
MAJOR JUDICIAL DECISIONS

Jan. — Dec., 1995

1. Constitutional and Administrative Law

a. Constitutional Law

A case in which the first paragraph of the Proviso in Article 900 (iv) of the Civil Code was held to be constitutional.

Ruling by the Grand Bench of the Supreme Court on July 5, 1995. Case No. (*ku*) 143 of 1991. A case of special *kōkoku* appeal of the ruling to dismiss the *kōkoku* appeal of the hearing of partition of estate. 49-7 *Minshū* 1789; 1540 *Hanrei Jihō* 3; 885 *Hanrei Taimuzu* 83. (See **Case 1** in the part of Family Law, *infra*.)

[Reference: Constitution of Japan, Article 14 (1). Civil Code, Article 900 (iv).]

[Facts]

In 1988 A (the person to be succeeded to), who is a grandmother of X (*kōkoku* appellant, special *kōkoku* appellant), died. Because B, an illegitimate child of A, had died in 1963, X, a daughter of B, succeeded B by representation, according to Article 887 (2) of the Civil Code. However, relying on the first paragraph of the Proviso

in Article 900 (iv) of the Civil code, which provides that the share in succession of an illegitimate child shall be one half of that of a legitimate child, the share in succession of the late B was argued not to be equal to that of A's other legitimate children in a consultation concerning partition of the estate. After the persons concerned did not reach an agreement, X went to Family Court, claiming B's equal share in succession.

Since the Atami Branch of Shizuoka Family Court ruled against X in 1990, X appealed to the Tokyo High Court by arguing, among other things, that the Proviso of Article 900 (iv) violates Article 14 of the Constitution by discriminating against illegitimate children. In 1991, the Tokyo High Court held that it was the matter of legislative discretion how to prescribe statutory shares in succession and rejected X's claims. X appealed to the Supreme Court.

[Opinions of the Court]

Although Article 14 (1) of the Constitution establishes equality under the law, the import of which is to prohibit discrimination that has no rational reason in itself. Therefore, to make a distinction in legal treatment based on various differences based on factual relations such as economic, social, and so on, if the classification has any rationality, is by no means in violation of the Article.

The system of succession is one which prescribes to whom and how the estate of the deceased should be apportioned. The forms of the system are diverse in terms of historical and social viewpoints, and in order to establish the system of succession, tradition, social circumstances, national sentiment, and so on in each country must be taken into consideration. The system in each country more or less reflects these issues and factors. In addition, since the present succession system is closely related to each country's concept of a family entity, no succession system can be established separately from the regulations concerning marital or parent-child relationships. Therefore, there is nothing further said about how to establish the succession system while considering such things synthetically other than by saying that such things should be left to the rational discretion of the legislature.

The rules concerning statutory shares in succession including the one in question are not compulsory, which means that succession should always be commenced in accordance with the rules. Such rules are supplementary, which means that the rules may function when there is no designation of the shares in succession by will, for example. It may not be said that the distinction of the rule in question between a legitimate and an illegitimate child concerning statutory shares in succession is in violation of Article 14 (1) of the Constitution, if there is rational basis in its legislative reason, and if the distinction is not so substantially irrational in relation to the legislative reason that the limits of the rational discretion given to the legislature have not been exceeded.

The legislative reason of the rule in question is, on the one hand, to respect the status of a legitimate child born between the deceased and his or her lawful spouse and, on the other hand, considering the status of an illegitimate child who is also a child of the deceased, to protect an illegitimate child, by providing one half of statutory shares in succession of a legitimate child. Its legislative reason is understood to reconcile respect for marriage and the protection of an illegitimate child. In other words, once the Civil Code adopted the marriage system, statutory shares in succession are prescribed favorably to the deceased's lawful spouse and his or her legitimate child, while providing some shares in order to protect an illegitimate child.

Because the present Civil Code has adopted the marriage system, it may be said that the legislative reason of the rule in question, which is mentioned above, has a rational basis. It also cannot be said that the rule in question, which makes statutory shares in succession of an illegitimate child one half of those of a legitimate child, is substantially irrational in relation to the legislative reason so that the limits of rational discretion given to the legislature are exceeded. Therefore, it cannot be said that the rule in question is discrimination which has no rational reason and is in violation of Article 14 (1) of the Constitution.

[Comment]

This is the first case in which the Supreme Court decided on the

constitutionality of the Proviso of Article 900 (iv) of the Civil Code. After the original court trying this case upheld the constitutionality of the provision in 1991, the Tokyo High Court twice held the provision to be unconstitutional in 1993 and 1994, respectively. Although the issue was finally settled in the Supreme Court, it was done by the majority vote of the ten members, and even among the majority camp, the opinions divided into three concurring opinions by five members. In addition, there were also two dissenting opinions by another group of five Justices which strongly argued against the majority opinion. In this comment, we will mainly discuss the constitutional aspects of the issue, focusing on the majority opinion of the Court.

Article 14 (1) of the Constitution of Japan provides that 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. It is an established view in academic circles that the provision, which has been thought to bind the legislature as well as the executive and the judiciary, should demand not absolute equality but relative equality so as to permit rational classifications established by law. In other words, if there is proportional uniformity between legal treatment and factual distinctions concerning each person based on sex, faculties, age, estate, occupation, and so on, the different treatment by law should not be held to be impermissible discrimination. The question is, then, how one can decide whether a given classification amounts to the irrational discrimination which Article 14 (1) prohibits. In this regard, the recent academic view has made it clear that the grounds enumerated in the second paragraph of Article 14 (1) should have a special meaning. According to this view, the constitution, by considering a classification based on certain types of grounds constitutionally suspect because it is contrary to the principle of respect for individuals, enumerated those grounds specifically in the Article. Thus, it argues that, if the constitutionality of such a classification is challenged, such a classification should be subject to a stricter standard of judicial review. This influential view in academic circles, then, by also taking other factors into consideration, which is irrelevant for the

present purpose, has proposed three different standards of judicial review applicable in an equality case by reference to the case law developed by the United States Supreme Court: strict scrutiny, or a compelling interest test; a rational basis test, and intermediate scrutiny, or a substantial relationship test. There is little dispute that in view of the relative flexibility inherent in a substantial relationship test, intermediate scrutiny should be applied in a case involving a classification based on illegitimacy, which falls under social status according to the definition in Article 14 (1) of the Constitution. Against these academic arguments, intermediate scrutiny should have been made use of in deciding this case. In this sense, it is highly regrettable that the majority gave no consideration to these ideas at all. Only the dissent followed this new approach to constitutional law.

The intermediate level of scrutiny questions both the importance of the legislative purpose and the substantial relationship between the means employed and the legislative ends. In other words, it demands that the government prove that the means chosen by the legislature are substantially related to any important governmental objectives. The majority understood that the legislative intent of the rule in question was to reconcile respect for marriage and the protection of an illegitimate child. This reasoning accepts the justification by the government submitted at the time of its enactment almost fifty years ago. However, this reasoning in itself is a reflection of discrimination against an illegitimate child because it starts from the premises that an illegitimate child should not be on equal terms with a legitimate child in regard to statutory shares in succession despite the fact that they are each equally a child of the deceased. Thus, it should be said that the objective of this rule lies in the protection of a family relationship arising through lawful marriage only. If so, because there is little objection that this should be accepted as an important governmental objective, the question is, then, whether there is a substantial relationship between the granting of one half of the statutory shares to an illegitimate child and the protection of a family relationship arising through lawful marriage. In this respect, the dissent argued that since an illegitimate child has no responsibility for his or her birth, there exists no substantial relationship between

the means employed and the legislative objective in the end. Due to the fact that it is the deceased who has the responsibility for the extramarital relationship and that relationship or the birth of an illegitimate child cannot be deterred by the existence of a discriminatory rule, the dissent is surely convincing. In addition, as it has often been said, this rule does not encourage lawful marriage, does not influence amounts of the shares in succession of a spouse because a spouse has always the right to succeed to one half of the inherited property under Article 900 (i) of the Civil Code, and even may cause an inconvenient result in that when a mother bears one child from lawful marriage and then another from actual marriage, there arises inequality regarding the mother's succession. Furthermore, it is hardly understandable that a law is allowed to be discriminate because it is not compulsory but supplementary. Based on these reasons, it is quite natural that the ruling of the case has been strongly criticised.

Finally, it is remarkable that two of the concurring opinions written by four Justices expressed some doubt concerning the rationality of this provision or their sympathy with such doubt, respectively. This means that among fifteen Justices of the Court, there were only six members who were willing to affirmatively support the provision. Nevertheless, those four Justices stopped short of joining the dissent. It was probably because they took into consideration the fact that the Ministry of Justice had been preparing a revision of the provision at that time, not to mention that they generally believed in the judicial philosophy that it is the province of the legislature to revise bad law. In addition, the issue of the retroactivity of a judgment, which indeed one concurring opinion presented, might have made them hesitate to strike down the provision. Thus, aside from the propriety of its ruling, the ruling could be understood to have demonstrated the Court's reliance on the political branch to act promptly. In this sense, although the Court settled the dispute judicially, it should be said that the political branch has been given the greater responsibility for resolving the issue.