the part of the assailant rather than to the untruthfulness of the content of the expression. And, as to the requirement (ii), it is desirable that more detailed criteria should be established focusing on the possibility of self-relief through "more speech".

This decision says that oral pleadings or a hearing of the assailant should precede the issue of the preliminary injunction against publication of the expression as a rule, but at the same time it also says that oral pleadings or a hearing of the assailant is unnecessary when the judge is satisfied that the requirements (i) and (ii) mentioned above are fulfilled in light of the materials submitted by the applicant. This statement seems to be based on the false idea that if the conclusion is already apparent, then procedures are trivial matters.

By Prof. HIDETAKE SATO
KIYONOBU MIYAI

b. Administrative Law

1. A case in which the application by Kyoto MK Taxicab Company for the reduction of the taxi fare was disputed.

Decision by the Second Civil Division of the Osaka District Court on January 31, 1985. Case No. (*gyo u*) 49 of 1983. A case seeking to avoid the rejection of an application for taxi fare reduction. 36 *Gyōshū* 74 ; 1143 *Hanrei Jihō* 46.

[Reference: Road Transportation Act, Art. 8.]

[Facts]

The fixed rate and revision of the taxi fare needs the sanction of the Transport Minister in accordance with the provision of Article 8(1) of the Road Transportation Act, and Article 8(2)(i) to (v) provide the sanction standard. The Ministry of Transport established the principle of "the same fare in the same area" (a

system in which the whole country was divided into plural regional territories by fare and no approval was given for different fares in the same territory) as a basic policy to enforce the sanction standard.

Under such circumstances, on March 1, 1982, the plaintiffs X (a company which is involved in a business to transport passengers publicly by automobile (taxi business) in Kyoto City) applied individually to the defendant Y (the director of the District Local Transport Bureau) for the reduction of the taxi fare by 12.66% for the purpose of increasing marginal profits. However, Y rejected X's application for the reason that the fare reduction was contradictory to the principle of "the same fare in the same area."

X sued Y, requesting the cancellation of Y's rejection of X's application, and asserted that Y's rejection of the application in question, which fulfilled the legal requisites of the provisions of each Item of Article 8(2), was an unlawful action in contravention of this Article as the director of the Local Transport Bureau had to sanction the fare revision in the case that the application for the fare change by the enterpriser licensed in the Road Transportation Act fulfilled the requisites of the provisions of each Item of Article 8(2).

[Opinions of the Court]

Judgment for plaintiffs.

It is appropriate to infer that the sanction for the change of taxi fare in accordance with the provisions of Article 8 of the Road Transportation Act has the nature of so-called legally-prescribed discretion. Therefore, the rejection of the application was an unlawful act under the condition that the application in question fulfilled the legal requisites.

The Act recognizes the approval of the different fares for each taxi enterpriser even in the same area, in the case that the application meets the principle of reasonable profit based on reasonable cost, as long as each taxi enterpriser is secure against unfair competition. Even if the application for the sanction of the

revision in taxi fare is contradictory to the principle of the same fare, it is not always against the provisions of Article 8(2)(i) and (iv) of the Road Transportation Act.

The rejection of the application in question on the ground that the application is contradictory to the principle of the same fare in the same area, and without any other particular reasons nor sufficient investigation, is in contravention of Article 8 of the Act, and therefore is not permitted.

[Comment]

According to the traditional legal principle of a license business, in the case of an automobile transportation enterprise which is a kind of public utilities, a sanction of fare revision in its essence is a discretionary action which is comprehensively supervised by the competent authority, so its decision would not be construed as the object of judicial judgment. However, from the standpoint of recent academic theory, the theoretical framework in which the regulation of public utilities is regarded as a part of administrative regulation of the freedom of trade is dominant. The current decision declared that even if the sanction of the taxi fare involved political discretion, the discretion was basically the legally-prescribed discretion and therefore the legal requirements of whether or not it deviated from the discretionary capacity were the objects of judicial judgment.

Moreover, the current decision determined that the principle of the same fare in the same area, which had been held as a guide line for the sanction of taxi fares by the Ministry of Transport for the long term, was unlawful in light of this view of the law. This was because it attached more importance to the user's disadvantage caused by the infringement on "fair competition" than to the confusion of the industry's system and the user's system through the coexistence of multiple fares in the same area.

In these days, the relaxation of the regulations by the Government toward regulated industries has become a great political topic and the current decision will exert a great influence on the present restrictive and protective policies toward trade compe-

tition in every administrative sphere in the future.

2. A case in which the legality of the withholding of a construction permit by the government was disputed.

Decision by the Third Petty Bench of the Supreme Court on July 16, 1985. Cases Nos.(*o*) 309 and 310 of 1980. A case demanding compensation for damage. 39 *Minshū* 989; 1160 *Hanrei Jihō* 45; 568 *Hanrei Taimuzu* 42.

[Reference: Building Standard Act, Article 6.]

[Facts]

The plaintiff X had planned to construct a "mansion" (high grade apartment) and submitted an application for permission for "mansion" construction to the defendants Y (Tokyo Metropolitan Office). Due to the fact that the residents living in the neighborhood of the site of the "mansion" lodged a petition against the construction of the "mansion" with the governor, the construction manager of Y advised and gave administrative guidance to X to negotiate with the opposing neighbors in order to settle the problem, and meanwhile withheld the construction permit of X. On one hand, X had been negotiating with the opposing neighbors to settle the problem, but, on the other, X requested that the construction committee should screen the case, anticipating difficulties in settling through negotiations.

Afterwards, X settled by paying compensation to the opposing neighbors, and the construction manager of Y released the withheld permit to X as per the construction plan which X had submitted accordingly. Over and above this, X made claims against Y, demanding compensation for the increased part of the construction expenses and for interest in the meantime on the basis of the State Tort Liability Act, as it was unlawful to withhold the permit through administrative guidance on the grounds of settlement with the said neighbors.

In first instance, the Tokyo District Court on July 31, 1978, turned down X's complaint, saying that it would recognize the legality of Y's withholding of the construction permit through

administrative guidance. In second instance, the Tokyo High Court on December 24, 1979, attaching importance to the fact that X had requested that the construction committee should screen the case, acknowledged X's demand partially, saying that it was illegal to withhold the construction permit after X had, by such request, clearly expressed its intention not to obey the administrative guidance.

Thus, Y filed a *jokoku* appeal, and X filed an incidental *jokoku* appeal as well.

[Opinions of the Court]

Both *jokoku* appeals dismissed.

Approving the construction basically allows no discretionary power to select by choice. When the conditions for construction are fulfilled, the construction manager should permit the construction without delay.

However, when it is acknowledged as reasonable based on socially accepted concepts for authorities to withhold the construction permit under various circumstances due to judicial aims, instead of giving the construction permit immediately according to the application, it may not be considered that withholding by administrative guidance is by all means an illegal action. When the permit is withheld due to administrative guidance in cooperation with and with submission by the applicant, but the applicant is determined not to cooperate with and not to obey the administrative guidance, authorities are not allowed to force him into accepting the guidance against his clear intention.

In such a case, it is an illegal action for the authority to withhold the construction permit on the grounds of administrative guidance unless, comparing the value of the disadvantage which the applicant would suffer with that of public necessity which the administrative guidance is aimed at, there are particular situations which represent the applicant's uncooperative action toward the administrative guidance in light of socially accepted senses of justice.

[Comment]

This is a case pointing out the problem of the legality of withholding a construction permit by administrative guidance. Taking it from a broad perspective, it may be meaningful to reconstruct the normative and logical structure of government responsibility with regard to the means of unofficial administrative guidance which is being made easily available these days.

Heretofore, there are three theories concerning the said problem.

One theory is that the construction permit is an obligation imposed by law in order to issue the permit naturally upon the fulfillment of certain legal conditions for construction and, in law, the construction permit cannot be withheld to secure effectiveness of the administrative guidance. Another theory is that the administrative guidance is a necessary means in order to construct a healthy metropolitan community and is in a sense a law of custom these days. Under the other theory, the administrative guidance can be executed without any basis of law, assuming voluntary cooperation of the party to whom it is addressed, and it cannot cause any enforcement on the party.

In the current case, the third theory was applied. However, it added a condition that withholding the construction permit was lawful even if the applicant expressed his opposition to the administrative guidance, when comparing the disadvantage of the applicant with that of public necessity, there was a special situation that his opposition was judged to be contrary to the socially accepted senses of justice.

The current case has positive significance in establishing the limit of the administrative guidance over the construction permit. However, it has left a bad example by setting the standard for withholding a construction permit based on a hazy concept of social justice and a comparison of value between private and public advantage and it has been criticized for neglecting a delicate analysis of the public nature of administration.

3. A residents' suit in which the City of Ichikawa was criticized for its administration of entertainment.

Decision by the First Petty Bench of the Supreme Court on February 27, 1986. Case No.(*gyo tsu*) 132 of 1983. An appeal demanding damages. 40 *Minshū* 88; 1186 *Hanrei Jihō* 3; 592 *Hanrei Taimuzu* 32.

[Reference: Local Government Act, Arts. 242.2 and 243.2.]

[Facts]

In 1980, the City of Ichikawa in Chiba Prefecture, in order to carry out smoothly the project of constructing various facilities, twice invited prefectural officials concerned with the project to dinner at a Japanese restaurant in expectation of the approval of a state subsidy and the floatation of borrowings, and disbursed entertainment expenses of 18,000 yen per person (the first time) and of 13,000 yen (the second time) from the Mayor's social expense account. Plaintiffs X et al., residents of the city, sued Y, the Mayor of the city, in a claim for damages, subrogating the city in accordance with the provision of Article 242.2(1)(iv) of the Local Government Act, asserting that the entertainment expenses in question were unlawful public disbursements which exceeded the limits of socially acceptable ideas.

The decision by the court of first instance (Decision by the Chiba District Court on February 18, 1983, 1084 *Hanrei Jihō* 61) rejected X's claim, concluding that the entertainment expenses in question were permissible as they were within a socially acceptable limit. The court of second instance (Decision by the Tokyo High Court on August 30, 1983, 1090 *Hanrei Jihō* 109) revoked the decision of first instance and dismissed the claim, concluding that the liability for compensation for the damage which was caused by the Mayor's unlawful disbursement as in this case should be realized exclusively in accordance with the procedure allowed for in the provisions of Article 243.2 and, therefore, the residents could not present a claim for damages, subrogating the city.

X et al., dissatisfied with the decision, filed a *jokoku* appeal.

[Opinions of the Court]

Original decision reversed and remanded.

The provisions of Article 243.2 are only unique in excluding the application of the provisions of the Civil Code to the liability for compensation for damage by officials which is set forth in the provisions of Paragraph 1 of the Article, in limiting the scope of such liability to the scope fixed by the provisions of Paragraphs 1 and 2 of the Article, and in simplifying the compensation for damage by introducing the system of compensation orders which is a simple method to inquire into liability within the local governments. Therefore, the right to claim damages against the aforesaid officials occurs immediately in the substantive law whenever it fulfills the conditions which the Article requires, and that does not occur by the compensation order.

In general, the liability of the head of a local government is inavoidably different from that of the other officials in consideration of his duty. Therefore, it is reasonable to interpret that the head of a local government is excluded from the officials set forth in Article 243.2(1) of the Act, and that his liability for the damages to the local government in question is as fixed by the provisions of the Civil Code.

[Comment]

This case is a residents' suit in which the plaintiffs X et al., residents of the city, asserted that the act of the Mayor who paid for entertainment expenses from the social expense account of the city was an unlawful disbursement. The controversies of this case were: (1) whether the residents could claim damages on the basis of Article 242.2 of the Local Government Act which provides for a residents' suit, instead of filing a suit based on Art. 243.2 of the Act which provides for the system of compensation orders, and (2) in case of a residents' suit, whether the ground of the liability of the Mayor and the other officials was based on Para. 1 of Art. 243.2 of the Act or Art. 709 of the Civil Code

(tortious liability).

The decision concluded that (1) a compensation order was not necessary as a preceding condition for the residents' suit, and that (2) the provisions of the Civil Code were not applicable to the liability of the officials set forth in the provisions of Para. 1 of Article 243.2 of the Local Government Act, but that (3) the provisions of the Civil Code were applicable to the liability of the head of a local government. In contrast to the original decision which concluded that the residents' suit was illegal subrogation due to the existence of the provisions of Art. 243.2 of the Local Government Act, and consequently defined the significance and the function of the residents' suit in a limited way, the current decision is significant in judging correctly the residents' suit in the sense that it denied the priority of the procedure of compensation order and recognized the legality of the subrogation in the suit.

However, as was pointed out in the original court, there is much room for controversy as in the interpretation of the rivalry in the system between a compensation order and a residents' suit or of the grounds in the substantive law for the liability for damages of the head of a local government. Therefore, legislative measures are expected to resolve the problem.

4. A case in which the relationship between the damage to a third party caused by a vehicle chased by a police patrol car and the State tort liability was disputed.

Decision by the First Petty Bench of the Supreme Court on February 27, 1986. Case No.(*o*) 767 of 1983. A case of claim for damages. 40 *Minshū* 124; 1185 *Hanrei Jihō* 81; 593 *Hanrei Taimuzu* 43.

[Reference: State Tort Liability Act, Article 1(1).]

[Facts]

The policemen, A and two others of Toyama Prefecture, started in a patrol car to chase B's automobile which was driving at a speed of 78km/hr. on a national road where the maximum

speed limit was 40km/hr., warning with a red warning light and siren in order to stop the automobile. B fled driving in a zigzag at speed of 100km/hr. and crossed over the center line disregarding the traffic signals, finally colliding with C's car which was driving in accordance with a green signal at a crossing, and C's car crashed into X's car. C was killed on the spot and X and other passengers in X's car were seriously injured.

X et al. sued the Toyama Prefectural Government which A et al. belonged to in order to claim damages on the basis of Article 1(1) of the State Tort Liability Act, asserting that a part of liability of the accident in question was due to an unlawful pursuit by A et al. Both the decisions of the courts of first and second instances admitted the plaintiffs' claim, partially recognizing the negligence of A et al., and concluded that the illegality of the pursuit was not justified in consideration of the seriousness of the injuries to X et al.

[Opinions of the Court]

Original decision reversed and the Supreme Court rendered its own judgment.

In order to conclude that the pursuit in question was illegal under the provision of Article 1(1) of the State Tort Liability Act on the occasion that the third party was injured by the car accident which was caused by the escaping car chased by the police patrol car, it is necessary to determine whether the chase was unnecessary to perform such duties as a *flagrante delicto* arrest or an *ex officio* questioning (a police checkup), or whether the start, the continuation, and method of the chase were improper in comparison with existing facts including the actual danger which was to be expected under the situation of the escaping car and the traffic.

It is reasonable to judge that, in this case, the policemen of the patrol car needed to check up on B and arrest him as a criminal *flagrante delicto* for speeding and, therefore, they needed to chase him under such circumstances. Furthermore, in this case, it is determined that it was impossible for the policemen to pre-

dict at that time the probable and actual danger of the occurrence of the third party's injuries, and also no particular danger accompanied their method of pursuit. Therefore, it is difficult to say that the pursuit in question was illegal.

[Comment]

This is a case in which it was disputed whether or not the pursuit in question was illegal under the State Tort Liability Act when the person who was being chased injured the third party as a result of the chase by the patrol car. Accidents such as the one in this case are very peculiar, but still a fair number of similar accidents have happened, and have raised difficult judicial problems. However, this decision is significant in the sense that it is the first case decided by the Supreme Court on problems of this kind.

As a tendency of the opinions in the lower courts, it is a common standpoint that, except in a case where the necessity and propriety of the chase by a patrol car is not recognized (a case in which the chase violates the standards of action of official duties), the chase by a policeman in order to perform his duty on the basis of judicial and administrative police rights is, as a matter of course, not illegal even if any damage occurs to a third party as a result of it. In such a case, the victim should, in principle, sue the runaway assaulter for damages.

On the contrary, some decisions in the lower courts, in consideration of the seriousness of the damage to the victim who is a third party, stand on the grounds that it is justifiable to inevitably infringe on a legal benefit of the third party only in the case that the pursuit is indispensable without any other substitutive measures and the social benefit which is accomplished by the pursuit is superior to the legal benefit of the third party.

The difference of both theories in light of the illegality of the pursuit results from the fact that the former judges on the basis of performance of duty, the latter on the basis of the seriousness of the legal benefit infringement. Comparative equilibrium theories such as the latter theory had been questioned in light

of academic theory from the point of veiw that the specification of the contents of benefit was difficult and the degree of the legal benefit infringement was influenced by chance. The current decision by the Supreme Court recognized the perspective of the former theory. However, we add that some legislative measure from the standpoint of the relief of the victims is expected in the future in order to relieve the damage to third parties that is caused by the exercise of public power by policemen.

By Prof. HIDETAKE SATO
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2. Law of Property and Obligations

Ownership of the land under the surface of the sea.

Decision by the Third Petty Bench of the Supreme Court on December 16, 1986. Case No. (*gyo tsu*) 147 of 1980. A case demanding revocation of a registration of lost land. 1221 *Hanrei Jihō* 3; 629 *Hanrei Taimuzu* 100; 1148 *Kinyū Hōmu Jihō* 41.

[Facts]

The land in dispute, part of a tideland submerging at high tide and appearing at low tide which is located in the coast of the Bay of Tabaru, had been entered in the land register with the classification of a quagmire and fifty persons, X_1 et al. (plaintiffs, *koso* respondents, *jokoku* respondents), had had their shares in the joint ownership of the land through the registration.

Originally the tideland in question was a tideland for which A was granted permission to develop a reclaimed rice field by Tokugawa Shogunate in the Edo era and was granted a title-deed in the Meiji era. Afterwards, it was registered as a quagmire in the name of A. Nevertheless, it had been transferred through