cial record, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. The Court, in a unanimous decision, held the statute invalid. Chief Justice Burger's opinion of the Court said, in essence, that government may not compel editors or publishers to publish that which reason tells them should not be published.

The common constitutional question in *Sankei* and *Tornillo* is the relationship between the public's right of access to the press (right of reply is one of its specific forms) and the integrity of an editor's right of free expression. Both decisions cannot be interpreted as a flat, unqualified denial of a right of reply. Although sweeping access rights will not be approved, narrow, specific access guarantees, designed to implement particular and weighty social objectives with the least possible jeopardy to editorial commentary, may be upheld.

Prof. Kenji Urata
Akihiko Kimijima

b. Administrative Law

There were many judicial cases in 1987 in which disputed points were significant from the point of view of administrative law. Among those cases, there were two judgments of particular interest in the field of state tort liability which we should focus on. One was "The Third Kumamoto Minamata Disease Civil Lawsuit," which contested whether it was a violation of the law when administrative agencies failed to exercise their authority. The other was "The Tama River Flood Case," which contested whether there was administrative mismanagement of the Tama River and demanded compensation for damage resulting from the mismanagement. These two cases can be considered to be important cases which provide a means for analy-

sis of social problems in contemporary Japan.

1. The Third Kumamoto Minamata Disease Civil Lawsuit.

Decision by the Second Civil Division of the Kumamoto District Court on March 30, 1987. Case No. (*wa*) 292 of 1980. A case claiming damages. 1235 *Hanrei Jihō* 3.

[Reference: Civil Code, Article 709; State Tort Liability Act, Article 1; Food Sanitation Act (the previous Act before its amendment by the Act, Ch. 108 of 1972), Articles 4 (ii) and 22; Fishery Act (the previous Act before its amendment by the Act, Ch. 156 of 1962), Article 39 (1); Kumamoto Prefectural Fisheries Adjustment Regulation, Articles 30 (1) and 32; Act Concerning Clean Water Preservation in Public Water Areas (before its abrogation), Article 5; Act Concerning the Control of Discharge of Waste, etc. from the Factory (before its abrogation), Articles 2 (2), 7, 12, 15 and 21.]

[Facts]

The defendants, Chisso Corporation, polluted the water by draining methylmercury (which was used as a catalytic agent to manufacture acetaldehyde, vinyl chloride and acetic anhydride) into the sea on the coast of Shiranuikai Bay. Consequently, the plaintiffs, who had been continuously eating the fish and shellfish caught in the sea area, became victims of Minamata Disease, a disease of the central nervous system. In addition to their claim for damages against the Chisso Corporation, the plaintiffs sought compensation from both the Japanese government and Kumamoto prefectural government for failure to take action to restrain the Chisso Corporation, even though the national and prefectural governments had been in a position to easily be aware of the Chisso Corporation's activities.

[Opinions of the Court]

Claim partially allowed.

(1) Minamata Disease is a sickness that destroys the brain and nerve cells by methylmercury penetrating the human body and attacking the central nervous system. There are many kinds of symptoms in different parts of the body.

(2) A person is acknowledged as suffering from Minamata Disease based on the diagnoses of the plaintiffs' doctors. It is not necessary to employ an expert witness.

(3) A legal duty on the part of the Japanese government and Kumamoto prefectural government arose, at the latest, as of November 1959. This duty was to restrain the Chisso Corporation from discharging waste from the corporation's Minamata Factory and to take action prohibiting the catching and selling of fish and shellfish. Despite the existence of this duty, no legal action was taken, causing damage to the plaintiffs. Therefore, the national and prefectural governments are liable to and must compensate the plaintiffs.

(4) A claim for damages in tort is constituted where an individual requests recovery for individual damage actually suffered. Therefore, a comprehensive claim is not permissible in this case.

[Comment]

The Third Kumamoto Minamata Disease Civil Lawsuit is different from the First and Second Lawsuits. The Third Lawsuit is a special case in that the Japanese government and Kumamoto prefectural government, as well as the Chisso Corporation, were questioned regarding their responsibility to compensate the plaintiffs for damages. In this case, there are many interesting moot points regarding torts. However, the comment here will focus on the illegal conduct of the Japanese government and Kumamoto prefectural government in not exercising their administrative authority.

Although various laws and regulations grant regulatory authority to administrative agencies, whether they exercise that authority is left to each agency's discretion without any particular restrictions by law; failure by the administrative authority to use the power granted to it by law is not considered to be immediately unlawful. However, if there are any concrete circumstances which contradict the objective of the law which gave discretionary power to the administrative agency and, also, if the agency shows a remarkable lack of judgment, the failure to exercise their administrative authority could be considered illegal just as in the case where the agency does exercise its authority. It is because granting discretion to administrative agen-

cies does not mean that the agencies are allowed to be arbitrary, and this is recognized as such whether the agencies take action or not.

Therefore, the problem is what should be the standard of judgment when the failure by an administrative agency to exercise its authority amounts to a violation of law because of the agency's woeful lack of judgment. In the current decision concerning this point, five standards of judgment are given (i.e. legal principle of the so-called "constricted right of discretion"; Reduzierung des Ermessen auf Null):

a. There is a real and imminent danger to peoples' lives and health.

b. The administrative agencies know, or should be in a position to easily know, about this dangerous situation.

c. It can be predicted that the effects of this dangerous situation cannot be prevented unless regulatory authority is exercised.

d. People expect and require the administrative agency to exercise its regulatory authority.

e. The effects of this dangerous situation can be easily prevented if the administrative agency exercises its regulatory authority.

Standards which are similar to those listed above have been seen in the decisions of previous cases such as where a wild dog bit an infant to death (Decision by the Fourteenth Civil Division of the Tokyo High Court on November 17, 1977. Case No. (*ne*) 175 of 1975. An appeal claiming damages. 875 *Hanrei Jihō* 17.), and in the Tokyo Sumon Disease cases (Decision by the Thirty-Fourth Civil Division of the Tokyo District Court on August 3, 1978. Cases Nos. (*wa*) 6400, etc., of 1971. Cases claiming damages. 899 *Hanrei Jihō* 48.). The standards established in these decisions can be evaluated as being reasonable, because in these decisions there was, on the one hand, a situation where the legal principle of regulating discretion was being introduced into the field of the wide-ranging free discretion (Freies Ermessen) of administrative powers, and there was, on the other hand, a situation where it was considered that if a less severe standard of judgment was established, administrative agencies would be excessively required to exercise their regulatory authority, possibly resulting instead in an encroachment on people's rights.

2. The Tama River Flood Case.

Decision by the Seventeenth Civil Division of the Tokyo High Court on August 31, 1987. Cases Nos. (*ne*) 231 and 1481 of 1979 and (*ne*) 2726 of 1981. A *koso* appeal and an incidental appeal for revision of the original decision. 1247 *Hanrei Jihō* 3; 684 *Hanrei Taimuzu* 66.

[Reference: State Tort Liability Act, Article 2 (1); River Act, Articles 2 (1) and 75 (2).]

[Facts]

Due to Typhoon No. 16's heavy attack from August 30 to September 1, 1974, the Tama River, grade first class, experienced its largest flood since 1947. (However, the quantity of water from the flood was more or less at the maximum water level indicated by a preliminary survey.) Due to this heavy flooding, an irrigation canal bank was destroyed, and consequently the main river bank was flooded, causing damage along 260 meters of river bank. This caused the Tama River to overflow, resulting in the so-called "Tama River Flood." Consequently, 33 people who suffered damage from the flood claimed that the current flood happened due to poor conservation management of the Tama River, and, based on the State Tort Liability Act, Article 2 (1), demanded compensation from the Japanese government as the river's administrator.

At first instance, the Tokyo District Court rejected the contention by the Japanese government that the "public installations" ("Öffentliche Anstalt") which are defined in the State Tort Liability Act, Article 2 (1), should be divided between public objects ("Öffentliche Sache") of nature such as rivers and public, man-made objects such as roads and that, accordingly, there should be qualitative differences in terms of the extent and range of liability for damages. The court partially admitted the plaintiffs' claim for damages because of the government's inadequate river conservation: the court found that the main bank and the bank for an irrigation canal, as well as other areas, were left in dangerous condition, and that it was possible to predict flooding by the Tama River if it reached

approximately the maximum water level indicated in the preliminary survey.

The Japanese government, dissatisfied with the decision, filed a *koso* appeal. The plaintiffs also filed an incidental appeal regarding the part of their claim that the court of first instance did not allow.

Some time after the decision by the court of first instance, the Supreme Court announced its decision in the Daito Flood case. The Daito Flood decision seriously influenced the current case under review.

The Supreme Court decision in the Daito Flood case (Decision by the First Petty Bench of the Supreme Court on March 30, 1978. Cases Nos. (*o*) 492, 493 and 494 of 1978. A case claiming damages. 38 *Minshū* 53.) held as follows:

(1) There are financial, technical and social restrictions on river control activities for Japan's many rivers on which improvement works are not yet started or still remain insufficient.

(2) Considerations of the adequacy of the river conservation administration should include considerations of various situations, such as the natural and social conditions that exist and the degree of urgent necessity for improvement projects, and should be based on a standard of whether the river is approvably safe in light of the general standard for the river conservation administration which is under financial, technical and social restrictions, in which the river is compared with others that are similar in kind and equivalent in scale, and in light of the socially accepted ideas.

(3) Unless there is a strong likelihood that there is a danger of flooding, one can not say that there is a defect in the river conservation administration because the improvement works on the river are not yet completed.

[Opinions of the Court]

Koso appeal (by the defendant Japanese government) allowed. Incidental appeal (by the plaintiffs) dismissed.

(1) The rivers in which the improvement works have been completed come within the class of rivers which have insufficient improvement works, and the standard for river conservation administration

is adequate for a level of transitional safety.

(2) Even if there is an authorized structure in the river area, whether the river conservation administration is adequate should be judged, under financial, technical and social restrictions, by a standard of whether the river is approvably safe in light of the general standard for river conservation administration concerning rivers that are similar in kind and equivalent in scale.

(3) Under the above standard, there is no defect in the river conservation administration of the Japanese government regarding both the giving of permission to settle an authorized structure and not taking any measures for improvement works.

[Comment]

First of all, concerning the definition of "defect" in the establishment or management of public installations, which was described in Article 2 (1) of the State Tort Liability Act, there are two very different views:

(A) One view is based upon the concept of a theory of responsibility for risk ("Gefahrdungstheorie") which means that public installations are lacking in general safety, and holds that there is no fault on the part of either the Japanese government or the public bodies.

(B) Another view is based on the idea that the administrators violate their duty of care regarding public safety ("Sicherheitsschutzpflicht"), construing that public installations are left in a defective state regarding safety conditions.

Instead of view (A) which was dominant in the past, recent judicial decisions show a tendency to make the duty of care (explained in (B) above) a subjective factor in their opinions. This is true in the present decision, also.

The most important point of this decision is that this case was influenced by the standard of judgment regarding the inadequacy of river conservation administration declared in the Supreme Court decision in the Daito Flood case.

In river conservation administration, it is acknowledged that there are certainly financial, technical and social restrictions, as well as

that there is the difficulty of eliminating risks in river conservation administration as compared with road maintenance, for example. Given the above restrictions there was the Supreme Court decision in the Daito Flood case in which the court stated that liability for damages would be reduced where improvement works on rivers had not yet been started or had been insufficient (The Theory of Transitional Safety). On the contrary, in the Tama River decision the Tokyo High Court had in mind the situation of ideal river conservation administration; the court adopted the theory that the river in which improvement works have been completed is the same as the river in which improvement works have yet not been completed or are insufficient. Moreover, the Tama River Flood occurred when the water swelled to less than the maximum water level which had been estimated by the basic plan of execution drawn up before the levee works were started. Furthermore, whereas with the Daito Flood only the improvements in the scale of the water system had been a problem, in the Tama River Flood only partial and supplemental works were at issue, as the improvement works had already been completed. Due to the different circumstances, one cannot judge these two cases on the same basis.

This Tokyo High Court decision has left a problem to be solved in the future, since it has enlarged the scope of the particular problems in river conservation administration which had been brought up as a general theory in the Supreme Court decision in the Daito Flood case.

(See the case reported in the section of "2. Law of Property and Obligations" in the part of Major Judicial Decisions in this issue.)

Prof. KENJI URATA
MASAO KIHARA