

ple at large. Overwhelming importance should not be attached to public interests. Indeed, in many cases public interests were taken into consideration but overwhelming importance was not attached to them. The main elements which should be taken into consideration are the nature, degree and extent of the damages. In the current case, the Supreme Court followed the prevailing theory, especially the criteria showed in the Osaka International Airport Case (decision by the Grand Bench of the Supreme Court, on December 16, 1981. See 3 *Waseda Bulletin of Comparative Law* 149), and insisted that full consideration of the matter should be made. This statement itself has no problem, but the way of considering the matter is problematic. And whether or not the conclusion is reasonable is also problematic. The Supreme Court also held that there must exist a reciprocal relation between the interests of the existence of the Atsugi Base and the damages arising from the Base. It follows that a minority should not suffer any disadvantage in the name of public interests.

The Atsugi Base case (No. 2) was held in 1992 (decision by the Yokohama District Court, on December 21, 1992. 1448 *Hanrei Jihō* 42). On that occasion, a claim for an injunction against US Navy planes and compensation for damages in the future was dismissed, a claim for an injunction against Japanese Self-Defense Forces planes was also dismissed, and a claim for compensation for damages in the past was partly allowed.

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3. Family Law

A case in which it was held that the Proviso of Article 900(iv) of the Civil Code providing that the share in the succession of an illegitimate child shall be half of that of a legitimate child is unconstitutional.

Decision by the Third Civil Division of the Tokyo High Court on June 23, 1993. Case No.(ra)1033 of 1992. A *kōkoku* appeal from the judgment concerning a division of estate. 45-6 *Kasai Geppō* 104.

[Reference: Constitution of Japan, Article 14; Civil Code, Article 900(iv). The Constitution of Japan, Article 14(1) provides: All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin. The Civil Code, Article 900 provides: If there exist two or more successors of the same rank, their shares in the succession shall be determined in accordance with the following provisions: (iv) where there exist two or more children, or lineal ascendants, or brothers and sisters, their respective shares in the succession shall be equal. However, the share in the succession of an illegitimate child shall be one half of that of a legitimate child, and the share in the succession of any of the brothers and sisters whose father or mother alone is the same with that of the person succeeded to, shall be one half of the share of any of the brothers and sisters whose father and mother both are the same with those of the person succeeded to.]

[Facts]

X (applicant, *kōkoku* appellant) is an illegitimate child of A (the person succeeded to). A, who intended to marry with X's mother, B, had cohabited with her. However, as he did not succeed in getting a divorce from his wife C, he separated from B before the birth of X. X was born on July, 3 1954 and A was recognized as the father by the court on February, 9 1955. A and B had no further association with each other after the birth of X. Although B received payments towards bringing up X from A until X became about 6 years old, she had no remembrance of meeting with him at all.

After C's death in September 1988, A began to live with C's sister, Y₁, and married with her in November 1988. A died on July, 25 1989. The successors of A were A's wife, Y₁, and D who was a legitimate child of A and C. D, however, died in July 1990, and D's wife, Y₂, and their legitimate children, Y₃, Y₄, Y₅ and Y₆ succeeded to D's status.

X filed an application for mediation to the family court and claimed to have a fair share of A's succession with Y₁ and the others. But, as Y₁ did not allow X even her legal half share in the succession, the mediation ended in failure and the case was transferred under the judgment.

X claimed that the Proviso of Article 900(iv) of the Civil Code in which the share in the succession of an illegitimate child shall be one half of that of a legitimate child violated Article 14 of the Constitution of Japan. However, the original court (decision by the Chiba Family Court on December, 8 1992) held that the Proviso "is provided for the sake of maintaining the order constituted by status laws through the protection of legal marriage, and therefore, it can not be said that the Proviso is considered to be unreasonable and it does not constitute a violation of Article 14 of the Constitution of Japan," and decided that X's share would be one half of that of a legitimate child (as a result, X's share came to be a sixth of A's succession). Then, X filed an immediate *kōkoku* appeal.

[Opinions of the Court]

The former part of the Proviso of Article 900(iv) violates Article 14(1) of the Constitution of Japan, and has no effect. The reasons are as follows.

(1) It can be understood that 'social status' provided in the Article 14(1) of the Constitution, means social status or position determined by the conditions at the time of birth. Whether the person is a legitimate child or not should be determined, according to whether the person's birth mother is legally married with his/her father (Article 772 of the Civil Code). From the viewpoint of children, the test as to whether he/she is a legitimate child or not is a status or a position determined by birth. It is apparent that by the former part of the Proviso of Article 900(iv) of the Civil Code a legitimate child and an illegitimate are treated differently in regard to their share in the succession, and therefore the provision is within the scope of Article 14(1) of the Constitution of Japan, which prohibits "discrimination in political, economic or social relations because of social status."

Article 14(1) of the Constitution of Japan, prohibits every discriminatory treatment unless it can be considered reasonable. Then, the question should be considered whether or not the treatment provided in the former part of Article 900(iv) of the Civil Code which deals with legitimate and illegitimate children in a discriminatory way is reasonable or not.

(2) To judge whether the provision is reasonable or not, two points must be examined; whether the purpose of legislation is important, and, whether there is a substantial relation between the purpose and the measure as a restraint.

(3) The importance of the purpose of the legislation

Formerly, it has been said that the purpose of the former part of the Proviso of Article 900(iv) of the Civil Code is to respect legitimate marriage, that is to say, to protect family relationships based on legal marriage. The Court considers the purpose itself should be respected even in these days. However, even if their shares would come to be equal between the legitimate child and the illegitimate, the share to the deceased's spouse in the succession cannot be affected by it. Also, attention must be paid to the fact that, even if substantial inequality for the spouse would be brought about, it is possible to adjust it by application of the distributive system.

The idea that family relations based on legal marriage should be protected should be respected. On the other hand, however, it must be remembered that an illegitimate child's personal dignity should be protected as equal to that of a legitimate child. Legislation under which the former would be protected at the sacrifice of the latter must be avoided as much as possible.

In these days, legislation in other states regarding this point seems to be expressly inclined to the equalization of illegitimate children's rights with legitimate children's rights. Furthermore, from the view of the spirit expressed in Article 24(1) of the ICCPR (the International Covenant on Civil and Political Rights), and Article 2(2) of the Convention on the Rights of the Child (as yet unratified), the following two ideas stand compatibly, and a fair balance must be found. The two ideas are: protection for family relations based on legal marriage, and an illegitimate child's personal dignity.

(4) The substantial relation between the purpose of the legislation and the means of restraint.

It is undeniable that interests of a legal family are protected as a result of adopting the system under which the interests of the wife's child is more important than that of another woman's child. In this sense, there is an interrelation between the former part of the Proviso of Article 900(iv) of the Civil Code and the purpose of the legislation.

However, firstly, it is almost impossible for the restraint provided in law to stop the birth of an illegitimate child. In addition, although an illegitimate child cannot change his/her illegitimate status, for which he/she is not responsible, he/she would be discriminated against because of the fact of illegitimacy.

Secondly, compared to the purpose of the legislation, the scope of restraint is too wide. For example, if a mother divorced her husband after she delivered a legitimate child and then lived with another man and delivered an illegitimate child, the illegitimate child will be discriminate in his/her share even in regard to the succession of his/her mother. This might be beyond the scope of the protection of the legal family that the former part of the Proviso of Article 900(iv) of the Civil Code had originally intended.

Accordingly, it is considerably doubtful that the restraint provided in the former part of the Proviso of Article 900(iv) of the Civil Code has a substantial relation with the purpose of the legislation.

(5) It follows that as the discriminatory treatment provided in the former part of the Proviso of Article 900(iv) of the Civil Code can not be considered reasonable, the Proviso violates Article 14(1) of the Constitution of Japan.

[Comment]

In Japan, there have been very few cases in which discrimination against illegitimate children was disputed. In the decision by the Tokyo High Court on March, 29 1991 (12 *Waseda Bulletin of Comparative Law* 53) it was held that discrimination in the share in the succession is constitutional. In the decision by the Tokyo District Court on May, 23 1991, it was held that discrimination between legiti-

mate and illegitimate children in the description of his/her lineal relationship with the head of household entered on the register of residence is constitutional. This is the first case in the following ways and is remarkable: it held that ① discrimination in the share in the succession against illegitimate children is unconstitutional; ② to be an illegitimate child is a form of 'social status'; and ③ 'strict reasonableness' that academic opinions claim to use is applied as a criterion for the determination of whether it is reasonable discrimination or not from the viewpoint of the Constitution.

The reasonableness of the former part of the Proviso of Article 900(iv) of the Civil Code has been a point of contention since the Civil Code was revised after the Second World War. Although it was also argued that the Proviso should be altered when some of the Civil Code was revised in 1980, this has not been done until now (12 *Waseda Bulletin of Comparative Law* 55). Then, also in "the interim tentative draft on the amendments to the marital system, etc.", published in July 1994, the repeal of the Proviso is intended. It seems to be highly possible that the abolishment of discrimination will be realized by legislation in the near future in regard to the share of the succession between legitimate children and illegitimate children.

Some changes are found in decisions. After the decision in this case, the Tokyo High Court held that Article 900(iv) of the Civil Code is unconstitutional (decision on November, 30 1994, 1512 *Hanrei Jihō* 3). Furthermore, it was published in newspapers (dated December, 14 1994) that two cases involving the issue in question which had been pending at the Supreme Court would be transferred to the Grand Bench. That the cases are transferred to the Grand Bench of the Supreme Court means that the Supreme Court will make a decision on this problem for the first time from the viewpoint of the Constitution.

The statements on the documents were then to be written in the same form regardless of the person is an legitimate child or not. On December, 16 1994, the Ministry of Home Affairs partly changed "the rules on entries in the register of residence". Formerly, the form of description of the child's lineal relationship with the headed person was as follows. In case of a legitimate child, 'the eldest male

(or female) child', or other terms of status were entered in the space concerning lineal relationship with the head of household on a register of residence. On the other hand, in the case of an illegitimate child who had been acknowledged by his/her father, he/she should have been described simply as 'the child' in the space. After the revision, such a distinction was abolished and 'the child' is the only way of description. From March, 1 1995 onward, a register of residence with the new style will be issued. On the family register (*Koseki*), the distinction in form between a legitimate child and an illegitimate remains ('the eldest male (or female) child' indicate a legitimate child, but, 'male' and 'female' for an illegitimate child). The family register is not likely to be reformed for a while.

As mentioned above, from 1993 to 1994, the issues on the discrimination between legitimate children and illegitimate children were suddenly highlighted and there is a huge movement for equalization. While it seems to be impossible to stop the move, in some academic opinions it is claimed that the discussion on these issues in Japan has not been sufficient and the matter needs to be considered more coolly and deliberately.

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4. Law of Civil Procedure and Bankruptcy

1. A collusive action conducted by a representative director of a stock corporation and the cause of retrial provided in the Code of Civil Procedure, Article 420(1)(iii).

Decision by the First Petty Bench of the Supreme Court on September 9, 1993. Case No. (o)1765 of 1991. A *jōkoku* appeal requesting retrial as to a claim of a payment in advance. 47 *Minshū* 4939; 1481 *Hanrei Jihō* 136; 835 *Hanrei Taimuzu* 271.

[Reference: Code of Civil Procedure, Article 420(1)(iii).]