uttering of a valuable paper the act of inserting a telephone card into a public telephone to make a call. As previously mentioned, it may be theoretically possible to affirm this conclusion. But, in consideration of the fact that telephone cards and other prepaied cards are different by nature from traditional documentary forms of valuable papers, it would be more desirable to settle this kind of problem by legislation, by which doubts arising in light of the principle of '*nulla poena sine lege, nullum crimen sine lege*' should be dispelled.

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b. Law of Criminal Procedure

1. A case in which it was disputed whether or not the fact that an interrogation was prearranged applied to "when it is necessary for the investigation" (Article 39(3) of the Code of Criminal Procedure), the requirement to designate the date, time, and place of interview with defense counsel.

Decision by the Third Petty Bench of the Supreme Court on May 10, 1991. Cases Nos. (*o*) 379 and 381 of 1983. Cases of claim to the state for damages. 45 *Minshū* 919.

[Reference: State Redress Act, Article 1(1); Constitution of Japan, the former part of Article 34; Code of Criminal Procedure, Articles 39(1) and (3).]

[Facts]

The defense counsel, A, went to the police station around 10:40 a.m. to request an interview with the suspect under detention, B. But, as he did not possess an interview permit, the policeman, C, telephoned the public prosecutor, D, of the district public prosecutor's office for instructions. D instructed C to tell A to come to obtain an interview permit which would be issued. Upon hearing this, A lodged a protest against C, saying, "It will take me more than two hours to go from here to the public prosecutor's office and back.

I should be allowed to meet B now even without an interview permit unless he is under interrogation now." C, however, did not accede to the protest.

An interrogation of the suspect, B, had been prearranged to take place after 1:00 p.m. that day. However, the police expected the defense counsel, A, to come again to meet B with an interview permit and suspended the intended interrogation while waiting. There was no interrogation of B that day after all.

After the above-mentioned course of events, A claimed damages against the state by reason that his intended interview had been illegally impeded.

[Opinions of the Court]

As the right of a suspect placed under physical restraint to interview with his defense counsel (Article 39(1) of the Code of Criminal Procedure) derives from the guarantee by the former part of Article 34 of the Constitution of the right to select defense counsel, the designation of the date, time, place of an interview (hereinafter referred to as "interview designation") which the investigation authority may do "when it is necessary for the investigation" based on Article 39(3) of the Code of Criminal Procedure is, strictly speaking, an exceptional measure that can be allowed only in cases of sheer necessity and it is natural that the interview designation cannot be utilized to improperly restrict the rights of the suspect to prepare for defense (Article 39(3), Proviso). Therefore, in case there is a request from the defense counsel for an interview with the suspect, the investigating authority must, in principle, give the defense counsel and suspect the opportunity for an interview at any time. But, "when it is necessary for the investigation", in other words, when there would be considerable disturbance caused by the interruption of the investigation by permitting the interview, the investigating authority is exceptionally allowed to do the interview designation. In doing so, however, the investigating authority should give the earliest possible opportunity determined through negotiations with the defense counsel so that the suspect may meet the defense counsel to prepare for defense (see the decision by the First Petty Bench of the Supreme

Court on July 10, 1978, 32 *Minshū* 820).

Cases "when there would be considerable disturbance caused by the interruption of the investigation" include not only those in which the investigating authority is actually in the course of interrogating the suspect or having him or her attend an on-the-spot investigation or inspection when asked for an interview by the defense counsel, but also those in which an interrogation or such has been firmly prearranged to take place at approximately the time when the interview is requested and such interrogation might not start as prearranged if the interview were permitted. This applies to the current case, so the interview designation itself is not illegal. (However, the public prosecutor in question, D, who should have offered the earliest possible opportunity for an interview determined through negotiations with the defense counsel, neglected to perform this duty and only instructed the policeman, C, to tell the defense counsel, A, to come to the public prosecutor's office for an interview permit. In this way D was negligent and, therefore, A's claim to the state for damages should be allowed.)

[Comment]

1. The suspect or the defendant is guaranteed the right to select a defense counsel (the former part of Article 34 of the Constitution; Article 30(1) of the Code of Criminal Procedure). Even if he or she can select a defense counsel, however, it is difficult for him or her to receive effective assistance from the defense counsel unless he or she is given the opportunity to consult sufficiently with the defense counsel. Particularly when the suspect or defendant is placed under physical restraint, it will be impossible for him or her to prepare for defense without an interview with the defense counsel. Therefore, the Code of Criminal Procedure provides in Article 39(1), "The defendant or the suspect placed under physical restraint may, without any official being present, have an interview with his defense counsel ..... and may deliver to and receive from his defense counsel any documents or any other matters", thus guaranteeing the suspect's or defendant's right to free access to his or her defense counsel for interviews. The Supreme Court held in the so-called Sugiyama decision, which

was referred to in the current decision, that this provision derives from Article 34 of the Constitution and "the right to access for interviews is among the most important foundamental rights, in terms of criminal procedure, for the suspect under physical restraint to receive the assistance from his or her defense counsel" (the decision by the First Petty Bench of the Supreme Court on July 10, 1978, *supra*). At the same time, however, Article 39(3) of the Code of Criminal Procedure provides that the investigating authority may, "when it is necessary for the investigation", designate the date, time, and place of an interview only in the case of a suspect. That is to say, the Code exceptionally approves the investigating authority's right to designate the date, etc. of the interview in order to harmonize the suspect's right to access for interviews with the necessity for investigation (though such designation cannot unreasonably restrict the rights of the suspect to prepare for defense (Article 39(3), Proviso)).

2. The problem is the meaning of the phrase "when it is necessary for the investigation". In practice, its interpretation is that the necessity means the necessity arising from the investigation in general including prevention of the destruction of criminal evidence, and that the judgment of this necessity is left to the investigation authority's discretion. On the basis of this interpretation, the practice has been that the investigating authority once prohibits interviews in virtually full measure by giving previous notice to the authority detaining the suspect that the interview designation may be done and then, when the investigating authority permits an interview, formally designates the date, etc. of that interview on an individual basis (usually, an interview permit is issued in the form of a written interview designation, the so-called "interview ticket"). Moreover, the fact is that the length of time approved on such occasions is as short as, e.g., fifteen minutes and the frequency of interviews is rather low. This has been criticized as disregarding the constitutional right to access for interviews and causing a reversal of the order of principle and exception. Theoretically, in this context, prevailing are the opinion that the interview designation should be limited to cases in which it is necessary to actually keep the suspect's person in order to interrogate him or her or take the suspect to an on-the-spot investigation or inspec-

tion, and the opinion, a little extended from this, that there should be included cases in which the investigating authority is about to start interrogating the suspect or take the suspect to an on-the-spot investigation or inspection. In this regard, the Supreme Court held in the aforementioned decision of Sugiyama case that the requirement in question "applies to cases in which there would be considerable disturbance caused by the interruption of the investigation, such as when the investigating authority is actually in the course of interrogating the suspect or it is necessary to take the suspect to an on-the-spot investigation or inspection". In the current decision, it was held that the requirement "also includes cases in which an interrogation or such has been firmly prearranged to take place at approximately the time when the interview is requested and such interrogation might not start as prearranged if the interview were permitted". This can be said to be basically in the same direction as the aforesaid prevailing opinions.

However, the current decision is facing criticism that such two requirements as the urgency of time and the firmness of prearrangement by contrast with the time when an interview is requested are not clear as standards and that the preference given to the use of the suspect's person (in particular, an interrogation of the suspect) over the right to access for interviews is laying too much stress on the necessity for investigation. What is more problematic is that the current decision neither can be said to drastically improve the practice that has caused such a reversal of the order of principle and exception as the prohibition against the defense counsel having an interview with the suspect without possessing a written concrete designation (interview ticket). Therefore, it may be safely said that it is still very necessary to review the past interpretations and practices from the viewpoint that the very principle is the guarantee of the right to free access for interviews.

2. A case in which it was disputed whether or not it was legal to tap telephone conversation with a warrant of inspection.

Decision by the Kōfu District Court on September 3, 1991. Cases Nos. (*wa*) 136, 158, and 172 of 1991. Cases of violation of the

Stimulant Drugs Control Act. 1401 *Hanrei Jihō* 127.

[Reference: Constitution of Japan, Articles 13, 21(2), 31 and 35; Code of Criminal Procedure, Articles 197(1) and 218(1).]

[Facts]

The defendant, A, had been secretly selling stimulant drugs on his exclusive telephone line without directly contacting his customers. The police could grasp the method itself of this illicit sale through an investigation of over three years but still found it necessary to clarify further the scope and personal names of the parties involved, the types of their involvement, etc. In order to intercept A's telephone conversations at NTT's Kōfu branch office, the police, based on facts of the suspected crime of transferring stimulant drugs for the purpose of making profit, requested a warrant of inspection.

Receiving this request, a judge issued a warrant, limiting the time for the interception from 5:00 p.m. to midnight respectively for two days and under the condition of prohibiting the tapping of any ordinary conversations not related to this case. A was prosecuted as a result of this interception. At the trial, A insisted that, since the inspection in this case was unconstitutional and illegal, the seized stimulant drugs, etc. should be excluded from evidence.

[Opinions of the Court]

The following facts are found in the current case: that facts of the suspected crime for which the warrant was issued had been the illicit sale of stimulant drugs performed in the past; that this is a major crime; that at the time when the warrant was issued, the suspicion concerning facts of the suspected crime themselves was evident, although the name of the suspect was unknown; that the interception of telephone conversations was indispensable to the investigation in this case; that it was very probable that A's telephone line was used only for the illicit sale of stimulant drugs; and that the warrant issued was subject to strict conditions regarding the date and time of inspection, the method of excluding ordinary conversations, etc. In view of these facts, if the necessity of protecting the privacy of communication is weighed against the necessity of investigation

and the insubstitutability of the investigation in question as a means of investigation, the warrant of inspection in the current case does not infringe on the Constitution and the Code of Criminal Procedure in any way, and the activity of tapping the telephone conversation conducted thereon is constitutional and legal.

[Comment]

1. The Code of Criminal Procedure provides in Article 197(1), "Any investigative activity which is necessary to achieve the purpose of the investigation may be done, though compulsory measures may not be taken unless there are special provisions therefore in this Code", thus declaring the principle of non-compulsory investigation (the main clause) and the principle of statutory provisions for compulsory measures (Proviso). Compulsory investigations, different from non-compulsory investigations, are not permitted unless there are special provisions therefor in the Code of Criminal Procedure. Moreover, the prior issue of a warrant by a judge is, in principle, necessary for compulsory measures in accordance with the principle of the necessity of a warrant under the Constitution (Articles 33 and 35). Here is the significance of the distinction between the two investigative activities.

As for the distinction between the two activities, a widespread understanding is that compulsory investigations (compulsory measures) are defined first and then the remainder are deemed to fall under the category of non-compulsory investigations (non-compulsory measures). In the past, compulsory measures have been interpreted as those involving the use of force or physical power. These days, however, the prevailing opinion is that compulsory measures are those that infringe on another's rights or interests including his or her privacy against his or her will, having been influenced by such leading cases as the U.S. Supreme Court's Katz decision (Katz v. United States, 389 U.S. 347 (1967)) in which it was held that the Fourth Amendment of the U.S. Constitution protects the people's privacy, and that the principle of the necessity of a warrant also applies to the activity of eavesdropping, which is conducted without any physical intrusion.

The point in dispute in the current case is whether or not the interception of another's telephone conversation (wiretapping), which is a kind of eavesdropping, is constitutional and legal (the activity of eavesdropping also includes electronic surveillance (bugging), which is an act of listening stealthily to a conversation by electronic means). There is a precedent in which eavesdropping was permitted as a non-compulsory measure in the case where the police had listened stealthily to a conversation in a room by a tapping machine installed outside with the consent of the house owner (the decision by the Tokyo High Court on July 14, 1953, 9 *Hanrei Jihō* 3). But this case was decided on the ground that there was no physical intrusion into the room and its value as a precedent is said to have already been lost. Nowadays, eavesdropping is generally understood to be a compulsory measure which infringes on the right to privacy, i.e., secrecy of any means of conversation and communication, which is protected by Articles 13 and 21(2) of the Constitution. Theoretically, the majority opinion is that eavesdropping, as it does not fall under any of the compulsory measures provided by the Code of Criminal Procedure such as search, seizure, etc., is illegal in principle in light of the principle of statutory provisions for compulsory measures. In contrast to this, there is a minority opinion which insists that eavesdropping, as it is a kind of inspection, is permissible with a warrant of inspection. The current decision, basically following this opinion, held that the wiretapping based on a warrant of inspection is constitutional and legal. There had been no precedent in which the constitutionality or legality of the eavesdropping based on a warrant of inspection was directly disputed. Therefore, the current decision, although it is a case of the lower court, is worth notice as the first case of this kind.

2. The problem is whether or not wiretapping based on a warrant of inspection can really be permissible. "Inspection" is a measure to recognize the existence and physical characteristics of a certain place, material or human body based on the five senses. Wiretapping, which is a measure to recognize the contents of conversation through the sense of hearing, cannot be asserted to bear no similarity to this (but this point is also disputed). In the first place, however,

wiretapping is very likely to also pick up conversations which have nothing to do with the crime. Therefore, it is almost impossible to particularly describe and specify the object of inspection, though to do so is required for an ordinary warrant (Article 35 of the Constitution and Article 219(1) of the Code of Criminal Procedure). Regarding this point, the current decision has sought to acquire a balance by affixing some conditions to the warrant. However, this is nothing but a revelation of the fact that the decision itself recognized the excess of wiretapping over the framework of inspection provided by the existing laws. In the second place, under the principle of the necessity of a warrant, a warrant must be shown in advance to the person subjected to the measure (Articles 110 and 222(1) of the Code of Criminal Procedure). This guarantees the appropriateness of the measure involved and also is an important step in order to give an opportunity to raise objections. But it is impossible to follow this procedure due to the nature of wiretapping, although such a substitutive method is conceivable as giving *ex post facto* notice to the person subjected to the measure. In the existing laws, however, there are no provisions concerning this point, and the current decision did not refer to it. Besides, it is pointed out that wiretapping entails a higher risk of infringing on the right to privacy than conventional types of compulsory measures. Having looked over this problem in this way, it seems natural that the majority should insist that the permission for wiretapping based on a warrant of inspection runs counter to the principle of statutory provisions for compulsory measures and deviates from the law-making function of the court.

Whether the legislation concerning eavesdropping is permissible or not is another question, though. In Japan, although there are disputes concerning its constitutional ground, it is generally understood that such legislation itself would not be unconstitutional. Also it is not impossible that eavesdropping, due to its nature, is covered by regulations under the principle of the necessity of a warrant. In fact, tapping based on a warrant is permitted by legislation in the United States (Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. §§2510~2520) and in Germany (Strafprozeßordnung, §§ 100a, 100b). With the current decision as momentum, therefore, it

may be safely said that promotion of legislative studies in terms of the requirements, procedures, etc. that can meet the nature of eavesdropping will be a theme in the future.

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6. Commercial Law

1. A case concerning standing to sue regarding an action for nullifying a merger by the co-successors of shares without any appointment of the exercising person and its notification.

Decision by the Third Petty Bench of the Supreme Court on February 19, 1991. Case No. 1059 (*o*) of 1989. A case concerning an action for nullifying a merger between joint stock companies. 1389 *Hanrei Jihō* 140, 761 *Hanrei Taimuzu* 154, 876 *Kinyū Shōji Hanrei* 3, 1297 *Kinyū Hōmu Jihō* 29.

[Reference: the Commercial Code, Articles 203(2) and 415.]

[Facts]

X, the plaintiff (*koso* appellant, *jokoku* appellant), and the others are co-successors of the shares of Y company (the defendant, *koso* respondent and *jokoku* respondent), which had been held by A, a founder of the business of Y. This company had concluded a agreement for merger with B. The later company was absorbed into the former. X brought an action for nullifying this merger (see Article 415 of the Commercial Code) on the grounds that the agreement for merger had never been approved by the general meetings of the two companies.

Y is a joint-stock company (*kabushiki-kaisha*) which issued a total