ground to favour the former in contrast to the latter in determining the statutory share of inheritance. There is no disagreement as to the purpose of the law to respect marriage, but to find the differentiation in the share of statutory inheritance to be reasonable means that the emphasis is laid on the attribute of the illegitimate child that he or she is not part of the married family and the differentiation is justified by this fact. This is not compatible with Article 24, paragraph 2 of the Constitution, which provides that the respect for individual should be the basis of legislation in inheritance, as mentioned above. While it is the deceased who is responsible for the birth of an illegitimate child, the child has no responsibility, and his or her status cannot be altered by their intention or efforts. Discriminating by law against an illegitimate child, who is by no means responsible for the birth, on the ground of birth is in excess of the purpose of legislation, i.e. the respect for and protection of marriage; there is no substantial relationship between the purpose of the law and the means of achieving it, and therefore, it cannot be found to be reasonable.

The majority view that the purpose of the enactment of the Provision is to protect the interest of illegitimate children and that it thus has a reasonable basis does not coincide with the real effect the Provision has on society. The Provision is part of the Civil Code which is the fundamental law on individuals' life and family relations, and although it is not mandatory, it has a normative force and should be understood to reflect the basic idea of the law on illegitimate children. Even considering the fact that the Provision concerns the area of inheritance, the fact that the share of statutory inheritance of an illegitimate child is set at one-half that of the legitimate child is one of the significant causes creating the perception in the society that illegitimate children are inferior to legitimate children. If the purpose of the legislation of the Provision is to protect illegitimate children, although it may have been compatible with the environment in the society at the time of enactment, at least it is not compatible to the present state of the society, and lacks reasonableness.

4. (Changes in the legislation on illegitimate children, adoption of treaties, and the unreasonableness in the contemporary period)
It is naturally possible that a law the purpose of which was regarded as reasonable and its purpose and means compatible at the time of enactment, later, with the changes in the perception of society, general trends of legislation in foreign countries, developments in legislative reforms within Japan, and ratification of treaties, now has come to be regarded as having lost the reasonableness of its legislative purpose and the compatibility of the purpose with the means. In order to determine its constitutionality, together with the purpose of legislation at the time of enactment, changes in the facts which serve as the basis of legislation as well as the content of the treaties subsequently ratified should be taken into account. Although there was some opposition to this Provision at the time of its enactment, as indicated by the majority opinion, the purpose of the legislation was to protect marriage. At that time, it was common in other countries to differentiate between illegitimate children and legitimate children in inheritance by law. However, since then, particularly since the 1980s, the general trend of legislation in foreign countries has been to amend the law and to treat them in an equal way in the legal system including inheritance on the ground that differentiating between legitimate and illegitimate children is unreasonable.

Also in Japan, the Office of Counsellors of the Civil Law Bureau of the Ministry of Justice, based upon a discussion at the sub-committee on family law of the Civil Law Committee of the Legislative Advisory Council, published a tentative draft of a reform programme which included an amendment to the effect that the share of illegitimate children be made equal to that of legitimate children, since the Provision was questionable in the light of the idea of equality under law. This was not transformed into a bill, but at present, another draft programme of reform with a similar content has been published and the legislative activities are continuing.

Concerning international treaties, Article 26 of the International Covenant on the Civil and Political Rights which Japan ratified in 1979, provides that all people are equal under law, and enjoy the right to equal protection without any discrimination. For this goal, the law prohibits all kinds of discrimination, and guarantees equal and effective protection to all, against discrimination on any grounds including birth or other status. Article 2, paragraph 1 of the Convention on the Rights of the Child, which Japan ratified in 1994, provides that the signatory countries shall respect and ensure that all children within their jurisdiction the rights provided by the Treaty regardless of the birth or other status of the children, their parents or statutory guardians.

Considering the above-mentioned facts and the effect on the society which the Provision seemingly has, as well as other factors, at least at present, discriminating against illegitimate children in relation to inheritance for the purpose of respecting and protecting marriage is against the principles of the respect of individuals and their equality, lacks a substantial relationship between the purpose of legislation and means of achieving it. It is strongly questionable whether the Provision can be considered to be constitutional.

5 (Non-retrospective effect of the judgment of unconstitutionality)
Finally, it should be added that if the Provision is to be found unconstitutional, the effect of the judgment does not automatically have a retrospective effect. The Supreme Court, when deciding that a law is against the Constitution, may limit the effect of the judgment to the time after the judgment has been rendered by declaring that the judgment has no retrospective effect in cases where judgments had been rendered in the past on the premise that the given law was constitutional and valid, many people effected juristic acts on the basis of this law, there is an establishment of rights and duties, and therefore, overturning all these will harm legal stability in a significant way. We are convinced that the Provision is unconstitutional, but by expressly declaring that the effect of the decision does not have a retrospective effect on the reason for the decision, we should maintain the validity of the judgments and agreements which presupposed the validity of this Provision.
Supplementary dissenting opinion of Justice Yukinobu Ozaki

The reason why the Provision is unconstitutional is presented in the dissenting opinion. I believe the unconstitutionality of the Provision will become even clearer by adding the following points.

1. Equality under law forms the basis of a democratic society and must be respected to a maximum extent; discrimination without reasonable grounds is prohibited by the Constitution (Article 14, paragraph 1). The Provision determines the share of statutory inheritance of an illegitimate child at one-sixth of a legitimate child and thus differentiates between legitimate and illegitimate children. As the dissenting opinion pointed out, whether this is a reasonable discrimination allowed by Article 14, paragraph 1 of the Constitution or not should not be judged by the existence or non-existence of a simple reasonableness, but of a reasonableness of a higher level in the purpose of legislation and the substantial relationship between the purpose and the means of achieving it should be examined. For such examination, the level of reasonableness or necessity of the purpose of legislation itself on the one hand, and the nature, content, and extent of the rights or legal value which is to be restrained by discrimination on the other hand, should be fully considered, and whether there is a substantial link between them both should be determined.

2. The Constitution provides for marriage, but it is silent on what should be regarded as marriage. It is reasonable for the Civil Law to have selected marriage by law from among various forms of marriage. However, in relation to the substantive purpose of legislation, among various factors which are related to marriage by law, factors which are necessary and indispensable should be differentiated from those which are not. For those which are highly necessary, it may be allowed to restrict other values protected by the Constitution. Prohibition of bigamy is an example. However, for those which are not of high necessity, other values should have preference and restriction should not be allowed. The Provision is a supplementary provision which determines the way the estate should be divided when there is no testament. It is indeed a natural feeling of a person to leave the assets which are the fruit of his or her life to persons whom he or she loves, such as the spouse or children after the death of his or her own choice. The Civil Law respects the will of the deceased and leaves the distribution of the estate to the will of the deceased (the system of reserved share was introduced out of a different legislative consideration and will be discussed later). It is clear from the Civil Law that it did not recognize the necessity of imposing a certain policy from the viewpoint of marriage by law on the distribution of the estate. To whom and how the estate should be distributed is related to the protection of marriage by law and the married family, but are not necessary and indispensable to them. Otherwise, the Civil Law would naturally have introduced mandatory provisions on this matter. Thus, the very fact that the Provision is supplementary suggests that the problem of the protection of marriage by law and the married family and the provision on the share of inheritance have no direct connection. It is difficult to find that discrimination between legitimate and illegitimate children is necessary in the light of the purpose of the enactment of the Provision, and even if there is any connection, its level is minimal.

3. The effect of discrimination provided by the Provision should also be considered. The law explicitly provides that one has only half of the right which the other has, although they are children of the same person. The only reason is because the child was born between a couple who were not married. Historically, illegitimate children were regarded as inferior, but once the system of marriage by law was adopted, they were treated as persons in the shadow and despised even more. Indeed, it is often reported that they are discriminated against in an impermissible way in entering schools, finding jobs and marriage. The court in its judgment of the enactment of the Provision was of course not intended to have such unjustifiable results, but still in our country, there is a strong feeling that illegitimate children are inferior. The Provision is in line with this trend, but also is used as the basis of its justification.

The significance of the effect such a discriminatory trend has on the personal development of illegitimate children is obvious. The society which we endeavour to develop is a society in which people are respected as individuals and make the effort to perfect their personality based upon the right of self-determination, and are able to develop their talent to the maximum. If one is treated as a person without full personality, a person in the shadow of society from youth upwards, is it possible to develop into a full and happy personality? At least, it is a major hindrance to such development. A better society cannot be attained unless constant efforts are made to eliminate such negative aspects of the society. If the Constitution does not respect for individuals and provides for equality under law, and at the same time, facilitates discriminatory treatment which has a negative influence on the spiritual development of illegitimate children and continues to retain the provision which may serve as a justification of such treatment, it is an enormous contradiction.

Although there may be some benefits in the means of discrimination which the Provision set out in order to protect the system of marriage by law and the married family, it results in obstruction to a person's spiritual life. They do not bestow protection by harming fundamental and important interest of a modern society. Considering the fact that the Civil Law itself evidently takes the position that married and unmarried interest can be left to the party, this conclusion is inevitable.

4. The interest which the married family has in relation to the estate is said to be greater than that of a illegitimate child. Usually, it is argued that the family of the legitimate child has led a family life longer and thus, the affection is deeper, and has contributed more to the accumulation of the estate, and therefore, it is natural that the share of inheritance should be larger. However, each family relation is different, and it is extremely questionable whether the law should rely on such a generalisation, and as a result, infringes the basic rights of others. I would dare to point out that cases where illegitimate relations emerge may be an exceptional situation to the general view. If, conceding to such generalisation, the share of inheritance by the married family should be made larger, there is a means to achieve that purpose without infringing other person's rights and
casting doubts on constitutionality. It is sufficient to use the testament.
Basically, disposal of the inheritance estate is left to the will of the deceased and even if it is disposed in a way which is against the expectation of the family of the deceased, no one can object. This is the same with the gift during life. What is decisive in the end is the will of the deceased and whether the family was linked by affection which genuinely deserves such treatment. This is the essence of inheritance, and provisions on the statutory share of inheritance are merely a means of convenience. At the time of enactment, when sufficient attention was not paid to fundamental human rights, the Provision was accepted without any serious doubt. If one considers without prejudice the fact that the Provision unreasonably discriminates against illegitimate children and the seriousness of the harm resulting from this discrimination, and, at the same time, takes into account that the benefit which is to be gained by the Provision is not related to public interest, but is of the nature which can be determined by the will of the party alone, one cannot but deny the validity of the Provision which is a cause of increasing the handicap of illegitimate children.
5. For the democratic society which we pursue, equality under law is a significant basis. Since the purpose of enactment of the Provision has little reasonableness or necessity, the resulting sacrifice is significant. Furthermore, even without the Provision, there is a means to attain the result which is suitable for specific circumstances. It is totally impossible to acknowledge substantial relationship between the purpose of enactment of the Provision and discrimination against illegitimate children. The Provision which compels a meaningless sacrifice should be regarded as being unconstitutional.

Presiding Judge
Justice Ryohachi Kusaba
Justice Seiichi Ohori
Justice Itsuo Sonobe
Justice Toshijiro Nakajima
Justice Tsuneo Kabé
Justice Katsuya Onishi
Justice Motoo Ono
Justice Toru Miyoshi
Justice Masao Ono
Justice Hideo Chikusa
Justice Shigebaru Negishi
Justice Hisako Takahashi
Justice Yukinobu Ozaki
Justice Shinichi Kawai
Justice Mitsuo Endo

(Translated by Sir Ernest Satow Chair of Japanese Law, University College, University of London)
The Japan NEWS

NATIONAL
Bar to kids’ citizenship ruled illegal
Supreme Court opens door to unwed foreign moms' children

BY JUN HONGO

ARTICLE HISTORY: JUN 5, 2006

In a ruling sure to affect thousands of others born out of wedlock to non-Japanese mothers, the Supreme Court on Wednesday granted 10 children of Filipino women the right to Japanese nationality.

Saying it led to unreasonable discrimination, 12 of the 15 justices on the top court's grand bench ruled unconstitutional a provision in the Nationality Law that states that such children can only become citizens of the mother’s home country.

The children, aged between 8 and 14, were all born out of wedlock and recognized by their Japanese fathers only after they were born. Under the law, had the fathers stepped forward before birth, the children would have been deemed Japanese.

The Tokyo High Court had denied them Japanese nationality based on this stipulation in the Nationality Law. It is believed that in many cases, the Japanese fathers were married to other women when the mothers became pregnant with their children.

In overturning the high court decision, Supreme Court Chief Justice Nire Shimada ruled that the provision in the law resulted in "discrimination without any rational reason" and thus violated Article 14 of the Constitution, which stipulates equality under the law.

In finding unlawful the clause requiring that the parents be married, the ruling stated, "The disadvantages caused to the children by this biased treatment cannot be disregarded."

The case marks the eighth time the Supreme Court has found a law unconstitutional. Most recently, in September 2005, the top court ruled the election law unconstitutionally denied full voting rights to Japanese living abroad.

Following Wednesday’s decision by the top court, the Diet and the Justice Ministry are expected to begin talks on revising the Nationality Law to grant full citizenship to children with similar backgrounds, estimated to number tens of thousands.

Lawyer Genichi Yamaguchi, who represented one of the plaintiffs, called the ruling "highly significant."

"The verdict clearly acknowledged that (the law) was irrationally discriminatory," Yamaguchi told reporters after the ruling.

"I would like to achieve my dream, which can come true now that I am Japanese. I want to become a police officer," plaintiff Masami Tapiru, 10, told reporters after the ruling.

Her mother, Rosanna, also thanked her lawyers and supporters for helping secure her child's human rights.

Lawyer Hironori Kondo, who represented the family, told reporters he would contact the Justice Ministry for instructions on how to proceed with obtaining Japanese nationality for his client.

"This is a huge ruling that affects many foreign nationals residing in Japan," Kondo said, adding he expected a considerable number of children to surface and seek Japanese nationality following Wednesday’s ruling.

An article in the Nationality Law, enacted in 1950, states that a child born out of wedlock to a Japanese man and foreign woman can only obtain Japanese nationality if the father recognizes paternity before the baby is born, or if the couple marry before the child turns 20.

The 10 plaintiffs' Japanese fathers, none of whom married the mother, acknowledged paternity only after their children were born. All the children have Philippine citizenship, and live with permanent resident status in the Kanto and Tohoku regions.

Although the children attend local schools and speak Japanese, they do not have access to full voting rights nor can they enter or leave Japan freely, the defense lawyers have said. "It is a great discrimination to deny nationality to these children, based on the fact that their parents are not married. Such conditions cannot be controlled by the children," they argued in court.

The 10 children filed suit with the Tokyo District Court in two separate groups, arguing that the law violated their constitutional right to impartiality.

The court ruled in favor of the children in 2005 and 2006, acknowledging that the clause "obstructs the constitutional right to equality" and has put the plaintiffs at "an immense disadvantage."

But the Tokyo High Court overturned the rulings on grounds that the Nationality Law is justified and does not interfere with the children's constitutional right to equality. The high court stated that the decision to grant nationality is "an inherent right of the state," and that it did not have the authority to award the children nationality.

The Civil Affairs Bureau of the Justice Ministry has argued in court that there are "rational reasons to the legal clause," which it said are backed by historical and cultural precedent.

The government has also said the law promotes legal marriages, adding that it would be inconsistent with the judicial duty of the court to find a law unconstitutional and involve itself with legislative matters.
Judgment concerning the relationship between a distinction in granting Japanese nationality caused by Article 3, para. 1 of the Nationality Act which provides that a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth may acquire Japanese nationality only if the child has acquired the status of a child born in wedlock as a result of the marriage of the parents, and Article 14, para. 1 of the Constitution.

Case name: Case to seek revocation of the disposition of issuance of a written deportation order

Result: Judgment of the Grand Bench, quashed and decided by the Supreme Court

Court of the Second Instance: Tokyo High Court, Judgment of February 28, 2006

Summary of the judgment:
1. Article 3, para. 1 of the Nationality Act provides that a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth may acquire Japanese nationality only if the child has acquired the status of a child born in wedlock as a result of the marriage of the parents, thereby causing a distinction in granting Japanese nationality, and in 2003, at the latest, this distinction was in violation of Article 14, para. 1 of the Constitution.

2. A child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth shall acquire Japanese nationality if the child satisfies the requirements for acquisition of Japanese nationality prescribed in Article 3, para. 1 of the Nationality Act, except for the requirement of acquiring the status of a child born in wedlock as a result of the marriage of the parents. (There are concurring opinions and dissenting opinions.)

Main text of the judgment

Reasons

Concerning Reasons I to III for final appeal argued by the appeal counsel, YAMAGUCHI Genichi

1. Outline of the case
The appellant of final appeal, who was born to a father who is a Japanese citizen and a mother who has nationality of the Republic of the Philippines, a couple having no legal marital relationship, submitted a notification for acquisition of Japanese nationality to the Ministry of Justice in 2003 on the grounds that he/she was acknowledged by the father after birth, but the minister determined that the appellant had not acquired Japanese nationality due to the failure to meet the requirements for acquisition of Japanese nationality. In this case, the appellant sued the appeal, seeking a declaration that the appellant has Japanese nationality.

2. Concerning Article 2, Item 1 and Article 3 of the Nationality Act
Article 2, Item 1 of the Nationality Act provides that a child shall be a Japanese citizen if the father or mother is a Japanese citizen at the time of birth, applying the principle of jus sanguinis (the principle of granting nationality to a child based on the child's blood relationship with the father or mother) when determining the acquisition of Japanese nationality by birth. Therefore, if a child has a legal parent-child relationship with a Japanese father or Japanese mother at the time of birth, the child shall acquire Japanese nationality by birth.

Article 3, para. 1 of the Nationality Act provides that a child who has acquired the status of a child born in wedlock as a result of the marriage of the parents and acknowledgment by either parent and who is aged under 20 (excluding those who have been Japanese citizens) may acquire Japanese nationality by making a notification to the Minister of Justice, if the father or mother who has acknowledged the child was a Japanese citizen at the time of the child's birth, and such father or mother is currently a Japanese citizen or was a Japanese citizen at the time of his/her death.

Article 2, Item 1 of the Nationality Act (Acquisition of Japanese Nationality by Birth)
A child shall be a Japanese citizen in the following cases:
(i) Where the father or mother is a Japanese citizen at the time of birth.

Article 81 of the Constitution
The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

The judgment of prior instance is quashed. The appeal to the court of second instance filed by the appellee of final appeal is dismissed. The appellee of final appeal shall bear the cost of the appeal to the court of second instance and the cost of the final appeal.

Concerning Reasons I to III for final appeal argued by the appeal counsel, YAMAGUCHI Genichi

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Article 3, para. 1 of the Nationality Act provides that a child who has acquired the status of a child born in wedlock as a result of the marriage of the parents and acknowledgment by either parent and who is aged under 20 (excluding those who have been Japanese citizens) may acquire Japanese nationality by making a notification to the Minister of Justice, if the father or mother who has
acknowledged the child was a Japanese citizen at the time of the child’s birth, and such father or mother is currently a Japanese citizen or was a Japanese citizen at the time of his/her death.” Para.2 of said Article provides that “A person who has made a notification under the provision of the preceding paragraph shall acquire Japanese nationality at the time of notification.” Article 3, para.1 of said Act addresses cases where either the father or mother has acknowledged the child. However, it is construed that a child born out of wedlock to a Japanese mother is to have a legal parent-child relationship with the mother by birth, and a child acknowledged by a Japanese father before birth is to have a legal parent-child relationship with the father upon birth, and in both cases, the child shall acquire Japanese nationality by birth under Article 2, item 1 of said Act. Consequently, Article 3, para.1 of said Act is not applied only to a child born to a couple of a Japanese father and a non-Japanese mother having no legal marital relationship and who was not acknowledged by the father before birth.

3. Judgment of prior instance, etc.
The appellant alleged his/her acquisition of Japanese nationality under Article 2, item 1 of the Nationality Act, and also alleged that he/she has acquired Japanese nationality by submitting a notification for acquisition of Japanese nationality to the Minister of Justice, on the grounds that Article 3, para.1 of said Act, which provides that in the case of a child born out of wedlock to a Japanese father, only such child who has acquired the status of a child born out of wedlock as a result of the marriage of the parents may acquire Japanese nationality by making a notification to the Minister of Justice, is in violation of Article 14, para.1 of the Constitution.

While denying the appellant’s acquisition of Japanese nationality under Article 2, para.1 of the Nationality Act, the judgment of prior instance held as follows with regard to the allegation concerning Article 3, para.1 of said Act. Every supposing that the provision of said paragraph should be in violation of Article 14, para.1 of the Constitution and therefore void, this does not lead to creating a new system for granting Japanese nationality to a child born out of wedlock who only satisfied the requirement of acknowledgment by a Japanese father after birth (but does not satisfy the requirement of the marriage of the parents), nor does it cause the appellant to automatically acquire Japanese nationality. Furthermore, since the Nationality Act must be subject to strict literal construction, the court is never permitted to put an analogue or broad construction on the provisions of said Act contrary to the lawmakers’ intention, and if the court, under the name of such legal construction, creates any requirement for acquisition of Japanese nationality that is not stipulated in the Act, this is equal to the case where the court performs a legislative act and therefore unacceptable. Therefore, the appellant’s power be deemed to have acquired Japanese nationality according to an analogue or broad construction of the provision of Article 3, para.1 of said Act. In conclusion, the judgment of prior instance dismissed the appellant’s claim.

The appeal counsel can be construed to be alleging as follows. Article 3, para.1 of the Nationality Act provides that a child born out of wedlock to a Japanese father may acquire Japanese nationality only if the child has acquired the status of a child born in wedlock as a result of the marriage of the parents, and this provision makes a distinct between a child who satisfies this requirement and a child born out of wedlock who is also acknowledged by a Japanese father but whose parents have no legal marital relationship, in that the latter child would lose the Japanese nationality even where he/she has satisfied other requirements prescribed in said paragraph (hereinafter referred to as the “Distinction”), and the existence of the Distinction is in violation of Article 14, para.1 of the Constitution. The appeal counsel further alleges that the provision of Article 3, para.1 of the Nationality Act is unconstitutional and therefore void only with respect to the part that causes the Distinction, and the appellant should be granted Japanese nationality under the remaining part of the provision of said paragraph. We therefore make examination on these points.

(1) Article 14, para.1 of the Constitution provides for equality before the law, and as this court determined in the past cases, this provision should be construed to mean that discriminatory treatment by law should be prohibited unless it has a reasonable basis that is in line with the nature of the matters concerned (See 1962 (O) No. 1472, Judgment of the Grand Bench of the Supreme Court of October 27, 1964, Minshu Vol. 18, No. 4, at 676, 1970 (A) No. 1310, Judgment of the Grand Bench of the Supreme Court of April 4, 1973, Kaishu Vol. 27, No. 3, at 265, etc.).

Article 10 of the Constitution provides that “The conditions necessary for being a Japanese national shall be determined by law.” In accordance with this provision, the Nationality Act provides for the requirements for acquisition and loss of Japanese nationality. The provision of Article 10 of the Constitution can be construed to mean that since nationality is the qualification for being a member of a particular state, and when specifying the requirements for acquisition or loss of nationality, it is necessary to take into consideration various factors concerning each state, including historical backgrounds, tradition, and political, social and economic circumstances, the determination on the content of these requirements should be left to the discretion of the legislative body. However, if any distinction caused by the requirements under a law concerning acquisition of Japanese nationality that are specified based on such legislative discretion amounts to discriminatory treatment without reasonable grounds, needless to say, raises a question of violation of Article 14, para.1 of the Constitution. In other words, where a reasonable basis cannot be found in the legislative purpose of making such a distinction even if the discretionary power vested in the legislative body is taken into consideration, or where a reasonable relevance cannot be found between the distinction in question and the aforementioned legislative purpose, the distinction is deemed to constitute discrimination without reasonable grounds and to violate the provision of Article 14, para.1 of the Constitution.
Japanese nationality is the qualification for being a member of the State of Japan, and it is also an important legal status that means a lot to people in order to enjoy the guarantee of fundamental human rights, obtain public positions or receive public benefits in Japan. On the other hand, whether or not a child can acquire the status of a child born in wedlock as a result of the marriage of the parents is a matter that depends on an act relating to the personal status of the parents, which cannot be affected by the child's own intention or efforts. Therefore, it is necessary to deliberately consider whether or not there are any reasonable grounds for causing a distinction in terms of the requirements for acquisition of Japanese nationality based on such matter.

(2)(a) Under the system for acquisition of Japanese nationality based on notification prescribed in Article 3 of the Nationality Act, a child born to a couple of a Japanese father and a non-Japanese mother having no legal marital relationship may acquire Japanese nationality by making a notification to the Minister of Justice if the child satisfies the requirements prescribed in para.1 of said Article, including acquisition of the status of a child born in wedlock as a result of the marriage of the parents and the acknowledgement by either parent (hereinafter referred to as "legitimation"). This system was introduced using the revision to the Nationality Act by Act No. 45 of 1984 for the purpose of supplementing the basic principle of said Act, jus sanguinis, by achieving a balance (in treatment) with a child born in wedlock to a Japanese father and a non-Japanese mother who may acquire Japanese nationality by birth. Article 3, para.1 of the Nationality Act does not allow a child born out of wedlock to a Japanese father and a non-Japanese mother to acquire Japanese nationality just by satisfying the requirement of being acknowledged by the father after birth, but it allows acquisition of Japanese nationality only when legitimation has taken place. This limitation is the cause of the Distinction. The primary reason that this provision was included in the Act can be construed as that in the case of a child acknowledged by a Japanese father after birth, when the child has acquired the status of a child born in wedlock as a result of the marriage of the parents, the child's life is united with the life of the Japanese father and the child obtains a close tie with Japanese society through his/her family life, and therefore it is appropriate to grant Japanese nationality to such a child. Furthermore, at the time when the revision was made to the Nationality Act, many states that adopted the principle of jus sanguinis made both acknowledgment and legitimation as requirements for granting nationality to children born to fathers who are their citizens. This may be another reason that the Distinction was introduced as a reasonable one.

(b) Even where a child is born to a Japanese citizen as his/her parent by blood, if the child does not acquire Japanese nationality by birth, he/she is likely to subsequently develop a close tie with a foreign state which is his/her state of nationality. It is construed that Article 3, para.1 of the Nationality Act, while keeping the basic principle of the Act, the principle of jus sanguinis, provides for certain requirements that can be the indexes by which to measure the closeness of the tie between the child and Japan, in addition to the existence of a legal parent-child relationship with a Japanese citizen. In order to achieve this purpose, requirements such as legitimation were introduced and this caused the Distinction. We should note that the aforementioned legislative purpose itself, which is the cause of the Distinction, has a reasonable basis.

Furthermore, according to the socially accepted views and under the social circumstances at the time when the provision of Article 3, para.1 of the Nationality Act was established, there may have been adequate reasons to consider that in the case of a child born to a Japanese father and a non-Japanese mother, the fact of the legal marriage of the parents would show the existence of the child's close tie with Japan developed through his/her family life with the Japanese father. In light of the aforementioned trends in the nationality law systems enforced in foreign states at the time of introduction of the aforementioned paragraph, a certain reasonable relevance can be found between the provision that requires legitimation in addition to acknowledgment for granting Japanese nationality, and the legislative purpose mentioned above.

(c) However, since then, along with the changes in social and economic circumstances in Japan, the views regarding family lifestyles, including the desirable way of living together for husband and wife, as well as those regarding parent-child relationships have also varied, and today, the realities of family life and parent-child relationships have changed and become diverse, as seen by the fact that the percentage of children born out of wedlock in the total number of newborn children has been increasing. In combination with these changes in the socially accepted views and social circumstances, as Japan has recently become more international and international exchange has been enhanced, the number of children born to Japanese fathers and non-Japanese mothers has been increasing. In the case of children whose parents are couples of Japanese citizens and foreign citizens, the realities of their family lifestyles (e.g., whether or not the child lives with a Japanese parent) as well as the views regarding a legal marriage and the ideal form of parent-child relationship based thereon are more complicated and diverse than in the case of children whose parents are both Japanese citizens, and in the former case, it is impossible to measure the degree of closeness of the tie between children and Japan just by examining whether or not their parents are legally married. Taking all of these points into consideration, it does not always match up to the realities of family life of today to determine that a child born to a Japanese father and a non-Japanese mother has a close tie with Japan to a sufficient extent for granting him/her Japanese nationality only after the Japanese father became legally married to the non-Japanese mother. In addition, it seems that other states are moving toward scrapping discriminatory treatment by law against children born out of wedlock, and in fact, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, which Japan has ratified, also contain such provisions to the effect that children shall not be subject to discrimination of any kind because of birth.

Furthermore, according to the provision of Article 3, para.1 of the Nationality Act which was established, states that had previously required legitimation for granting nationality to
children born out of wedlock to fathers who are their citizens have revised their laws in order to grant nationality if, and without any other requirement, it is found that the father–child relationship with their citizens is established as a result of acknowledgement. In light of these changes in social and other circumstances at home and abroad, we should say that it is now difficult to find any reasonable relevance between the policy of maintaining legitimation as a requirement to be satisfied when acquiring Japanese nationality by making a notification after birth, and the aforementioned legislative purpose.

(c) On the other hand, as explained above, the Nationality Act adopts the principle of jus sanguinis, and while taking a stance of granting Japanese nationality to a child by considering that the existence of a legal parent–child relationship with the father or mother who is a Japanese citizen indicates that the child has a close tie with Japan, provides that a child shall acquire Japanese nationality if the father or mother is a Japanese citizen at the time of birth (Article 2, item 1). As a result, not only a child born in wedlock to a Japanese father or mother but also a child born out of wedlock and acknowledged by a Japanese father before birth and a child born out of wedlock to a Japanese mother are to acquire Japanese nationality by birth, whereas only a child born out of wedlock who is acknowledged by a Japanese father but has not acquired the status of a child born in wedlock as a result of legitimation, although such a child is also born to a Japanese citizen as his/her parent by blood and has a legal parent–child relationship with a Japanese citizen, is unable to acquire Japanese nationality by birth or even by making a notification under Article 3, para.1 of said Act. We should say that due to such distinction, a child born out of wedlock who satisfies only the requirement of being acknowledged by a Japanese father after birth, alone, is subject to considerable discriminatory treatment in acquiring Japanese nationality.

Considering that acquisition of Japanese nationality means a lot to people in order to enjoy the guarantee of fundamental human rights and other benefits in Japan, we should say that the disadvantages that children would suffer from the above-mentioned discriminatory treatment cannot be overlooked, and we must say that we can hardly find reasonable relevance between such discriminatory treatment and the aforementioned legislative purpose. In particular, between children acknowledged by Japanese fathers before birth and those acknowledged after birth, it is difficult to find a difference in general in terms of the level of the tie with Japanese society developed through their family life with Japanese fathers, and it is also difficult to explain the reasonableness of the policy of applying the above-mentioned distinction when granting Japanese nationality from the perspective of the level of the tie with Japanese society. In addition, under the Nationality Act that adopts the principle of jus sanguinis, if, despite the fact that children born out of wedlock to Japanese mothers can acquire Japanese nationality by birth, children born out of wedlock who satisfy only the requirement of being acknowledged by Japanese fathers after birth are not allowed to acquire Japanese nationality even by making a notification, we should say that such a situation is somewhat inconsistent with the basic stance of the Act from the perspective of gender equality.

(e) The Nationality Act provides that such a child born out of wedlock as mentioned above, although he/she also has a legal parent–child relationship with a Japanese citizen, alone, is not allowed to acquire Japanese nationality by birth or by making a notification unless the marriage of the parents—or an act relating to the personal status of the parents—that the child can do nothing about—has taken place. If we also take into consideration the circumstances described in (c) and (d) above, we must conclude that in order to achieve the legislative purpose of granting Japanese nationality only to persons who have a close tie with Japan, this provision applies a means that goes far beyond the bounds where reasonable relevance with such legislative purpose can be found, even if the discretionary power vested in the legislative body is taken into account. As a result, said provision should be deemed to cause unreasonable discrimination.

(f) It is true that there is a way for a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth, to acquire Japanese nationality through simplified naturalization prescribed in Article 8, Item 1 of the Nationality Act. However, since naturalization depends on the discretion of the Minister of Justice, and even a person who satisfies the requirements prescribed in said item may not automatically acquire Japanese nationality, we cannot deny the lack of reasonable relevance between the Distinction and the aforementioned legislative purpose by regarding simplified naturalization as a substitute for acquisition of Japanese nationality.

We should add that if Japanese nationality is to be granted to a child by reason of acknowledgment by a Japanese father before legitimation takes place, fictitious acknowledgment is likely to occur in an attempt to acquire Japanese nationality. The necessity to prevent acquisition of Japanese nationality by way of a fictitious act may be another reason for the Distinction. However, even though such likelihood exists, the policy of making it a requirement for acquisition of Japanese nationality to acquire the status of a child born in wedlock as a result of the acknowledgment of the parents cannot necessarily be said to have reasonable relevance with the necessity to prevent acquisition of Japanese nationality by way of a fictitious act, and it is difficult to accept this likelihood as a reason to overturn our conclusion mentioned in (e) above.

(3) For the reasons stated above, we should conclude that although the legislative purpose itself from which the Distinction is derived has a reasonable basis, reasonable relevance between the Distinction and the legislative purpose no longer exists due to the changes in social and other circumstances at home and abroad, and today, the provision of Article 3, para.1 of the Nationality Act imposes an unreasonable and excessive requirement of acquiring Japanese nationality. Moreover, since the Distinction involves another distinction described in (2)(d) above, we must say that it causes a child born out of wedlock who satisfies only the requirement of being acknowledged by a Japanese father after birth to suffer disadvantageous discriminatory treatment in acquiring
Japanese nationality, and even if we take into consideration the discretionary power vested in the legislative body when specifying requirements for acquisition of Japanese nationality, we can no longer find any reasonable relevance between the consequence arising from the Distinction and the aforementioned legislative purpose. Consequently, it can be construed that the Distinction, by the time when the appellant submitted a notification for acquisition of Japanese nationality to the Minister of Justice, at the latest, had lost reasonable relevance with the legislative purpose, even if the discretionary power vested in the legislative body is taken into account. Therefore, we must conclude that at the time mentioned above, the Distinction amounted to unreasonable discrimination, and the provision of Article 3, para.1 of the Nationality Act was in violation of Article 14, para.1 of the Constitution in that the provision caused the Distinction.

5. Whether or not it is permissible to grant Japanese nationality to the appellant on the presupposition of the unconstitutional condition arising from the Distinction
(1) As explained above, we must say that the provision of Article 3, para.1 of the Nationality Act, in that it causes the Distinction, has been in violation of Article 14, para.1 of the Constitution since the time mentioned above, at the latest. However, if, just because Article 3, para.1 of the Nationality Act imposed an excessive requirement for acquiring Japanese nationality and thereby caused the Distinction, the whole part of the provision of Article 3, para.1 of the Nationality Act is made void in order to eliminate the unconstitutional condition arising from the Distinction, and the chance to acquire Japanese nationality by making a notification is denied even for a child who is legitimated (hereinafter referred to as a "legitimated child"), this would ignore the purpose of said Act that introduced the system for acquisition of Japanese nationality after birth in order to supplement the principle of jus sanguinis, and it can hardly be imagined as the lawmakers' reasonable intention, and therefore we must say that such legal construction is unacceptable. Therefore, it follows that while presupposing the existence of the provision of Article 3, para.1 of the Nationality Act under which a legitimated child may acquire Japanese nationality by making a notification, it is necessary to give relief to people who are subject to unreasonable discriminatory treatment due to the Distinction, thereby correcting the unconstitutional condition arising from the Distinction.
(2) From this viewpoint, we examine how this problem can be corrected. In light of the demand of equal treatment under Article 14, para.1 of the Constitution and the basic principle under the Nationality Act, the principle of jus sanguinis there is no choice but to enforce the provision of Article 3, para.1 of said Act which allows acquisition of Japanese nationality after birth while keeping the principle of jus sanguinis, in terms of its purpose and content, upon a child born out of wedlock to a Japanese father and a non-Japanese mother who satisfies only the requirement of being acknowledged by the father after birth. In other words, by considering that even such a child is allowed to acquire Japanese nationality by making a notification if he/she satisfies the requirements prescribed in said paragraph except for the requirement of acquiring the status of a child born in wedlock as a result of the marriage of the parents, it may be possible to put a constitutional and reasonable construction on the provision of said paragraph as well as the provisions of said Act, and we should say that such construction is also appropriate from the perspective of opening a path to direct relief for people subject to unreasonable discriminatory treatment due to the Distinction.

The aforementioned construction is drawn by, in order to correct the unconstitutional defect arising from the Distinction, avoiding making void the provision of Article 3, para.1 of the Nationality Act as a whole and putting a reasonable construction on it while excluding the part that imposes an excessive requirement and causes the Distinction, and the outcome of this construction does not go beyond granting Japanese nationality under the same requirements as those applied to legitimated children. This construction is in line with the purpose and objective of the provision of said paragraph in that it is intended to grant Japanese nationality to a child born out of wedlock after birth if the child satisfies the requirement under the principle of jus sanguinis (having a legal parent-child relationship with a Japanese citizen), and also satisfies other requirements that are the indexes by which to measure the child's close tie with Japan (e.g. the father is currently a Japanese citizen). If it is argued that this construction is impermissible because it is equal to the case where the court creates a new requirement for acquisition of Japanese nationality that is not stipulated by law and performs a legislative act that should originally be performed by the Diet, we should say that such an argument is wrong even if we take into consideration the possibility that there is any other reasonable option for legislating the aforementioned requirements for acquisition of Japanese nationality. Consequently, we should conclude that a child born out of wedlock to a Japanese father and a non-Japanese mother acknowledged by the father after birth shall be allowed to acquire Japanese nationality under Article 3, para.1 of the Nationality Act if the child satisfies the requirements prescribed in said paragraph, except for the requirement of acquiring the status of a child born in wedlock as a result of the marriage of the parents.

(3) According to the facts legally determined by the court of prior instance, we can find that the appellant satisfies all of the requirements prescribed in Article 3, para.1 of the Nationality Act that should be satisfied based on the legal construction mentioned above. Therefore, it is appropriate to construe that by submitting the notification for acquisition of Japanese nationality to the Minister of Justice, the appellant has acquired Japanese nationality pursuant to the provision of Article 3, para.1 of the Nationality Act.

6. Conclusion
As mentioned above, the appellant is found to have acquired Japanese nationality pursuant to the provision of Article 3, para.1 of the Nationality Act. The determination of the court of prior instance, which dismissed the appellant's claim on grounds that are contrary to this reasoning, abrogates the provisions of Article 14, para.1 and Article 81 of the
Constitution and the provisions of the Nationality Act. The appeal counsel’s arguments are well-grounded in alleging such misconstruction, and the judgment of prior instance should inevitably be quashed. According to our holdings shown above, the appellant’s claim is well-grounded, and the judgment of first instance that upheld the claim is justifiable, and therefore the appeal to the court of second instance filed by the appellee of final appeal should be dismissed.

Therefore, the judgment has been rendered in the form of the main text by the unanimous consent of the Justices, except that there are a dissenting opinion by Justice YOKO Tazuko, Justice TSUNO Osamu, and Justice FURUTA Yuko and a dissenting opinion by Justice KAINAKA Tatsuo and Justice HORIGOME Yukio. There are also concurring opinions by Justice IZUMI Tokigi, Justice IMAI Fumie, Justice NASU Kohei, Justice WAKUI Norio, Justice TAHARA Mutsuo and Justice KONDO Takaharu, respectively, and an opinion by Justice FUJITA Tokiyasu.

The concurring opinion by Justice IZUMI Tokigi is as follows. 1. Article 3, para.1 of the Nationality Act requires “marriage of the parents” for granting Japanese nationality to children who were born to Japanese citizens as their fathers or mothers and are ineligible for application of Article 2 of said Act, thereby excluding children born out of wedlock who are acknowledged by fathers after birth but who do not satisfy the requirement of “marriage of the parents” from the scope of children eligible to acquire Japanese nationality. This exclusion constitutes discrimination in granting Japanese nationality against children born out of wedlock and acknowledged by Japanese fathers after birth, by reason of their social status as children born out of wedlock and the gender of their Japanese parents, i.e. the fact that it is their fathers (not their mothers) that are Japanese citizens.

The interest affected by this discrimination is Japanese nationality, a fundamental legal status, and the reasons for the discrimination are social status and gender, which are indicated as prohibited reasons for discrimination under Article 14, para.1 of the Constitution. Therefore, in order to determine that this discrimination is not in violation of said paragraph, the legislative purpose of Article 3, para.1 of the Nationality Act must be important for the State of Japan, and there must be actual and substantial relevance between the legislative purpose and the means to achieve the purpose, i.e. requiring the acquisition of the status of a child born in wedlock as a result of the “marriage of the parents.”

2. The legislative purpose of Article 3, para.1 of the Nationality Act is to, in accordance with the principle of jus sanguinis, grant Japanese nationality to children who were born to Japanese citizens as their fathers or mothers and are ineligible for application of Article 2 of said Act, on condition that they have close connections with Japanese society. This legislative purpose per se can be deemed to be justifiable.

3. Article 3, para.1 of the Nationality Act, as a means to achieve the legislative purpose mentioned above, provides that Japanese nationality shall be granted only to “a child who has acquired the status of a child born in wedlock as a result of the marriage of the parents” and the acknowledgment by either parent,” thereby excluding children born out of wedlock and acknowledged by fathers after birth from the scope of children eligible to acquire Japanese nationality.

However, the requirement of “marriage of the parents” cannot be fulfilled by the will of the child or the Japanese father alone, and it gives rise to children who are born to Japanese citizens as their fathers but unable to acquire Japanese nationality by the will of their fathers alone. On the other hand, children born out of wedlock and acknowledged by Japanese fathers after birth, even through they have not acquired the status of a child born in wedlock as a result of the “marriage of the parents,” have legal parent-child relationships with their fathers and have the duty to support each other, and in this respect, they actually have connections with Japanese society. The closeness of the connections with Japanese society of such children born out of wedlock is not so different from that of children born out of wedlock to Japanese mothers, who are eligible for application of Article 2 of the Nationality Act, or of children born out of wedlock and acknowledged by Japanese fathers before birth. Furthermore, in the case of children whose parents are in common-law marriage or those who are in effect the custody of their fathers, it is difficult to say that the connections with Japanese society of children born out of wedlock and acknowledged by Japanese fathers after birth are substantially inferior to such connections of children born in wedlock. In fact, these children born out of wedlock have the potential to develop their connections with Japanese society upon being acknowledged by fathers. In today’s Japanese society where family relationships are becoming more diversified, I must say that it is a stereotyped and rigid way of thinking to consider that the connections between the aforementioned children born out of wedlock and Japanese society are weak unless they are supported by the “marriage of the parents.” Consequently, I can hardly find actual and substantial relevance between the aforementioned legislative purpose and the means to achieve this purpose, i.e. granting Japanese nationality only to, among children acknowledged by Japanese fathers after birth, those who have acquired the status of a child born in wedlock as a result of the “marriage of the parents.”

In conclusion, the discrimination in granting Japanese nationality created by Article 3, para.1 of the Nationality Act against children born out of wedlock, which constitutes discrimination by reason of the children’s social status and the parent’s gender, cannot be deemed to have sufficiently justifiable grounds, and therefore should inevitably be deemed to be in violation of Article 14, para.1 of the Constitution.

4. I believe that the appellant should be granted Japanese nationality by applying the provision of Article 3, para.1 of the Nationality Act, except for the part requiring the “marriage of the parents.”

The gist of the provision of Article 3, para.1 of the Nationality Act is to grant Japanese nationality to children
who were born to Japanese citizens as their fathers or mothers and are ineligible for application of Article 2 of said Act, and the "marriage of the parents" is merely one of the requirements to be satisfied to achieve this. Therefore, said gist of the provision should be maintained to the greatest possible extent even if the part requiring the "marriage of the parents" is unconstitutional, and this is what the lawmakers would have intended. Furthermore, applying Article 3, para.1 of the Nationality Act in this manner conforms to the gist of Article 24, para.3 of the Covenant on Civil and Political Rights which provides that "Every child has the right to acquire a nationality" and that of Article 7, para.1 of the Convention on the Rights of the Child. However, application of Article 3, para.1 of the Nationality Act in the manner mentioned above may not be permissible when there is a clear probability that the Diet, from the legislative perspective, will not maintain the provision of said paragraph, with the part requiring the "marriage of the parents" removed therefrom. The most possible alternative to removing the part requiring the "marriage of the parents" from the provision of Article 3, para.1 of the Nationality Act may be repealing said Article as a whole. However, this option will bring about more serious discrimination than that under the existing Act against children born out of wedlock and acknowledged by Japanese fathers after birth, and it seems unlikely that the Japanese Diet will choose this opinion, despite its obligation to comply with Article 24 of the Covenant on Civil and Political Rights which provides that every child shall be protected from any discrimination as to birth or the parent's gender. The next possible alternative may be also imposing the requirement of "marriage of the parents" on children born out of wedlock to Japanese mothers, who are eligible for application of Article 2 of the Nationality Act, and children born out of wedlock and acknowledged by Japanese fathers before birth. The Diet is also unlikely to choose this option because it will bring about undue discrimination against all children born out of wedlock, which is contrary to the principle of equality under the Constitution. There is also another possible alternative, imposing a new requirement of proving a child's close connections with Japanese society, such as "having been born in Japan," "retaining a domicile in Japan for a certain period of time," or "sharing the same family budget with a Japanese citizen." This option imposes an additional requirement from a viewpoint that is different from the principle of jus sanguinis under the Nationality Act, which determines a child's connections with Japanese society basically from his/her legal parent-child relationship with a Japanese citizen, and therefore it cannot be said to be highly probable that the Diet will choose this opinion. After all, it cannot be said that there is a clear probability that the Diet, from the legislative perspective, will not maintain the provision of Article 3, para.1 of the Nationality Act, with the part requiring the "marriage of the parents" removed therefrom, and it can be construed that it is more in harmony with the lawmakers' intention to apply the provision of said paragraph, while excluding the part requiring the "marriage of parents," thereby granting Japanese nationality to children born out of wedlock and acknowledged by Japanese fathers after birth.

It is of course within the Diet's legislative discretion to revise, in the future, the provision of Article 3, para.1 of the Nationality Act in line with the Constitution, but until then, the provision of said paragraph should be applied while excluding the part requiring the "marriage of the parents." When the court applies the provision of Article 3, para.1 of the Nationality Act, while excluding the part requiring the "marriage of the parents," it means that the court construes and applies the provision of said paragraph according to the principle of equality under the Constitution, and such application of law is not equal to the creation of a new law by the judiciary but is necessarily permissible as the judiciary's role.

5. The majority opinion construes the aforementioned discrimination to be unconstitutional in terms of the relevance between the legislative purpose and the means to achieve it, and it has a basic framework of judgment which is common with my opinion. With regard to application of the provision of Article 3, para.1 of the Nationality Act to the appellant, the majority opinion is in line with my opinion presented in 4 above. Therefore, I agree with the majority opinion.

The concurring opinion by Justice IMAI Isao is as follows.
I am in agreement with the majority opinion. However, in light of the dissenting opinion concerning the issue determined by this court as mentioned in 5 above (whether or not it is permissible to grant Japanese nationality to the appellant), I would like to present a concurring opinion with regard to what is a judicial relief that is desired in cases where a provision of a law is partially unconstitutional.

1. The dissenting opinion argues as follows: The Diet, among children acknowledged by Japanese fathers after birth, allows those legitimated to acquire citizenship by jus sanguinis (hereinafter simply referred to as "nationality") by making a notification but has not yet made a law to grant nationality to those not legitimated (hereinafter referred to as "non-legitimated child(ren)") (this fact can be referred to as "non-existence of legislation or inaction on legislation"), and even when this violates Article 14, para.1 of the Constitution, if the courts allow acquisition of nationality by non-legitimated children as well, it is equal to the court, where the court, by a judgment, creates a new requirement for granting nationality that is not stipulated in the Nationality Act, and it is beyond the bounds of judicial power and therefore impermissible.

2. The purpose of vesting the court with the power of judicial review on constitutionality is to protect rights and interests of citizens by repealing an unconstitutional law, or in other words, to give relief to people whose rights and interests are infringed by an unconstitutional law. If the provision of a law that is alleged to be void is a provision that imposes a criminal penalty on citizens or deprives citizens of their rights or interests, there is basically a special problem because the issue of unconstitutionality can be solved just by regarding the provision as being ineffective and avoiding its application. A problem will occur in cases where, as in this law case, the provision of a law in dispute is a provision that grants rights or interests to citizens. In such case, if the provision as a
whole is made void, the grounds for granting rights or interests will be lost, which makes it not at all possible to grant the rights or interests concerned. This construction may apply in some cases. However, where the provision to grant rights or interests to citizens specifies two requirements for granting the rights or interests, Requirements A and B, and stipulates that the rights or interests shall be granted only to such persons who satisfy both requirements (which means, as construed in the opposite way, that the rights or interests shall not be granted to those who satisfy only Requirement A), if the court finds it contrary to the principle of equality and therefore unconstitutional to require citizens to satisfy Requirement B in addition to Requirement A in order to acquire the rights or interests, the question would be whether or not it is permissible to grant the rights or interests to those who satisfy only Requirement A. In such case, by taking into consideration various factors such as the framework of the law as a whole, the reason for judging the provision to be unconstitutional, and the appropriateness of the consequences, it can be construed that the part of the provision concerning Requirement B alone should be made void (Requirement B should be ignored), and as a result, those who satisfy only Requirement A are also eligible to acquire the rights or interests granted under the provision, and I think such construction is sufficiently valid as a constitutional construction of law.

3. The Nationality Act adopts the principle of jus sanguinis, and according to this principle, the Act specifies three types of methods of acquiring nationality, (i) automatic acquisition by birth (Article 2), (ii) acquisition by naturalization (Article 4 to Article 9), and (iii) acquisition by naturalization (Article 4 to Article 9). Article 2 provides that a child who satisfies the requirement that the legal father or mother is a Japanese citizen at the time of birth shall automatically acquire nationality, Article 3, as a supplementary provision of Article 2, stipulates that a child whose father by blood is a Japanese citizen but who is born out of wedlock and acknowledged by the father after birth may acquire nationality only if the child is legitimated, thereby denying the eligibility of a non-legitimated child to acquire nationality, Article 4 to Article 9 provide a child who is ineligible to acquire nationality under Article 2 or Article 3 with the chance to acquire nationality through naturalization (with permission of the Minister of Justice). The mechanism of the system for acquisition of nationality under the Nationality Act can be summarized as follows: the Act, as a first principle, provides that nationality shall be granted in cases where a child is found to have a legal blood relationship with a Japanese citizen, or more specifically, where a child's legal father or mother is a Japanese citizen, and Article 2 firmly holds this principle without condition, whereas Article 3 imposes an additional requirement that the child should acquire the status of a child born in wedlock as a result of the marriage of the parents (hereinafter referred to as the "legitimation requirement"). In light of such mechanism under the Nationality Act, I must say that Article 3, while holding the principle of jus sanguinis, excludes children who do not satisfy the legitimation requirement from the scope of eligible children. On this point, the dissenting opinion argues that Article 3, para.1 only provides that among children acknowledged by Japanese fathers after birth, only those legitimated may acquire nationality by making a notification, whereas with regard to the issue of whether or not to grant nationality to non-legitimated children, the Act has merely failed to have a provision to grant nationality to such children, which amounts to nothing more than inaction of legislation. However, it is obvious that by enacting the provision of Article 3, para.1 of the Nationality Act and allowing only legitimated children to acquire nationality by making a notification, the Diet has, when viewed from the opposite side, actively realized its legislative discretion to deny nationality to non-legitimated children. It can be construed that if it is found that Article 3, para.1 discriminates non-legitimated children from legitimated children, and such discrimination is contrary to the principle of equality and therefore unconstitutional, non-legitimated children should also be granted nationality as legitimated children, and such construction is sufficiently valid as a constitutional construction of law as mentioned in 2 above. From this viewpoint, the majority opinion can be understood as stating that the court has, by exercising its power of judicial review, tried to construe the provision of Article 3, para.1 of the Nationality Act in line with the Constitution, and finally reached a conclusion that non-legitimated children should be granted nationality as legitimated children under said paragraph, and such an argument that the court has, by doing so, created a new law beyond the bounds of the requirements stipulated in said Act is a mistaken criticism. If the court, through legal construction, seeks to eliminate the discrimination between legitimated children and non-legitimated children under the existing Nationality Act, which is contrary to the principle of equality, the court has no option but to deny the eligibility of legitimated children or recognize non-legitimated children as being eligible as legitimated children. There may be no objection to the opinion that the former option, irrespective of the validity of its consequence, can never be considered to be infringing the Diet's legislative power. In the same way, the court should also be permitted to choose the latter option. For the reasons stated above, I believe that the constitutional construction of the provision of Article 3, para.1 of the Nationality Act, it is appropriate to construe that said provision means to allow a child acknowledged by a Japanese father after birth to acquire nationality by making a notification, and this construction does not infringe the Diet's legislative power.

4. Should the dissenting opinion be adopted, the unconstitutional condition that is contrary to the principle of equality would remain—among children acknowledged by Japanese fathers, legitimated children can acquire nationality whereas non-legitimated children cannot acquire nationality even if they go to court and prove their legitimacy. The dissenting opinion seems to consider that even though the unconstitutional condition is to remain, there is no way to solve this problem unless a legislative measure is taken, on the following grounds: Article 10 of the Constitution provides that "The conditions necessary for being a Japanese national shall be determined by law," and who
should be granted nationality is a matter that the Diet should determine through legislation. Since the Nationality Act does not provide that non-legitimated children may acquire nationality, even when the discrimination between legitimated children and non-legitimated children is contrary to the principle of equality and therefore unconstitutional, if the court allows acquisition of nationality by non-legitimated children, it is equal to the case where the court creates a new law and therefore impermissible. However, although it is needless to say that it is in principle left to the Diet's discretion to take a legislative measure to determine what requirements should be satisfied to grant nationality, it is the court's duty to make a review on the constitutionality of the legislative measure taken by the Diet by exercising its discretionary power. Article 3, para.1 of the Nationality Act is the legislative measure taken by the Diet by exercising its discretionary power, and the court has examined it and determined that it is contrary to the principle of equality and therefore unconstitutional because the provision of said paragraph causes unreasonable discrimination between legitimated children and non-legitimated children. In such case, it is the court's duty to give protection to people who are prevented by such an unconstitutional law from enjoying protection to which they should have been entitled to enjoy, and such act of the court does not infringe the Diet's legislative power, nor can it be deemed to go beyond the bounds of the court's judicial power.

5. Some people may argue that if the court determines that nationality should also be granted to non-legitimated children, it would derive the Diet of the chance to exercise its discretionary power to add any other requirement for acquisition of nationality in lieu of the legitimation requirement, such as retaining a residence in Japan for a certain period of time, and I do not deny the possibility of such an argument. Nevertheless, even if the court puts a constitutional construction on the provision of Article 3, para.1 of the Nationality Act, which does not specify such an additional requirement, thereby granting nationality to non-legitimated children, needless to say, this does not preclude the Diet at all from exercising its discretionary power to create a new law that specifies, in lieu of the legitimation requirement, any constitutional requirement to be satisfied by children acknowledged by Japanese fathers after birth in order to acquire nationality, and thereby, the aforementioned constitutional construction by the court never deprives the Diet of its discretionary power in legislation.

Justice NASU Kohei and Justice WAKUI Norio support the concurring opinion by Justice IMAI Isao.

The concurring opinion by Justice TAHARA Mutsuo is as follows.

I am in agreement with the majority opinion. However, I would like to give my concurring opinion with regard to the issues concerning the relationship between the acquisition of nationality and the right to receive education, and the distinction between children acknowledged before birth and those acknowledged after birth.

1. Having nationality of a certain state means being a member of the state, and people who have Japanese nationality have freedom to reside in Japan, and they are entitled to enjoy the fundamental human rights guaranteed by the Constitution, choose their occupations freely, and exercise their franchise as well as various other rights granted to Japanese citizens by law. Whether or not a person can acquire Japanese nationality by birth or by acknowledgment and notification makes a difference in whether or not the person can automatically acquire and exercise these rights granted to Japanese citizens, and in this respect, it directly affects the person's human rights.

The chance to acquire nationality by acknowledgment and notification is granted to people aged under 20 (Article 3, para.1 of the Nationality Act), and in fact, most people who face the issue of eligibility to acquire nationality are preschool children or school-aged children as in this case. Therefore, to these people, among the rights to be granted on condition of acquisition of nationality, whether or not they can exercise the right to receive education or right to receive social security means more than whether they can acquire the franchise or freedom to choose occupations. Article 26 of the Constitution provides for the citizens' right to receive education (para.1), and also provides for, from the opposite side, guardians' obligation to have their children receive ordinary education, while stipulating that compulsory education shall be free (para.2). In accordance with these provisions of the Constitution, the Fundamental Act of Education provides that citizens shall have the obligation to have children under their protection receive ordinary education, and no tuition fee shall be collected for compulsory education to be provided at schools established by the State or local public entities (Article 4 of the former Fundamental Act of Education Act and Article 5, para.1 and para.4 of the Fundamental Act of Education). The School Education Act also provides that guardians shall have the obligation to send their children to elementary school and junior high school (Article 22 and Article 39 of the School Education Act prior to revision by Act No. 96 of 2007, Article 16 and Article 17 of the School Education Act after revision). The Ordinance for Enforcement of the School Education Act contains various provisions, such that in order to ensure the performance of the obligation to send children to school, a municipal board of education shall, based on the basic resident register of the municipality, compile student rosters of school-aged students who have domiciles within the area of the municipality, and give a notice to guardians of children who are to reach the school age with regard to the date of admission to elementary school or junior high school, two months before the start of the next academic year (Article 1 and Article 5 of the Ordinance for Enforcement of the School Education Act).

These provisions, which are stipulated from the standpoint of the obligation of children's guardians, embody children's right to receive education guaranteed under Article 26, para.1 of the Constitution, and children accordingly have the right to receive compulsory education without fee. However, these provisions shall not apply to children who have Japanese nationality, and their right to receive education is recognized only through the measures taken by individual
municipal boards of education to grant admission to foreign children who wish to go to school
In terms of social security, under the Public Assistance Act, Japanese citizens shall be entitled to public assistance (Article 2 of the Public Assistance Act), whereas foreign nationals shall not be eligible for application of said Act, and they are given assistance equivalent to public assistance only based on administrative decisions. Thus, under the existing laws, for children like the appellant, whether or not they can acquire Japanese nationality makes a great difference in whether or not they can enjoy benefits of rights to receive education or social security.

2. With regard to the issue of whether or not Japanese nationality should be granted to children born out of wedlock to Japanese fathers and non-Japanese mothers and acknowledged by the fathers after birth (hereinafter referred to as "children acknowledged after birth"), the distinction between non-legitimated children and legitimated children under Article 3, para.1 of the Nationality Act (children acknowledged after birth shall be granted Japanese nationality only if they are legitimated as a result of the marriage of their parents), and the distinction between children acknowledged by Japanese fathers before birth and those acknowledged after birth (children acknowledged by Japanese fathers before birth shall automatically acquire Japanese nationality under Article 2, item 1 of the Nationality Act) are challenged from the perspective of whether or not they are in conformity to Article 14, para.1 of the Constitution.

The majority opinion argues that the distinction between legitimated children and non-legitimated children among children acknowledged after birth under Article 3, para.1 of the Nationality Act, is in violation of Article 14, para.1 of the Constitution, and non-legitimated children may also acquire Japanese nationality if they satisfy the requirements prescribed in Article 3, para.1 of the Nationality Act, except for the requirement of having acquired the status of a child born in wedlock as a result of the marriage of the parents. I have no objection to the majority opinion on this point. In addition to the distinction between legitimated children and non-legitimated children among children acknowledged after birth, I consider that the distinction between children acknowledged after birth and those acknowledged before birth is also important in relation to Article 14, para.1 of the Constitution.

Children can never know whether or not they will be legitimated, and in this respect, there is no difference between children acknowledged before birth and those acknowledged after birth. To become a legitimated child requires a legal procedure, the marriage of the parents. However, the difference between children acknowledged before birth and those acknowledged after birth comes from nothing more than the difference in terms of the time of acknowledgment, whether they are acknowledged before or after birth. As pointed out in 4(2)(d) of the majority opinion, between children acknowledged before birth and those acknowledged after birth, it is difficult to find a difference in general in terms of the level of the tie with Japanese society developed through their family life with Japanese fathers, and it is also difficult to explain the reasonableness of the policy of applying the above-mentioned distinction when granting Japanese nationality from the perspective of the level of the tie with Japanese society. From this standpoint, a conclusion can be drawn that the provision of the Nationality Act that automatically grants Japanese nationality to children acknowledged before birth while not granting Japanese nationality to children acknowledged after birth unless they are legitimated, is in violation of Article 14, para.1 of the Constitution.

If it is possible to construe, on the assumption that the provision of Article 3, para.1 of the Nationality Act is void, that the retroactive effectiveness of acknowledgment under the Civil Code (Article 784) also applies to the case of acquisition of nationality, children acknowledged after birth are supposed to acquire Japanese nationality under Article 2, para.1 of the Nationality Act retroactively as from the time of birth, which will lead to elimination of the distinction between children acknowledged before birth and those acknowledged after birth. However, such construction where the retroactive effectiveness of acknowledgment is also applicable to acquisition of nationality would bring about a question of whether or not it is appropriate to grant nationality by reason of acknowledgment to children acknowledged after birth, who have already acquired nationality of other states before acknowledgment, automatically or regardless of the intention of these children, as well as the problem of dual nationality, and it would also bring about other legal issues in various aspects. It is difficult to solve all of these problems collectively by a single method, but a solution should be sought separately by law. Such a construction that is likely to cause many legal issues should inevitably be deemed to be beyond the construction of the Nationality Act and therefore unacceptable.

Therefore, I believe that the provision of Article 3, para.1 of the Nationality Act should be construed in a limited manner as suggested by the majority opinion, so as to construe that children acknowledged after birth who are aged under 20 may acquire Japanese nationality by making a notification to the Minister of Justice, and this construction is consistent with the entire framework of said Act and also reasonable when aiming to give relief on a case-by-case basis to the appellant and other people who also satisfy this requirement. This conclusion does not completely eliminate the distinction between children acknowledged before birth and those acknowledged after birth in that the former can automatically acquire Japanese nationality by birth whereas the latter are required to make a notification to the Minister of Justice in order to acquire Japanese nationality.

However, in the case of children acknowledged after birth, the aforementioned problems such as unreasonable procedure, and requiring children acknowledged after birth to make a notification so that the children themselves (or persons who have parental authority over them) can decide whether or not to grant Japanese nationality is within the bounds of reasonable discretion of the legislative body, and such distinction will not raise an issue of violation of Article 14, para.1 of the Constitution.

The concurring opinion by Justice KONDO Takaharu is as follows.
The majority opinion declares Article 3, para.1 of the Nationality Act to be unconstitutional in causing the Distinction, and further determines that the appellant has acquired Japanese nationality. In conclusion, the majority opinion supports the judgment of first instance that declared the appellant has Japanese nationality, while dismissing the appeal to the court of second instance filed against said judgment. The court thus allows acquisition of nationality by excluding, from the requirements prescribed in Article 3, para.1 of the Nationality Act, the requirement of having acquired the status of a child born in wedlock as a result of the marriage of the parents (legitimation requirement), and only applying the remaining requirements. There may be a criticism that such determination of the court is equal to depriving the legislative body of the opportunity to choose any other reasonable requirement in lieu of the legitimation requirement, thereby unduly restricting the discretionary power vested in the legislative body to take legislative measures, and therefore impermissible. I completely agree with the concurring opinion by Justice IMAI on this point, and as one of the justices who are in agreement with the majority opinion, I would like to give an additional opinion. The majority opinion allows acquisition of nationality by excluding the legitimation requirements from the requirements prescribed in Article 3, para.1 of the Nationality Act and applying only the remaining requirements. This is nothing more than the consequence of the court's efforts to construe the existing Nationality Act in line with the Constitution, and it does not mean that revising the Nationality Act to add any other requirement goes against the Constitution. Needless to say, it is permissible to add any other requirement in lieu of the legitimation requirement based on legislative decision as far as such additional requirement is in conformity to the Constitution. As explained in the majority opinion, the legislative purpose of the Nationality Act is to, while keeping the principle of jus sanguinis, provide for certain requirements that can be the indicators by which to measure the closeness of the tie between the child and Japan, in addition to the existence of a legal parent-child relationship with a Japanese citizen, and grant Japanese nationality to children after birth only if they satisfy these requirements, and this legislative purpose per se has a reasonable basis. However, the majority opinion holds that no reasonable relevance can be found any longer between requiring legitimation as a means to achieve the legislative purpose and the legislative purpose per se. Therefore, revising the Nationality Act to add any other requirement that can be an indicator to measure the closeness of the tie between the child and Japan is permissible as the exercise of the discretionary power to take legislative measures, as far as such additional requirement has any reasonable relevance with the legislative purpose. For instance, in addition to being acknowledged by a Japanese father after birth, having the place of birth within Japan or residing in Japan for a certain period of time can be a requirement for acquisition of Japanese nationality, as other states also have such requirements, and these options can be chosen in the future, irrespective of whether or not they are acceptable from the policy perspective.

There is an argument that if a person can acquire Japanese nationality just by obtaining acknowledgment and making a notification, a person other than the natural father of a child is likely to make a fictitious acknowledgment (false acknowledgment) in an attempt to acquire Japanese nationality for the child, and this may be considered as a reason for supporting the legitimation requirement. However, as explained in the majority opinion, even though such likelihood exists, it is difficult to find any reasonable relevance between the necessity to prevent fictitious acknowledgment and the adoption of the legitimation requirement. Nevertheless, in order to prevent fictitious acknowledgment, for instance, making it a requirement for acquisition of nationality to scientifically prove the existence of a natural father-child relationship between the child and the person who is to acknowledge the child, is another option, and I do not deny the possibility that this option will be chosen in the future, irrespective of whether or not it is acceptable from the policy perspective.

Thus, following the rendition of this judgment, there may be the possibility that the Diet, by exercising its discretionary power to take legislative measures, will revise the Nationality Act in line with the Constitution and provide for an additional requirement in lieu of the legitimation requirement. If such legal revision is made in the future, a difference in treatment would occur between the appellant, who is not legitimated but found to have acquired Japanese nationality regardless of whether or not he/she satisfies the new requirement, and non-legitimated children born after the legal revision who are required to satisfy the new requirement. However, since it is possible, as the majority opinion suggests, to put a constitutional and reasonable construction on the provision of Article 3, para.1 of the Nationality Act as well as the provisions of said Act while taking into consideration only the requirements prescribed under said paragraph except for the legitimation requirement, any possible difference in treatment, which may be caused by the exercise of the discretionary power in legislation to provide for an additional requirement in lieu of the legitimation requirement, will not be so material.

The opinion by Justice FUJITA Tokiyasu is as follows.

1. I am in agreement with the conclusion of the majority opinion on the following points: Under the existing Nationality Act, discrimination in granting Japanese nationality exists among children born out of wedlock to Japanese fathers and non-Japanese mothers depending on whether or not they satisfy the requirement of "marriage of the parents" prescribed in Article 3, para.1 of said Act (legitimation requirement), and this discrimination is unconstitutional under the Constitution; it is possible to eliminate this discrimination by putting a reasonable construction to the provision of Article 3, para.1 of said Act, without strictly sticking to the exact language of said paragraph, so as to construe that the provision of said paragraph should also be applied to children who do not satisfy the legitimation requirement (non-legitimated children), and in this law case, this court should choose this way. However, I cannot deny that there is a gap between my way of thinking and that of the majority opinion with regard to what the substance of the provision of Article
3. para.1 of the existing Nationality Act is and what the exact meaning of the aforementioned reasonable construction is. Therefore, I would like to give my own opinion on these points.

2. The basic structure of the existing Nationality Act can be summarized as follows. The Act, as a primary principle, provides that a child shall acquire Japanese nationality if the father or mother is a Japanese citizen at the time of birth (Article 2), and basically allows those who do not have Japanese nationality to acquire Japanese nationality through naturalization (Article 4), while strictly allowing acquisition of nationality by those who satisfy the requirements prescribed in Article 3, para.1 of said Act by making a notification. This means that Article 3, para.1 of the Act provides for the legitimation requirement with the intention of giving preferential treatment in granting nationality to legitimate children who satisfy other requirements prescribed in said paragraph, and it is not intended to deliberately exclude non-legalized children. In other words, the present situation where non-legalized children are unable to acquire nationality by making a notification is not due to the existence of Article 3, para.1 of the Act but it is rather a natural consequence leading from Article 2 and Article 4 of the Act, and the existence of the discrimination that is caused by the legitimation requirement under Article 3, para.1 of the Act and cannot be overlooked under the Constitution is, in a way, nothing more than a reflex effect of said paragraph. Accordingly, I should say that the existing unconstitutional condition is due to the existence of the legitimation requirement under said paragraph and not derived from the existence of an "excessive" requirement, as argued by the majority opinion, but it is rather caused by the "deficiency" of the requirements, and if we wish to eliminate the unconstitutional condition by putting a reasonable construction to the provision of Article 3, para.1 of the Act, it should be done not by removing the "excessive" part but by supplementing the "defective" part. As far as my views shown above with regard to the legislative purpose of said paragraph and the cause of the unconstitutional condition in dispute in this law case are concerned, I must say that I have more in common with the dissenting opinion than with the majority opinion.

3. The question is, in order to eliminate the unconstitutional condition in dispute in this law case, whether or not it is permissible for the court to put a broad construction to the provision of Article 3, para.1 of the Nationality Act as mentioned above, and with regard to this question, I should say that the dissenting opinion by Justice KAINAKA Tatsuo and Justice HORIGOME Yukio—the unconstitutional condition due to inaction of the legislative body should be eliminated exclusively through a legislative measure to make a new law, and if the court attempts to extend such a construction, it goes beyond the limit of the judicial power—is sufficiently worth listening to. Nevertheless, I would dare to choose the option of putting a broad construction to solve the issue in this case, for the following reasons. In general, where the legislative body has been in the state of unconstitutional inaction, the task of eliminating such state should be primarily left to the legislative body, and in particular, as in this law case, where the issue in dispute relates to the requirements and procedure for acquiring nationality, which should by nature be basically left to the legislative body's broad discretion, and the unconstitutional condition at issue is in violation of the principle of equality before the law, it cannot be denied that there is only very limited room for the judiciary to intervene in such inaction. However, where the legislative body has already made a judgment based on a certain legislative policy, and according to the basic direction of such judgment, there seems to be a very limited number of reasonable options to be chosen for the area where a specific legislative measure has not been taken, I believe that it is not completely impermissible for the court, for the purpose of giving relief within the scope of individual lawsuits to people who are subject to seriously unreasonable discrimination, and for the sake of a broad construction to the provisions of the existing law and aim to eliminate the unconstitutional condition to the extent that it does not conflict with the basic judgment already made by the legislative body, I would like to explain this reasoning in more detail in light of the specific circumstances of this case.

As mentioned above, the legislative body has, by establishing Article 3, para.1 of the Nationality Act, already made an arrangement for people who were unable to acquire Japanese nationality upon birth so as to enable them to acquire Japanese nationality by making a notification if they are acknowledged by Japanese after birth and their parents are married. This arrangement itself does not raise any issue of unconstitutionality at all, and there is no problem with the effect of the provision of said paragraph (The majority opinion, considering that said paragraph contains an "excessive" requirement, argues if there were a theoretical possibility that the provision of said paragraph as a whole would be held unconstitutional due to the unconstitutional condition alleged in this law case. However, according to my views shown above with regard to the legislative purpose of said paragraph, there could be no theoretical possibility that said paragraph itself would be held unconstitutional). It goes without saying that the court should perform legal construction while presupposing the existence of this provision (the lawmakers' judgment) or making good use of it. On the other hand, the legislative body has also made an arrangement for children who are acknowledged by Japanese fathers after birth but not legitimated, not simply requiring them to take the same procedure as foreign nationals in general but allowing them to acquire Japanese nationality through a more simplified procedure (Article 8). It cannot be denied that as the underlying basis for these provisions, the possibility of a policy judgment to give preferential treatment at least to children born to Japanese citizens for acquisition of Japanese nationality as far as it will not be problematic from the perspective of national interest and national security and maintaining order. As the majority opinion also points out, the difference in the level of preferential treatment regarding the procedural requirements that exists between legitimated children and non-legalized children under the existing law as described above, seems to be basically created because of national
interest in that legitimated children seem to have a close tie with Japan whereas non-legitimated children do not. Such grounds are unreasonable and therefore any distinction created due to such grounds is unconstitutional. This is where the argument on unconstitutionality started in this case. Assuming so, and as far as the existence of Article 3, para.1 of the Nationality Act is presupposed, treating non-legitimated children in the same manner as legitimate children may be a very natural way to eliminate the existing unconstitutional condition. There is no sufficient reason to argue that such solution is absolutely against the intention of the lawmakers who created the existing Nationality Act. A possible counterargument to this view may be that the legislative body could have chosen to grant nationality to, among non-legitimated children, for instance, only those who have been residing in Japan for a certain period of time (add a ‘residence requirement’). However, since we stand on the assumption that the policy itself of making a distinction between legitimated children and non-legitimated children by reason of the close tie with Japan is unreasonable, a similar question will be posed, why it is necessary to impose the residence requirement only on non-legitimated children, and I find it difficult to give a reasonable explanation to this question. Under these circumstances, when the court, in an effort to eliminate the existing unconstitutional condition, puts a broad construction to the provision of Article 3, para.1 of the Nationality Act so as to construe that said paragraph shall also apply to non-legitimated children who were acknowledged by Japanese fathers after birth, cannot possibly think that such legal construction will be in conflict with the lawmakers’ reasonable intention. On the other hand, focusing on the situation of the appellant, it cannot be said that the right to acquire Japanese nationality is directly guaranteed to him/her under the Constitution. However, as stated in the majority opinion, Japanese nationality is an extremely important legal status that means a lot to people in order to enjoy the guarantees of fundamental human rights, obtain public positions or receive public benefits in Japan, and in this respect, it constitutes the critical basis for enjoying fundamental rights. The appellant, despite the fact that he/she was born to a Japanese citizen, is prevented from acquiring such legal status even by making a notification. This is all due to various distinctions made to distinguish people like him/her from others, irrespective of what he/she wishes or how hard he/she tries to avoid—distinctions made under the existing law to determine whether or not to grant nationality (distinction on the basis of the time of birth and distinction based on whether or not the parents are married), as well as distinction based on the factual cause (distinction based on which of his/her parents (father or mother) is a Japanese citizen), and he/she was caught in a web of these distinctions. Even if these distinctions are reasonable to some extent from the perspective of legislative policy when examined one by one, when people who are in the situation mentioned above due to such web of distinctions demand relief by individually filing lawsuits, it is rather the court’s duty to meet such demand by, while taking into consideration the legislative body’s reasonable intention that can be presumed, putting a broad construction to the existing provisions of law, which is not generally rejected as an available method of legal construction, and I believe that the court, by doing so, cannot be deemed to go beyond the bound of its power and usurp the legislative power. Needless to add, if an unavoidable considerable inconvenience would be caused in terms of national interests when the construction on Article 3, para.1 of the Nationality Act that this court has adopted in this case is established as a general legal rule, the legislatively body has a choice to immediately take a legislative measure to revise it to the extent that such measure will not be in conflict with this court’s judgment on unconstitutionality. The reasonable sharing of powers and duties between the legislative body and the judicial body should be considered from such comprehensive perspective.

The dissenting opinion by Justice YOKOOG Kazuko, Justice TSUNO Osamu, and Justice FURUTA Yuki is as follows. The Nationality Act provides that among children acknowledged after birth, legitimated children are allowed to acquire Japanese nationality by making a notification whereas non-legitimated children are required to follow the naturalization procedure, and we believe that these provisions are not beyond the range of choices of legislative policy and therefore not in violation of Article 14, para.1 of the Constitution. Consequently, we find that the conclusion of the court of prior instance that dismissed the appellant’s claim is justifiable, and his/her final appeal should be dismissed. The reasons for our opinion are as follows.

1. To grant nationality is to determine the person’s birth status as a member of a national community, and whether or not to grant nationality should be decided by taking into consideration the person’s tie with the national community and other various circumstances as indicated by the majority opinion. It is the most fundamental function of a national community and can be said to be one of the most fundamental sovereign functions. From this viewpoint, we should say that it is left to the broad legislative discretion to formulate requirements for granting nationality, and only extent not prejudicial to the principle that nationality should be granted according to clear standards upon birth uniformly and in the manner that each person should have only one nationality if possible.

Although nationality is an important legal status necessary to enjoy the protection of fundamental human rights and other benefits, it is unallowable, in principle, to claim nationality of a particular state as a right, and such an importance of nationality cannot be deemed to have any influence on the aforementioned legislative discretion. It should also be noted that, apart from the case where a person has no nationality at all, in which state a person receives protection, in Japan or any other, the issue of the sovereignty of each state. Legal advantages or disadvantages that the person is to enjoy or suffer will vary depending on his/her respective nationality or state of residence or depending on the issue in question, and such advantages and disadvantages are of a relative nature, i.e. an advantage in one state could be a disadvantage in another state and vice versa.

Dual nationality is a condition that arises unavoidably from the fact that nationality is granted uniformly upon birth, and it is only acceptable as an inevitable exception.
The Nationality Act, while keeping the principle of jus sanguinis, grants nationality uniformly upon birth to people who are children of Japanese citizens not only by blood but also by law, and it can be construed to provide that cases where children who have blood relationships with Japanese citizens have become legal children of Japanese citizens after birth, since such children have different living conditions, whether or not to grant nationality should be determined by specifically examining whether or not the children have a tie with Japanese society that is beyond the mere fact that they were born to Japanese citizens, and considering the degree of closeness of such tie.

In light of such structure of the Nationality Act, the provision of Article 3, para.1 of said Act can be regarded as a special provision of Article 2 of said Act in that it recognizes the effect of automatic acquisition of nationality, and at the same time it can also be regarded as a special provision on naturalization in that it allows acquisition of nationality after birth.

2. The majority opinion argues as follows. Although it is reasonable to allow acquisition of nationality after birth by taking into consideration a child's tie with Japan, and at the time when Article 3, para.1 of the Nationality Act was enacted, it was reasonable to regard the fact of becoming a legitimated child as an indicator to show the existence of a close tie between the child and Japan. However, due to the changes that have occurred since then, such as changes in views regarding family lifestyles and parent-child relationships, changes in the realities such as the increase in the number of children born out of wedlock, the increase in the number of children born to couples of Japanese citizens and foreign citizens, and the changes in international trends in legal systems, it is no longer reasonable, in relation to the legislative purpose, to regard the fact of legitimation as an indicator to show the child's tie with Japan. However, although it is true that the views regarding family lifestyles and parent-child relationships have changed to some extent, in what form and to what extent these views have changed, or whether or not there has been a significant change in the public consciousness of these matters, cannot be deemed to be specifically clarified.

We do not think that there has been an outstanding change in the realities of family lifestyles. According to the statistics, the number of children born out of wedlock increased from 14,168 (1.0%) in 1985, the year following the year of enactment of Article 3, para.1 of the Nationality Act, to 21,634 (1.9%) in 2003, and the number of children born to Japanese fathers and foreign mothers also increased from 5,535 in 1987, the first year when statistical data were available, to 12,690 in 2003, but the increase in these numbers is small.

Thus, contrary to the argument presented by the majority opinion, it is sufficiently possible to regard the fact that the increase in the number of children born out of wedlock over the past 20 years is so small, as proof to show, at least, that there has been no significant change in the public consciousness with regard to the desirable form of a family relationship.

It is true that foreign states, mainly those in Western Europe, have made laws to grant nationality to non-legitimated children as well as legitimated children. However, in these states, it seems that international marriages have been popular for historical or geographical reasons, and in addition, regional integration has been promoted and enhanced, as seen in the case of formation of the European Union. Furthermore, the percentage of children born out of wedlock exceeds 30% in many of these states, and even in the lower cases, the percentage seems to exceed 10%. Thus, there is a large difference between these states and Japan in terms of the social circumstances. At the time of enactment of Article 3, para.1 of the Nationality Act, the legal systems of these foreign states may have been referred to when examining whether the provision of said paragraph was appropriate as a legislative measure but they do not seem to have been referred to when examining the constitutionality of said provision. According to these circumstances, we consider that it is inappropriate to directly take into consideration the trends in these foreign states in the process of examining the constitutionality of the provision in Japan.

The majority opinion also points out the difference in treatment compared to children born out of wedlock to Japanese mothers or children acknowledged by Japanese fathers before birth. However, in both cases, it is determined at the time of birth that the children are legal children of Japanese citizens, and there is no possibility that any subsequent change in their living situation will have an influence on this definite fact. Considering that nationality should be granted uniformly upon birth, it is reasonable to grant Japanese nationality to these children. Substantially, children born out of wedlock to Japanese mothers shall be subject to the parental authority of the mother upon birth, and acknowledgment before birth may be made only voluntarily. In these cases, although there may be a difference in level, we can find some factors showing that children, upon birth, already have a tie with Japanese society arising from the parental-child relationship, which is stronger than the tie established by jus sanguinis. The difference in treatment between children born out of wedlock to Japanese fathers and those to Japanese mothers arises from the difference between father and mother in terms of how they interact with the child and in clarification birth, and we do not find it appropriate to regard such difference as discrimination based on gender.

3. On the other hand, Article 3, para.1 of the Nationality Act was enacted with the aim of achieving a balance in treatment, when granting nationality, between children whose birth precedes the marriage of the parents and children whose birth follows the marriage of the parents, and also by giving consideration to the view that it is desirable that children born in wedlock aged under 20 who live with their parents should have the same nationality as that of the parents. In this respect, said paragraph is established as a measure to supplement the principle of jus sanguinis under which nationality is granted on the basis of the time of birth, and it is not intended to thoroughly implement or enhance the principle of jus sanguinis. We can find it sufficiently reasonable to allow acquisition of nationality not in all cases where children have obtained acknowledgement but only in cases where legitimation has occurred and
The dissenting opinion by Justices KAINA Katsuo and Justice HORIZOME Yukio. We would like to make an additional comment on this point. As both Justices KAINA and Justice HORIZOME suggest, the impossibility for non-legitimated children to acquire nationality even by making a notification is due to lack of a provision that allows their acquisition of nationality, and it is the same with or without the provisions of Article 3, para.1 of the Nationality Act. Although said provision requires acknowledgment as a prerequisite for acquiring nationality, it mainly focuses on children who have acquired the status of a child born in wedlock, and limits the scope of children eligible to receive nationality to those who have acquired such status as a result of legitimation. It appears that the majority opinion, while considering that the procedure wherein the level of ties with Japan is examined specifically on a case-by-case basis, and that in the case of non-legitimated children, the requirements for naturalization are significantly relaxed. It cannot be said that these points have been changed due to the circumstances suggested by the majority opinion.

With regard to naturalization, the majority opinion argues that even though the requirements for naturalization are relaxed for children who have obtained acknowledgement, naturalization depends on the discretion of the Minister of Justice, and the availability of the naturalization procedure does not give reasonable grounds for the difference in treatment between legitimated children and non-legitimated children. However, as explained above, with regard to non-legitimated children whose ties with Japanese society are difficult to classify, it is rather reasonable to grant them nationality through naturalization. Furthermore, even though naturalization depends on a discretionary act of the Minister of Justice, as far as the minister performs this act as a State organ, the act should be reasonable based on the purpose of the naturalization system, and may also be subject to a judicial review. We must say that the majority opinion underestimates the entire structure of the Nationality Act and the simplified naturalization system, although there may be some points to consider in the operation thereof.

For the reasons stated above, we believe that even though there is room to review the scope of children eligible to acquire nationality by making a notification through arrangements such as classifying the cases where a close tie with Japan can be found in non-legitimated children, the provisions of the Nationality Act which allow legitimated children to acquire nationality by making a notification, while requiring non-legitimated children to follow the naturalization procedure, are not beyond the range of choices of legislative policy and therefore not in violation of Article 14, para.1 of the Constitution.

We of course do not deny that non-legitimated children should be given proper protection depending on their needs, but it is a different matter from what conditions nationality should be granted.

4. Even supposing that it is unconstitutional not to allow non-legitimated children to acquire nationality by making a notification, we still believe that the final appeal should be dismissed. The reasons for our view are almost the same as
agent).

Such view according to the majority opinion is not only far beyond the legislative purpose of Article 3, para.1 of the Nationality Act but also inconsistent with the structure of the Nationality Act wherein whether the child has a close tie with Japanese society should be taken into consideration when granting nationality after birth.

The procedure for granting nationality has a significant impact in various aspects with regard to immigration control and management of foreign nationals residing in Japan, and it should be noted that it is an issue that needs to be examined from a policy perspective by taking these matters into consideration.

Should the view suggested by the majority opinion be acceptable at all, in cases where the provisions for granting rights or interests created by laws are concerned, it would be possible for the court to grant a wide range of such rights or interests to people who are not entitled to receive them under the laws, regardless of the content of the provisions or the nature or structure of the laws, and beyond the legislative purpose or objective thereof.

We do not mean to deny that the court may exercise its power of judicial review on constitutionality in cases like this law case. However, taking into consideration all of these points mentioned above, we believe that if the court grants nationality by a judicial decision in this case, it would cause a problem in terms of the limit of the judicial power.

The dissenting opinion by Justice KAINAKA Tatsuo and Justice HORIGOME Yukin is as follows.

We consider that the final appeal should be dismissed, for the following reasons.

1. The Nationality Act is a law that creates and grants rights, and it stipulates, in accordance with the provision of Article 10 of the Constitution, what requirements should be satisfied when granting Japanese nationality. Without the provisions of the Nationality Act, the definition of Japanese citizens cannot be determined. Where a person does not satisfy the requirements prescribed in the Nationality Act for acquiring Japanese nationality, it is only as if nothing has been decided in relation to acquisition of Japanese nationality. In other words, where a person fails to conform to the provisions under which Japanese nationality shall be granted, it is nothing more than the state of non-existence of legislation or inaction on legislation in relation to the provisions of the Nationality Act. This also applies to other administrative laws under which the Dist shall grant certain rights or interests to the public from a policy perspective.

2. In accordance with Article 2, item 1 of the Nationality Act, a child acknowledged by a Japanese father before birth shall acquire Japanese nationality by birth. Article 3, para.1 of said Act also provides that legitimated children born to Japanese fathers may acquire Japanese nationality by making a notification. However, with regard to children who were acknowledged after birth but not legitimated (non-legitimated children), said Act does not contain any provision to the effect that such children shall be granted Japanese nationality upon notification. Therefore, we should say that in relation to acquisition of nationality by non-legitimated children by making a notification, the current situation is nothing other than the state of non-existence of legislation or inaction on legislation.

3. The Nationality Act causes a distinction between legitimated children and non-legitimated children by granting nationality to the former through the notification procedure while closing the door for the latter to acquire nationality through said procedure due to the non-existence of legislation or inaction on legislation (this distinction shall hereinafter be referred to as the "Distinction"). At the time when Article 3, para.1 of the Nationality Act was enacted, the Distinction had a reasonable basis and was not in violation of Article 14, para.1 of the Constitution. However, we consider that at the time when the appellant submitted a notification for acquisition of Japanese nationality to the Minister of Justice, at the latest, the Distinction amounted to discrimination without reasonable grounds and constituted violation of Article 14, para.1 of the Constitution. The reason for this view is the same as the holdings of the majority opinion in 4 above. However, what is unconstitutional is the state of inaction on legislation, or the lack of a provision to grant nationality to non-legitimated children upon notification. While the majority opinion states that what is unconstitutional is the provision of Article 3, para.1 of the Nationality Act per se, we consider that said provision is not unconstitutional at all because it is a provision that is intended to create and grant a right, i.e. grant nationality to legitimated children upon notification.

The majority opinion can be construed to hold that the provision of said paragraph contains a part that means that non-legitimated children shall not be granted Japanese nationality even if they make a notification and such part is unconstitutional and therefore void. However, since such construction goes contrary to the nature of the Nationality Act as a law that creates and grants rights, it is, after all, the same as recognizing legitimated children as children acknowledged after birth, and it should inevitably be deemed to be beyond the limit of legal construction.

We agree with the idea that where a special provision or a provision that restricts rights is unconstitutional, it is permissible, as a method of legal construction, to make such a construction, thus rendering the provision void and applying a general provision in order to grant rights. However, it is obvious that this law case is not such a case. Since the Nationality Act can be deemed to adopt the principle of jus sanguinis, as mentioned in the majority opinion, but cannot be construed to stipulate thorough implementation of the principle of jus sanguinis, the provision of Article 3, para.1 of said Act cannot be construed to generally grant Japanese nationality to children acknowledged after birth upon notification, while restricting non-legitimated children from acquiring Japanese nationality through the notification procedure. Consequently, acquisition of Japanese nationality by non-legitimated children by making a notification cannot be allowed according to the construction of the provision of Article 3, para.1 of the Nationality Act.

4. As explained above, what constitutes violation of Article 14, para.1 of the Constitution in this case is the provision of Article 3, para.1 of the Nationality Act per se but the state of inaction on legislation or the lack of a law.
that grants nationality to non-legitimated children upon notification, and it is obvious that this fact does not make the appellant legally entitled to acquire nationality by making a notification. Therefore, we believe that the judgment of prior instance that dismissed the appellant’s claim is justifiable and the final appeal should be dismissed.

Justice FUJITA Tokiyasu holds that what is unconstitutional is the inaction on legislation which results in not granting nationality to non-legitimated children even if they make a notification, and in this respect, he holds the same viewpoint as ours. However, Justice FUJITA further argues that nationality should be granted to non-legitimated children by putting a broad construction to the provision of Article 3, para.1 of the Nationality Act and concludes that the appellant’s claim should be upheld. We find his view to be worth listening to, but cannot immediately agree to construe the provision of said paragraph in that way.

5. The majority opinion is based on the assumption that “it is necessary to give relief to people who are subject to unreasonable discriminatory treatment due to the Distinction, thereby correcting the unconstitutional condition arising from the Distinction.” Such assumption will inevitably lead to the conclusion drawn by the majority opinion. However, it is inappropriate to depend on such assumption, because the mission entrusted to the judiciary is to construe and apply law objectively on neutral ground, and in this case, the court should make its decision from the perspective of “whether or not it is possible, through construction and application of the provision of Article 3, para.1 of the Nationality Act, to give relief to people who are subject to unreasonable discriminatory treatment due to the Distinction, thereby correcting the unconstitutional condition arising from the Distinction.”

6. The conditions for being a Japanese citizen are determined by law through creation and grant of rights. Since the state of inaction on legislation can be found with regard to the point at issue in this law case—acquisition of nationality by non-legitimated children by making a notification, if such state is found to be an unconstitutional condition but it cannot be corrected through construction and application of law, it is a principle under the Constitution to correct this state through a legislative measure taken by the Diet (Article 10, Article 41, and Article 99 of the Constitution). Furthermore, if there are several reasonable options for legislation, the Diet has the authority and responsibility to decide which one of them should be chosen. In this law case, when determining requirements to be satisfied for acquisition of nationality by non-legitimated children by making a notification, there exists “the possibility that there is any other reasonable option for legislation” in addition to the requirement based on the construction given by the majority opinion. Also in this respect, we consider that it should be left to the Diet to decide how to eliminate the unconstitutional condition.

7. For the reasons stated above, we should say that the majority opinion has established an inappropriate assumption according to the legal construction that is contrary to the nature of the Nationality Act, i.e. the provision of Article 3,

para.1 of said Act per se is in violation of the Constitution, and upheld the appellant’s claim based on such assumption. The majority opinion, after all, creates a new requirement for acquisition of nationality that is not stipulated by law and it is in effect equal to legislation by the judiciary. Therefore, we cannot agree with the majority opinion.

Presiding Judge

Justice SHIMADA Niro
Justice YOKOO Kazuko
Justice FUJITA Tokiyasu
Justice KAINAKA Tatsuo
Justice IZUMI Tokui
Justice SAIGUCHI Chihiro
Justice TSUNO Osamu
Justice IMAI Isao
Justice NAKAGAWA Ryoji
Justice HORIGOME Yukio
Justice FURUTA Yuki
Justice NASU Kohei
Justice WAKUI Norio
Justice TAHARA Mutsuo
Justice KONDO Takaharu

(This translation is provisional and subject to revision.)