place where different laws are applied according to person's status. Article 40 states, 'where a party concerned has nationality in a country where different laws are applied according to that person's status, his/her national law shall be the law designated in accordance with the rules of the country (in the absence of such rules, the law with which the party is most closely connected)'. When a Japanese man and an Indian woman marry in Japan, Article 24(1) of the private international law refers to the national laws of the parties for the formation of the foreign couple. Regarding the essential requirement for an Indian woman to celebrate a valid marriage, we have to seek the internal rules of India as the law to be applied. In India, such rules can be found mostly in case laws and doctrines that are found in texts, but usually not explicitly written in statutes. If such laws are written, they are usually an unilateral source. Similar situations are found in other South Asian countries such as Pakistan, Bangladesh and Sri Lanka, that are influenced by common law. In such countries, 'the rules' are neither uniform nor based on general principles. The recent Supreme Court verdicts on Muslim divorce law and the Penal Code are expected to reduce the gender inequalities in Muslim law. And the government claims to introduce a Uniform Civil Code, based upon modern Hindu law that was changed and reformed with constitutional values. However, India has various cultures and religious groups that give huge influences to family matters. Therefore, each community tries to promote its personal law with the values of constitution and the international conventions. People do not rely on a Uniformed Civil Code unless it respects the diversities in community, so that legal plurality in India remains.