## b. Administrative Law

### Review of Principal Cases

There were many decisions concerning administrative law involving interesting issues made in 1984. However, a remarkable legal principle was outlined in the field of state tortuous liability. Thus, we would like to introduce a judgment in this field that year as well as a judgment on a tax to encourage preservation of ancient cities that will provide many materials for administrative law research.

**1. A case where management responsibility on an ordinary river was disputed.**

Decision by the First Petty Bench of the Supreme Court on November 29, 1984. Case No. (*o*) 876 of 1979. A case claiming damages. 838 *Jurisuto* 46.

[Reference: Article 2 of the State Tort Liability Act; Article 2(3)(ii) of the Local Government Act.]

***[Facts]***

Those rivers to which the River Act is not applicable are called ordinary rivers, and the plaintiff's child fell into a ditch that was defined as an ordinary river and was drowned. The plaintiff (appellant in *koso* appeal, respondent in *jokoku* appeal) instituted a suit against Kyoto City, claiming damages based on Article 2 of the State Tort Liability Act.

At the trial, the Kyoto District Court, though recognizing the management responsibilities of Kyoto City and/or Kyoto Prefecture, which was not a party to the suit, rejected the claim by reason that there had been no defect in the city's management.

On appeal the Osaka High Court entered judgment for the plaintiff, holding that Kyoto City should be held responsible for

management according to the spirit of Article 2 of the State Tort Liability Act, and that there had been a defect in its management.

Kyoto City appealed, asserting that the management responsibility was vested in either Kyoto Prefecture or the governor of Kyoto Prefecture as an agent of the government.

***[Opinions of the Court]***

*Jokoku* appeal dismissed.

(a) Management responsibility of a local public entity on ordinary rivers cannot be deduced from the provisions in Article 2(3)(ii) of the Local Government Act. Because the appellant has no ordinary river management regulations, it cannot be assumed that it is the legal management body for the ditch concerned. (b) Management bodies of public structures (öffentliche Sachen) as provided in Article 2 of the State Tort Liability Act include the state or local governments that assume actual management. Although the management responsibility of the appellant is not an official one, it must recognize the duty to compensate for damage suffered under Article 2 of the State Tort Liability Act, if any damage is inflicted on third parties due to defects in its management of the rivers or ditches. (c) The decision of the original court that there were in fact defects in the way the city managed the ditch concerned should be upheld.

***[Comment]***

While management of ordinary rivers is in most cases not always clearly assigned, the present case is the first judgment of the Supreme Court that found a local council liable to pay compensation on account of defects in management.

Normally, the legal management body of an ordinary river assumes liability for compensation, but methods for determining who is the management body had not yet been established. To expand further, in the case where a local public entity manages an ordinary river flowing through state land by enacting manage-

ment regulations for the river under the Local Government Act, the local public entity concerned that establishes these regulations is the legal management body. In the case where there are no such management regulations, there are theories that it is correct to assume that the state becomes the management body and its right to manage these structures is assigned to the governor of the prefecture in which they flow and that although public structures other than those specified by law are national properties, property management based on the National Property Law and functional management of public structures are distinct, the latter being considered public affairs based on Article 2(2) of the Local Government Act, and therefore, in principle, municipalities can maintain and repair such public structures within their boundaries by Article 2(4).

The present judgment, however, did not make any decisive findings as to the validity or otherwise of these theories, but found Kyoto City liable to pay compensation, holding that actual management bodies were included in the term management bodies for public structures as specified in the State Tort Liability Act. If the concept of the actual management is approved, liability to pay compensation can be determined using this concept, even in cases where it is not possible to decide what the management body is through Article 2 of the State Tort Liability Act. Thus, it is submitted that this decision is a noteworthy one.

**2. A case where the imposition of tax for promoting cooperation in preserving ancient cities was disputed.**

Decision by the Third Civil Division of the Kyoto District Court on March 30, 1984. Cases Nos. (*wa*) 12 and 264 and (*gyo u*) 7 of 1983. Consolidated cases claiming invalidity of the regulation imposing the relevant tax, claiming prohibition of submitting a bill of the regulation imposing such tax, and seeking an injunction preventing new establishment of such tax. 35 *Gyōshū* 353.

[Reference: Article 20(1) of the Constitution; Article 669 of the Local Taxes Act.]

*[Facts]*

Kyoto City created regulations imposing taxes outside the area of those specified by law in 1956 and 1964 and the regulations designated people who went to see cultural or sightseeing places as tax payers and nominated shrines and temples, which own those places, as responsible for withholding the tax. The regulations were opposed by the shrines and temples and the period of enforcement of the special tax was limited to 5 years (1964–1968) because a memorandum stating that this kind of tax should not be instituted nor should the existing tax be prolonged had been exchanged between the mayor and the representatives of the shrines and temples.

In spite of this, the mayor approved a bill for tax for promoting cooperation in preserving ancient cities and attempted to present it to the municipal assembly in January 1983 for the purpose of financial reconstruction. The plaintiffs in the present case instituted a suit seeking an order preventing presentation of the bill, but the mayor presented the bill to the municipal assembly and the assembly approved it. (There was no approval from the Minister of Home Affairs.)

The plaintiffs then instituted a suit against Kyoto City and the mayor, claiming that the regulations concerned were in violation of, inter alia, Article 20(1) of the Consitution.

*[Opinions of the Court]*

The suit claiming a declaration that the regulations are invalid, the suit seeking an injunction preventing enforcement of the regulations, the suit claiming a declaration that the city has a duty not to establish the new tax and all other claims against Kyoto City should be turned down.

*[Comment]*

When a local public entity establishes a tax other than one specified by law such as the tax in the present case, it is provided

that such local public entity should be granted the approval of the Minister of Home Affairs. In this case, however, such approval was not granted and nothing had been done to make the shrines and temples responsible for withholding the tax, so that whether or not the court can issue a preventive injunction was the principal issue.

As the present lawsuit system does not permit abstract norm controls, the Court rejected the claims for a declaration as to the unconstitutionality of the regulation because such a declaration would not be accompanied by any practical orders, within the scope of existing precedents.

The judgment as to the permissibility of a preventive injunction followed conventional precedents and the Court cited three requisites: (1) whether the administrative agency has the right to make first judgment, (2) the presence of an actual necessity for preliminary relief, and (3) there is no other remedy available. The decision is similar to a theory called "the supplementation theory" that considers an injunction a supplement to the "Anfechtungsklage", which is a form of retrospective relief. On the other hand, there is "the independence theory" that permits an injunction generally if the suit is ripe, regardless of presence or absence of actual necessity for preliminary relief, that is, possibility of there being unrecoverable damage. The current administrative suit system is, however, provided mainly for the Anfechtungsklage and employs it as a guiding principle, so that judgments should be made, using the supplementation theory to grant injunction only in exceptional cases.

Finally, the contract concluded between the City and the representatives of shrines and temples involved an important issue. It would be questionable, however, from the viewpoint of equality in the national taxation field to find that the contract would cause the local public entity to abandon a part of its right to taxation.

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