

appellate court's decision to the effect that Article 26 of the Labor Standards Act excludes the application of Article 536(2) of the Civil Code. Secondly, it is also significant that the Supreme Court ruled that the scopes of the two provisions are different. On these two points, we agree with the opinions of the Supreme Court. On the latter point, however, the Supreme Court did not clarify the provisions' respective scopes. This will be left to future decisions.

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8. International Law

1. The ownership of Chinese property abroad after the Sino-Japanese normalization.

Decision by the Tenth Civil Division of the Osaka High Court on February 26, 1987. Case No. (*ne*) 335 of 1986. 1232 *Hanrei Jihō* 119.

[Reference: Civil Code, Article 206.]

[Facts]

The land and building thereon, so-called Kokaryo, which the Republic of China (Taiwan) (plaintiff, *koso* respondent) requested the students (defendants, *koso* appellants) to evacuate had been during World War II leased by Kyoto University. (Whereas the Republic of China had been used as the name of the plaintiff or *koso* appellant in this case, Taiwan was used as the name of the *koso* respondent in the current case in the Osaka High Court under review.) After the war, the Republic of China (Taiwan) purchased the building concerned in 1947 and her ownership was formally registered in 1961. In 1966, the Republic of China (Taiwan) filed a suit with the Kyoto District Court, calling for removal of the students who were in con-

tinuous possession of the building concerned in defiance of the will of the Government of the Republic of China (Taiwan).

Incidentally, on September 29, 1972, when the original case was pending before the Kyoto District Court, the Japanese Government switched its recognition of China from the Government of the Republic of China to the People's Republic of China, breaking off relations with the Government of the Republic of China.

At first instance, the Kyoto District Court dismissed the plaintiff's claim, ruling that the whole national property, public or private, should be, without exception, acknowledged as owned by the government to which Japan grants recognition as the sole legitimate representative of the Chinese people. (Decision by the Third Civil Division of the Kyoto District Court on September 16, 1977. Case No. (*wa*) 1025 of 1967.) However, the Osaka High Court, in the second instance, reversed the decision and remanded the case to the Kyoto District Court, holding that, irrespective of the switch in recognition, the Republic of China (Taiwan) did not immediately lose the ownership of the building concerned, and that the ownership of public assets other than public assets which were directly related to the representation function of a state was not necessarily transferred to the successor government. (Decision by the Sixth Civil Division of the Osaka High Court on April 14, 1982. Case No. (*ne*) 1622 of 1978.) The Kyoto District Court in dealing with the remanded case supported the decision of the Osaka High Court of 1982, and ordered the students to evacuate the building. (Decision by the Third Civil Division of the Kyoto District Court on February 4, 1986. Case No. (*wa*) 1382 of 1982.) The students, dissatisfied with the decision, filed a *koso* appeal with the Osaka High Court.

[Opinions of the Court]

Koso appeal dismissed.

“There is nothing for it but to be judged according to the concrete circumstances, such as the details and reasons of the acquisition of the building concerned, the character of it, and the purpose and situation of the use of it, whether ownership of the building concerned is to be succeeded to by the People's Republic of China with

the above-mentioned switch in recognition.”

“The building concerned...had exclusively been used as a residence for Chinese students in Japan since 1945 when the Japanese Government initially leased it. After World War II, the lease ended and Kyoto University, which had been entrusted by the Japanese Government with management of the building, ceased the management of it.... The students living there at the time repeatedly requested that the representative mission of the Republic of China (Taiwan) in Japan should take proper measures. The representative mission decided to appease the students’ dissatisfaction and solve the problem by purchasing the building.... The sales contract on it was twice concluded; this occurred after the establishment of the People’s Republic of China on October 1, 1949. After the purchase of the building concerned, the respondent did not begin to manage it as before...and both supporters of the People’s Republic of China and those of the Republic of China continued living there for the time being. The above-mentioned facts are recognized.”

“In light of the above-mentioned facts, the building concerned can be considered to be neither diplomatic property nor property for the execution of state power. It is considered property which the respondent purchased after the establishment of the new government with the aim of eliminating the distress of the students living there. Thus, the building concerned is not considered property which the Japanese Government should transfer to the new government. It follows that the respondent is understood to retain and be able to exercise the right to own the building concerned in Japan regardless of the switch in recognition.”

[Comment]

The present litigation, which originally was just a civil action, became a complicated diplomatic dispute when the People’s Republic of China claimed ownership of the building concerned, Kokaryo, after the Kyoto District Court recognized ownership of the Republic of China (Taiwan) in 1986. As a result, this case came to public view as both a legal and political issue.

In the original trial in the Kyoto District Court (1972), the resump-

tion of diplomatic relations with the People's Republic of China and the switch in recognition of governments caused a rupture of diplomatic relations with the Republic of China (Taiwan). The following two points were raised as the central issues: (1) Whether the Republic of China (Taiwan), with respect to which recognition was withdrawn, has the capacity to be a party to a litigation before a Japanese court; and (2) Whether ownership of the Kokaryo is to be transferred from the Republic of China (Taiwan) to the People's Republic of China following the switch in recognition.

Point (1) had already been settled in the decision of the Osaka High Court of 1977, in which it remanded the case. This 1977 decision recognized the capacity to be a party, on the ground that the capacity in the private legal dispute should not be connected with the issue of the recognition of a government. The present decision, supporting it, held on this point as follows: "It cannot be denied that the respondent became a party to private legal relations in Japan and it is reasonable that the court responsible to resolve legal disputes should recognize Taiwan's capacity to be a party." Although the point (1) had indeed already been settled in the 1977 decision, there remain the following theoretical problems: (a) To what extent approval or disapproval of the capacity of a government to be a party with respect to which recognition has been withdrawn may be connected with the judgment under international law, namely the effect of recognition; and (b) How the existence of the Republic of China (Taiwan) is to be understood in view of the interpretation of municipal law, e.g., whether, by analogy, the Republic of China (Taiwan) may be regarded as an incorporated association set forth in Article 46 of the Code of Civil Procedure, which has no legal personality but has the same substance as a corporation.

However, since the above-mentioned decision of the Kyoto District Court in dealing with the remanded case, the major issue had been concerned with point (2). With respect to this issue, except for the Kyoto District Court which, in originally dealing with the present case, held that with the switch in recognition, ownership had been transferred to the People's Republic of China, all decisions took the position that the Kokaryo remained the property of the Republic of

China (Taiwan) on the ground that it was not diplomatic property, applying the theory of “Succession of Government,” especially the category of “Incomplete Succession.”

The “Succession of Government” means that a new government succeeds to the rights and duties under international law and the public or official property of a former government. As a general rule, it is a principle under international law that a new government succeeds, in a comprehensive manner, to the public property as well as to the rights and duties. It is apparent in light of the legal maxim that *forma civitatis mutata, non motatur civitas ipsa*. However, pursuant to the position taken by courts so far, such a comprehensive succession is approved only in the case of a complete succession, i.e. in the case where a former government is no longer existent and a new government completely replaces the former one. In such a case where a former government remains in a locality and still dominates the territory effectively as in the present case, it is assumed that a new government does not succeed completely. On this occasion it becomes necessary to distinguish succeeded property (public property concerned with state power) from non-succeeded property (other property). The present decision, which upheld the decision of the Kyoto District Court in dealing with the remanded case in 1986, ruled on this point as follows: The building concerned is not property which should be succeeded to by the People’s Republic of China, because it can be approved as neither diplomatic property nor property for the execution of state power. The court also recognized the ownership of the Republic of China (Taiwan) in the present decision.

The present case is indeed a peculiar case, there being few precedents in light of the following two points: (a) There exist two governments each disputing the legitimacy of the other; and (b) The object of public property is located in a foreign state. In such a sense, it is a foresight that the courts explained the transfer of the rights from the former government to the new one by applying the theory of “Succession of Government.” However, “Succession of Government,” as described before, usually means a succession in a comprehensive nature. Though the theory of “Succession of State,” especially “Incomplete Succession,” is applied to the present case which is consid-

ered a marginal case lying between "Succession of Government" and "Succession of State" (Shinya Murase, 869 *Jurisuto* 127), "Succession of State," occurring from a secession or uniting of states and a partial transfer or independence of a territory, takes place by mutual agreement such as a succession agreement; otherwise, it comes under general international law. Accordingly, it is exceptional to apply the theory to such a case where the governments have disputed each other and there is no room for agreement as in the present case. Thus, there is left a problem regarding the present holding, regarding whether the theory of "Succession of Government or State" can be applied to the present case on a different premise.

In such a case which might develop into a diplomatic dispute as in the present case, it would be possible to apply the Anglo-American theory of "Judicial Self-Restriction." In this theory, an issue of recognition of a new state or a new government should be solely dealt with by an administrative body, and the court should refrain from an act of recognition which is independent of the administrative judgment. Hence, the court is to make an inquiry to the Ministry of Foreign Affairs about how they will deal with the new entity. This is a practice of long-standing in England. In view of the international trend which shows that an increasing number of states are abolishing the institution of recognition of government, this theory would be realistic and, also, beneficial in terms of diplomatic trouble.

2. The Japanese civil jurisdiction over acts by members of the U.S. armed forces done in the performance of official duties in Japan.

Decision by the Fifth Civil Division of the Yokohama District Court on March 4, 1987. Case No. (wa) 2096 of 1980. 1225 *Hanrei Jihō* 45.

[Reference: Article 6 of the Treaty of Mutual Cooperation and Security between Japan and the United States of America (hereinafter referred to as "the Treaty"); Article 18 of the Agreement under Article 6 of the Treaty of Mutual Cooperation and Security between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan (hereinafter referred to as "the Agreement"); Article 2 of the Act for Spe-

cial Measures Concerning Civil Cases to Implement the Agreement under Article 6 of the Treaty of Mutual Cooperation and Security between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan (hereinafter referred to as “the Act”).]

[Facts]

At around 1 p.m. on September 27, 1977, a Phantom scout plane (RF4B) of the U.S. Marine Corps, after taking off from Atsugi Base-ment in Kanagawa Prefecture, developed a fire and crashed into the housing complexes of the plaintiffs (X₁, X₂, X₃, X₄). Y₁ and Y₂, piloting the plane, bailed out just before the crash. But plaintiff X₁ sustained injuries in this accident, and the house and personal properties jointly owned by X₁ and her family (X₂, X₃, X₄) were burnt down. The plaintiffs filed a suit against Y₁ and Y₂ and Y₃ (Japanese Government) with the Yokohama District Court, calling for compensation for damages and solatia (consolation money) for burnt household goods.

Prior to the hearing on the merits, Y₁ and Y₂ contended that they had no competence to be a party to the litigation as a defendant for the following reasons:

(a) Pursuant to Article 18 (5) of the Agreement, they are never subject to the Japanese civil jurisdiction over an accident arising in the performance of their official duties.

(b) Compensation for damages may not be claimed against individual members of the U.S. armed forces because it is the Japanese Government that is under obligation to make the redress of damages in accordance with Article 1 of the Act and Article 1 of the State Tort Liability Act (hereinafter referred to as “the Compensation Law”).

[Opinions of the Court]

Claim partially allowed.

(1) Re the civil jurisdiction over members of the U.S. armed forces in the performance of official duties.

The decision rejected the defense of the defendants (Y₁, Y₂)

holding that, "the status of the U.S. armed forces in Japan is regulated by the Agreement. According to Article 18 (5) (f) of the Agreement, when members of the armed forces inflict damages on third parties other than the Japanese Government through the performance of official duties, they shall not be subject to any proceedings for the enforcement of any judgments given against them in Japan. In addition, Article 18 (9) (a) of the Agreement provides that the U.S. shall not claim immunity from the jurisdiction of the courts of Japan over members of the U.S. armed forces, except to the extent set forth in Article 18 (5) (f). Consequently, in such civil procedures as the present one, members of the U.S. armed forces, including the defendants, are subject to the Japanese civil jurisdiction."

(2) Re the claim against the individual members of the U.S. armed forces.

The court held as follows:

"Article 1 of the Act states that if members of the U.S. armed forces in Japan have inflicted any damages on another person through an illegal act in the performance of official duties, the U.S. shall be under obligation to make the redress of such a damage as in the case wherein any damage has been inflicted by a governmental official through an illegal act in the conduct of official duties. Article 1 (1) of the Compensation Law applies in the case where a governmental official illegally inflicted losses upon another person."

"In light not only of the purpose of the Act to make complete reparation for damages, but of the fact that the State has full capacity to pay compensation, it should be considered that the individual official who inflicted damages, on account of either fault or gross negligence, is not liable to compensate such damages. (See the decision of the Second Petty Bench of the Supreme Court rendered on October 20, 1978. 32 *Minshū* 1367.) Thus, individual members are assumed to be not responsible for indemnity."

(3) Re the theory of punitive compensation.

Regarding the damages in this case, the plaintiffs claimed the so-called "theory of punitive compensation" as follows: As in this case, where an assaulter has gigantic power, or where the infringement is so vicious that recurrence of such an accident is expected, the

amount of compensation should be more than in normal cases so as to restrain and prevent recurrence of such accident. However, the decision held: “Since the purpose of the Compensation Law of Japan is to restore the damages and not to inflict punishment, the theory is not applicable.”

[Comment]

Plane crashes of the U.S. armed forces have often occurred so far. However, this is the first case in which affected residents claimed compensation against members of the U.S. armed forces and the Japanese Government. The central issue in this case was whether members of the U.S. armed forces are subject to the Japanese civil jurisdiction.

The jurisdiction, as the decision states, “in principle extends to foreigners in Japan under international law, with the exception for foreign sovereigns and diplomatic representatives who have extritorial rights, as well as other special cases provided for in treaties.” Thus, the question in this case is whether members of the U.S. armed forces fall under the above-mentioned exception, i.e. whether they enjoy immunity from the Japanese civil jurisdiction over their illegal action while in performance of their official duties.

Regarding cases where members of the U.S. armed forces in Japan have inflicted injury, death, or damage to property on another person through the performance of duties (commission and omission) or accidents, Article 18 (3) and (6) (a) of the Administrative Agreement under Article 3 of the Security Treaty between the U.S.A. and Japan (the former Agreement) in 1951 provided as follows: “Members and civilian employees of the U.S. armed forces (excluding those employees who have only Japanese nationality)” shall not be subject to suit “in Japan with respect to claims.” However, Article 8 of the North Atlantic Agreement in 1951 provides that members and civilian employees of the U.S. armed forces “shall not be subject to any proceedings for the enforcement of any judgment” given against them in the receiving state in a manner arising from the performance of their official duties. Article 18 (5) (f) of the present Agreement, as described before, was amended in light of Article 8

of the North Atlantic Agreement. The submission to jurisdiction is different from the submission to the enforcement. In view of the difference in proviso between the former Agreement and the present one, it is clear that the Agreement provides for only immunity from the enforcement of the judgment and not from civil jurisdiction as such. The present judgment is worth noticing in light of the fact that the Japanese court for the first time made a definite decision on this point.

Incidentally, this decision, quoting the decision of the Supreme Court in 1978, put members of the U.S. armed forces in the same position as Japanese governmental officials in interpreting Article 1 of the Act. The present decision, furthermore, concluded that, while the Japanese Government was liable to make the redress of damages under the Act, individual members of the U.S. armed forces were under no obligation to do so. However, whereas the Compensation Law deals with the responsibility of Japanese governmental officials, whose wages are paid through taxes levied from Japanese nationals, the Act deals with the problems of sharing the responsibility arising from the illegal act of the foreign armed forces which is not directly supported by Japanese nationals. In view of such differences, it is not reasonable to apply the same logic to issues different in character and to deny the responsibility of individual members. An approach, with consideration given to the originality of the Act, would be required hereafter.

Although this decision affirmed the Japanese civil jurisdiction over members of the U.S. armed forces in the performance of official duties, its practical benefit is assumed quite small since it finally denied the responsibility of individual members.

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