

try. It is accepted in International Law that states may extend their jurisdiction to prohibit their nationals from engaging in certain activities in the territorial sea of a foreign country.

In addition, the nature of the crab in question makes a sound ground for the decision. The interrelationship between fishing for crab near Shikotan Island and the fishing for crab near the shore of Hokkaido are noted in the decision. The nature of legal interest which is damaged could be different if the object of the fishing were different.

This decision is very important because, in following the precedent, the Supreme Court determined that the changes of circumstances surrounding the law of the sea has little effect on the punishment for fishery activities without permission in the territorial sea of foreign states under the Fishery Law.

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2. A case in which it was held that damages caused by the disturbance of interviews between lawyers and convicts should have been compensated under the State Redress Law.

Decision by the Second Civil Division of the Tokushima District Court on March 15, 1996. Case No. (*wa*) 264 of 1991, Case No. (*wa*) 268 of 1992 and Case No. (*wa*) 9 of 1991. A case claiming state redress for disturbance of interviews between lawyers and convicts. Unreported.

[Reference: Constitution, Article 32; Prison Law, Article 45 (1) and (2); Enforcement Regulation of Prison Law, Articles 121 and 127 (1); International Covenant on Civil and Political Rights, 1966 (hereinafter cited as "the Covenant"), Article 14 (1).]

[Facts]

The plaintiffs are lawyers for three convicts in Tokushima prison who were treated violently by the prison officer and received unreasonable punishment. As legal counsels in this case they claimed damages against the Government of Japan, the defendant. When they

made an application to interview the convicts to prove the case stated above, the warden of the prison limited the amount of time for the interview, denied the application and suspended the interviews. Then the plaintiffs brought an action against the Government of Japan for compensation for non-pecuniary damages because these unlawful limitations were violations of the right of the convicts as plaintiffs in a former case to claim compensation for damages and denied their right of access to courts and also the right to legal defense.

[Opinions of the Court]

In this case, it is an issue whether the warden's acts such as limiting the amount of interview time, and denying the application are breaches of Article 45 (1) and (2) of the Prison Law and Articles 121 and 127 (1) of the Enforcement Regulation of the Prison Law. The court interpreted these Articles in accordance with Article 14 (1) of the Covenant and the Constitution.

Under Article 98 (2) of the Constitution "treaties are implemented into municipal law by ratification and promulgation, are directly applied in the municipal legal system without any legislative measures and supercede general municipal law." The treaties, however, which are "only abstract and general principles or political duty declarations" have no such efficacy and require legislative measures to accomplish this. The Covenant, "which contains fundamental rights such as political rights, is founded on the idea that these rights should be enjoyed by all members of the human family and it stipulates that the rights are vested in individuals as a subject of law. Considering the facts stated above, it cannot be understood only as a declaration of abstract and general principles. Therefore it has a direct effect as national law and supercede all other national laws."

Article 14 (1) of the Covenant stipulates the right of access to the courts. The court referred to the European Convention of Human Rights (hereinafter cited as "the Convention") and a resolution of the General Assembly of the United Nations to specify the contents of Article 14 (1).

Article 6 (1) of the Convention dictates the right of access to courts. This Article has been "interpreted to include the right of a

convict to communicate with his legal counsel in a civil action and the European Court of Human Rights held that such communication may not be done in the presence of a prison officer". The Court then stated that "this Article has certain value for the interpretation of Article 14 (1) of the Covenant."

Second, the court referred to the resolution of the General Assembly of December 9, 1988, "The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment." Principle 18 stipulates that a detained or imprisoned person shall be entitled to communicate and consult with his legal counsel, have adequate time and facilities for consultations, and interviews between a detained or imprisoned person and his legal counsel may be within the sight, but not within the hearing, of a law enforcement official. The court recognized this resolution as following an international standard and stated, "The resolution cannot be said to have no effect on the interpretation of Article 14 (1) of the Covenant", even if the resolution had no legally binding effect.

Of the reasons stated above, "Article 14 (1) of the Covenant should also have as its corollary the ability to secure the convict's right to interview with a lawyer as legal counsel. It is still unclear about the interview time and the presence of a prison officer but Article 14 (1) does not permit limitation of interviews by way of obstructing the right to consultation in a civil action." Therefore the interview clause of the Prison Law and the Enforcement Regulation of the Prison Law should be interpreted in accordance with the objective of this Article and any laws and rules "are invalid if they are contrary to this objective."

The court also considered Article 32 of the Constitution, which provides for the right of access to court, and held that the Article did not directly secure the right to interview but this right could be understood to be secured under the Constitution. The limitation of interviews was a "violation of the right of lawyers to defense."

Article 45 (1) and (2) of the Prison Law gives a prison warden broad discretion in permitting or denying interviews between convicts and non-relatives, however it cannot be interpreted to give full discretion in light of the objectives of Article 14 (1) of the Covenant

and the Constitution and the importance of the right to interview. It should be understood that if there are no special circumstances, refusal of interviews is beyond the scope of the discretion. The court also stated that Articles 121 and 127 (1) of the Enforcement Regulation of the Prison Law were not invalid because they were contrary to Article 14 (1) of the Covenant, but they did not give the prison warden full discretion.

The court did not recognize that the presence of a prison officer during interviews was illegal, but stated that the limitation of the interview time was, because it was beyond scope of discretion. Therefore, it ordered the defendant to pay ¥50,000 for each limitation and ¥100,000 for non-pecuniary damages arising from not interviewing.

[Comment]

Article 98 (2) of the Constitution stipulates the effect of treaties on domestic law. Both doctrine and jurisprudence also uphold the effect of treaties on the national legal system without legislative measures. Whether treaties can be directly applied by the national judiciary is another question to be solved.

In recent years treaties, especially human rights treaties, have been often referred to in Japanese courts, but the courts have not shown clearly whether they have applied a particular provision of a treaty or just referred to it as a standard to interpret municipal law. In this case, however, it is noteworthy that the court made this point very clear. It stated that Article 14 (1) of the Covenant secured the right of convicts to have an interview with a lawyer as legal counsel in civil cases and that the Prison Law and the Enforcement Regulation of the Prison Law should have been interpreted in accordance with its objective. The court also stated if any provision of either law was contrary to the objective, it would be invalid. That is to say, the court recognized that Article 14 (1) of the Covenant was self-executing and treaties superceded national laws.

Another interesting point in this case is the reference to the Convention and the UN General Assembly resolution to specify the contents of Article 14 (1) of the Covenant. Both of them arose after the adoption of the Covenant, which means the court referred to them

as subsequent practices of the Covenant. The resolution is one of the practices which occurred within the United Nations framework as a Covenant, but, on the other hand, the decisions of the European Court of Human Rights based on the Convention are not a practice of the United Nations, but that of other forum. It is doubtful whether the court could have made use of such decisions as a standard for interpretation of the Covenant.

The interpretation based not only on the subsequent practices of the United Nations but also on the practices not of the United Nations could suggest that a rule of customary international law recognizing that the right of access to court prohibits the limitation of interviews has been established.

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