

poration but also against the government and Kumamoto Prefecture. Five courts advise the solution by way of the settlement in consideration of a long period of dispute and the plaintiffs of advanced ages. While the Chisso Corporation and the Kumamoto Prefecture accepted the advice of the settlement, the government rejected it. In 1990, the government passed the Comprehensive Measure concerning Minamata Disease. Under the Comprehensive Measure of Minamata Disease, some of the non-certificated victims were awarded costs of medical treatment. The government stressed that it did not acknowledge legal liability by issuing the Comprehensive Measure and that the Comprehensive Measure was established in light of the political liability imposed on the government. Thirty-six years have passed since a Minamata Disease victim was officially certified for the first time. Most of the victims are of such aged that they should be provided compensation as early as possible.

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3. Family Law

- 1. A case in which it was held that Article 733 of the Civil Code providing for the period of time (six months) for which a divorcée is prohibited from remarrying is constitutional.**

Decision by the Second Division of the Hiroshima High Court on November 28, 1991. Case No. (*ne*) 38 of 1991. A *koso* appeal for damages. 1406 *Hanrei Jihō* 3.

[Reference: Civil Code, Article 733; Constitution of Japan, Articles 13, 14 and 24; Convention on the Elimination of All Forms of Discrimination against Women, Preamble, Articles 2, 15 and 16;

State Redress Act, Article 1(1). Civil Code, Article 733 provides: (1) A woman may not remarry unless six months have elapsed from the day of the dissolution or annulment of her previous marriage; (2) In cases a woman is pregnant prior to the dissolution or annulment of her previous marriage, the preceding paragraph shall cease to apply as from the day of her delivery.]

[Facts]

X₁ (female, plaintiff, *koso* appellant) divorced A by mediation on December 1, 1988, and took the custody of B and C, the children of X₁ and A. X₁ lived together with X₂ (male, plaintiff, *koso* appellant) as *de facto* husband and wife from the time immediately after the divorce, and lived together also with B and C. On March 7, 1989, X₁ and X₂ made notification of their marriage to the Mayor of Takehara City in Hiroshima Prefecture, but the Mayor did not accept their notification on the grounds that it was in violation of Article 733 of the Civil Code. Prior to this, on December 9, 1988, X₂ applied to the family court for permission to adopt B and C, but on April 3, 1989, the court dismissed the application. The reason for dismissal was that if the application were granted and X₂ adopted B and C before the marriage, the adoption might be detrimental to the welfare of those minors in case the marriage were not carried out. On June 2, 1989, X₁ and X₂ married, and after the marriage X₂ adopted B and C (the family court's permission is not required and a notification is sufficient to effect an adoption if a person adopts his or her spouse's lineal descendant (Article 789 of the Civil Code)).

X₁ and X₂ claimed compensation (500,000 yen each) against the State (defendant, *koso* respondent) by reason that the rejection of their marital notification by the Mayor and the refusal of X₂'s adoption by the family court inflicted disadvantages and mental pain on them. X₁ and X₂ brought this action for damages for mental pain which they suffered during the period of the prohibition of remarriage on the basis of the following reasons. ①Article 733 of the Civil Code relies on the paternalistic idea which has an aversion for remarriage by women on the basis of the Confucian moral philosophy in which men predominate over women. If prohibiting

women from remarrying for a certain period served the purpose of avoiding the overlap of paternity presumptions, a term of 101 days after the dissolution of the previous marriage would be sufficient. Therefore, Article 733 would be in contravention of the Constitution of Japan and the Convention on the Elimination of All Forms of Discrimination against Women. ② There was an illegal exercise of public power by government officials in that the members of Congress legislated Article 733 and did not repeal or amend it and that the Cabinet did not introduce a bill to repeal or amend it.

The court of first instance decided as follows (decision by the Hiroshima District Court on January 28, 1991, 1375 *Hanrei Jihō* 30).

(1) In order to say that Article 733 of the Civil Code is in violation of Article 14(1) (equal protection under the law) and Article 24 (equality of the sexes in marital and family relationships) of the Constitution, it must be the case that the provision of the term of six months for which only women are prohibited from remarrying can be judged to be clearly unreasonable at first view. The *mens legislatoris* of Article 733 of the Civil Code was nothing but to avoid difficulties in confirming father-child relationships. Since it is an important policy of the State to clarify family relationships and it is a grim reality that only women can bear children, it cannot be said to be clearly unreasonable at first view to provide for a term of six months for which only women are prohibited from remarrying on the basis of the physiological difference in male and female. And it cannot go so far as to be said to be clearly unreasonable at first view to provide for the period of the prohibition of remarriage which is longer than the period in which the paternity presumptions in law may be overlapped, because there is no reason that Article 733 of the Civil Code should be interpreted as only purporting to avoid the overlap of paternity presumptions.

(2) The members of Congress should take political responsibility concerning legislation only in the relationship to the people as a whole and should not take legal responsibility in the relationship to the people's respective rights. This applies to the Cabinet, too.

Dissatisfied with this decision, X₁ and X₂ filed a *koso* appeal.

[Opinions of the Court]

koso appeal dismissed.

In order that Article 733 of the Civil Code is not unconstitutional, the restriction on women's marriages must be inevitable means to prevent confusion of paternity and to protect the interests of the child born after remarriage and the peaceful life of the latter marriage. Therefore, the claim for damages based on the State Redress Act should be regarded as well-founded on reason only in the following four cases: ①where it is clear that Article 733 of the Civil Code was provided not to avoid the overlap of paternity but, in reality, to prohibit women's remarriage on the basis of the androcentric, feudalistic moral philosophy; ②where it is clear that Article 733 is useless to avoid the overlap of paternity and there will only be harms that cause the increase of *de facto* marriages and the birth of illegitimate children; ③where it is clear that there are other less restrictive means to prevent the overlap of paternity; ④where it is clear that the period of six months for which women are prohibited from remarrying is unreasonable in light of the purpose of avoiding the overlap of paternity.

It must be examined whether Article 733 is clearly unreasonable in light of the purpose of avoiding the overlap of paternity.

(1) X₁ and X₂ assert that Article 733 of the Civil Code is a provision legislated relying on the paternalistic idea which has an aversion for remarriage by women on the basis of the androcentric Confucian moral philosophy. However, according to the history of the legislation, it is clear that the *mens legislatoris* of Article 733 is nothing but prevention of the confusion of paternity, and that it was legislated without depending on the paternalistic philosophy.

(2) X₁ and X₂ assert that the provision of the period of remarriage prohibition does not reflect the actual situations that remarriage is preceded by *de facto* dissolution of a former marriage and *de facto* formation of a latter marriage in many cases, in which it is usual that husband and wife facing divorce are separated and there is no sexual intercourse between them before marital dissolution. However, in Japan, different from foreign countries, a certain peri-

od of separation and reflection on divorce is not provided for as a requirement for divorce. Therefore, it is inevitable in our legal system that the paternity presumption by former marriage overlaps that by latter one.

(3) X_1 and X_2 assert that Article 733 is a useless and harmful provision in the sense that it entails the possibility of increasing *de facto* marriages and illegitimate children because the period of remarriage prohibition cannot prevent *de facto* remarriages and it cannot exclude completely the possibility that the latter husband's child who is presumed to be the former husband's is born after the formation of the latter marriage. However, the objective itself of Article 733 is reasonable. If the period of remarriage prohibition were to be abolished, the paternity of a child with overlapping paternity presumptions would remain undecided until the court determined it in the action for determination of the paternity (Article 733 of the Civil Code). This would be against the interests of the child. Therefore, the period in question cannot be said to be a useless and harmful restriction of remarriage.

(4) X_1 and X_2 assert that the provision of the period of remarriage prohibition for the purpose of avoiding overlap of paternity presumptions is unreasonable, because the presumption of paternity could be reversed by a blood test and, thus, the provision of the period of remarriage prohibition on the basis of the possibility that the paternity presumption may sometimes be overlapped is unnecessary. However, if the period of remarriage prohibition were to be abolished, determination of paternity would have to be made by the court. This would be against the welfare of the child because the paternity of the child would remain undecided until the court determined it and because bringing an action would take time and money. Therefore, the period in question cannot be said to be unreasonable only because a blood test can be carried out easily and precisely.

(5) X_1 and X_2 assert that the provision in question is unreasonable because there can be the way in which when paternity presumptions overlap, the child should be presumed to be of the latter husband, and the presumption could be overruled by the court in an action for confirmation of nonexistence of the father-child rela-

tionship, and that, thus, it is unnecessary to have the system of the period of remarriage prohibition which imposes disadvantages only on women. However, there are some countries, for example, the former West Germany and Switzerland, which maintain the period of remarriage prohibition in spite of having legal system similar to that advocated by plaintiffs and, thus, minimize cases of conflicts of paternity. Therefore, it cannot be said that the system of the period of remarriage prohibition is unreasonable at first view on the ground that there are other less restrictive means to prevent the overlap of legitimacy presumptions.

(6) X_1 and X_2 assert that the period of remarriage prohibition as provided for by Article 733 of the Civil Code is extremely unreasonable in the sense that it is too long for the purpose of attaining the object of preventing conflicts of paternity presumption. However, the period of six months was fixed because it is difficult for ordinary people to be sure of pregnancy in 100 days (or 101 days). Therefore, this sort of incidental *mens legislatoris* cannot be readily said to be unreasonable.

(7) X_1 and X_2 assert that clearly Article 733 of the Civil Code is unreasonable because it does not exclude application of the provision concerning the period of remarriage prohibition even when a certificate written by a physician to the effect that the woman is not pregnant be presented. However, a registrar in charge of family registration does not have the substantial authority to review and determine whether the woman wishing to remarry is pregnant or not. It is a legislative matter of what certificate is appropriate. Therefore, Article 733 cannot be said to be unreasonable at first view in this case.

(8) X_1 and X_2 assert that Article 744 of the Civil Code providing for the annulment of marriages made in contravention of the period of remarriage prohibition provided for by Article 733 is extremely unreasonable. However, this point need not be examined to reach a conclusion in the current case because this case is not a case involving the annulment of a marriage made in contravention of the provision of the period of remarriage prohibition.

The *koso* appeal is dismissed as groundless.

[Comment]

This decision rendered in *koso* appeal instance is one of the first case in which it was directly disputed whether or not Article 733 of the Civil Code providing for the period of time for which only women are prohibited from remarrying is constitutional. In recent years, the opinion regarding this provision as unconstitutional is prominent in academic circles, and it is the subject of examination by the Legislative Council of the Ministry of Justice in the on-going work of reconsideration of marriage law. Therefore, this decision has attracted considerable attention.

When a woman is to remarry to a man other than her former husband, the question occurs whether the provision should apply. That is, in the practice of family registration, remarriage with the former husband is permitted during the period of remarriage prohibition (six months after the marital dissolution). The provision does not apply when the determination of the paternity may not be confused in fact, for example, when the court orders divorce for reason that the life or death of the husband has not been ascertained for three years or more (Article 770(iii) of the Civil Code). Moreover, the registration of marriage was accepted within the period of remarriage prohibition on the basis of the woman's age (67 years old), that is, the age at which a woman is considered to be unable to become pregnant. In contrast, the registration of marriage two months after the husband's death could not be accepted even if a medical certificate proving the woman is not pregnant is presented.

In academic circles, Article 733 is criticized on three points. The first criticism is that the period of six months for which remarriage is prohibited is too long, that is, the provision is overinclusive. In Article 772 of the Civil Code, it is provided that a child conceived by a wife during marriage shall be presumed to be the child of her husband (Article 772(1)), and that a child born two hundred days or more after the day on which the marriage was formed or born within three hundred days from the day on which the marriage was dissolved or annulled shall be presumed to have been conceived during the marriage (Article 772(2)). A child presumed to be the husband's

child under this provision is held to be a legitimate child. Under Article 772, in the case of a child delivered two hundred days or more after the remarriage of its mother and within three hundred days from the day on which her previous marriage was dissolved or annulled, there will be an overlapping of the presumptions of paternity. However, the period of the overlap is one hundred days. Therefore, it is insisted that the prohibition of remarriage for six months is too long and overinclusive, because a period of one hundred days for which remarriage is prohibited is sufficient if Article 733 purports to avoid an overlap of presumptions of paternity.

The second criticism is that the cases to which the provision does not apply should be increased. It is insisted that remarriage should be permitted when substantially there cannot be confusion or overlapping concerning the presumption of paternity. That is, Article 733(2) provides that in cases a woman is pregnant prior to the dissolution or annulment of her previous marriage, the preceding paragraph (the period of remarriage prohibition) shall cease to apply as from the day of her delivery, and this provision should be interpreted more extensively. Therefore, for example, it is said that if the period of remarriage prohibition does not apply in the case in which a woman is pregnant at the time of the dissolution or annulment of the marriage, it may well be that remarriage should also be admitted within the period of prohibition if there is a physician's certificate to the effect that a woman is not pregnant after the day of the marital dissolution or annulment.

The third criticism is that the provision of Article 733 restricting women only from remarriage should be repealed. It is said that even if the law prohibits remarriage, the object of avoiding the overlap of paternal presumptions would not be attained as *de facto* remarriage cannot be prevented. This opinion is divided into two views concerning how to deal with it upon repeal. One view is that an action for determining the father should be brought in cases it is unclear as to who is the father; that is, all disputed cases concerning paternity should be settled by such action. The other view is that remarriage should be admitted soon after the dissolution of the previous marriage, and that the father of the child delivered after remarriage

should be presumed to be the latter husband, who may bring an action and other proceedings for denial of the legitimacy.

X₁ and X₂ asserted, based on the above criticisms, that the provision in question is in contravention of Article 13 (respect for persons), Article 14 (equal protection under the law), Article 24 (equality of the sexes in marital and family relationships) of the Constitution, and the Convention on the Elimination of All Forms of Discrimination against Women. However, the court rejected this assertion. As the Legislative Council of the Ministry of Justice is considering law reform concerning this provision currently, it may be said that the court entrusted the conclusion to the legislature. Three opinions are enumerated on this problem in the section 1-1-3 of the Interim Report on Reform of the Marriage and Divorce System made public in December 1992. That is, (a) the opinion that the existing system should be sustained; (b) the opinion that the period of remarriage prohibition should be reduced to one hundred days; and (c) the opinion that the provision should be repealed and that the method of determining paternity should be established for cases of overlap of presumptions of paternity. At present, opinions are being sought from various fields.

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

Decision by the Fifth Civil Division of the Tokyo High Court on March 29, 1991. Case No. (*ra*) 819 of 1990. A *kokoku* appeal from the Judgment concerning a division of estate. 764 *Hanrei Taimuzu* 133.

[Reference: Civil Code, Article 900(iv); Constitution of Japan, Articles 13 and 14. 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, *kokoku* appellant) is a granddaughter of A (the person succeeded to), and B (the father of X, the deceased) is an illegitimate child of A. A, born before the Second World War, was the eldest daughter of the family and had no brother. At that time, the family system was the basis of Civil Law and, as a rule, the eldest male child succeeded to the family as *koshu* (the head of a household). If a male child was not born, the eldest female child succeeded to the family, and her husband succeeded to her family as *koshu* if she married. A's father was *koshu* then, and he considered A's marriage carefully because her husband would be *koshu* sometime. For that reason, A had four trial marriages. C (the father of B) was her *de facto* husband in her second trial marriage. Although B was born between A and C, A did not come to marry C legally due to her father's opposition. Therefore, B was an illegitimate child. A's other children were legitimate (it is not clear how many children A gave birth to).

X is the successor to B by representation. Although X claimed a share in the succession the same as that of legitimate children, the original court judged the share of X to be one half of that of a legitimate child by applying Proviso of Article 900(iv) of the Civil Code (decision by the Atami Branch of the Shizuoka Family Court on December 12, 1990). X appealed to reverse the original judgment on the grounds that the provision violates Articles 13 and 14 of the Constitution by reason of discrimination against illegitimate children.

[Opinions of the Court]

Kokoku appeal dismissed.

It cannot be said that Proviso of Article 900(iv) of the Civil Code is unconstitutional.

[Comment]

This decision is the first case in which the court made a judgment concerning the constitutionality of Proviso of Article 900(iv) of the Civil Code. As facts are not outlined precisely and the reasons of this judgment are not mentioned in detail, it is difficult to say that the view of the court is expressed clearly. However, this is a significant case in which the court held the provision to be constitutional for the first time.

Since the time of civil law reform after the Second World War, the question whether Proviso of Article 900(iv) of the Civil Code is reasonable or not has been discussed. Even following a drastic law reform, the relevant provision remained the same as in the prewar Civil Code by reason that the differentiation between a legitimate child and an illegitimate child should be reasonable discrimination in order to encourage respect for formal marriage. In the civil law reform of 1980, the revision of this provision was disputed. In the “Tentative Draft on the Civil Law Amendments to the Succession System” published in 1979, the share of an illegitimate child was the same as that of a legitimate child. However, the amendment draft on this provision was shelved because it was premature to go ahead with reform in light of popular sentiment toward respect for formal marriage. According to a public opinion poll conducted by the Prime Minister’s Office in 1979, forty-eight percent of those questioned support the existing system.

Two months after this decision, the court delivered another decision concerning discrimination against an illegitimate child (decision by the Tokyo District Court on May 23, 1992, 1382 *Hanrei Jihō* 3). The plaintiffs of this case were a couple who hoped to keep their surnames unchanged and chose *de facto* marriage. The child born between them is illegitimate because they have not legally married and, as a result, the child was registered simply as “a child” in the section of the certificate of residence (*jūminhyō*) concerning the relationship to the head of the household (*setainushi*). If a child is legitimate, the child is registered as “the eldest male (or female) child”, “the second male (or female) child”, etc. in that section. The plain-

tiffs asserted that the different forms of registration between a legitimate child and an illegitimate child violates Articles 13 and 14 of the Constitution. However, the Tokyo District Court rejected this assertion. In the decision, one reason given is that the form of registration is based on the viewpoint that protection of the interests of the family formed by a legal marriage should first be taken into consideration, and that that basis is reasonable. The other reason given is that this form of registration in the section concerning the relationship to the head of a household has proper grounds as long as the Civil Code classifies children by legitimacy.

In these two decisions, discrimination against illegitimate children was not held to be unconstitutional. Certainly, it is doubtful whether there is a consensus of the Japanese people that such discrimination must be abolished. The fact that the revision of the relevant provision was shelved after various kinds of arguments at the time of the civil law reform of 1980 may have been considered in these two decisions. However, it seems that the courts should have given a detailed judgment by clarifying, at least, the standard of constitutional scrutiny of such discrimination.

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4. Law of Civil Procedure and Bankruptcy

For the year under review, this paper will focus on two Supreme Court decisions in the fields of Law of Civil Procedure and Bankruptcy: a Supreme Court decision on whether the prohibition of dual actions may be applied to a set-off defense asserting a claim which is the subject matter of another pending action; and a Supreme Court