

RECHTSPRECHUNG

New Judgments of the Supreme Court

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SHARE OF INHERITANCE BY ILLEGITIMATE CHILDREN

The Judgment of the Supreme Court, the Second Petit Bench, March 28, 2003

The Judgment of the Supreme Court, the First Petit Bench, March 31, 2003

The Constitutionality of the provision of the Civil Code which sets the share of inheritance of an illegitimate child at half of that of a legitimate child was found to be constitutional once again by the Supreme Court.

The Supreme Court ruled on this matter in the Grand Bench judgment of 1995 (Judgment of July 5, 1995). Against the argument that the arrangement in the Civil Code was against Article 14 paragraph 1 of the Constitution which guarantees equal treatment of the people, the Court ruled that this was a reasonable differentiation rather than discrimination. There were six dissenting opinions.

This time, the case was handled by the petit bench with five justices. The majority opinion found the provision in question of the Civil Code to be constitutional, referring to the 1995 Grand Bench judgment. However, there were two dissenting opinions.¹

The dissenting justices pointed out that there have been significant social changes since the 1995 judgment which warrant the equal treatment of legitimate and illegitimate children. The 1996 Programme on the Partial Amendment of the Civil Code has proposed changes towards this direction. The UN Human Rights Commission, in its report on the state of human rights in Japan, expressed concern about this problem and recommended changes. It was argued that with the progress of internationalization and diversification of values, the life style of families is not uniform any more, and the relationship between parent and child has accordingly changed. Therefore, it has become even more difficult to find the differentiation of the share of inheritance depending on circumstances which are beyond the control of the children to be reasonable.

Three days later, the First Petit Bench of the Supreme Court rendered a judgment on a similar case. There were two dissenting justices. The presiding justice, in his concurrent opinion, pointed out that although the given provision was not evidently unconstitutional, its constitutionality was highly doubtful, and a legislative measure was needed.

¹ An English translation of the Grand Bench judgment can be found in the Supreme Court website: www.courts.go.jp.

PARALLEL IMPORT AND TRADE MARK RIGHT

Judgment of the Supreme Court, the First Petit Bench, February 27, 2003

An English Company, *Fred Perry*, held a trademark right over their products in more than 100 countries including Singapore, China, and Japan. The trademark rights were later assigned to its 100% subsidiary (the *jokoku* appellee). The *jokoku* appellant imported polo shirts made in China with marks identical to the trademark of *Fred Perry* and marketed them in Japan after June 1996. The products were produced by a Chinese subcontractor of a Singaporean company and imported into Japan via Singapore. The Singaporean company had been granted a license to use the *Fred Perry* trademark for three years from April 1994. The licensing agreement contained a clause which prohibited the licensee from contracting with a subcontractor without a written consent of the licensor. The products in question were produced in China without the consent of the licensor and therefore the licensee was in breach of this agreement. The *jokoku* appellee (the trademark rightholder) advertised that the products in question were counterfeit and initiated a procedure under the Japanese Customs Tariff Law and the Trade Mark Law. The *Jokoku* appellants initiated an action against the right holder, arguing that they were obstructing the business of the appellants and discrediting them. They also argued that this importation was a parallel import which is not unlawful.

The Supreme Court ruled that, in principle, the importation of products identical to those designated under the trademark with the same registered trademark attached to them is an infringement of a trademark. However, this is not an infringement, if

- 1) the trademark has been attached by the legitimate rightholder in a foreign country,
- 2) the rightholder in this foreign country is identical to the rightholder in Japan and the trademark indicates the same origin as the trademark registered in Japan, and
- 3) the rightholder in Japan can exercise quality control over the product directly or indirectly and therefore there is no meaningful difference between the given product and the product with trademark attached by the Japanese rightholder.

This is because these products would not harm the function of a trademark, *i.e.*, the function to indicate the origin and the guarantee of quality, and does not affect the credibility of those who use trademarks or the interest of the consumers. This is in line with the Supreme Court judgment in the Parker Pen case decided in 1970.

However, in this particular case, the products were produced by a subcontractor in breach of the licensing agreement by the Singaporean company. This harms the function of a trademark to indicate the origin of the product. The fact that the product was produced by a sub-contractor in China without the consent of the licensor means that the quality control by the licensor does not extend to the disputed products. If such importation is acknowledged as legitimate, it may well be against the expectation of consumers who believe that they are purchasing the product of the same origin and quality as *Fred Perry*. Thus, the Court ruled that this was not a parallel import of the genuine product which was regarded as lawful.

INJUNCTION AGAINST PUBLICATION OF A NOVEL ON THE GROUND OF LIBEL
Judgment of the Supreme Court, the Third Petit Bench, September 24, 2002

A is a well-known author and B is her publisher. The *jokoku* appellee claimed damages for the harming of the feeling of honour and sought an injunction against the publication of the novel written by A and to be published by B.

The *jokoku* appellee is a resident Korean in Japan. She was brought up in Korea, but has been studying as a graduate student in Japan. She has a birthmark on her face which was not curable despite repeated operations. Her father, a professor of international politics, had been imprisoned in Korea for several years.

A, who became acquainted with the *jokoku* appellee during her visit in Korea, later wrote a novel, using her as a model. The character in this novel is easily identifiable with the *jokoku* appellee, due to her birthmark, career, and her family relations. There were some fictional features added to her character in the novel, such as her joining a religious sect which solicits donations. Her birthmark was depicted as ugly, tragic, and weird.

The *jokoku* appellee was not aware that she had been made a model character in this novel until she read it. When she read it, she felt betrayed, and she felt that her entire personality had been ignored. She sought compensation and an injunction against further publication of the novel.

The Supreme Court ruled that the character in the novel is easily identifiable with the *jokoku* appellee and by the publication of this novel, the honour of the *jokoku* appellee had been harmed and her privacy and her sense of honour had been infringed. The court ruled that a person who had his or her personal value infringed is entitled to an injunction. Under what circumstances an injunction should be granted shall be determined by weighing the expected disadvantage the victim may suffer and the disadvantage suffered on the part of the author and the publisher by an injunction, by taking into consideration the social status of the victim and the nature of the infringement.

In the present case, the *jokoku* appellee is a graduate student, and has no public standing. The content of the novel has nothing to do with public interest. By further publication, her mental pain further increases and her normal life will be disrupted. Therefore, the court concluded that an injunction should be granted.

The Supreme Court has granted an injunction against publication of a defamatory article in a political magazine in the process of an election in the past, but this is the first time an injunction was granted against a literary publication on the ground of privacy and honour of a person who was used as a model.