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

**Summary:**

In the case of the preliminary injunction that Y filed, X filed "Secrecy Order"(Himitsu-Hoji Meirei)under the Patent Act Art. 105-4 para. 1. The act makes it a condition that the case is "under litigation"(Sosho). The point at issue is whether "under ligation" includes a preliminary injunction or not.

The Supreme Court held that "under litigation" includes the preliminary injunction. Because "the preliminary injunction of this case" and "the merits of the case" have a common point.

**Reference:**

Art. 100 para. 1of Patent Act,
Art. 105-4 para. 1 of Patent Act,
and Act Art. 23 para. 2 of Civil Provisional Remedies

**Facts:**

X imported liquid crystal displays and liquid crystal televisions, and sold them. Y claimed X's importing and selling was an infringement of Y's patent. This is the reason why Y filed a preliminary injunction against X's importing and selling.

In the preliminary injunction case that Y filed, X filed "Secrecy Order" (Himitsu-Hoji Meirei)under the Patent Act Art. 105-4 para. 1, because X has to protect information about the "construction, shape, driver etc." of a liquid crystal module. The act makes it a condition that Secrecy Order can be used "under litigation"(Sosho). So the point at issue is whether "under ligation" includes the preliminary injunction or not.

First, The Tokyo District Court held that "litigation" is different from "preliminary injunction".

Next, The Intellectual Property High Court held that "litigation" under the Civil Procedure Act is different from "preliminary injunction" under the Civil Provisional Remedies Act. It is too difficult for Japanese nationals to interpret that "litigation" includes "preliminary injuction". To impose a punishment on the violation of Secrecy Order, means we must think about the principle of deterrence of criminal penalty.

The Supreme Court, however, held that "under litigation" includes

the preliminary injunction. Because the preliminary injunction and the merits of the case have a common point.

**Opinion:**

The original decision was quashed and the Supreme Court upheld itself.

The Supreme Court held that X is able to file Secrecy Order in the case of a preliminary injunction.

Without protecting trade secrets by Secrecy Order, parties cannot produce and present evidence, or could refuse to submit evidence. This point of view -the necessity of trade secrets protection- is the same under a preliminary injunction procedure. And if it is applied to Secrecy Order under a preliminary injunction, it could not harm the merit of a preliminary injunction system.

Therefore the definition of "under litigation" in the Patent Act Art. 105-4 includes preliminary injunction.

**Editorial Note:**

This case is about "Secrecy Order" (Himitsu-Hoji Meirei) under the Patent Act Art. 105-4 para. 1. And the act makes it a condition that we can use Secrecy Order "under litigation" (Sosho). So the point at issue in this case is whether "under litigation" includes a preliminary injunction or not.

However, we can interpret the language in either way. That is the reason why we should think about the merits (or demerits) of applying it to preliminary injunctions.

The Supreme Court held that "under litigation" includes the preliminary injunction. Because "the preliminary injunction of this case" and "the merits of the case" have a common point, namely, the preliminary injunction of this case is a kind of "Manzokuteki Kari-shobun". This means, in this case, that a preliminary injunction realizes the same situation that the creditor (party) wants.

Of course, "litigation" and "preliminary injunction" are different. So one academic theory says that this decision is a legislation by the Supreme Court. But it depends on standpoint. If you think the preliminary injunction of this case is just a "preliminary injunction", this decision is a legislation by the Supreme Court. On the other hand, if you attach greater

importance to think that the preliminary injunction of this case is "Manzokuteki Kari-shobun", this decision is "an" interpretation, not a legislation by the Supreme Court.

I think, however, that it is true that the preliminary injunction of this case is not just "preliminary injunction", but "Manzokuteki Kari-shobun". And if so, the hearing about the preliminary injunction of this case is similar to the trial about the merits of this case. That is the reason why I support the latter interpretation.

I guess that the Supreme Court is sending the message that we should consider the settlement of the dispute in a preliminary injunction procedure.

# 6. Criminal Law and Procedure

**X v. Japan**
Supreme Court 3rd P. B., September 28, 2009
2007 (A) No. 798
KEISHU Vol. 63, No. 7, p868

**Summary:**

In the case where the investigation authorities, with the aim of achieving the purpose of the investigation, inspect parcels that have been put into the delivery agent's transportation process upon the request of the consignors, without obtaining consent from the consignors or consignees, by irradiating these parcels with x-rays from outside and observing the projections of the items contained therein, such an act is regarded as a compulsory disposition that has the nature of an inspection in a criminal procedure, and it is illegal to conduct such an inspection without an inspection warrant.

**Reference:**

Article 197, paragraph (1) and Article 218, paragraph (1) of the Code of Criminal Procedure

Article 197, paragraph (1) of the Code of Criminal Procedure