8. International Law

1. A case in which it was held that the arrest for refusal to be fingerprinted is illegal but the fingerprinting system itself is not contrary to the provisions of the International Covenant on Civil and Political Rights of December 16, 1966.

Decision by the Second Civil Division of the Osaka High Court on October 28, 1994. Case No. (*ne*) 1290 of 1992. A case claiming damages. 1513 *Hanrei Jihō* 71; 868 *Hanrei Taimuzu* 59.

[Reference: Constitution of Japan, Articles 13, 14 and 98(2); International Covenant on Civil and Political Rights of December 16, 1966, Articles 7 and 26; Vienna Convention on the Law of Treaties of May 23, 1969, Articles 31 and 32; Law Concerning State Liability for Compensation, Article 1; Alien Registration Law, Articles 14, 18(1) and 18(2).]

[Facts]

X (plaintiff, *kōso* appellant) has the right of permanent residence based on the Agreement on the Legal Status and the Treatment of the Nationals of the Republic of Korea Residing in Japan between Japan and the Republic of Korea signed on June 22, 1965. In February, 1985, he applied for the delivery of a new certificate of registration of foreigners in exchange for an old one, but he refused to be fingerprinted. He was delivered a new certificate on which "not-fingerprinted" was written. The Kyoto Prefectural Police knew about the refusal, and delivered a summons several times in order to hear the facts from him. X refused to go to the police voluntarily, so the police requested the Court to issue an arrest warrant concerning the breach of the Alien Registration Law. The reasons necessitating the arrest were the danger of escape and that of evading the authorities. X was arrested and brought to the police station. After the investigation, including the taking of photos, fingerprinting and physical search, he was released. X brought an action for damages of 1 billion yen against the Government (Y1), Kyoto Prefecture (Y2) and the police officer applying for the arrest warrant (Y3), and an action

demanding delivery of the original and copies of his fingerprint against Y1 and Y2. The bases for the action are that Articles 14, 18(1) and 18(2) of the Alien Registration Law requiring fingerprinting and punishment are contrary to Articles 13 and 14 of the Constitution of Japan and Articles 7 and 26 of the International Covenant on Civil and Political Rights of December 16, 1966 and they are null and void; the request for the warrant and its delivery did not fulfill the condition of necessity; the procedure of taking photos, fingerprinting and physical search is illegal. The Kyoto District Court dismissed the claims (decision of March 26, 1992, case No. (*wa*) 928 of 1986). X appealed to the Osaka High Court.

[Opinions of the Court]

The Court reversed the judgment of the court below with respect to Y1 and Y2 and held that Y1 and Y2 shall each pay 400,000 yen and interest to X. The Court dismissed the claim concerning Y3, as the court below had also done.

First, the Court examined the illegality of the request for an arrest warrant and its delivery. The purpose of the arrest was to ensure the appearance of the accused and to prevent him from evading the authorities. The prosecutors and police officers requesting the arrest warrant had to present the documents that show the reasons for and necessity of the arrest, and the judge who received the request should have denied that request when he realized that there was a reason for the arrest but it was not necessary. The violation of the duty of fingerprinting constitutes a crime with a minor degree of illegality and of social reproach; the exercise of the power of arrest as a compulsory measure is intended to be restrictive. In the present case, X's intention to escape and evade the authorities could not be found, and circumstances of his life did not give rise to a fear of his escape. The evidence that the police had obtained before the arrest was sufficient to show the fact of violation of the fingerprinting requirement. The request for an arrest warrant in this case was made though there was no need, and the judge delivered the warrant greatly in excess of the limits of his discretion.

Second, the treatment of X while in police custody is regarded

as a factor in the calculation of damages. The taking of photos, fingerprinting and physical search were not illegal, and did not correspond to "degrading treatment" as defined under Article 7 of the Covenant.

Third, the Court examined whether the fingerprinting system is contrary to the Constitution and the Covenant or not, as far as it is nessesary for calculation of damages. With respect to the Covenant, it held that the Covenant has in principle a self-executing character and is directly applicable in the domestic sphere; municipal laws conflicting with the Covenant are denied legal effect. When it interprets the Covenent, the rules of the Vienna Convention of the Law of Treaties codifying customary law becomes the guide to interpretation. With respect to Article 7 of the Covenant, the Court held that "degrading treatment" defined in Article 7 of the Covenant is an act by which pain or suffering, whether physical or mental, is inflicted with the participation, whether positive or negative, of public officers. The pain or suffering of those who is fingerprinted does not reach the degree mentioned above, but the pain or suffering of one who lost his Japanese nationality as a result of the Treaty of Peace with Japan of 1951 is stronger than that of an ordinary foreigner, and there is room to appreciate that the pain or suffering may reach "the certain degree". There are many problems to be considered and it is impossible to conclude that the compulsory fingerprinting of former Japanese constitute a violation of Article 7 of the Covenant. Concerning the claim of violation of Article 26 of the Covenant, the Court held that the fingerprinting system is a system of separation based on nationality, and it violates Article 26 except when its standards are rational and objective and are established in order to attain legal purposes. The legislative purpose of the system is to ensure specification, registration and identification of foreigners residing in Japan. It is legal under the Covenant and the standard of separation is rational and objective. When it is applied to the former Japanese discussed above, there is room to doubt the standard of the different treatment between a Japanese national and the former Japanese, but this did not lead to a conclusion that the system is contrary to Article 26 of the Covenant.

[Comment]

The instant case arose before amendment of the Foreigner Registration Act by the Law of 1987 (No. 102). The doubts about the necessity and rationality of the fingerprinting system become strong and against that background the Alien Registration Law was amended in 1985, 1987 and 1992.

In this case, the Court reflects this social movement. With regard to the point that the fingerprinting system itself serves an appropriate administrative purpose and has necessity and rationality, this case basically reflects the precedent, but we can find something new. First, in this case, the Court found the lack of necessity for the arrest. In its reasoning, it regarded the violation of the duty of fingerprinting as a crime of a minor degree of illegality and social reproach, and it is different from a judgment by the Tokyo District Court of March 26, 1986 (1186 *Hanrei Jihō* 23) that the refusal to be fingerprinted cannot generally be regarded as minor crime. Second, with respect to the finding concerning the danger of escape and evading the authorities, the Court's view seems contrary to a judgment by the Kobe District Court of December 4, 1992 (815 Hanrei Taimuzu 150) in which the circumstances are very similar to the present case. The different factors are the accused's intention to contend the illegality of the system through judicial procedure and the exsistence of the guarantee of a third party that X would not escape. These two factors led the Court to make a contrary finding. Third, the Court showed doubt that the fingerprinting of those who lost their Japanese nationality due to the Treaty of Peace with Japan of 1951 may be contrary to the Constitution and the Covenant.

As to the relation between municipal law and the Covenant, the Court clearly discussed the principles that the Covenant has in principle a self-executing character and is directly applicable in domestic sphere; municipal laws conflicting with the Covenant are denied legal effect. In Japan, it is generally accepted that under Article 98 of the Constitution, treaties are generally accepted and have internal effect without transformation. There is an doctorinal controversy about whether the concepts of "self-executing" character and of

"direct applicability" are the same or not, but Japanese courts seem to use these concepts without any distinction. With respect to customary law, an April 18, 1989 decision by Tokyo District Court gave a definition of the concept of "self executing" character (32 *Japanese Annual of International Law* 140 (1989)). In the present case, the standard of distinction between the self-executing treaties and non-self-executing treaties was not shown. Further, it seems doubtful that the all provisions of the Covenant in principle have self-executing character or direct applicability.

As to the interpretation of the Covenant, the Court relied on the rules of the Vienna Convention on the Law of Treaties, and refers as supplementary means to the treaties on human rights and various opinions and decisions made by the Human Rights Committee established by the Covenant, the European Commission of Human Rights and the European Court of Human Rights. The interpretation seems more detailed than prior cases. It may be said that Japanese courts became a little more positive in its interpretation and application of international human rights law.

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2. A case in which it was held that the declaration of incompetency of a Soviet Russian in Japan by the Consul General of the USSR stationed in Japan was invalid, denying the competence of such declaration by the consul.

Decision by the Sixteenth Civil Division of the Tokyo High Court on February 22, 1994. Case No.(*ne*)4620 of 1991. A *kōso* appeal for demand to register the transfer of proprietorship of a real estate. 862 *Hanrei Taimuzu* 295.

[Reference: Treaty on Consular Relations between Japan and the USSR, Articles 29(1) and 37; Charter on the Consul of the USSR, Article 31; Horei, Article 4(2).]

[Facts]

T, a Russian born in the Republic of Russia of the USSR (X, plaintiff, *kōso* appellant), lived in Japan for 60 years. T had once made a testament to bequeathe his real estate to X, but then he made another notarial testament including the bequest of the property to his doctor, Y (defendant, *kōso* respondent). T died on November 3, 1984. Y registered the transfer of ownership of the real estate.

X demanded that Y transfer the registration of the real estate to him, asserting that X had acquired ownership of the real estate under the former testament. Y claimed that the former testament is regarded as revoked and he had obtained ownership. X asserted the invalidity of the second testament in the following respects: (1) violation of the notarial testament procedure; (2) lack of testamentary competency; (3) existence of a valid declaration of incompetency of T by the Consul General of the USSR and violation of the procedure of testament by an incompetent.

The Tokyo District Court dismissed the claim of X on December 20, 1991. X filed a *kōso* appeal.

[Opinions of the Court]

The *kōso* appeal dismissed.

A state organ of one particular state can exercise its public authority only over the area where the territorial sovereignty of the state extends, which is within the territory of the state. This is a principle of international law (territorial jurisdiction). A national is subject to the sovereignty of the state in which he has settled in principle as long as he resides or stays within the territory of that state; his own country cannot exercise its public authority over him, and it can only exercise its power exceptionally on the matters especially agreed to by the state in which he has settled. When a state sends consuls to a foreign state, it is necessary to have the consent of the receiving state. The jurisdiction of the sending state's consul is limited to the terms of any agreement by, for example, a treaty between the sending state and the receiving state.

It is provided in the Vienna Convention on Consular Relations

that, concerning the functional power of consuls, the matter of exercise of jurisdiction is not permitted. Declaration of incompetency is an act by which the state organ limits a person's capability to act. The state acts to exercise its public authority, which is jurisdiction *lato sensu*, in particular. It is appropriate that as a rule, a consul is not allowed to take a state action on behalf of its nationals under the territorial sovereignty of another state. He or she may, under exceptional circumstances, be allowed to do so, but only if the receiving state consents.

With respect to the admissibility of the declaration by the consul of the incompetency of T, who was staying in Japan, it depends on whether Japan, as the receiving state, consented. As the USSR is not a member of the Vienna Convention on Consular Relations, the Convention is not at issue, and as it does not provide for a declaration of incompetency, it cannot be assumed that Japan as member of the Convention consented comprehensively to the consul of a foreign state declaring its nationals incompetent within the territory of Japan.

In addition, the Treaty on Consular Relations between Japan and the USSR, which addresses the extent of functional power of a foreign consul within a receiving state, enumerates the functions individually and precisely in Articles 30 to 42. It is clear that the matters prescribed in Articles 30 to 42 are a restrictive list and do not include a provision concerning the declaration of incompetency. The plaintiff claims that the "other functions according to the law of the receiving state" in Article 29 (1) include the competence to declare incompetency. However, this provision is understood to be a matter apart from the restrictive list and which is obviously and clearly permitted by the law of the receiving state as an aspect of the competence of consuls because of the character of their work. Furthermore, Japan does not have legislation to entrust the competence to declare incompetency to a foreign consul, thus there is no room for interpretation of the treaty provision that "other functions of the consul" include that competence.

The domestic law of the USSR on the competence of a consul confers functional power as a judicial organ concerning its nationals within the receiving state. However, this competence is limited

to situations in which it is not prohibited by the law of the state of settlement as a receiving state. Consequently, in interpreting the law of this state, the Treaty on Consular Relations between Japan and the USSR, and the law of the USSR, it is not permissible to confer upon a foreign consul general staying in Japan the competence to declare a Russian in Japan incompetent. Therefore, it is reasonable to understand that the consul general of X (appellant) in Japan does not have competence to declare incompetency, and this declaration of incompetence was not valid from the outset.

Moreover, the declaration of incompetency of a Russian in Japan in this case was done by the consul of the USSR whose jurisdiction to make such a declaration within Japan is impermissible, it cannot be regarded as a declaration made by a competent authority in his home country. There can be no recognition of the declaration of incompetency of a foreign state.

[Comment]

1. In this *kōso* appeal, the court, as a general principle of international law, considers the permissible condition for the exercise of public authority by taking notice of the territorial area. The issue is the definition and permissible area for the concept of "public authority".

The definition is not clear in the court opinion. The leading doctrins classify the function of national competence using a national or state jurisdiction doctrine. As the court refers to the exercise of jurisdiction *lato sensu*, it is reasonable to understand from the court opinion that it takes this declaration as the actual exercise of national competence or executive or enforcement jurisdiction *lato sensu* (as it is not a physical enforcement measure).

The permissible area of exercise is traditionally considered the predominance of the territorial principle and the exclusiveness of territorial sovereignty, as it was in this court opinion. With the recent increase of transborder activities, the influence of private persons has changed the criteria used to settle national competence or jurisdiction. Aiming not at the maintenance of a coexistence of sovereign states but at the substantial guarantee of interests of nationals,

the existence of a "genuine and effective link" for the actual activities or influences within the relevant states tends to be determined and compared. The actual conclusion of the court will not be affected, but because this court opinion is based on the traditional understanding of national competence, there can be other opinions as well.

2. The court interprets the Treaty on Consular Relations between Japan and the USSR with a wealth of detail. As the court opinion says, the declaration of incompetency is affirmatively denied based on the provisions of Article 37. This kind of Article does not exist in the consular treaty with the US or one with the UK. On one hand, the consular treaties between the Socialist countries allowed them the competence to select a guardian or manager; on the other hand, the treaties between the USSR and non-Socialist countries or between non-Socialist countries permitted only the competence of recommendation. That interpretation is supported by the fact that these are different systems. (See the comment on this decision by Akio Morita, *Jurist* No.1068 (1995) pp.253–255)

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