executed; (2) that the recitals and agreements expressed in the instrument are accurate reports of the parties' statements and agreements; and (3) that any fact that the instruments recite to have occurred in the presence of the notary did occur, and any act the instruments recite to have been performed by the notary was in fact performed. The conclusive nature of a public act can be upset only in a querela di falso, a special proceeding with criminal overtones.

Successful completion of a difficult national examination is a requirement for admission to the notariat. **(T)** The candidate must have completed law school and have served a two-year apprenticeship in the office of a notary. When a vacancy occurs in one of the approximately 4,000 notarial positions, preference is given to notaries already in service. Vacancies that are not applied for by incumbent notary are filled by the successful examination candidates **.**

The keeping, filing, and indexing of notarial records are minutely governed by law. Ordinarily, any notary must retain the original of any instrument he prepares or that is filed with him. *** ** On demand he is required to prepare and deliver a copy of any instrument—except a will—that is in his official custody. A notarial copy *** ** has the same evidentiary value as an original.

Although a notary is a public official he receives no salary. ** ** The fees charged are rigidly fixed by law and fixed high **.**

The profession offers its members generous financial rewards and performs a highly useful function. The implicit trust that is granted notaries is rarely abused. Lawyers consider the profession a dull, plodding one, but many envy it for its secure earning power and the universal respect it is accorded.

3. The Italian Judiciary in Transition. In Italy, as in any other civil law country, the judiciary is made up of several thousand career judges—5,744 presently serving, according to the latest figures published by the Superior Council of the Judiciary. This number includes the public prosecutors (precisely 2,254), who are part of the judicial organization according to the Italian Constitution (art. 107 para. 4). Access to the judiciary depends on the passing of a difficult highly competitive national examination (art. 106, para. 1)—a rule designed to assure that the selection is based only on the ascertainment of technical skills and is immune from political considerations. Successful candidates, after a period of up to two years of apprenticeship as uditori giudiziari, become full judges and advance in their career as judges and/or prosecutors.

The Constitution assures both the judiciary as a whole (art. 104, para. 1) and individual judges very strong guarantees of independence. They are subject only to the law (art. 101, para. 2), they are differentiated only by the diversity of their functions (art. 107, para. 4), their career has been made to depend substantially on seniority, following a number of statutes enacted between 1966 and 1979, and they cannot be removed without their consent either from office or from the functions they exercise (art. 107, para. 2). The bulwark of judicial independence, well beyond the proclamations contained in a written text, is the Consiglio Superiore della Magistratura, established by art. 104 of the Constitution, which is the governing body of the judiciary. It is the CSM which appoint, promote, discipline and, in general, supervises ordinary judges.

Sec. IV STRUCTURE OF THE LEGAL PROFESION: CIVIL LAW

In the chapter on the machinery of justice which Professor Varano wrote in 2001 for the Introduction to Italian Law edited by J.S. Lena and U. Mattei (2002)—which the reader can be referred to for further information on judges and their independence—he anticipated that the center-right coalition led by Mr. Silvio Berlusconi, which had gained the general elections of May 2001 and a large majority in Parliament, had marked the "problem of justice" as a priority on its agenda, mainly as a reaction against the season of "clean bands", i.e. the criminal investigations of the early 1990s which revealed how politics was dominated by corruption, and practically removed from the scene an entire political ruling class and the main political parties (foremost the Christian Democrats and the Socialists) which had governed Italy for over forty years.

The final outcome of the Legislature, characterised by the ongoing bitter contrast between the executive and the judiciary, is the Law of July 25, 2005, n. 150, which reforms deeply the law on the judiciary in force since 1941, and delegates authority to the Government to implement it through secondary legislation. The law has been criticised by the opposition, by a substantial number of scholars, and by influential associations of judges as undermining the independence of the judiciary and individual judges. The law does not succeed in separating sharply the careers of judge and prosecutor and putting the latter under a closer control of the Minister of Justice, which was the real political objective of the government, but certainly limits severely the possibility of moving from judicial to prosecutorial duties, and vice-versa, throughout a judge's career, which until now has been quite common.

The career of judges is no longer substantially based on seniority, but on a complicated system of internal evaluations and competitions which ends up in submitting the judge to a continuous scrutiny and distracts her from the dispatch of judicial work; the law provides that the various judicial offices, and in particular the prosecutorial offices, are more hierarchically structured than it is the case today—to the point, for instance, that it is only the head of the office who bears the responsibility of instituting the prosecution and who is allowed to have contacts with the media. The foregoing are only some of the points of a very complex law which have been more sharply criticised. At the time of writing (October 2006), the new center-left Government which came out from the general elections of April 2006 has not repealed the law, as some observers would have expected, but has limited itself to delay the coming into effect of the implementing decrees concerned with the above mentioned crucial areas until July 2007 so as to modify them.

JAPAN

The Constitution of Japan (1946).*

Article 6

**(2)** The Emperor appoints the Chief Judge of the Supreme Court as designated by the Cabinet.

Article 76

* * *

(3) All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.

Article 78

(1) Judges shall not be removed except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties.

(2) No disciplinary action against judges is to be administered by any executive organ or agency.

Article 79

(1) The Supreme Court shall consist of a Chief Judge and such number of judges as determined by law. All such judges excepting the Chief Judge shall be appointed by the Cabinet.

(2) The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten (10) years, and in the same manner thereafter.

(3) In cases mentioned in the foregoing paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed.

* * *

(5) All such judges receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.

Article 80

(1) The judges of the lower courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court.

(2) All such judges shall hold office for a term of ten (10) years with privilege of reappointment, provided that they shall be retired upon the attainment of the age as fixed by law.

(3) The judges of the lower courts shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.


III. THE SITUATION OF THE JAPANESE BAR

For hundreds of years, the Japanese feudal regime banned practice of law as immoral while the judiciary dealt only with the parties in person. Legal profession was officially legitimized in the 1870s but until the end of the Second World War it did not enjoy neither a prestige nor a power vis-à-vis the judges in particular. The number of practicing lawyers was kept small and lawyers were under a strict governmental supervision. The post-War reform included liberalization of lawyers and a reform of professional training. Now the integrated bar became a fully autonomous body free from any governmental supervision and future lawyers came to be trained together with future judges and prosecutors (procurators) for two years in the Legal Training and Research Institute (LTRI) attached to the Supreme Court. But the pre-War social status of practitioners was not to be improved immediately. Number of lawyers
Sec. IV STRUCTURE OF THE LEGAL PROFESSION: CIVIL LAW

has been kept small even till today due to a small numeros clause of the LTRI. It was kept at 500 a year for a long time until about 10 years ago. It has become 1,000 only a couple of years ago.

For a long time since the creation of modern bar as a legitimate profession in the early 1870’s, the relationship between the judges and the lawyers was not a good one. These two groups were separated and did not regard each other as partners. The judges, being professionally authoritarian and socially prestigious, formed an elitist group. The lawyers, still suffering a low social status even after being liberated from a governmental supervision after the Second World War, generally could not attract elitist sector of the society and accordingly chose to position themselves as an anti-government and anti-officialdom power. Thus, any proposal by the judiciary or by individual judges, however constructive and reasonable it might be, tended to be received as a sign of oppression and to meet a strong resistance from the organized bar and individual members thereof. The political climate in the post-War period also enhanced this tendency. There was a clear polarization of political forces with a conservative party in power on the one side and Marxist oriented opposition parties (Communist Party and Socialist Party) on the other. The organized bar always sided with the latter.

The situation began to change in the 1980’s for various possible reasons. Two most important factors must be mentioned, namely, first, the effect of the post-War period of training of prospective judges and lawyers and secondly a qualitative change of the bar. In the pre-War period, according to the general civil law tradition, the judges and lawyers, though studying together in the university had to take a separate entry examination and separate training although the examination was unified since 1934 in the High Civil Service Examination for Judicial Officials. One of the post-War legal reforms was the creation of LTRI mentioned before for a common two years training for prospective judges, prosecutors and lawyers. It was only in the 1980’s that those judges and lawyers who went through the new system took the leading positions within the judiciary and the bar.

The mere fact that the future lawyers and the future judges are trained together would not have change the landscape. What has changed the situation was the quality of people who decided to go to practice rather than to the judiciary or to the prosecuting office. From the 1970’s more and more graduates of LTRI who would have elected to become judges and prosecutors began to choose to become a practitioner. Not only the number of these people increased but also their quality improved. Many of those whom the judiciary and the prosecuting office wanted to recruit and did try to recruit to their respective organizations declined the invitation and chose the career as practitioner. It used to be the norm that promising young candidates volunteered to be a judge or prosecutor and those who had taken years to pass the extremely competitive National Legal Examination went to the practice. In the 1980’s this pattern was reversed. The number of students of LTRI was gradually increased so that a sufficient number of qualified candidates could be secured for the judiciary and prosecuting office. In my view, the change was caused primarily for two reasons.

First, the lawyers’ public image started to change in the 1960’s when a group of leftist lawyers won public support in pursuing large anti-air or water pollution suits. It was a political rather than legal movement for attacking the governmental policy of the controlling conservative party to push forward the country’s economic developments in disregard of environmental and ecological consideration. Famous Minamata Disease case (mercury poisoning in the Minamata Bay area causing many deaths) in the 1960’s was representative. This and other similar litigation led to the legislation of the Pollution Control Basic Law in 1967. This was a kind of the bar’s activity that was impossible before the War without risking a severe sanction because of strict governmental control over the lawyers. It was instrumental not only for changing the public image of lawyers, but also for helping change the self-image of the lawyers themselves. What used to be a monopoly of the “progressive” leftist lawyers became a part of ordinary practice of any lawyer. The bar gained a new attractiveness as an independent profession serving social justice. This, as a matter of fact, represents another aspect of Americanization brought into Japan through the post-War reform. Though in a lesser degree, litigation in Japan sometimes has played certain political function thanks to the activism of the bar, as typically seen in the United States and elsewhere.

One of the other causes for the popularity of lawyers was, of course, financial. As the Japanese economy expanded and internationalized, a demand for competent lawyers arose and a high starting salary was promised by emerging international law firms. Although the judges and prosecutors are much better paid than ordinary civil servants of equivalent background and age in the executive branch, the income of successful practitioners well exceed that of those in the public sector. In addition, an improved social image of lawyers carried with it an air of freedom and challenge which could not be enjoyed in the bureaucratic career system of the judiciary or the prosecuting office. Thus, there are many reasons why ambitious and capable young men and women came to be attracted to the practice of law. Successful large law firms also aggressively recruited eligible young trainees in the LTRI from early days of their training. All this added a centripetal force toward the practice.

Despite all of these recent trends, the number of lawyers in Japan is still kept very small (currently only about 21,000 lawyers serving 120 million people) compared to that in other industrialized nations. Government has declared that the number will be increased to 100,000, the per capita level in France, in a couple of decades, and as the first step toward this goal the American styled “law schools” have been created. Almost 60 of these new 2-3 years graduate professional schools with more than 5,000 fresh students started operation from April, 2004. The real achievement of this development is to be seen in 10 years. At present, it is still true that the historical vestige of Japanese practicing bar has at
least so far contributed the way the Japanese civil procedure is conducted to date. At the same time, it is also true that the post-War legal training reform and the recent popularity of legal practice have had a decisive impact on the success of the recent procedural reform as discussed shortly.

VII. New Role of Court Clerks

Better preparation, concentrated witness examination, better scheduling, etc., all require much work and responsibility not only of the participating lawyers but also of the judge in charge. Frequent contact between the court and the lawyers becomes necessary. For that purpose, a competent administrative support system is needed, so that the judges can concentrate in their proper works. In this respect, the new role of the court clerk should be particularly mentioned here. Under the Code of Civil Procedure, the court clerks are given the independent authority and responsibility for keeping record of proceedings. In reality, they have been long considered as a second class court officer subordinate to the judges. In addition, under the previous political environment, the court clerks were unionized under a strong leftist orientation and often opposed to the court and the judiciary as an oppressive employer. At about the same time as the bar’s attitude toward the judiciary was changing, the attitude of clerks also began to change. The judges who wanted to have more efficient preparatory proceedings and concentrated witness examination gave the clerks a greater responsibility for organizing and managing matters in cooperation with the judge.

Many willing clerks positively responded to this offer of a challenging new role and they proved in fact capable enough to conduct such works. To become a court clerk one must pass a demanding state examination comparable to the National Legal Examination and thereafter go through a rigorous training program for one (for law graduate) or two (for non-law graduate) years in the Court Clerk’s Training Institute attached to the Supreme Court. Under this system which was also instituted during the post-War period, the level of the court clerks has been remarkably elevated. The 1996 Code thus transferred some of the judge’s responsibilities to the court clerk. It is now the court clerk’s responsibility to issue the summary payment order (German Mahnverfahren) and to assess the court costs after the conclusion of litigation. Court clerks are now characterized as the “court manager”. A busy movie actor or actress cannot perform well in the screen without a competent manager behind him or her. The judge similarly can play his or her proper role better with a good arrangement by the court clerks. The court clerk is no longer a subordinate officer but an independent player side by side with the judge. The court clerks posted in the litigation management constantly contact the parties (lawyers) for various purposes, for just scheduling or for a more substantive matter like clarification of allegations.

Note on Developments in Japan

1. New law schools and National (or Bar) Examination:

The characteristically small size of the Japanese legal profession is about to change thanks to the recent reform of the justice system. The reforms include (1) creation of more than 70 graduate level law schools, graduation from which is now a prerequisite for taking the National Legal Examination (NLE); and (2) a radical relaxation of the pass rate of the NLE, which for decades remained as low as 2 to 3 percent. Another innovation is that any applicant for the NLE can take the examination only three times in the individual’s lifetime.

In 2006, the new law schools produced their first graduates. Starting from that year, there are two types of NLE: a new type of examination which can be taken only by graduates from one of the new law schools subject to an increasing admissions quota; and the old type of examination which will continue for 5 years, subject to a decreasing admissions quota. It is projected that the total number of successful applicants will reach 3,000 in 2010. The number of practitioners, presently about 23,000, is thus expected to reach 50,000 in 2018 and 135,000 in 2026.

Recent NLE statistics of applicants and their success rate are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Applicants</th>
<th>Passers</th>
<th>Success Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>45,865</td>
<td>1,064</td>
<td>1.3%</td>
</tr>
<tr>
<td>2006</td>
<td>35,782</td>
<td>549</td>
<td>1.5%</td>
</tr>
<tr>
<td>2007</td>
<td>2,227</td>
<td>1,009</td>
<td>47.0%</td>
</tr>
<tr>
<td>Total</td>
<td>1,358</td>
<td>300</td>
<td></td>
</tr>
</tbody>
</table>

* The new law schools which started in April 2004 have two types of students: those who hold an undergraduate law degree and those who hold other undergraduate or graduate degrees. The former can graduate in 2 years while the latter are required to study for 3 years before taking the legal examination. Applicants for the new exam in 2006 were only those who graduated in 2 years. Applicants in 2007 include fresh graduates who have studied for 3 years and those who failed the 2006 exam.

2. Statistics of choices by graduates from LTRI (judges, prosecutors or practitioners):

Uniform training of future practitioners and judges/prosecutors was started in 1947 as one of the post-War reforms. The training period was two years, with time allocated as follows: (1) the first 4 months for class room education; (2) 16 months in the field (8 months in the court, 4 months in the prosecuting office, and 4 months in a law office); and (3) the last 4 months again for class room education, to be concluded by a final examination. The period of training was shortened to 1.5 years in 1999 in order to accommodate an increased number of trainees; it was decreased again to one year beginning 2007 for graduates of the new law schools. Law schools are expected to provide elementary practical trainings formerly provided at the LTRI. The “1.5 year” program will continue, side by side, with the new requirements, until the old examination is terminated in 2011.
The first graduating class of 1949 had only 134 trainees, of which 72 became judges, 44, prosecutors, and 13, practitioners. The following table shows changes in professional choices in every tenth year and in the most recent two years (number of women in parentheses):

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Judges</th>
<th>Prosecutors</th>
<th>Bar</th>
<th>Others*</th>
</tr>
</thead>
<tbody>
<tr>
<td>1959</td>
<td>282</td>
<td>69</td>
<td>51</td>
<td>157</td>
<td>5</td>
</tr>
<tr>
<td>1969</td>
<td>518</td>
<td>84</td>
<td>53</td>
<td>374</td>
<td>5</td>
</tr>
<tr>
<td>1979</td>
<td>465</td>
<td>84</td>
<td>49</td>
<td>350</td>
<td>2</td>
</tr>
<tr>
<td>1989</td>
<td>470</td>
<td>58</td>
<td>51</td>
<td>360</td>
<td>1</td>
</tr>
<tr>
<td>1999</td>
<td>729</td>
<td>97</td>
<td>72</td>
<td>549</td>
<td>11</td>
</tr>
<tr>
<td>2005</td>
<td>1,158 (274)</td>
<td>124 (34)</td>
<td>96 (30)</td>
<td>911 (204)</td>
<td>27</td>
</tr>
<tr>
<td>2006</td>
<td>1,386 (264)</td>
<td>115 (35)</td>
<td>87 (20)</td>
<td>1,144 (262)</td>
<td>40</td>
</tr>
</tbody>
</table>

* “Others” include academics, civil servants, those unknown at the time of survey, etc.

The increasing size of the “others” category in recent years seems to reflect a greater difficulty in finding an employment in law firms.

V. THE STRUCTURE OF THE LEGAL PROFESSION IN THE COMMON LAW: ENGLAND AND THE UNITED STATES

ENGLAND

The machinery of justice in England has been undergoing radical changes in the last fifteen years or so. The two branches of the legal profession—barristers and solicitors—were characterized by rules and practices of medieval origin which aimed at protecting the interests of the guilds rather than serving the public interest. At some point, it was inevitable that the profession would have to face the challenges of the market. As to judicial organization, the Human Rights Act 1998 contributes decisively to making certain features of the English judiciary untenable, such as the fusion of executive, legislative, and judicial powers in the Lord Chancellor’s office and the ambiguous position of the Appellate Committee of the House of Lords.

As far as the legal profession is concerned, the two branches have lost some of their most peculiar features, and have consequently come closer to each other though they have not been unified. Following the Courts and Legal Services Act 1990, and the Access to Justice Act 1999, barristers no longer enjoy their monopoly over the right of audience before the superior courts, which in turn means that they have lost also their monopoly on appointments to the bench. At the same time, they are no longer prevented from direct contacts with clients.

As to solicitors, also their monopoly on conveyancing has been swept away after centuries by the winds of liberalization of the legal profession: see § 34–37 of the CLEA.


The twilight of the welfare state has brought about a gradual demise of the Legal Aid and Advice schemes, for which England had been celebrated since 1948. In its place, § 58 of the Courts and Legal Services Act 1990, as amended by § 27 of the Access to Justice Act 1999, have introduced, conditional fee agreements (“CFA”). Consider whether a conditional fee agreement is compatible with the principle of equality of arms in that it exposes a defendant to a higher cost of risk whenever a claimant chooses to be represented on a CFA basis.


A CFA usually takes the following form. The lawyer agrees not to charge the client any fee in the event of the client being unsuccessful. At the same time, the lawyer agrees with the client a normal hourly fee plus a success fee, in the event of the client being successful in the litigation. The lawyer recovers the hourly fee and the success fee from the unsuccessful party. A CFA would still leave the client liable for the other party’s costs, if the client is unsuccessful. The client may also be liable for the expenses that his own lawyers have incurred on his behalf to the extent that they are not recoverable from the other side. To protect himself from such risks the client normally takes out an after the event insurance policy (ATE), under which the insurer undertakes to pay the insured litigation liabilities. ATE premiums are recoverable from the losing party, alongside the lawyer’s hourly fee and success fee. The availability of CFA representation has improved access to justice [in those areas of litigation in which they are easily available]. However, the fairness of the scheme is far from obvious.

Note on Developments in England

Certain results of the liberalization process are already clearly visible, among them the fact that legal services are now being delivered by a number of other professionals such as legal executives, licensed conveyancers, and patent agents. However, more changes seem to be on their way. A White Paper was published by the Secretary of State for Constitutional Affairs and Lord Chancellor in October 2005, “The Future of Legal Services: Putting Consumers First” and a Draft Legal Services Bill (Cm. 6839) was presented to Parliament in May 2006.

With regard to the judicial organization, the major changes concern the abolition of the Appellate Committee of the House of Lords, and the establishment of a new Supreme Court in its place, the reform of the historic office of the Lord Chancellor, and the new approach to judicial selection. As to the Lord Chancellor’s office, it is clear that the Human...
Date of the decision 1995.07.05
Case number 1991(Ku)No.143
Reporter Minshu Vol49, No.7 at 1789
Title Decision on the share in the inheritance of an illegitimate child
Case name Case of special appeal against the decision to dismiss the appeal against the decision on the partition of estate
Result Judgment of the Grand Bench, dismissed
Court of the Second Instance Tokyo High Court, Decision of March 29, 1991
Summary of the decision The first part of the qualifying proviso of Article 900, subparagraph 4 of the Civil Code is not in violation of Article 14, paragraph 1 of the Constitution (there are concurring opinions and dissenting opinions)
References Article 14, paragraph 1 of the Constitution, Article 900 of the Civil Code
Main text of the judgment The present appeal is dismissed. The cost of appeal shall be borne by the appellant.
Reasons On the grounds for appeal presented by the counsel.

The argument of the counsel can be summarised as follows: the first part of the qualifying proviso of Article 900 (hereafter the Provision), subparagraph 4 of the Civil Code which determines the share in inheritance of a child who is not legitimate (hereafter illegitimate child) as half that of the legitimate child is against Article 14, paragraph 1 of the Constitution.

1 Article 14, paragraph 1 of the Constitution provides for equal treatment under law. It is intended to prohibit discrimination without a reasonable ground. Differentiation in the legal treatment on the ground of the difference in economic, social, and other various factual relations concerning individuals is not against this provision, insofar as the differentiation is reasonable (Judgment of the Supreme Court, Grand Bench, May 27, 1984; Minshu 18-6-876; November 18,1982; Keishu 18-9-579).

As a prerequisite of examining this issue, the system of inheritance in Japan is reviewed in the following: 1) The system of traditional family inheritance (kotoku-sozoku) was abolished and the system of joint inheritance was introduced by the Law on the Partial Amendment of the Civil Code (Law No.222, 1947), based upon Article 24, paragraph 2 of the Constitution which provides that laws regulating marriage and inheritance etc. should be enacted on the basis of individual dignity and the essential equality of men and women.

Concerning the scope of heirs, the current Civil Code provides that the spouse of the deceased is always an heir (Art. 890), and children of the deceased are also heirs (Art.887) and thus makes it a rule that the spouse and children are heirs. The Code further provides that if there is no children or a person who subrogates the child, the lineal ascendant and the siblings become the heirs of first and second rank respectively (Art.889). The Code also provides for the division of the estate in cases where there are multiple heirs (Art.900, hereafter, statutory shares), and if, among the joint heirs, there is a person who had accepted a gift by testament from the deceased (special beneficiary), this person’s share is the remaining amount after deducting this amount from the statutory share (Art.903).

Thus, the deceased may determine the share of joint heirs by testament, but also may give all or part of the assets to the heirs or a third party by testament (Art.964). However, this cannot be effected against the provisions on the statutory reserved portion as provided in articles 1028 and 1044 (qualifying proviso to Art.964) and those who are entitled to such portion may claim the reduction of gift by testament which is against these provisions (Art.1031). The heirs have a choice of accepting inheritance or not. An heir must fully or conditionally accept the inheritance or waive it within three months of the time he or she learned of the commencement of the inheritance (Art.915).

Article 908 sets out the criteria for the division of the estate in cases of joint inheritance and provides that in dividing the estate, the kinds and nature of the assets and rights which are included in the estate, the age, profession, mental and physical state of health and circumstances of living of each heir should be taken into consideration. Joint heirs may agree on the division of the estate by negotiation (Art.907, para.1), and if they fail to reach an agreement, they may request the family court to divide the estate (ibid., para.2).

On the other hand, the deceased may determine the means of dividing the estate by testament, or prohibit division for up to five years of the beginning of inheritance (Art.908). The share of the spouse, where the spouse and child are joint heirs, was altered to one half of the estate (previously one-third), where the spouse and a lineal ascendant of the deceased are joint heirs, two-thirds (previously, one-half), and where the spouse and the siblings are joint heirs, three-quarters (previously, two-thirds).

Also by this amendment, a system of contributory portion was introduced. Thus, the newly inserted Article 904-2, paragraph 1 provides that if, among the heirs, there is a person who made a special contribution to the maintenance or in increase in the assets of the deceased by way of providing work and service for the deceased’s business, or proprietary contribution, providing of caring and nursing for the deceased, the estate to be divided equals the assets which the deceased had at the time of the beginning of inheritance reduced by the portion of contribution as determined by the agreement of all heirs. This person’s share is the statutory or testamentary share plus the portion of contribution. Paragraph 2 of the same provision provides that if the heirs failed to reach an agreement, or are unable to negotiate, the family court may, upon the request of the person who made the contribution as provided in this provision, determine the portion of contribution by taking into consideration the time, means, and extent of contribution, the amount of the estate and all other circumstances. By this system, those who made a
special contribution to the maintenance of or increase in the deceased’s assets are allowed to receive inheritance above statutory or testamentary share, and thus substantial fairness in inheritance is ensured. Article 900 which provides for statutory shares is among one of these provisions; it does not make it mandatory to have the estate divided in accordance with the statutory shares. On the contrary, despite the provisions on statutory share, the deceased may choose to determine the share by testament. Heirs who do not wish to accept inheritance may waive inheritance. In cases where the share is discussed between the heirs, the estate does not necessarily have to be divided in accordance with the statutory share. Joint heirs may, by considering the circumstances involving each heir, allow a particular heir to receive more than the statutory share by agreement. However, in cases where the heir cannot reach an agreement on the division of the estate, the family court adjudicates the matter, and the estate has to be divided in accordance with the statutory shares.

In this way, provisions on statutory shares of inheritance are designed to operate in a supplementary way in cases such as where there is no designation by testament.

2. The system of inheritance determines by whom and how the assets of the deceased should be inherited. Historically and socially, there are different kinds of inheritance. When designing the system, tradition, social environment, perception of the people, and other factors have to be considered, and the system of inheritance in each country more or less reflects these factors. Furthermore, a contemporary system of inheritance is closely related to the idea of family in a given country, and the system cannot be established without considering the rules of marriage and the family in that country. It should be concluded that the way the inheritance system is established is left to the reasonable discretion of the legislature by taking all these into consideration.

As mentioned above, considering the fact that provisions on statutory inheritance shares including this Provision do not provide that inheritance should always be effected in accordance with the statutory shares, but are intended to be applied in a supplementary way in cases such as where there is no designation by testament, differentiation of statutory shares of inheritance between legitimate and illegitimate children in this Provision, insofar as it has a reasonable ground in the reason of enactment and differentiation is not excessively unreasonable in relation to the reason of enactment, and can be acknowledged as being within the scope of reasonable discretion granted to the legislature, cannot be regarded as an unreasonable discrimination which is in violation of Article 14, paragraph 1 of the Constitution.

3. While Article 24, paragraph 1 provides that marriage is concluded only on the basis of the consent of both sexes, Article 739, paragraph 1 of the Civil Code provides that ‘marriage takes effect by filing in accordance with the Law on Civil Status,’ and thus excludes de facto marriage and adopts marriage by law. Article 732 prohibits bigamy and declares the system of monogamy. It goes without saying that the system adopted by the Civil Code is not against the above-mentioned provision of the Civil Code.

If, as a result of the adoption of the system of marriage by law by the Civil Code, a legitimate child born from the marriage and an illegitimate child born outside the marriage are differentiated and regulated differently in the establishment of parental relationships, and common law spouses are not entitled to inheritance of the other spouse, this is something which has to be tolerated.

Summary

The aim of enactment of the Provision is understood to be to respect the status of the legitimate child who was born between spouses who are married by law, and at the same time, paying due attention to the status of the illegitimate child, grant a statutory share of one-half of the legitimate child’s share in order to protect the illegitimate child and thus balance the respect of marriage by law and the protection of the illegitimate child. In other words, since the Civil Code has adopted the system of marriage by law, insofar as the statutory inheritance share is concerned, the legitimate child has to be given preference. On the other hand, the illegitimate child was allowed some share and it was intended to protect the illegitimate child.

Since the Civil Code has adopted the system of marriage by law, the reason of enactment of the Provision has a reasonable ground. The fact that the Provision set out the statutory inheritance share of an illegitimate child at one-half that of the legitimate child cannot be regarded as excessively unreasonable in relation to the reason of enactment and exceeded the scope of reasonable discretion granted to the legislature. The Provision cannot be regarded as an unreasonable discrimination and is against Article 14, paragraph 1 of the Constitution. The argument of the appellant cannot be accepted.

Therefore, the kokoku appeal is dismissed and the cost of the appeal shall be borne by the appellant. There are concurring opinions of justices Itsuo Sonobe, Tsuneo Kabe, Katsuuya Onishi, Hideo Chikusa and Shinichi Kawai, and dissenting opinion of justices Toshijiro Nakajima, Masao Ono, Hisako Takahashi, Yukinobu Ozaki, and Mitsuo Endo, while others agree to the main text of the decision.

Concurring Opinion of Justice Kabe

I concur with the majority opinion that the appellants’ argument that the Provision on the statutory inheritance share of the illegitimate child is against Article 14, paragraph 1 of the Constitution is without grounds. However, in the light of dissenting opinions which found the Provision to be unconstitutional, supplementing the majority opinion, I would like to express my views as follows.

1. The Civil Code has adopted the system of marriage by law and the system of monogamy, while prohibiting polygamy. It is known that in real life, the way men and women are associated varies and is different according to the country and the time, but the adequacy by law of the adoption of the system of marriage by law and monogamy is no longer questioned nowadays. The matter at issue is not the adequacy of the system of marriage by law, but the adequacy of the difference in the statutory share of
inheritance which inevitably emanates from the system of marriage by law.

A person who has assets may give them away as a gift while he or she is alive, or give them by testament, or designate the
share of inheritance. In order to address the situation in
which such measures are not taken, supplementary
provisions on statutory shares of inheritance, including the
provision that in the event of death of the spouse of the deceased, in cases where the spouse and the
child are jointly heirs, the statutory share of the spouse has
been increased from one third to one half by the
amendment by Law No.S1 of 1980. Then who is going to
inhabit the remaining one half? As the leading heir, the
child in most cases, as a person who has to rely on the estate
of the deceased for the income in the later life, this is a matter of
utmost interest for the spouse. In Japan, where the
primary component of the estate is residential real estate,
in the light of the current state of affairs in which prices of
real estate are extremely high, this only natural and
understandable.

The heir who is entitled to the remaining one half of the
statutory share is a child of the deceased, but in such
cases, since the law has adopted the system of marriage by
law on the basis of monogamy, the law naturally
presupposes that the heir who comes second to the spouse
is the legitimate child. In reality, the possibility that the child
of the deceased is born as an extra-marital child cannot
be denied, and extra-marital children should not be ruled out as
heirs as children of the deceased (the view which denies
inheritance to an illegitimate child is rare in Japan, though
this is not the case in some foreign countries). How is
it not easily acceptable to the spouse who built a family with
the deceased by marriage by law, if the share of inheritance
of the illegitimate child is to be made equal to that of the
legitimate child.

Against this view, there is an argument that the emergence of
extra-marital (illegitimate) children cannot be prevented
by differentiating the share of inheritance between
legitimate and illegitimate child. However, the issue here is
not an off-hand examination of a purpose/effector argument,
i.e., whether making their treatment not necessarily equal
(differentiating the share of inheritance) facilitates marriage
by law or not. Insofar as the system of marriage by law is
adopted, in a way it is a logical outcome of this system that
a difference in the share of inheritance emerges between
legitimate and illegitimate child.

2. Next, special reference should be made to the traditional
family — i.e., system of marriage by law.

After the War, by the enactment and taking of effect of the
Constitution, the system of marriage by law based on the
Civil Code before the War was abolished, and the family was
transformed from the living community under the head of
the family to a family centering around the married couple
on the basis of the consent of both parties.

Naturally, a couple married in accordance with law does not
always have a child. In such cases, the law presupposes
adoption, but from the viewpoint of those who respect the
continuity of blood lines, there has to be an heir of the
insertion descent regardless of the fact of whether this person is
intra-marital child or not. The background to such a view is
the system of marriage by law. Whether it is an male line or female
treatment, to what extent differentiation is allowed. What is at issue in the present case is not the appropriateness of the legislation which denies, as can be seen in the often quoted US cases, the right of the illegitimate child (extra-marital child) as the child of the deceased, but the appropriateness of the shares of inheritance based upon the premise that the extra-marital child should naturally be one of the heirs.

In sum, by adopting the system of marriage by law based on monogamy, and on the premise that this system should be maintained, the determination of the appropriateness of the Provision which provides for the inheritance share for illegitimate child as one half that of the legitimate child as a supplementary provision, applicable in cases where gift during life, devise, or designation of shares of inheritance by the deceased does not exist, is within the scope of discretion of the legislature and in substance, does not generate the problem of unconstitutionality.

Concurring opinion of Justice Katsuya Onishi

I concur with the majority opinion that the share by statutory inheritance for an illegitimate child is not against Article 14, paragraph 1 of the Constitution as discrimination without reasonable grounds, but would like to add some reasons for it.

I agree with the majority opinion that insofar as the Civil Code has adopted the system of marriage by law, it is inevitable that in rules concerning the establishment of parental relations and inheritance there are some difference between legitimate and illegitimate children. I also agree that the reason of enactment of the Provision which protects the legitimate marital relations and the family which was formed on the basis of this relation, and at the same time, intends to protect illegitimate children has reasonable grounds.

The Provision originates from a similar provision in the Civil Code before the War and has remained in force after the 1947 amendments. Under the societal conditions at those times in Japan, the Provision may have had some rationale. However, since then, the social environment and the perception of the people have significantly changed.

Firstly, in the past, the estate in most cases comprised assets as means of living of the descendants, but today, when inheritance of business has become exceptional, such a meaning is about to lose effect, and it is now evident that as the meaning of family assets changes, changes can be seen in the perception of the people on the grounds (raison d'etre) of inheritance. The increasing of the share of inheritance in 1980 was in line with these changes.

Concerning the family, while several generations of people living together was the rule in the past, now, the number of children has become smaller, the age of the people in society has risen, and furthermore, the number of people who choose to stay single has increased. Some people point out that concerning marriage, common law marriage and those who prefer not to marry are on the increase. In this way, the perception of the people concerning inheritance as well as marriage, parental relations and forms of the family have changed enormously and still continues to change.

3. Changes in the international environment surrounding Japan cannot be overlooked either.

Article 24 of the International Covenant on the Civil and Political Rights (Treaty No.7, 1976) provides that all children have the right to measures for the protection needed for their status as minors provided by the family, society, or the state without any discrimination by birth. Article 26 provides that the law guarantees equal and effective protection to all, against discrimination on any grounds, including birth or other status. Article 2 of the Convention on the Rights of the Child (Treaty No.6, 1994) provides that children are guaranteed that the rights as provided by the Convention are respected and guaranteed without discrimination, regardless of the birth or other status.

Furthermore, by the 1960s, triggered by the increase in the number of illegitimate children, a majority of European countries had amended the law in order to make the share of inheritance of the illegitimate child equal to that of a legitimate child. Although there are countries in which, because of a strong tradition for the protection of the legitimate family, amendment of the law for equal treatment has yet to be adopted, there are also countries which, despite that fact that full equal treatment is not realised, equal treatment is pursued while balancing it with the rights of the spouse and legitimate children.

4. As seen above, circumstances concerning the Provision on the share of inheritance of illegitimate children have considerably changed in Japan as well as internationally, and the rationale behind the Provision which existed at the time of enactment has gradually lost validity. At this point, one cannot say that this exceeds the scope of reasonable discretion granted to the legislature, but when examining the scope of examination to this Provision, the reasonableness as to the relationship with the reason of enactment has become significantly questionable.

5. On the other hand, Civil Law is based upon the adjustment and balancing of interests of individuals, and therefore, it is not appropriate to examine one interest separately from the other. Although provisions on inheritance do not concern pure proprietary interests as in commercial transactions, unlike marriage, concerning civil status, ultimately, these are the provisions which determine to whom and how the assets of the deceased are assigned. Moreover the Provision is supplementary in that it is applicable only when there is no testament which reflects the deceased’s clear intention. There are different views on the raison d’etre of inheritance, but the will of the presumed heir cannot be totally ignored. The system should be examined also from the viewpoint of how a stronger guarantee of a benefit to be granted by inheritance to one person affects the benefit the others used to have. When examining the reasonableness of the Provision, an overall consideration of the compatibility with the relevant provisions on inheritance, marriage, parental in view, including the problem of whether it is necessary to take measures to protect the interest of the spouse and others if the share of inheritance of a legitimate child is to be made equal to that of legitimate child, is needed.

Based upon the above, while it may be appropriate to discuss the possibility of reform as a matter of legislative policy, at this moment, it cannot be concluded that the Provision is excessively unreasonable in relation to the
Concurring opinion of justices Hideo Chikusa and Shinichi Kawai

We concur with the majority opinion that the Provision on the share of inheritance of an illegitimate child is not against Article 14, paragraph 1 of the Constitution, but would like to add the following.

1 In general, it is possible that provision of a law had a reasonable ground at the time of enactment, but with the passing of time, circumstances involving the subject matter change and the reasonableness of the given provision becomes questionable. The normal way of dealing with such a situation is by legislative measures, such as the amendment or abolition of the provision in question or enactment of a new law. It goes without saying that this is the most desirable way of dealing with such a situation.

2 This applies to the present case as well. It is understandable that concerning the Provision, half a century after its enactment, circumstances involving illegitimate children have changed, and an opinion which, from the viewpoint of further respecting the rights of children, casts doubts on its reasonableness has emerged. However, in order to deal with such a situation, amendment of the Provision by a legislative measure is the best way. Particularly since the Provision is an integral part of the system of inheritance and family, in order to amend it, the effect the amendment may have on related provisions and the compatibility with these provisions should be considered in the light of the entire system of inheritance and family; if necessary, other provisions should be amended or newly introduced at the same time. In addition, handling of inheritance matters based upon the Provision has been going on for many years and still continues. Presumably, preparation for the near future is being made on the same basis. Therefore, if the Provision is to be amended, the determination of the time of its taking effect and the scope of application must be examined carefully by taking into consideration the effect the change may have on the practice. All these can be achieved more properly by legislative activities of the Diet. In this way, changes in the perception of the general public can be reflected on the legislative process. It will also be possible to convince them of the goal of the amendment as well as the necessity of the amendment and to make these widely known.

3. However, if the reasonableness of a particular provision of law has been lost in a significant way, and has reached the level that in the light of Article 14, paragraph 1 of the Constitution, it cannot possibly be tolerated, its application must be immediately excluded by the court declaring that the given provision is unconstitutional without waiting for legislative measures to be taken. However, in relation to this Provision, it cannot be said that it has reached such a stage.

Dissenting opinion by justices Toshijiro Nakajima, Massao Ono, Hisako Takahashi, Yukinobu Ozaki, Mitsuo Endo (Justice Ozaki gives a supplementary opinion to the dissenting opinion)

1 We are of the opinion that the qualifying proviso to the first part of Article 900, subparagraph 4 of the Civil Code (hereafter, the Provision) which determines the statutory share of inheritance of an illegitimate child to be one half that of the legitimate child is against Article 14, paragraph 1 of the Constitution and therefore is null and void, and that the original decision should be quashed.

2. (The system of Inheritance and the Criteria of Constitutionality)

Although the system of inheritance is an outcome of an overall legislative policy which has taken into consideration various social conditions and balancing of interests of the members of the family, there is a constitutional limit to legislative discretion, and it is a matter of course that it can be reviewed from the viewpoint of constitutionality. Article 13 provides at the beginning that ‘all people are respected as individuals,’ and as a corollary, Article 24, paragraph 2 provides that ‘on matters concerning inheritance, and family, laws should be enacted upon the basis of the dignity of individuals and the essential equality of men and women.’ This should be fully respected when examining the constitutionality of a law related to family, including inheritance.

The fact that Article 14, paragraph 1 of the Constitution provides that ‘all people are equal under law, and shall not be discriminated against on the ground of race, creed, sex, social status or social origin, in political, social or economic relations’ is understood to mean that in the light of the dignity of individuals which is a fundamental idea of democracy, discriminative treatment against individuals should be eliminated. This provision does not prohibit all discrimination; it allows differentiation based upon a reasonable ground in accordance with the nature of the matter. What is reasonable should be examined in the light of the nature of the matter. In the present case, what is at issue is the constitutionality of determining the statutory share of an illegitimate child to be one half that of the legitimate child, although they are children of the same deceased. The case does not directly involve spiritual freedom, but the determination of reasonableness of discrimination at issue in the Pro vision basically depends on whether the emphasis should lie – whether the attribute of the illegitimate child as part of the married family or as an outsider should be stressed, or the equal status as an individual. The illegitimate child as a child of the deceased should be stressed. Therefore, this determination shall be made in accordance not only with the existence or non-existence of reasonableness as in cases involving property rights. Instead, examination of the existence of a higher level of reasonableness in relation to the reasonableness of the purpose of the law itself and its substantial relation with the means of achieving it is required. However, in this case, even the existence of simple reasonableness cannot be found.

3. (Unreasonableness of the Provision)

Concerning the reasonableness of the Provision, the majority opinion seems to presuppose that since the Civil Law adopts the system of marriage by law, the differentiation between a legitimate child born from intra-marital relations and an illegitimate child born from extra-marital relations emerges, and that there is a reasonable