

Peace Treaty does not give rise to an international responsibility for reason of non-execution of the treaty obligations by the Japanese government, and the means of relief by right of diplomatic protection of the state in question have also been closed. That the current decision allowed the claim of the plaintiff on the basis of the principle of *bona fides* can be highly evaluated from the standpoint of protection of individuals, especially in connection with the question to what extent a state can protect and guarantee damages on lives, persons and properties war incurs upon individuals.

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## **b. Private International Law**

**An international case calling for the protection of personal liberty. Habeas Corpus case.**

Decision by the Osaka District Court on June 16, 1980. Case No. (*Hito*) 3 of 1980. Demand dismissed. 417 *Hanrei Taimuzu* 129.

### **[Issues]**

In case a person detaining and a detainee both reside in Hawaii, the action filed by the real parents of the detainee (an infant) for protection of personal liberty is unlawful for lack of Japanese jurisdiction.

[Reference: Habeas Corpus Act §§ 11 (1), 16, and Habeas Corpus Rules §§ 2, 21 (1)(i), 37]

### **[Fact]**

$X_2$  gave birth to a child (detainee  $Z$ ) out of her relations with  $X_1$  who had a wife and children. She consented to A that “she

shall give up her parental rights to Z and leave the right to choose parents to A et al.” Thereupon, A handed the infant child Z to Y<sub>1</sub> and Y<sub>2</sub>, a couple residing in Hawaii. X<sub>1</sub> and X<sub>2</sub> who were married afterwards as man and wife demanded Y<sub>1</sub> and Y<sub>2</sub> that Z be returned to them on the basis of the Habeas Corpus Act, contending that the declaration of intention as above was invalid.

### *[Opinions of the Court]*

“The Habeas Corpus Act, as is evident by Article I of the Act, is a law of procedure with the object of enabling people to recover the liberty – actually deprived unlawfully – of persons in a prompt and easy manner through judicial procedure in accordance with the ideals of the Japanese Constitution, which guarantees fundamental human rights, not designed to carry out a conceptual relief such as to order the release of a detainee by way of a court judgment, but requiring essentially the court to realize the actual state of release by way of a judgment (Act § 16, Rules § § 2 and 37).

“According to this procedure, when the Habeas Corpus order has been served upon the person detaining and the person detained through the person detaining are deemed to be placed in the custody and under the protection of the court (Habeas Corpus Rules § 25 (1)). However, in order that such an arrangement can be guaranteed lawfully, the person detaining must fall under Japan’s Jurisdiction, that is, he or she must be actually residing in an area where Japan’s sovereignty extends. In otherwords, the Habeas Corpus Act should be interpreted as a legal procedure expected to function within the area where Japan’s sovereignty extends. Accordingly, if the person detaining does not fall under Japan’s jurisdiction because he or she is residing overseas, there is no cause for invocation of the Act. Hence, the claim in the current case against the person detaining who, residing overseas, does not fall under Japan’s jurisdiction shall be dismissed, as it is unlawful in the light of the Habeas Corpus Act § 11 (1)(i), and the Habeas Corpus Rules § 21 (1)(i).

### *[Comment]*

The procedure of the Habeas Corpus Act is structured to the procedure of having the person detaining and the detainee under the jurisdiction of the court by dint of legal force, in order to achieve the inherent object of the act to relieve a person from unlawful restrictions on his liberty.

Should we attach importance to this outstanding phase of the Habeas Corpus Act, invocation of the act is to be limited to cases where “the person detaining actually resides in an area where the sovereignty of Japan extends.” However, there is an opinion that in cases where the Habeas Corpus Act is employed to dispose of the problem surrounding the care and custody of a child, and in cases where importance is attached to the phase of solving the question involving the child’s care and custody by the court, the relief procedure in the Habeas Corpus Act can be termed as a civil action procedure in international law of civil procedure, and whether or not there is international jurisdiction should be decided from the standpoint of the international distribution of jurisdiction. [See, “Overseas Decisions Study,” Kazunori Ishiguro, 33 *Jurist* 156]

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