been dominant in academia or the practice of Japanese civil law.

It seems to be believed in legal academia that the Supreme Court has in this case adopted substantially the duty of mitigation or the rule of avoidable consequences, although it does not expressly say so. But there is some difference in that the Court relies on the rule of reason (*jori*), while scholars who argue for the duty of mitigation or the rule of avoidable consequences usually rely on Article 418 providing for comparative negligence. That is why some authors points out that the Supreme Court considers those rules as a general civil rule, which would apply not only in contract but also in tort cases.

Comparing with the present state of academia and legal practice, whether the decision of the Supreme Court above-mentioned is appropriate or not in the context of Japanese civil law is a difficult question. But even though it would be appropriate for the Supreme Court to adopt generally the duty of mitigation or the rule of avoidable consequences, there would be plenty of room for arguments about whether or not it is reasonable for the Court to apply those rules in this specific case indeed, because the case is a lease contract case where a substitute transaction is not always easily made like a scholar says.

This decision has an English text on the Homepage of the Supreme Court with a proviso that the translation is provisional and subject to revision. Since the above Summary and Opinion are extracts from it and Facts are drafted with reference to it, please refer to http://www.courts.go.jp/english/judgments/text/2009.01.19-2007. -Ju-.No..102.html for the details of the decision.

4. Family Law

Xs v. Ys
Supreme Court 2nd P. B., September 30, 2009
Case No. (*ku*) 1193 of 2008
61 (12) KATEISAIBAN Geppo 55; 1314 HANREI TAIMUZU 123

Summary:

The clause for a statutory share in inheritance which provides that the share in inheritance of a child born out of wedlock be one half of the share of a child born in wedlock (Civil Code, Art. 900, Item 4) does not violate Art. 14, Para.1 of the Constitution. (The conclusion is supported by three majority Justices. One Justice has a supporting opinion. One Justice has a dissenting opinion.)

Reference:

Civil Code, Art. 900, Item 4; Constitution, Art. 14, Para. 1, Art. 24, Para. 2

Facts:

Xs, wife and children born in wedlock of a decedent, made an application for a division of inherited property to Ys, children born out of wedlock of the decedent, by a statutory share in inheritance in the Civil Code, Art. 900, Item 4.

In the first and second instances (Naha Family Court, Nago branch office, November 12, 2007; Fukuoka High Court, Naha branch office, November 6, 2008), both courts admitted Xs' application for the division of inherited property by a statutory share; Ys appealed to the Supreme Court by asserting that the clause for a statutory share in inheritance which provides that the share in inheritance of a child born out of wedlock be one half of the share of a child born in wedlock (Art. 900, Item 4) violates Art. 14, Para.1 of the Constitution.

Opinion:

Y's appeal shall be dismissed.

1. Majority Opinion (Chief Justice Furuta, Justice Nakagawa and Justice Takeuchi):

We cannot accept Y's affirmation based on the violation of Art. 14, Para.1 of the Constitution; a precedent has been established that a clause for a statutory share in inheritance which provides that the share in inheritance of a child born out of wedlock be one half of the share of a child born in wedlock (Art. 900, Item 4) does not violate Art. 14, Para. 1 of the

Constitution (the Supreme Court, Grand Bench, July 5, 1995).
2. Supporting Opinion (Justice Takeuchi), abbreviated.
3. Dissenting Opinion (Justice Imai):

A judgment of High Court holding that the clause of a statutory share in inheritance does not violate Art. 14, Para.1 of the Constitution shall be quashed and remanded to the High Court, since I deem that there is a violation of Art. 14, Para. 1.

This clause set a discrimination in the statutory share in inheritance between children born in and out of wedlock. The basis of the distinction is whether a child of a decedent is legitimate or illegitimate, in other words, born in wedlock or out of wedlock. The legislative purpose is respect for the legal institution of marriage, as the judgment of Supreme Court put it in 1995. Even though the purpose of respect for the legal institution of marriage is rational, is the distinction of a share in inheritance between legitimate and illegitimate really rational? Art. 24, Para.2 of the Constitution provides that individual dignity shall be a legal principle in inheritance; someone in charge of the birth of a child should not be the child born out of wedlock of the decedent but the decedent. Whether a child is born in or out of wedlock cannot depend on the intent and effort of the child. The distinction in a statutory share in inheritance based on this kind of matter is incompatible with individual dignity. Accordingly, a reasonable relation between the legislative purpose of respect for the legal institution of marriage and the distinction in a statutory share in inheritance should not be admitted.

A judgment of the Supreme Court (the Supreme Court, Grand Bench, June 4, 2008) held that pre-revised Art. 3, Para.1 of the Law of Nationality violates Art. 14 of the Constitution on the ground that this clause which admitted a child affiliated after birth by his father with his parents' subsequent marriage (legitimate, *junseishi*) to get Japanese nationality but a child affiliated similarly without his parents' subsequent marriage (illegitimate, *hijunseishi*) not to get it despite both being affiliated by a Japanese father set a discrimination without a rational reason. The intent should apply to the discrimination in a statutory share in inheritance in this case, too.

The clause provided that the share in inheritance of a child born out of wedlock be one half of the share of a child born in wedlock was set on

the establishment of the old Civil Code in the Meiji period and has been kept without any change even during the full amendment after the Pacific War. I have to admit that it remained a matter of affirmation as rational at that time, but it is apparent from the supra Supreme Court judgment in 2008 that there are some cases where a distinction which was rational at that time lacked rationality afterward in the light of subsequent changes in societal attitudes and legislative trends in our country and others.

I have to note that our consciousness of family life, including the living together in marriage and of the parent and child relationship is becoming different with a change in our social and economic situation, and that the proportion of children born out of wedlock to the number of live births is increasing today, and the current status of family life and of the parent and child relationship is changing and becoming diverse. And in many countries, including European countries, too, they provided that the share in inheritance of a child born out of wedlock be the same as of a child born in wedlock. In our country, as I will discuss later, we have an opinion on the revisions in the Civil Code that will make the share in inheritance of a child born out of wedlock the same as of a child born in wedlock; and the Legislative Council of the Ministry of Justice (hereinafter referred to as LCMJ) decided the outline of the revision and replied to a request to the Minister of Justice in 1996, but this amendment still has not happened.

In order to amend the clause that makes up a part of the institution of relatives and inheritance, we have to pay careful attention to the whole institution and to consider the influence on and consistency with the pertinent rules; and we also have to check up on the timing of the coming into effect, etc. since the processing in inheritance based on the clause has been implemented for a long time. For that reason, this amendment is supposed to be carried out in the legislative process, by nature.

In this way, even though it should be carried out in the legislative process, by right, giving relief to parties aggrieved by the clause which the court held to be unconstitutional, and seeking a legal remedy is a duty of the court. And so, avoiding the court holding it to be unconstitutional on the ground that the amendment should be carried out in the legislative process is not in the right.

The problem of the distinction in inheritance between children born in and out of wedlock has been apparent for a long time, and the tentative

plan of an outline of the revision that the share of an inheritance of a child born out of wedlock becomes the same as that of a child born in wedlock was published in 1979, based on the deliberations of a small committee for the status law at the Civil Law Session in the LCMJ. However, the revision was passed over. In addition, a tentative plan of an outline of a revision to the same effect was published in 1994, and the outline of the revision was decided at the general meeting in LCMJ, and it replied to a request to the Minister of Justice in February, 1996. However, the submission of the bill to the Diet has been shelved to this day. At the time of the *supra* Supreme Court judgment in 1995, the revision was relied on, and the deliberations conducted based on the tentative plan of an outline of the revision. It is, however, a dozen years since the LCMJ submitted the report to the Ministry of Justice, but the revision has never been carried out to this day. It is time that the waiting for the revision in the legislative process should not be tolerated any more.

Editorial Note:

There is ongoing debate as to the constitutionality of the Civil Code, Art. 900, Item 4. After the Supreme Court judgment in 1995 that the clause did not violate Art. 14, Para. 1 of the Constitution, this decision has been followed by subsequent similar judgments as a precedent. However, some supporting and dissenting opinions were added to all the judgments, and the constitutionality of the precedents is quite unstable. The focus of constant attention has been on the timing with which the Supreme Court will hold it unconstitutional.

Last year, a Supreme Court judgment on June 4, 2008, held that the pre-revised Art. 3, Para.1 of the Law of Nationality violates Art. 14 of the Constitution on the ground that the clause which admitted a child affiliated after birth by his father with his parents' subsequent marriage (legitimate, *junseishi*) to get Japanese nationality but did not admit a child affiliated similarly without his parents' subsequent marriage (illegitimate, *hijunseishi*) to get it, despite both being affiliated by a Japanese father, set a discrimination without rational reason. This intent should apply to the discrimination in the statutory share of inheritance in this case, and this judgment held just after the *supra* Supreme Court one has attracted a great deal of attention. But, once again, the Court sustained the constitutionality

of the clause. The reason why is not clear, with "upholding the Supreme Court judgment of 1995" the only reason given.

The feeling of hope that when the statutory share of inheritance of a child born out of wedlock is one half of the share of a child born in wedlock, many people will submit a notification of marriage in fear of legal discrimination against their child and the legal institution of marriage will consequently be supposed to be sustained and respected, should not be maintained legally with the discrimination against a child born out of wedlock. In our country, where the marriage rate of young people itself has diminished, the maintenance of and respect for the legal institution of marriage should be achieved by other measures and policies. Discriminating legally, naturally, with no choice, against a child born without choosing his parents is a major problem.

A child born out of wedlock and only affiliated by a Japanese father without his parents' subsequent marriage had the possibility of suffering forced repatriation to his or her mother country since he or she could not get Japanese nationality. If the Supreme Court had not held Art. 3 of the Law of Nationality to be unconstitutional, the extent of human-rights infringements would have been tremendous, without doubt. On another front, the Court will not think that the discrimination in inheritance is a due payment to a child born out of wedlock. In the existing conditions, where resolution in the legislative process cannot be expected, a certain amount of flexibility should be sought in judicial passivism in the light of children's rights. And I hope that the revision will be carried out by the current regime which is comparatively positive towards amending Japan's family law.

5. Law of Civil Procedure and Bankruptcy

X v. Y
Supreme Court 3rd P. B., January 27, 2009
Case No. (kyo) 36 of 2008
63 (1) Minshu 271; 2035 Hanrei Jiho 127; 1292 Hanrei Taimuzu 154