notice to the third party especially in connection with its purpose and function. On this score, future trends concerning academic theories and decisions call for special attention.

In connection with the current decision, X made a *Jokoku* appeal being dissatisfied with the basic time of calculating compensation for loss, but a decision was made on Dec. 5, 1980 dismissing the case. As Y did not make a *Jokoku* appeal, the Supreme Court made no judgment on the controversial problem surrounding the effect of the notice to the third party.

By Assoc. Prof. TETSUO KATO
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5. Criminal Law and Procedure

a. Criminal Law

1. A case in which the negligence of a cook in causing death from *Fugu* poisoning was inferred.

Decision by the Second Petty Bench, the Supreme Court, on Apr. 18, 1980. Case No. (*a*) 886 of 1979. Charges of causing death by negligence in the performance of work and violating the ordinance concerning the handling of *Fugu*. 34 *Keishū* 149.

[Opinions of the Court]

The defendant made a *Jokoku* appeal on the ground that he could not have foreseen the consequences. The Supreme Court, however, made the following decision:

"In the light of the circumstances that the poisonous nature of *Fugu* has been considerably made clear in recent years and that there are Kyoto Prefectural regulations concerning the handling of *Fugu*, as well as lecture meetings sponsored by the *Fugu* Cuisine

Union on the basis of prefectural administrative guidance, etc., the decision in the court below ruled that the defendant who has a Kyoto Prefectural license to operate as a *Fugu* cook could have foreseen the possibility of causing *Fugu* poisoning symptoms by serving *Tora Fugu* liver to customers. The judgment above should be deemed fit and proper in this instance."

[Comment]

There still remains theoretical dispute with regard to crimes by negligence, especially concerning the content of liability for taking care and the system of criminal theory [the element of a crime (Tatbestand), illegality and liability]. However, there is no objection to the contention that to constitute a crime by negligence there must be "foreseeability of the result" on the part of the actual offender. In the current case, it was disputed whether foreseeability existed.

In recent years there have been controversies about foreseeability, that is, a sort anxiety about the occurrence of the result which is enough to constitute foreseeability, or there must be foreseeability about the likely occurrence of the result. (See, for instance, the decision by the Takamatsu Higher Court, Mar. 31, 1966. 2 *Kōkeishu* 136.) The current decision sought likely foreseeability by maintaining the traditional stand.

In addition, it admitted the existence of the foreseeability on the ground that 1) the cooking of *Fugu* liver is prohibited by the ordinance and that 2) it is virtually common sense among *Fugu* cooks in Kyoto not to use liver for food. Of course, the existence of the "foreseeability of the results" should not be discussed concurrently, rather it should be handled case by case. The current decision, in this regard, points to the direction that negligence should be inferred because of the regulatory ordinance concerning licensed cooks.

Moreover, the decision was carefully worded in that it mentioned "the foreseeability of causing *Fugu* poisoning symptoms . . ." not the foreseeability of causing the occurrence of death from *Fugu* poisoning.

On this score, the way of thinking on the substance of crimes by negligence as seen in the current decision can be considered satisfactory, in that it regarded the substance of the crime by negligence as a violation of the "obligation to be taken to avoid such results," and that an attempt was made to ascertain the object of foreseeability from the standpoint of what kind of foreseeability is necessary to avoid the result in question. However, it is considered that there ought to be a more precise theoretical explanation on these points.

[Reference: Criminal Code § 211]

2. Commitment of a crime of damage or destruction of things in general was found in a case where posters suspected of violating the Public Officers Election Act were destroyed.

Decision by the Third Petty Bench, the Supreme Court, on Feb. 29, 1980. Case No. (*a*) 809, 1979. Charges of violation of the Act for Punishment of Acts of *V*iolence, etc. 34 *Keishū* 56.

[Opinions of the Court]

The defendants jointly pasted stickers printed with such words as "killer" on the profiles and names of political party leaders on posters exhibited in public places announcing speeches to be made by the political party. Such act constitutes a crime as prescribed in Article 1 of the Act for Punishment of Acts of Violence, etc. (Criminal Code § 261) on the ground that it destroyed the utility of the poster. Even if the exhibition of the posters in question had violated articles 129 and 143-1 of the Public Officers Election Act, this does not lead to the conclusion that they cannot be protected as an object of the crime of violating Article 1 of the Act for Punishment of Acts of Violence, etc.

[Comment]

In terms of the Criminal Code, the crime of damage or destruction of things in general is a crime relating to property, and the ownership of things is regarded as the legal interest to be protected by law. It is also interpreted that what is meant by "destruction

and damage" in the said crime should include the destruction of the utility of the thing in addition to the material destruction or damage.

In this regard, an act of passing stickers which display an intention counter to the content of posters is to be included in the act of destruction or damage.

Calling for special attention in the case was whether or not a poster displayed in contravention of the law can still be considered the object of "destruction".

In the current decision, the judgment on whether the display of the poster itself was illegal or not was reserved, but it was ruled that even if the display violated the Public Officers Election Act it could be the object of the crime of damage or destruction of things in general. The reason was that while the charge against the crime of destruction of things aims to protect property interests, the Public Officers Election Act is purported to protect a kind of national and social interest, that is, the maintenance of justice in an election, and that the two mentioned above are different in their purposes.

There is an opposing view, however, that as to the destructive act of reducing the utility of a thing, if the utility of the poster, as in the current case, is prohibited by law, posters illegally pasted cannot be an object of protection under crimes of destruction or damage of things in general (Decision in the first instance).

[Reference: Criminal Code § 261; Public Officers Election Act §§ 129 and 143]

3. A case in which the defendants were charged with the crime of distributing or selling obscene literature, carrying in a magazine an article entitled "Lining of *Fusuma* Sliding Door in a Four-and-a-Half Mat Room," said to be the work of the late novelist Kafu Nagai, and selling the said magazine.

Decision by the Second Petty Bench, the Supreme Court, on Nov. 28, 1980. Case No. (*a*) 998. Charges of selling obscene literature. 34 *Keishū* 433.

[Opinions of the Court]

The bone of contention in the current case concerned the following two points: 1) whether or not Article 175 of the Criminal Code on crimes of distributing or selling obscene literature runs counter to the "freedom of expression" provided for in Article 21 of the Constitution and 2) whether or not the concept of "obscenity" in Article 175 of the Criminal Code which is quite ambiguous runs counter to the substantive due process.

With regard to 1), the Supreme Court turned down the claim of the defendants quoting such a decision (11 *Keishū* 997) and others as rendered by the Supreme Court on Mar. 13, 1957. With regard to 2), the Supreme Court denied it on the following ground. "In exercising judgment in deciding upon the obscenity of any literature, it is necessary to investigate if the said literature as a whole mainly appealed to the sensual appetites of the readers after taking into account various aspects such as the degree and method of raw, detailed portrayal and descriptions of sexual matters, the weight of the said portrayal and descriptions in the whole context of the literature, their relationship with the thought and ideas expressed in the literature, the composition and development of the story, and the degree of easing sexual excitement by dint of the artistic and ideological nature of the literature, etc. After sounding out these backgrounds and in the light of the healthy social concept of the times, a decision must be made to determine whether it runs counter to good sexual moral concepts by exciting or stimulating sexual desire unnecessarily and damaging the normal sexual morality of ordinary men."

The Supreme Court stated that viewed from these points, sexual portrayal occupied the central part of the said literature both quantitatively and qualitatively, and that even if its composition, development and literary value are taken into consideration, the literature is meant to appeal to the sexual interest of readers. Hence, the court ruled that the said literature was subject to the Criminal Code Article 175.

[Comment]

The current judgment, following the trend of existing court decisions, called for three requirements to define "obscenity," that is, "to damage the sense of shame or morality," "to excite and stimulate sexual desire," and "to run counter to good sexual moral concepts." The current Supreme Court decision attempted to provide concrete form to the method and standards concerning the judgment of obscenity in literature.

In the light that past decisions employed "the good sense in society," that is, "the generally accepted idea in society," in judging whether or not the literature in dispute satisfied the three requirements above, it is worthy of note that the current decision attempted to clarify the concept of obscenity through a concretization of the method and standard of the judgment.

The decision, in passing judgment on "obscene nature" excluded the "partial study method," a method of studying whether there is any part that can be obscene in the literature or in pictures or drawings, and adopted instead the "total study method," a method of studying if the literature, pictures or drawings as a whole can be recognized as primarily appealing to the sexual interest of readers. It can be evaluated as a step forward in that the court, upon confirming expressly the adoption of such a method, suggested a practical method.

Incidentally, the decision in the court below in referring to reasonable grounds for legal restrictions on obscene literature listed 1) the probability that sexual order, etc. could be adversely affected and 2) the probability that a harmful influence would affect the national interest such as the alienation of minors because of such obscene literature.

The current decision, however, failed to pass an explicit judgment on this score. It seems that the court did not make an explicit judgment because it probably followed the "principle on the non-public nature of sexual deeds" as shown in the Chatterley case. Hence it is hoped that decisions will be deployed in the future on the basis of the concrete and substantial approach shown in the decision of the court below.

[Reference: Criminal Code § 175; Constitution § § 21 and 31]

4. A case in which a contention that committing an injury with the consent of the victim is legal was denied.

Decision by the Second Petty Bench, the Supreme Court, on Nov. 13, 1980. Case No. (*shi*) 91. 34 *Keishū* 396.

[Opinions of the Court]

The current case was a request for a retrial on the basis of the Law of Criminal Procedure Article 435 (6) on the ground that an injury inflicted on the victim with the latter's consent does not constitute a crime. The Supreme Court, however, turned down the request on the following ground:

"Whether or not the crime of inflicting an injury on the person of another can be established, in case the victim consented to receiving such injuries, should be decided in the light of all circumstances such as the motive behind the consent, purpose, means and method of inflicting the injury, the extent of the injury, in addition to the fact that there existed the consent of the victim. In the current case, consent was obtained illegally to use it for an illegal purpose of obtaining insurance money by fraud. Hence, it is reasonable to interpret that the illegality of the said act of inflicting an injury cannot be rejected."

[Comment]

In the crime, for the protection of individual legal interests as in the case of crimes of inflicting injuries on the person of another, there is a question whether a crime can be constituted where the victim agrees to the crime. In other words, it is questioned that although the criminal act itself is illegal, if the victim agrees to the injury the crime cannot be established, as the illegality is rejected for lack of protective legal interests of the crime. The current decision answered this question exactly.

This question concerns the basic issue of criminal law, whether the function of the Criminal Code should be regarded as the pro-

tection of individual legal interests or the maintenance of social order.

From the standpoint of the former, it is believed that room for constituting a crime becomes small since the victim consented to the injury. In the case of the latter, the crime can be established after taking into account various factors such as the justifiability of the motive behind the consent, the purpose and method. Academic opinions on this score are not so simple that they can be divided into the two theories mentioned above. Actually, there are many variations between the former and the latter. The current decision may be considered somewhat near the latter theory.

There are cases similar to this problem such as those considered with sadistic or masochistic deeds in sexual matters and the enucleation in heart transplantation, and in this regard it is expected that many more case examples sill surface in the future.

[Reference: Criminal Code §§ 211, 204; Code of Criminal Procedure § 435]

5. A case in which the defendant was charged with the crime of theft and robbery having classified materials brought out and copied.

Decision by the Criminal Department No. 19, Tokyo District Court, on Feb. 14, 1980. Case No. (*wa*) 3598, 1979. Charges against theft and robbery. 3 *Keisai Geppō* 47.

[Opinions of the Court]

After stating explicitly that "the intention to illegally deprive" is needed to constitute a crime of theft and robbery, the court ruled:

"It is reasonable to recognize that the economic value of a list of member subscribers, a classified document, consists of 'the contents of prescribed in it,' and that the intention to use the list in the manner recognized as fact for the purpose of handing it over to a rival company was the intention to exclude the person entitled to use it in accordance with its economic use as if it were his own possession." Thereupon, the existence of

the intention to illegally deprive must be recognized. The defendant took out the list of member subscribers from the desk drawer with the intention of illegally depriving of it and took it out of the office. Thus the possession of the list was transferred to the defendant, constituting the crime of theft and robbery.

With regard to the fact that the list was returned after the defendant made a copy of it, even if he had the intention to return it after its use and it was actually returned, the action should be regarded as tantamount to ex post facto disposal by a thief, thus constituting the crime of theft and robbery. Even if it was returned shortly afterwards, it does not make any difference.

[Comment]

There have been conflicting views in academic circles whether or not an "intention to illegally deprive" is necessary to establish the crime of theft and robbery in addition to the transfer of the possession.

The Supreme Court has always been of the opinion that such intention is necessary. It also defines the intention as such as "to eliminate the person entitled to use or dispose of it according to its economic utility as if it were his own."

As in the current case, where there was the intention to return after temporary use, the question arises in determining the existence of an "intention to illegally deprive," that is, 1) the intention of temporary use and 2) that the intention of returning it after use may function in a direction denying the existence of an "intention to illegally deprive."

With regard to question 1), the Supreme Court stated that the "intention to illegally deprive does not have to be an intention to maintain the economic benefit of the thing in question forever" (Decision by the Supreme Court on July 13, 1951, 5 *Keishu* 1437), and concerning question 2) the Supreme Court held that "even if there was an intention to return it after use, it could be said that there was an intention to illegally deprive." (Decision by the Supreme Court on Oct. 30, 1980, 34 *Keishū*

357)

Hence, the Supreme Court explicitly held that both 1) and 2) do not deny the existence of the intention to illegally deprive. In the current case, the decision followed the attitude of the Supreme Court as such. However, even if such a way of thinking is admitted, it is not proper to affirm the establishment of the crime of theft and robbery by recognizing the existence of an intention to illegally deprive in a case where the value of the thing in question was not consumed by temporary use. The existence of the intention as above should be recognized only when the consumption of the value can be presumed in one way or another.

When the current case is viewed from such an angle, it must be stated that the consumption of the value of a classified material occurs not by mere recopying it but only by offering it to a rival company. Accordingly, the recognition of the intention to illegally deprive in the current case should be based on the purpose to leak the secret of an enterprise.

On the other hand, there is room for further study whether or not such a purpose can immediately be linked with the "intention to use and dispose of the thing just like its owner." Moreover, there should have been an explanation how the action to make a copy at his own expense differs intrinsically from the action to read and make a note of it (which is considered legal).

[Reference: Criminal Code § 235]

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b. Law of Criminal Procedure

1. Legality of Car Checks.

Decision by the Third Petty Bench, the Supreme Court, on