

pital is a worker becomes an issue of law.

Article 9 of the Labor Standards Law defines a “employee” as the person who is employed for the business or the establishment “regardless of the kind of occupation” and is paid wages. At this point, the Courts have considered synthetically the form of labor and the character of reward, etc. A report in 1985 concerning this problem said the main factors of the criteria whether a man/woman was a “employee” was work under direction and supervision (possibility of refusing request of work, presence of direction and supervision for working and time and place restraint) and the character of reward, and that supplementary factors were the amount of reward and the way of tax management about reward.

Up to now, the Supreme Court has not shown a general opinion. But in some cases, the Supreme Court judged as follows (for example, the case of Yokohama-Minami labor standards inspection office, 28 November, 1996). It is important whether he/she works under direction and supervision of others. And, the methods of calculating reward, etc. are reinforcing factors.

This judgment is in line with past cases because it focused on the point that the labor was under direction and supervision. Concretely, it examined whether the time and place restraint and direction and supervision existed, and if so, the degree of them.

## 9. International Law and Organization

### **X et al. v. Japan**

Tokyo High Court, June 23, 2005

Case No. (*ne*) 4212 of 2001

1904 HANREI JIHO 83

### **Summary:**

Claim for compensation against the Government of Japan by three family members of a Chinese national who had been forced to work in a

mine in Japan during the Second World War and subsequently compelled to hide in the wild is denied.

**Reference:**

Forced Labour Convention, 1930 (ILO Convention No. 29); State Redress Law and its Annex; Civil Code of Japan.

**Facts:**

The plaintiffs are family members and heirs of a Chinese worker (hereinafter “A,” died in 2000), who was taken to Hokkaido during the Second World War by the Government of Japan, and was forced to work at a coal mine operated by a private company. He had been forced to work under such harsh conditions that he escaped from the mine and had to live a hide-away life in the wild, thus suffering intolerable pain for 13 years.

The plaintiffs claimed for compensation in the amount of 20,000,000 yen. The earlier decision by a lower court found the forcible drafting and the forced labour illegal, and awarded the damages from the Government (Tokyo District Court, July 12, 2001). The Government appealed against that decision.

**Opinion:***Dismissed.***1. Claims based on international law:**

The plaintiffs rely on several international conventions, including the Forced Labour Convention, as the bases for their claims. They argue that they should be recognized as subjects of international law with the right to claim compensation from the wrongdoing State. However, international law basically governs the relations between States. Therefore, in order to recognize such a right of the plaintiffs, specific provisions are required in Japanese law which clearly recognize the applicability of the conventions in question in national courts as well as the rights of individuals to file claims for injuries in national courts. Since no such provisions are found in relation to the present Case, the plaintiffs’ claims for compensation have no legal basis.

2. Claims based on the Civil Code and the doctrine of the non-responsibility of the State:

During the Second World War, under the Constitution of the Japanese Empire, the Civil Code did not apply to injuries caused by the public acts of the Government, and thus the Government was considered to be not liable for any acts done for such public policy purposes. Since forcibly moving people into Japan for forced labour was carried out as part of the public policies of the Government during the War, the acts concluded by the Imperial Army and the relevant Ministries can be considered as acts of the State.

Therefore, the legality of the forcible drafting and the forced labour which had been executed before the enactment of the State Redress Law in 1947 must be judged on the basis of the doctrine of the non-responsibility of the State, according to which any responsibility of the Government is denied.

3. Responsibility of the Government under the State Redress Law:

On the other hand, the Court recognizes the duty of the Government (Ministry of Health and Welfare) to protect A after the promulgation of the State Redress Law. The question at issue concerns the wrongfulness of the Government act and its causal relations with the injuries suffered, which are prerequisites for establishing Government liability under Article 1, Paragraph 1, of the Law. When the Law came into force, the Ministry of Health and Welfare had the duty to protect A; it must have been in a position to predict that the life of A would be threatened as a consequence of his unwilling escape from the place of his forced labour. For the purpose of both crime prevention and the protection of a missing person's life, the Government was responsible for taking necessary measures to search for and protect A while he was at large. The Government should have informed the police of the physical features of A and the fact that he had escaped from the coal mine, with instructions to notify it when he was found. In addition, the Government should have publicized the details about A among the local people in cooperation with the local governments.

The failure of the Government to take action as described above is considered to constitute a wrongful act under Article 1, Paragraph 1, of

the State Redress Law. Reasonable causal relations can also be established between the omission and the injuries which the plaintiffs suffered.

4. Applicability of the statute of limitation for filing claims under the Civil Code:

On the applicability of the statute of limitation, Article 724 of the Civil Code provides that the right to file claims for compensation for injuries lapses 20 years after the wrongful act. The liability for compensation will thus disappear with the application of this provision. The exceptions to this rule are strictly limited to a case where the application of the statute of limitation would result in a situation grossly against justice and fairness.

In the present Case, the plaintiffs argue that there were insurmountable obstacles to them filing lawsuits in Japan. They complained that there had been no official diplomatic relationship between Japan and the People's Republic of China until September 29, 1972 (when the Japan-China Joint Communiqué was issued), and that they were unable to obtain their passports which were necessary for traveling to Japan. However, such a situation was not one caused by the Government of Japan. In addition, by 1958, the support organization for the plaintiffs had already acquired parts of the reports on the servitude of Chinese workers prepared by the Ministry of Foreign Affairs.

In the light of these circumstances, it must be concluded that no special situation existed which would render the application of the statute of limitation grossly against justice and fairness. Therefore, the plaintiffs' claim for compensation under article 1 of the State Redress Law is considered to have lapsed with the passage of 20 years.

5. Responsibility to take legislative measures:

The plaintiffs argue that the Diet should have adopted legislation for remedying the injuries individuals had suffered by the acts of the Government during the War, and that the failure to do so violates article 1 of the State Redress Law.

However, decisions regarding law-making are made essentially in political, and not legal processes. The Diet members bear a political responsibility toward the whole nation, and are not obliged to enact specific legislation. Unless the Constitution provides for the duty to take

specific legislative measures, the question of whether or not to enact a new law is a matter to be decided by the majority of the Diet on the basis of policy considerations.

Therefore, it must be concluded that the claims by the plaintiffs on this point have no legal grounds.

### **Editorial Note:**

Although 60 years have passed since the Second World War, many cases involving claims for damages and injuries suffered by Japanese and foreign victims during the War have continued to be filed with the Japanese courts. Various plaintiffs, e.g. Japanese nationals, former colonials and foreign prisoners of war have complained about various war damages or injuries. The courts have, however, consistently denied the responsibility of the Government of Japan to compensate, except for only a few cases, including, e.g. the judgment of Shimonoseki Branch of Yamaguchi District Court on August 27, 1998, which ordered the Government to pay compensation to three Korean “comfort women” for the injuries caused by the Imperial Army.

In the first trial of the present Case, Tokyo District Court concluded that the full amount of the plaintiffs’ claims was recognized. However, Tokyo High Court rejected the claims.

The High Court admitted that the forcible drafting and the forced labour were part of the public policies of the Japanese Empire, and then went on to apply the doctrine of the “non-responsibility of the State,” holding that the Government was not held responsible for acts done in the exercise of its power. On the other hand, the High Court concluded that, since the adoption of the State Redress Law, the Government had neglected the duty to search for and protect A while he was hiding out.

The High Court followed the judgment of the District Court on these points, but denied the responsibility of the Government, taking a different position on the following two points.

The first point concerns the requirement of the “guarantee of reciprocity” in article 6 of the State Redress Law. The District Court held that reciprocity was guaranteed by the enactment of the Chinese State Redress Law in 1995. However, the High Court examined whether reciprocity had been established “as of 1958,” when A was rescued, and concluded that a

law equivalent to the State Redress Law of Japan had not existed in China at that time and thus a Japanese national suffering injuries in China would not have been entitled to claim compensation from the Government of China.

The second point relates to the applicability of the statute of limitation, or the “cut-off period (*Ausschlußfrist*)” for filing claims under the Civil Code.

In 1946, in the immediate aftermath of the Second World War, the Ministry of Foreign Affairs compiled documents on forcible drafting and forced labour in various regions of Japan. They were however burned, with a few exceptions, for fear of being utilized as evidence in the war-crime trials. In 1958, after A was rescued, the Ministry of Foreign Affairs denied in the Diet the facts of forcible drafting and forced labour, stating that there was no document regarding them. The District Court considered that attitude as grossly against justice and fairness, and did not apply the cut-off period. However, the High Court reversed the decision and applied the cut-off period, finding that it was not the act of the Ministry of Foreign Affairs that had prevented the plaintiffs from instituting the suit.

With respect to the breach of obligations under international law, the plaintiffs argued that private individuals who were victims of acts done for the purpose of aggression in violation of international law were naturally entitled to claim reparations from the responsible State, and should have been treated as the subject of international law. The plaintiffs also argued that the Government of Japan had violated anti-slavery rules under the Slavery Convention and international customary law, the Forced Labour Convention, and international humanitarian law, and committed crimes against humanity. The High Court denied the self-executing character of these conventions and rejected the plaintiffs’ claims.

A variety of international law rules have been at issue in post-war compensation cases. In rejecting claims against the Government, the Japanese courts have consistently resorted to reasoning that international law deals only with questions of compensation between States, and it cannot provide any basis for individual victims of war to claim compensation. As a corollary to this, it is argued that any basis for individuals’ claim must be found in Japanese domestic law.

Under such circumstances, and considering that the plaintiffs of many post-war compensation cases have considerably aged, the almost only, though not best, judicial remedy that may realistically be possible now would be the restriction on the application of the statute of limitation. It remains to be seen whether this avenue will be considered in detail in future cases.

**X v. State of Georgia, USA**

Tokyo District Court, September 29, 2005

Case No. (*wa*) 1230 of 2001

1907 HANREI JIHO 152, 904 ROHAN 35

**Summary:**

The plea of immunity by a foreign State is not recognized in the case where an employee claims confirmation of the invalidity of her dismissal by that State and the reinstatement to her former status because the Court should adopt the restrictive doctrine concerning jurisdictional immunity of a State in a civil proceeding.

**Reference:**

Labor Standards Law, Article 18-2; UN Convention on Jurisdictional Immunities of States and Their Property, Article 11.

**Facts:**

The defendant established the Georgia Ports Authority in 1945 through its legislation, and has set up an office representing the Authority in Tokyo. In June 1995, the Authority employed X as a member of staff of the office, and on September 12, 2000, notified her that she would be dismissed as of the 15th of that month.

Against this action of the Authority, X complained that, in those days, the number of cargoes being dealt with by the Authority was increasing and its profit growing, and that the defendant had no reasonable grounds for reducing its cost and personnel. X thus requested the Court to confirm that the act of dismissal violated the Labour Standards Law and hence invalid because it was summarily executed without observing the duties to avoid unnecessary dismissal and to clarify the

legal basis of dismissal. X further asked the Court to order the defendant to pay her 624,205 yen for each month since the day of her dismissal.

Against these claims, the defendant argued that the State of Georgia, a constituent state of the United States of America, is equivalent to a nation State and can thus enjoy State immunity. The defendant maintained that, under established customary international law, even if the restrictive doctrine of State immunity is adopted, immunity should be denied only when a State conducts “commercial activities” in its private capacity, and that the disputes concerning contracts of employment between a State and an individual enjoy immunity. The defendant further argued that under Japanese law there are no procedural rules concerning such matters as service of process, disclosure of evidence and enforcement of judgments in connection with the exercise of jurisdiction by a court against a foreign State, and that under such circumstances proceedings would lack due process and hence violate both the Constitution and international law. Thus, the defendant demanded that, because of the lack of such procedural rules in the forum State, the law of the defendant State, i.e. the State of Georgia, be applied, and that the plaintiff’s claims be dismissed on account of their non-conformity with the requirements of the law of that State.

### **Opinion:**

None of the arguments the defendant offered in the preliminary objection before entering into the merits is admissible.

It is clear that the defendant is an entity which can enjoy State immunity because it is a constituent state of the United States of America, with its own constitution, the three separate branches of the government, and the right to withdraw from the Union.

In applying State immunity, however, it is more appropriate to adopt the restrictive doctrine, under which commercial transaction and profit-making activities conducted by a State on equal terms with private persons cannot enjoy immunity in civil proceedings.

The employment contract at issue in the present case is a type of agreement which a private person can also enter into, and is not a sovereign act which is performed normally by a State as such. Judging from the substance of the contract, the defendant cannot be considered



to have employed X on the basis of any specific qualifications that it had set. The contract is therefore in no way different from one concluded between private persons. Moreover, the Authority is an entity established to manage the facilities owned by the State of Georgia and to promote transactions between the state and foreign countries. Therefore, at least with respect to the operations in which X was involved, the activities of the Authority are those relating to commercial activities both in its nature and purpose, and thus cannot be considered to relate to sovereign acts.

Against this view, the defendant argued that a number of domestic and international practices, including the US Foreign Sovereign Immunities Act 1976, the UK State Immunity Act 1978, the Australian Foreign States Immunities Act 1985, and the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, show that immunity concerning the employment relationship between a State and a private person is an established rule of customary international law. However, the establishment of the rule as part of international customary law cannot be proved by such examples alone. Moreover, the contract of employment in question is a general contract requiring no special qualifications, and it is thus not reasonable to argue that only the dismissal and reinstatement procedures in the contract concern sovereign acts.

Further, the argument cannot be entertained that the Court cannot exercise its jurisdiction because no procedural rules applicable to foreign States exists. It is sufficient to follow the procedures provided for in the Code of Civil Procedure of Japan, or to utilize formal diplomatic channels.

### **Editorial Note:**

It is generally understood that the courts of Japan have adopted the absolute doctrine of State immunity since the 1928 decision of the Great Court of Cassation (Matsuyama case. See 4 I.L.R. 168). However, some district courts have recently started to state clearly that they have adopted the restrictive doctrine, as illustrated by the decisions of the Tokyo District Court on November 30, 2000 (1740 HANREI JIHO 54), the Yokohama District Court on August 29, 2002 (1816 HANREI JIHO 86), and the Tokyo District Court on July 31, 2003 (1850 HANREI JIHO

84). Furthermore, on April 12, 2002, the Supreme Court suggested that it might be shifting towards the restrictive doctrine by pointing to a growing number of State practices which consider it inappropriate to grant immunity from civil proceedings to private law or business activities of States, though immunity was recognized in the case in question because it related to the US military exercises (1786 HANREI JIHO 43).

The restrictive doctrine is becoming accepted as a common practice among developed countries at least. It is however not so simple to define a “commercial activity” for which immunity is not granted. Two separate doctrines exist on the criteria for deciding whether a State activity is considered as sovereign act or not. One focuses on the nature of the act, and the other on the purpose of the act. Most of the Western countries adopt the former, while some countries like France take the latter also into consideration. Developing countries like China and India, which have many publicly-owned enterprises leading the nation’s economic growth, basically have adopted the absolute doctrine. In Japan, on March 29, 2002, Tokyo High Court granted State immunity in a case concerning guarantee contracts for a loan to a public corporation. In the present case, the Court appears to have reached the above-mentioned decision on the basis of an overall consideration of the defendant’s actions, which were regarded as private law or business activities from the point of view of both their nature and purpose.

The above-quoted UN Convention provides that while in principle a State cannot invoke immunity from jurisdiction in a proceeding which relates to a contract of employment, this does not apply, *inter alia*, in two cases. One is the case which relates to the recruitment, renewal of employment or reinstatement of an individual, where immunity applies unconditionally; the other is the case which relates to the dismissal or termination of an individual, where immunity is recognized only when it would interfere with the security interests of that State (Art. 11, Para. 2, (c) and (d)). The Convention thus shows a trend of recognizing judicial settlement in a case of termination of employment, while recognizing the discretionary powers of the State for acceptance of employment. Contrary to this trend, in the present case, where the plaintiff claimed her reinstatement through the confirmation of her rights under the contract as well as the payment of her salary, the Court recognized that such

claims for reinstatement are also admissible where the contract in question clearly constitutes a private law or business management act.

This is a case where a Japanese court followed the recent trends towards the restrictive doctrine of State immunity. It is not desirable for the stability of international trade, however, that, despite its ever-growing economic transactions with foreign countries, Japan, the second largest economy in the world, has still no legislation concerning State immunity. It is hoped that the Government will seriously consider early preparation of such legislation particularly since it is one of the countries which have actively led the negotiations for the UN Convention.