to be illegal even if account was taken of what the majority opinion of the Court referred to as the "special circumstances", and thus, the voluntariness of the confession obtained therefrom was doubtful. This, too, may be said to suggest that the said "special circumstances" do not suffice as grounds to justify the interrogation in this case.

Further, also prominent in some academic theories is the view that calls in doubt the very supposition of the lengthy 22 hours of the detention for interrogation and the interrogation to be an investigation based on a voluntary cooperation. That is to say, the police put the accused virtually under arrest without a warrant of arrest in this case and, therefore, the interrogation was an illegal investigation performed with such compulsory means. Therefore, it is felt that the majority opinion of the Court should have examined this point a little more deliberately.

Of course, the majority opinion of the Court takes a critical view of such manner of interrogation as seen in this case and did not positively approve it. However, there is strong criticism that the majority opinion of the Court concluded that the interrogation was legal in this case, thus leaving room for widespread approval of unreasonable interrogations through ready findings of the "special circumstances" in the future.

Prof. MINORU NOMURA
KATSUYOSHI KATO

6. Commercial Law

Validity of the issuance of new shares in the case where a corporation did not give either public notice on issuance matters or notice thereon to the shareholders in contravention of the Commercial Code, Article 280-3-2.

Decision by the Eighth Civil Division of the Tokyo District Court on September 26, 1989. Case Nos. (*wa*) 422 and (*wa*) 4958 of 1989. A claim for nullifying issuance of new shares. 843 *Kinyū Shōji Hanrei* 43.

[Reference: Commercial Code, Articles 280-3-2 and 280-15(1).]

[Facts]

Y Corporation (defendant) was incorporated on April 1, 1966. The total number of shares issued as of the end of July, 1988 was 40,000 shares, of which 95% (38,000 shares) were held by X (plaintiff), the then director of Y Corporation, his relatives and C Corporation (not a party to this action) whose representative was X (X held 15,000 shares; A (X's wife, not a party to this action) held 5,700 shares; B (X's nephew, not a party to this action) held 3,600 shares; C Corporation held 13,700 shares).

On July 29, 1988 the following agreements were made between X and D (not a party to this action), the then director of Y Corporation, who held 1,000 shares;

(1) X would resign as director of Y Corporation and entrust D with the power to operate Y Corporation.

(2) The shares held by X, A and B, and C Corporation would be bought by D, on the sale price and other sale terms to be fixed by later mutual agreement. On August 1, 1988 X resigned and D assumed the directorship of Y Corporation.

Afterwards, Y Corporation issued 40,000 shares of common stock at face price of 500 yen on August 30, 1988, and again did so on November 11, 1988. D subscribed to all these shares, and became the holder of them. Y Corporation, however, did not give public notice on issuance matters or matters thereon to the share holders (hereinafter referred to as "public notice") required by the Commercial Code, Article 280-3-2 in issuing them. Therefore, X brought an action for nullifying the issuance of new shares on the grounds of the absence of public notice.

[Opinions of the Court]

Claim allowed.

Public notice on issuance matters as required by the Commercial Code, Article 280-3-2 is an indispensable system to provide the opportunity to demand the suspension of issuance under the Commerical Code, Article 280-10. In the absence of such public notice shareholders can hardly demand the suspension of issuance, unless under special circumstances they come to know through other routes a plan for their corporation to issue new shares. Consequently, if the issuance of new shares without such important public notice were valid, it could be said not only to efface the purpose of the issuance-suspension system provided by the Commercial Code for shareholders, but also to deprive them of the way of exercising their rights. Certainly, shareholders may have *ex post facto* remedies through bringing an action for damages against directors, an action to enforce the liability of subscribers who purchased shares at unfair price, and so on. But these actions are not always proper methods of exercising shareholders' rights because not only of the great time, effort, cost, etc. required, but also because of the difficulty of damages proving. Therefore, issuance of new shares without public notice on issuance matters should be nullified as having serious defects, unless shareholders are found to have had opportunities to demand for the suspension of issuance under special circumstances.

[Comment]

If a corporation issues shares either in contravention of any law or ordinance or of the articles of incorporation, or in a grossly unfair manner, and there is any fear of shareholders suffering pecuniary disadvantage thereby, such shareholders may demand of the corporation the suspension of issuance (the Commercial Code, Article 280-10). Needless to say, in order that shareholders may use this right of suspension effectively without missing an opportunity, it is necessary for the shareholders to actually know of issuance matters of significance. That is why the Commercial Code, Article 280-3-2 provides that a corporation shall, two weeks prior to the date for payment, give public notice on issuance matters for the purpose of securing an opportunity to exercise that right. The issue in this case is whether the absence of such public notice in issuing new shares

is regarded as sufficient reason to nullify such issuance.

If there is any legal defect as to the issuance of new shares, i.e., if there is a contravention of any law or ordinance which must be complied with, or of the articles of incorporation, shareholders, directors or auditors may bring an action to nullify such issuance within six months of the day of the issuance (Commercial Code, Article 280-15). Although the Commercial Code does not specify the reasons to nullify the issuance of new shares, generally a limited interpretation of the reasons is taken, considering the security of such transactions. Consequently, there are different theories as to whether the absence of public notice on issuance matters as required by the Commercial Code, Article 280-3-2 is a reason to nullify the issuance of new shares. In this respect, a theory regarding the absence of public notice as required by the Commercial Code, Article 280-3-2 as a reason to nullify the issuance of new shares (the nullifying theory) is based on the ground that such absence unfairly deprives shareholders of the possibility to exercise the right to demand the suspension of issuance. Although the Supreme Court has not yet made a decision on this issue, past decisions by lower courts, including this decision, are based on the nullifying theory. On the other hand, an opposite theory (non-nullifying theory) emphasizes the security of transactions, and gives its attention, not to such procedural aspects as absence of public notice, but to whether there are any substantive reasons to nullify the issuance or not.

The remedies given to shareholders against illegal or unfair issuance consist of both the right to demand the suspension of issuance which is a prior measure, and an action for nullifying the issuance of new shares or an enforcement of directors' personal liability under the Commercial Code, Article 266-3 which works as *ex post facto* measures. Of these measures, *ex post facto* measures can not function as sufficient relief measures, because generally a limited interpretation of the reasons to nullify issuance of new shares is taken, and because not only can't the directors' personal liability provide adequate compensation for the disadvantages concerning corporate control, which become issues particularly in the case of unfair issuance, but also, in the enforcement of such liability it is difficult to

assess the exact amount of actual damages. From the viewpoint of protecting the interests of previous shareholders, it is necessary to make effective the right to demand suspension of issuance which right, having the nature of prior relief can be exercised against all defective issuances of prior relief. Then, as one method of doing so, the absence of public notice on issuance matters as required by the Commercial Code, Article 280-3-2, whose purpose is to secure opportunities of exercising such right for shareholders, must be regarded as a reason to nullify the issuance of new shares. Thereby, an effect may be expected which considerably restrains corporations from unexpected issuances without public notice. The non-nullifying theory would result in defeating not only the purpose of the system provided by the Commercial Code, Article 280-3-2 but also *mens legislatoris* provided through the Commercial Code, Article 280-10; the shareholders' right to demand suspension of illegal or grossly unfair issuances.

As stated above, however, so far as the nullifying theory is to be based on the securing of opportunities to exercise the right to demand suspension of the issuance of new shares, it should be reasonalbe to understand that the absence of public notice on issuance matters will cease to be a reason to nullify the issuance of new shares if a corporation shows either that no reason to demand suspension of the issuance existed, or that substantially all shareholders fully knew in advance (i.e., two weeks prior to the date for payment) of the issuance matters which must be notified under the Commercial Code.

This decision also states explicitly that the absence of public notice as required by the Commercial Code, Article 280-3-2 will cease to be a reason to nullify issuance of new shares if shareholders "come to know of the plan for a corporation to issue new shares by other routes under special circumstances", i.e., "if shareholders are found to have had opportunities to demand the suspension of issuance under special circumstances." Although it is not clear whether this decision interprets this bar to include cases in which only the plaintiff shareholder, but not all the shareholders, knew of the issuance matters to be notified under the Commercial Code, it can be said that

the conclusion of this decision is correct.

This case has been appealed to a higher court.

Prof. TAKAYASU OKUSHIMA
NOBUO NAKAMURA

7. Labor Law

1. Penal Sanction against Incitation of a Public Employees' Strike.

Decision by the First Petty Bench of the Supreme Court on December 18, 1989. Case No. (*a*) 204 of 1986. 43 *Keishū* 882.

[Facts]

X_1 and X_2 were officials of A (a trade union organized by public school teachers). A, demanding wage increase etc., went on a one-day strike on April 11, 1974. X_1 and X_2 conspired with other officials of A respectively to decide the strike and to give members of A instructions to go on the strike.

X_1 and X_2 were accused of incitation of a public employees' strike.

The court of first instance fined each of the accused a hundred thousand yen. At the second instance, X_1 was sentenced to six months in prison with a year's suspension of sentence and X_2 was sentenced to three months in prison with a year's suspension of sentence. X_1 and X_2 filed a *jokoku* appeal.

[Opinions of the Court]

Jokoku appeal dismissed.

The accused's claim that Article 37 of the Local Public Service Act, which prohibits public employees' strikes, is unconstitutional does not have grounds in the light of past decisions by the Supreme Court.