

The defendant may be justified by proving the public interest in the matters disclosed. This indicates the importance of freedom of expression. In this case, the Supreme Court decided the case by balancing many factors. Among them, the nature of fact disclosed was conclusive. The fact that a person has been convicted concerns the judiciary and usually constitutes a public matter. So it could be imagined that this fact was regarded as in the public interest and the disclosure could be justified. However, the Supreme Court rejected this idea, recognizing an interest in having been rehabilitated and in enjoying a quiet social life. This is a useful way to protect privacy that also relates to public matters, and the decision should be followed in this regard.

Prof. KATSUICHI UCHIDA
YASUO OKADA

3. Family Law

1. The constitutionality of the differential treatment of illegitimate children in the statutory share of succession.

Order by the Grand Bench of the Supreme Court on July 7, 1995.
Case No. (ku) 143. 885 *Hanrei Taimuzu* 83, 1540 *Hanrei Jihō* 3.
[Reference: Civil Code, Article 900(iv)]

[Facts]

“A” (female, deceased) was born in the days before females could legally represent a family. She, therefore, entered into several marriages aimed at conceiving the proper successor of the “*Iye*” (house) under the old family system of law.

Eventually she had seven legitimate children and one illegitimate child in the course of three marriages. Illegitimate child “C” was born during first marriage.

After A’s death, “X”, who is a child of A’s illegitimate child

“C” and heirs per stripes of A’s succession, filed an application for mediation to the family court in Shizuoka and claimed a fair share of A’s inheritance with other successors. X’s claim was dismissed, with the mediation ending in failure, and the case was transferred to the adjudication of the family court. The family court held that decisions regarding shares in succession are issues of legislative policy. In ruling so, the Proviso of Article 900(iv) of the Civil Code would not be a violation of the Constitution of Japan. The Family Court, therefore, decided to divide the estate in accordance with Article 900.

Although X appealed to the Tokyo High Court, the court dismissed X’s claim for the same reason.

Finally, X appealed to the Supreme Court.

[Opinions of the Court]

Majority Opinion

(1) The Court held that Article 14 (1) of the Japanese Constitution provides for equal treatment under the law, but the provision is intended to prohibit discrimination without reasonable ground. It is not a violation of the Constitution when discrimination is based on an individual circumstance (Citing decisions on May 27, 1964 and November 18, 1964).

Then, after surveying the distributive system of Inheritance Law including designation of the shares in succession by will, waiver of the inheritance right and agreement regarding the distribution of the deceased person’s property, the Court held that the Civil Code of Japan, as demonstrated by provision of determination of shares in succession and so on, does not necessarily require successors to share according to the statutory shares in succession. The provision will work as a supplement when such a determination does not exist.

(2) The legislature has the discretionary power to design the distributive system according to the extensive considerations that include tradition, social circumstances, common sense, marital and family law and so on.

(3) The purpose of this provision is to show respect for legal marriage, and on the other hand also consider the rights of an illegitimate child, and protect them by giving them one half of the share

of a legitimate child. The Court understands that the provision strikes a balance between legitimate marriage and protection for an illegitimate child. Accordingly, as the Civil Code adopts the system of legal marriage, Article 900(iv) gives the spouse and the legitimate child a priority; thereafter, illegitimate children are also given a specific shares of succession to protect them.

The Court decided that because the Civil Code adopts the legal marriage system, the purpose of that provision is reasonable. Relative to that purpose, it does not exceed the bounds of legislative discretion that the Legislature makes a difference in the statutory share of succession between legitimate and illegitimate children. The Court concludes that the provision is not discrimination without reasonable ground, and does not violate Article 14(1) of the Constitution.

Dissenting Opinion

(1) This provision violates Article 14(1) of the Constitution, and the judgment of the High Court should be set aside. The reasons are as follows:

(2) Article 14(1) of the Constitution recognizes a distinction which is based on reasonable grounds according to the nature of a case. The judgment of rationality as to discrimination that is at issue in the case fundamentally depends on whether an illegitimate child belongs to a legitimate marriage or whether each child should be with respect to the deceased's other children. Accordingly, a judgment should examine whether there exists that purpose itself, and whether a substantive relationship between the purpose of the legislation and the means of regulation is more than rational. But in this case, as follows, even simple rationality is not found.

(3) The majority opinion is based on the Civil Code's adoption of legal marriage system, and concludes that this provision has rationality. Based on the purpose of this provision, such an understanding would not accord with the purpose of Article 24 of the Constitution, because an illegitimate child does not belong to a legitimate family and Article 24 of the Constitution declares the principle that individual dignity must be respected in inheritance. The illegitimate child has no substantial responsibility regarding his birth and it is not changed by his intention and effort. This discrimina-

tion goes beyond the scope of the object of legislation, and as there is no relationship between the object of legislation and means of the regulation, it is not reasonable.

One of the reasons given in majority opinion is that the purpose of this provision also protects the illegitimate child and therefore it is reasonable. The majority overlooks the effect of this provision on our society. This provision indicates that people think that the illegitimate child is inferior to the legitimate child.

Accordingly, at least in our present society, this provision is unreasonable because of its disagreement with existing circumstances. In addition, the dissenting opinion considers the international trend and treaties (UN Convention on the Right of the Child, International Covenant on Civil and Political Rights).

[Comment]

Although illegitimate children whose paternity has been acknowledged by the biological father or court have the right of succession, they have only one half of the share in succession of legitimate children under Article 900(iv) of the Civil Code.

This regulation means that the sin of the parents is passed on to their children. Even if discrimination in statutory share of succession will continue, it is doubtful that the discrimination can restrain the procreation and birth of illegitimate children.

Moreover, the regulation is contrary to the spirit of the international treaties that Japan has ratified, such as UN Agreement B 24(1) and Article 2(2) of the Convention on the Rights of Children.

Accordingly, the constitutionality of this provision is suspect, and illegitimate children should have the same share in an estate as legitimate children. Now, in the tentative draft of the Family Law in the Civil Code reform, the Legislative Council of the Civil Law Division proposes to repeal this statutory discrimination. In addition, the international trend promotes the abolition of this kind of discrimination. Such discrimination against illegitimate children cannot be continued.

2. A case in which the court granted a divorce to a guilty spouse having a dependent child.

Dicision by the third Petty Bench of the Supreme Court on February 8, 1994. Case No. (o) 950. 46-9 *Kasai Geppō* 59, 858 *Hanrei Tai-muzu* 123, 1505 *Hanrei Jihō* 59.

[Facts]

“X” (husband, plaintiff) and “Y” (wife, defendant) were married in 1964. They had four children.

In 1979, when the company that X ran had financial difficulties, he ran away from the marital home and disappeared. Y waited for her husband to return and raised her children, but, as her children were too young, she could not work enough to support them. Moreover, they were run out of their home because a creditor proceeded with compulsory sale of the house. Finally, they had to depend on welfare benefits under the Livelihood Protection Law. On the other hand, X got to know “A”, a divorced woman, who was the mother of two children, and lived together with her. X identified her as his wife to the company in which he was working at that time.

In 1985, Y found that X, A and her children lived together, and sought to contact X by letter and repeated phone calls. Y strongly asked him to return. On the contrary, he hated her and increasingly made up his mind to get a divorce.

In September 1988, the Family Court ordered X to pay 170,000 yen per month to Y as her alimony. He sent her 150,000 yen per month after this court order. X had no intention to reconcile with her, wanted a divorce and proposed to pay 7,000,000 yen to her as property distribution and alimony on divorce. Y refused to divorce because their youngest son needed a father for his healthy development. Their other children are already adult, mature and independent.

The court of first instance denied his petition. The reason why the court denied it was X’s guilt and the existence of a dependent child. X appealed to the High Court. The Court of second instance set aside the first court dicision, and granted the request for divorce. The Court also decided that only Y would have parental rights over her youngest dependent son after the divorce.

Finally, Y appealed to the Supreme Court.

[Opinions of the Court]

The Court dismissed Y's appeal. The reasons are as follows:

In a divorce case brought under Article 770(v) of the Civil Code by the spouse primarily responsible for causing the breakdown of the marriage, to decide whether the divorce action should be allowed in light of the principle of good faith, courts should consider the state and degree of responsibility of the guilty spouse. On that occasion, courts should also consider the will of the innocent spouse as to whether to continue the marriage, his or her feelings against the guilty spouse, his or her mental, social and financial condition when divorce would be granted, the presence of children born to the spouses, especially the state of care, education and welfare of dependent children, and the conditions of the spouse and children following the separation. Moreover, courts should consider the effects of the passage of time in relation to the factors listed above. (Refer to the decision by the Supreme Court on September 2, 1987)

Accordingly, in a case in which a guilty spouse requests a divorce, even if the parties have dependent children, courts should not dismiss the claim only for that reason. In the exclusive consideration of the factors noted above, when the divorce claim would not violate the principle of good faith, it is proper that courts grant a divorce to the guilty party. In this case, the marriage between X and Y was already ended and Article 770(v) of the Civil Code applies. Though it is obvious that X is the guilty spouse, it is a considerably long time when over thirteen years have passed since the separation. The Court also considers both parties' ages and the period of cohabitation. In view of X's new lifestyle and Y's present conduct, the Court can decide that the marriage has been irretrievably broken. Therefore, even if the Court considers X's responsibility for the marital breakdown and Y's difficulties caused by X's conduct, the Court should not now regard the conditions noted above as more important than the necessary. It would not be proper for the Court to deny the request for divorce. Though the Court understood Y's mental damages, effort and cost in bringing up the children and mental damages and finan-

cial difficulties after the divorce, the compensation for this should be settled elsewhere and the Court should allow the divorce.

Moreover, now the three children of four born to X and Y have reached majority and are independent. The youngest son is a second year high school student. Although he has been a dependent yet, his presence does not prevent the divorce in this case. The reason is as follows: the son has been brought up under Y since he was three years old and will finish the school before long. On the other hand, having sent 150,000 yen to Y per month, X was not indifferent to the bringing up him. And the Court can expect that X can pay money to Y as a property division and alimony.

Then the Court concluded that the divorce should be granted.

[Comment]

Generally the “dependent children” mean the “minor”. But in a decision by the Osaka High Court on November 26, 1987, the court held that a university student that was over half and nineteen and lived in a dormitory was not a dependent child. There are some cases regarding dependent children. In a decision by the Tokyo High Court, the court paid special attention to the fact that a dependent children had loved both parents equally. In a decision by the Tokyo High Court on August 23, 1988, the court considered to be serious the fact that the one of three unmarriad children was a seventeen-year-old student and disagreed with parents’ divorce.

Some scholars point out: the presence of dependent children does not always prevent parents from divorce. There may be cases where divorce is the better solution in the best interests of children, when their parents fight tooth and nail every day in the presence of their children. If there is a dependent child and his or her interests are not particularly jeopardized by parents’ divorce, the divorce should be recognized.

In September 1995, Civil Code Panel of Legislative Council approved their subcommittee’s proposals. So the Justice Ministry announced the interim report in which the non-fault divorce may be allowed if they have lived apart for 5 years or more, but at the same time the report includes the good faith clause which rejects the

selfish and irresponsible request for divorce as well as the hardship clause as a defence.

Prof. WAICHIROU IWASHI
Assoc. Prof. MASAYUKI TANAMURA

4. Law of Civil Procedure and Bankruptcy

1. A case in which it was held that waiver of claim in a divorce suit is admissible.

Decision by the First Petty Bench of the Supreme Court on February 10, 1994. Case No. (o) 589 of 1993. A *jōkoku* appeal requesting retrial of a default judgment. 48 *Minshū* 388; 1505 *Hanrei Jihō* 63; 858 *Hanrei Taimuzu* 127.

[Reference: Code of Civil Procedure, Article 203; Personal Matters Procedure Act, Article 10.]

[Facts]

X (plaintiff, *kōso* appellant, *jōkoku* appellant) entered a lawsuit against Y (defendant, *kōso* respondent, *jōkoku* respondent) asking for divorce. Y claimed distribution of property against X, which was preliminarily subject to approval of this divorce action.

The court of first instance upheld X's divorce action and ordered X to distribute his property including land and buildings as well as 55,000,000 yen in response to Y's claim for distribution of property. X filed a *kōso* appeal. However, X made a statement on the date of the *kōso* hearing that X waived his claim for divorce.

The *kōso* Appellate Court affirmed the judgment of the court of first instance, holding that waiver of claim is not permitted when applying Article 10 of the Personal Matters Procedure Act (hereinafter referred to as PMPA), in a matrimonial action. X filed a *jōkoku* appeal and stated that the *kōso* Appellate Court's denial of waiver of the claim was caused by a mistake in construction and applica-