

## Recent Judgements of the Supreme Court

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### The Judgement on the Right of a Person in Custody to Consult and Communicate with the Defence Counsel

*Judgement of the Supreme Court, Grand Bench, March 24, 1999*

The Supreme Court rendered a judgement on the constitutionality of Article 39, paragraph 3 of the Code of Criminal Procedure. Article 39, paragraph 1 provides that a suspect or defendant in custody is entitled to meet the defence counsel, or a person who is to be a defence counsel upon request of a person who is empowered to appoint a counsel without the presence of any person, or receive documents and other things and thus grants the right to consult and communicate with the defence counsel.

Some years ago, it was customary for public prosecutors to ban the access of defence counsel to the suspect in custody in general and allow access only as an exception at a designated date and time and for a very short period.

In 1978, the Supreme Court (petty bench) ruled in relation to the right to communicate with the defence counsel that 1) investigative agencies, in principle, should allow the defence counsel to see the suspect in custody whenever there is an application for an interview, 2) if there is an evident disadvantage to investigation through interruption by allowing access, such as in cases where the suspect is currently being interrogated, or there is a necessity for the suspect to be present in on site inspection, the investigation agency must discuss the matter with the defence counsel and designate an alternative date and time as close as possible<sup>1</sup>. This is not limited to instances where the suspect is currently being interrogated, but extends to cases where an interrogation is scheduled shortly and if access is allowed, the interrogation cannot commence as scheduled<sup>2</sup>.

Restrictions imposed by the public prosecutor on the access by the defence counsel to the suspect in custody have become less common in the last decade. According to the Ministry of Justice's statistics, only around 1% of those who were arrested had some restriction on access<sup>3</sup>.

In the present case, two attorneys were denied by the public prosecutor access to the suspect in detention on the ground that interrogation was scheduled.

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1 Judgement of the Supreme Court, July 10, 1978 (*Minshû* 32-5-820).

2 Judgement of the Supreme Court, May 10, 1991 (*Minshû* 45-5-919).

3 *Nikkei* March 25, 1999.

The court of first instance found the refusal on the part of the investigative agency to be unlawful, but the court of second instance found it to be lawful. The present judgement is the first judgement by the grand bench on this matter.

In this judgement, the grand bench of the Supreme Court confirmed these rules established by the petty benches. Against the argument that Article 39 of the Code of Criminal Procedure is against Article 34 of the Constitution which guarantees the right to defence, the Court ruled that a reasonable balance must be struck between the exercise of the right of the suspect in custody to consult and communicate with the defence counsel on the one hand, and the exercise of investigative power on the other. The Court concluded that Article 34 does not deny the possibility of enacting a provision which strikes such a balance by law, provided that the goal of the Constitution to guarantee opportunities for suspects in custody to be assisted by the defence counsel is not harmed in a substantial way.

Furthermore, the court pointed out that the final part of Article 39, paragraph 3 provides that 'however, this designation shall not be of a nature that unreasonably restricts the right of the suspect in preparing the defence', and makes it clear that the designation of the place and time etc., is a necessary and indispensable, but exceptional measure, and that it is not allowed to restrict the right of the suspect in preparing the defence in an unreasonable way.

Thus, according to the Supreme Court, in the light of such legislative purpose and the content of Article 39, as a rule, the investigating agency is under obligation to provide opportunities for interviews etc., when so requested by the defence counsel. 'Necessity for investigation', as provided in the main text of Article 39, paragraph 3 should be limited to instances where, if an interview is allowed, an obvious obstruction to investigation emerges, such as an obstruction by interruption of interrogation. If these conditions are met and the place and time etc. of the interview etc. are to be designated, the investigating agency should designate the time which is as early as possible upon consultation with the defence counsel and take measures to ensure that the suspect is able to prepare the defence with the defence counsel and others.

On the other hand, the Court ruled that, if, at the time of the request by the defence counsel for an interview, the investigation agency was actually interrogating the suspect, the suspect was attending an on site investigation, or where there is a fixed schedule to interrogate the suspect shortly and if an interview is allowed in accordance with the request of the defence counsel, the scheduled interrogation may not be able to start as planned, as a rule, these should be understood as instances as cited above, where, 'if an interview is allowed, an obvious obstruction emerges, such as obstruction by interruption of interrogation'.