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Compensating Colonial Lepers, Slave Laborers and *Hibakusha*: Troubling Legacies and Evolving Standards of Postcolonial Justice in Japan

By Jeff Kingston

On Oct 25, 2005 a three-judge panel of the Tokyo District Court upheld a lawsuit filed by 25 leprosy (Hansen's disease) patients from Taiwan claiming compensation from the Japanese government for being forcibly segregated during Japanese colonial rule. On the same day, another panel of judges ruled against 117 South Korean leprosy patients seeking compensation who had also been quarantined during the colonial era.[1]

All of the plaintiffs were forcibly institutionalized under the aegis of Japanese colonial administrations. Previously these plaintiffs had unsuccessfully approached the Japanese government for the same redress awarded to all leprosy patients in Japan in a 2001 decision by the Japanese government to offer compensation ranging from 8-14 million yen. This compensation, it should be noted, was granted regardless of ethnicity to all those segregated in Japan. The government later extended the compensation to lepers who had not been segregated, acknowledging that the segregation policy, in effect until 1996, had exacerbated a social stigma against all lepers whether or not they had been quarantined. The colonial lepers filed suit to gain what has been offered to all lepers, and bereaved families of lepers, in Japan.

The Rulings

According to Masami Ito, "In rejecting the compensation demand from former South Korean patients, presiding Judge Tsuruoka Toshihiko ruled that the Diet deliberations that took place while establishing the compensation law show that the law was expected to cover all people who were institutionalized in sanitariums in Japan." [2] Tsuruoka based his ruling denying compensation to the Korean lepers on his narrow interpretation of the compensation law, asserting that, "...neither the lawmakers in the Diet nor those who established the law had such former patients in mind during the deliberations." Ito further quotes Tsuruoka as arguing that, "It would be difficult to say that the law specifically excluded patients in institutions outside Japan. But it is also obvious that there is no ground (for concluding) that the law includes such people." He went on to suggest revision of the compensation law because "...it cannot be denied that those institutionalized outside Japan were also subject to discrimination because of the government's segregation policy at home, and that there is room for consideration to give compensation to such former patients as well." In effect the judge is arguing that his decision against granting compensation is based on the current law and the intentions of those who wrote and implemented the compensation statute. However, in principle it appears that he is not against compensating the plaintiffs for the segregation and discrimination they suffered, and is sympathetic to their claim, if the law is revised to include them.

Judge Kanno Hiroyuki, the presiding judge in the panel that ruled in favor of the Taiwanese plaintiffs, took a broader view concerning the aims of the compensation law. Kanno stated, "This is not just compensation for damages or loss...(it is),"a special type of compensation to heal the physical and emotional scars of people who were placed in Hansen's disease institutions, as well as to ensure a peaceful life for their futures." In his view, "It is difficult to interpret the law as limiting compensation to certain areas in view of the law's nature, which is aimed at helping former leprosy patients broadly and comprehensively." Thus, he ruled that it was illegal for the Japanese government to arbitrarily deny compensation to any lepers who had suffered from discriminatory and inhumane treatment as a consequence of Japanese government policy because the compensation law was intended to provide redress to everyone who had been so wronged. Since the institutionalized colonial lepers had not been specifically excluded, he concluded that there is no basis for denying them the benefits of the compensation law.

In fact the compensation law places no restriction on where the leprosaria are located, stipulating only that redress be paid to anyone forced by Japanese authorities to live in such facilities. Only the implementing ordinance of the Ministry of Health and Welfare limits compensation to patients segregated in Japan.

Judge Tsuruoka based his ruling against the Koreans on the fact that, although the 1934 Leprosy Prevention Law of Japan that stipulated forced segregation of leprosy patients was enacted officially in Taiwan, it was never adopted in Korea. He ruled that the Korean institution could not be regarded as a Japanese state facility. However, the 1917 Korean Leprosy Disease Prevention Ordinance copied an earlier version of the Leprosy Prevention Law in Japan. As a result of this colonial Korean ordinance, a leprosarium was established on the small island of Sorokto off the southern coast of the Korean Peninsula. Currently there are 740 elderly former leprosy patients housed there.

However, several legal scholars rejected the idea that this legal nicety explains the clashing rulings. Rather they saw the disparity as normal. Contradictory rulings at the district court level are fairly common and the role of appeals courts is to provide recourse to, and remedy for, such inconsistencies and disparities. Ken Port, a specialist in Japanese law at William Mitchell College of Law in Minnesota currently conducting research in Tokyo, commented, "It is not unusual in Japan or America to have district courts come to different results. I doubt that it has anything to do with the nationality of the plaintiffs." [3]

Professor Suami Takao of Waseda Law School, Luke Nottage, a professor of Law at the University of Sydney, and Dan Rosen of Chuo University Law School all agree with this assessment. Suami notes, "The chamber in charge of the Korean case understands that discussion in the Diet was made on the assumption that people outside Japan would not be able to get compensation by the Act. On the other hand, the chamber in charge of Taiwanese considered the refusal to give Taiwanese compensation as the violation of the equality principle.....the difference in legal interpretation will be unified by the Tokyo High Court, which is the Court of Appeals. It is my impression, the Tokyo High Court is in general not in favor of protection of rights of non-Japanese. Therefore, it seems difficult for the Korean plaintiffs to succeed in overruling the judgment of the District Court at the High Court." [4]

Rosen concludes, "So it seems he (Judge Tsuruoka) is putting everyone not within Japan itself in the same (non-covered) category. I don't have specific information about former colonial powers taking or avoiding responsibility. However, I imagine that–in general--such countries claim that all such matters are resolved by whatever treaty took effect at the end of the colonial period. In other words...that the claims are extinguished." [5]

This indeed is the Japanese government's view; the 1965 Treaty of Normalization with South Korea aimed to extinguish any further legal claims. However, at the end of August 2005 Seoul abruptly shifted its position on this question and indicated that it continues to hold Japan legally responsible for "inhumane crimes".

The Japan Times reported this diplomatic bombshell as follows,

"We cannot see that the normalization treaty resolved such inhumane crimes as comfort women, in which Japan's state power, such as the government and military, was involved," said Yu Chong Sang, a senior official at the prime minister's office. "Japan's legal responsibility remains." Other "inhumane crimes" include slave laborers who died during their ordeal, and those caught up in the atomic bombings who were in Japan against their will, Yu said. However, Seoul is not holding Japan responsible for other slave labor cases, as the money it received from Tokyo at the time of normalization included compensation for that, he said. South Korea received an $800 million package, including $300 million in grants, from Japan in return for establishing ties. Yu said the $300 million was seen as resolving the compensation issue for slave labor." [6] Higashizawa Yasushi, a lawyer active in the Japan Civil Liberties Union, writes that, "It is not

certain whether the {1965 Normalization} Treaty covered claims caused by leprosy detention and treatment during colonization." [7]

It would appear that segregation of lepers would fall into the category of "inhumane crimes" cited by the Korean government as not being extinguished by the 1965 agreement. In January 2005 the Japanese government released the findings of its investigation of the nation's leprosaria. This 1,500 page report delves into the history of the facilities since their inception and details the cruel treatment endured by the patients/inmates. Truly, they were houses of horrors. Macabre specimens of aborted fetuses were preserved dating as far back as 1924 without any apparent reason. The report harshly criticizes the medical ethics practiced at the facilities and reserves special condemnation for the consequences of the Eugenics Protection Law that led to abortions, compulsory sterilizations, smothering of babies upon birth, research autopsies and dubious medical experiments. It is particularly damning that the investigators conclude that the main reason why the Health Ministry continued to require segregation of lepers - the official policy between 1907-1996 - was to secure budget allocations from the Finance Ministry and maintain employment for the staff and physicians. This policy was maintained long after effective medication was widely available and everyone involved knew that segregation was unnecessary.

Many of my students, neighbors and friends in Japan believe that the rulings reflect both a bias against Koreans and the political tensions between the two nations. While relations with Taiwan are relatively good, relations with Korea remain troubled by, inter alia, rifts over history textbooks and by PM Koizumi Junichiro's repeated visits to Yasukuni Shrine, seen by many Koreans as a talismanic symbol of unrepentant militarism and a whitewash of Japan's aggression in Asia. I was surprised to discover that my students do not believe that the judges ruled on the legal merits of the cases and instead insisted that the rulings reflected anti-Korean prejudice. Some students also mentioned that the government is concerned that a favorable ruling on Korean claims for compensation in this case would set a costly precedent that might influence lawsuits by former comfort women and slave laborers. In short, Japan enjoys friendly relations with Taiwan and Taiwanese memories of the colonial era are relatively positive while many Koreans are angry about their shared history with Japan. In this context, the potential liability for settling all possible claims with Korea could be very high.

This disparity in perceptions between legal scholars and the public regarding how subjective factors influence legal rulings is widespread. Judges are seen to be minions of the establishment, usually favoring the government or ruling Liberal Democratic Party. [8] This perception gap is one of the driving forces of ongoing sweeping judicial reforms as the legal community tries to address concerns about a lack of credibility and public distrust of the judiciary.

Courting Compensation

As of 2005, 3,475 former lepers have received compensation in Japan based on the 2001 Compensation Act that is set to expire in 2006. Of the 70 billion yen budgeted for compensation, 42.34 billion has been paid to claimants, ranging from 8-14 million yen. Thus, if the government does decide to compensate the colonial lepers, nearly 40% of the compensation fund has not yet been distributed.

The leprosy rulings bring to mind the similarly inconsistent rulings involving hibakusha (atomic bomb survivors) resident overseas, slave labor and comfort women. Different courts have issued different rulings although in general redress has proved elusive.

Wartime slave laborers have won redress at the district court level in Japan only to have their awards overturned on appeal. In contrast, in 2001 the German government and 6,300 German firms started paying redress to 1.6 million slave laborers from Eastern Europe that it had tracked down after considerable effort and on its own initiative. A $6 billion Remembrance, Responsibility and Future Foundation was established to distribute the compensation, funded through government and industry contributions. No lawsuits, no appeals, no legal technicalities or quibbling-just the political will to atone and offer a token of justice to those who had suffered untold indignities and prolonged injustice. [9]

It is estimated that approximately 39,000 Chinese were transported to Japan between 1943-45 and forced to perform unpaid slave labor. Over sixty lawsuits have been filed in Japan by survivors of this ordeal. They won a landmark case in the Fukuoka District Court in 2002 awarding them compensation from Mitsui Mining. However, in the first-ever ruling at the high court level regarding the lawsuits filed by former slave laborers, in May, 2005 the Fukuoka High Court dismissed the plaintiff's demand for compensation, citing the expiration of the twenty-year statute of limitations. Although compensation was denied, the high court did acknowledge that the government and Mitsui Mining shared joint liability for transporting the men to Japan and forcing them to work in the Mitsui mines.

Interestingly, the high court rejected the government's claim that it enjoyed immunity because it was not liable for state actions under the Meiji Constitution. This claim to immunity has been a standard government argument in rejecting wartime compensation claims. Bill Underwood states that this may be a "silver lining" to the ruling denying compensation. [10] By weighing in on the constitutional immunity defense the chances are greater that the case might be heard in the Supreme Court with the potential for setting a precedent favorable to redress movements. The high court also accepted evidence presented that proved a post-WWII government cover-up of knowledge about the slave laborers. This damning evidence indicates that the government was aware of the slave labor situation and tried to suppress this information in order to thwart legal action by the former slave laborers. The judge acknowledged that the suppression of such evidence "transgresses moral laws" but stopped short of upholding the district court finding that to apply the statute of limitations in this case "severely contradicts the idea of justice".

In April, 2004 the Niigata District Court rejected the government's claim that laws at that time exempted it from paying compensation to slave laborers, arguing that to acknowledge the government's position would be inappropriate from the standpoint of justice and fairness. The judge also dismissed claims that the statute of limitations precluded compensation. This is the first time that a court has held both the firm and the government liable, prompting a swift appeal. The government is basing its appeal on the Supreme Court's two previous rulings that the state cannot be held liable for the illegal actions of civil servants. These precedents, along with the 1965 Treaty of Normalization, were most recently cited in the February 2005 Nagoya District Court Ruling against compensation for South Korean women forced to perform slave labor at a Mitsubishi Heavy Industries ammunition factory during WWII. It is estimated that some 4,000 Korean women were conscripted to work in wartime Japan.

Underwood argues that former forced laborers, "…have consistently met with insincerity and obstruction from the Japanese government and corporations. As with other Japanese war crimes (Korean forced labor, comfort women, Unit 731, etc.), the GOJ response has been to stick with blanket denials until the emergence of incontrovertible evidence makes the incremental admission of historical facts unavoidable. The unsuccessful Asian Women's Fund for military sexual slavery was the closest that GOJ, which holds that past treaties and state-to-state agreements have extinguished all claims, has ever come to compensating individuals." [11]

In general, the postwar Japanese government has shirked responsibility for wartime excesses and atrocities. However, there are recent signs of change on the redress front. In the NBR, an Internet forum focusing on Japan, Underwood writes, "South Korea's "Truth Commission on Forced Mobilization under Japanese Imperialism" has been in the headlines all year and the pressure, described as "new principles" for confronting Japan on its colonial responsibility, is producing real results. Seoul asked Tokyo for information about 135,000 Korean civilians who worked in Japan during the war; Tokyo in turn asked corporations, municipalities and temples nationwide to search for name rosters and human remains. This is no small about-face…". [12]

Even more promising are legal developments regarding the overseas hibakusha (atomic bomb survivors) claims for the same benefits that are accorded to hibakusha resident in Japan. In October 2005 the Fukuoka High Court upheld a lower court ruling that overseas hibakusha do not have to come to Japan to apply for health-care benefits. The government long resisted pressures to make it easier for these ailing and elderly atomic bomb survivors to receive the same benefits provided their counterparts in Japan. The advancing age of the hibakusha was cited as one compelling reason why the government decided not to appeal the ruling. As a result of the high court ruling, the health ministry is revising the Atomic Bomb Survivors' Support Law so that overseas hibakusha can apply for recognition and benefits at Japanese consulates and embassies where they live. Currently, 3,660 overseas hibakusha are officially recognized and receive benefits wherever they reside, a consequence of a 2002 court ruling that waived the residence requirement imposed by the government. Now, some 1,000 more hibakusha are expected to benefit from the new policy as of November 2005. This sensible and humane policy shift offers a precedent for extending compensation to the colonial lepers.

Reconciliation

Steve Kuiack, a Canadian free-lance journalist who has written about the grim conditions and experiences of former Hansen's disease patients in Korea and works with the Hanvit Welfare Association, terms the recent Tokyo District Court ruling against the Korean plaintiffs a miscarriage of justice.[13]

Kuiack comments that," I am absolutely baffled as to why Japan's court would make such a damaging and inconsistent ruling. Of course, ruling in favor of Korea could have possibly opened up a whole can of worms by having other helpless victims of Japan's imperial control also begging for mercy and justice. As for the reaction in Korea, of course the Koreans are outraged as it tends to legitimize their long-held animosity toward Japan. Unlike the Germans who have taken an active role in righting the wrongs of their past aggression, Japan's token lip-service on some issues seems insincere and lack of action on others is improper. People have a sense that Japan just wants to sweep its shameful treatment in the past under the carpet, but forgiveness can only proceed once an official admission has been formally provided. Koreans also want to put the pain of Japan's imperialism in the past." [14]

Lawyers for both plaintiff groups met with officials of the Ministry of Labor, Health and Welfare after the split rulings and thought the government had agreed not to appeal the ruling awarding compensation to the Taiwanese. Back in 2001, PM Koizumi rejected the advice of his advisers to appeal the Kumamoto District Court ruling in favor of the Hansen plaintiffs. Pursuing the usually lengthy appeals process would have been tantamount to denying compensation to many of these ailing and elderly patients.

However, on Nov. 8, 2005 the government appealed the ruling in favor of the Taiwanese with an eye towards negotiating a settlement with both sets of plaintiffs. By applying legal pressure, the government is hoping to strengthen its position in negotiating a settlement. Unexpectedly, however, it expanded the scope of the anticipated settlement to other colonial lepers when Welfare Minister Kawasaki Jiro announced that compensation will also be extended to former leprosy patients in Palau, Saipan, Micronesia and the Marshal Islands. Kawasaki told reporters, "We have to quickly consider how to compensate those former leprosy patients who resided in overseas sanatariums." To this end new legislation is being prepared that will specify procedures for certifying eligibility and establish levels of compensation.

This move to craft a broad settlement represents a significant development in redress. According to Underwood,

"Japan tends to take an exclusive, "small tent" approach in which the goal appears to be compensation for as few individuals as possible. Cynics might observe that the bureaucratic ideal would be compensation for no one at all. When that becomes politically untenable, we see breakdowns in implementation like the Environment Ministry's ongoing refusal to revise its three-decade-old certification criteria for Minamata Disease, despite the Japan Supreme Court's clear intention that it do so. In western countries, by contrast, redress-related lawmaking and implementation tend to follow an inclusive, "big tent" model. To employ a funnel image: western governments point the wide end at potential redress recipients; Japan points the narrow end at them." [15]

Time for "ROUGH JUSTICE"?

The concept of rough justice has been applied to former victims of Germany during WWII. This approach balances the difficulty of clearly documenting claims to redress with the moral imperative of atonement. By setting the bar low for recognition of eligibility for compensation, the German government sought to reach out to as many victims as possible and thereby avoid unseemly disputes that would detract from what is, above all, a symbolic act of contrition. Underwood writes, "This novel legal concept was accepted during the late-1990s string of Holocaust restitution cases by European governments and corporations, having been developed in cooperation with American lawyers, judges, and State Department officials. The idea was to cram as many potential recipients inside the big compensation tent as possible. To a remarkable degree, concrete proof of actual victimization was deemed unnecessary. Compensation was in many cases granted upon reasonable likelihood of having performed forced labor or belonging to some other victim group. "Rough justice" was adopted because there was firm political commitment to enact compensation legislation BEFORE numbers of potential recipients were even known! The chief drawback to the approach: as recipients unexpectedly increased, individual payouts (always intended as symbolic) decreased. The case of Korean hibakusha, who often lack documentation and the necessary witnesses to place them in Hiroshima or Nagasaki, although many Koreans were certainly there, cries out for a "rough justice" solution." [16]

Overall, it appears that there are some encouraging developments on the various redress fronts, but scant sign of political resolve. In the larger context of Japan's troubled relations with China and Korea, there are good reasons for the Japanese government to move towards a rough justice solution. The stigma of failing to make any progress on reconciliation, and the growing importance of regional economies to Japan's future, suggest the need for a pragmatic accommodation. With the 2008 Beijing Olympics fast approaching, the economy on the mend, and neo-conservatives firmly entrenched in power, there is a golden opportunity for Japan to make a significant symbolic gesture of respect towards Asians. The time is ripe for a Japanese Future Fund, a big and inclusive tent, supported by the government and business. This would be good for business, mend fences, remove the stigma of denial, and lay the foundation for continued peace and prosperity in the region. Much is at stake. By taking responsibility and making a grand gesture, Japan can simultaneously lay to rest major injustices of the past that continue to poison relations with its neighbors, restore national dignity and promote its self-interest.

Jeff Kingston is Director of Asian Studies, Temple University Japan and author of Japan's Quiet Transformation: Social change and civil society in the twenty-first century. *He wrote this article for Japan Focus. Posted November 24, 2005.*

[1]Ihttp://www.asahi.com/english/Heraldasahi/TKY200510260094.html and http://www.yomiuri.co.jp/dy/national/20051026TDY01003.html
[2] Japan Times 10/26/2005
[3] Personal communication
[4] Personal communication
[5] Personal communication
[6] http://www.japantimes.co.jp/cgibin/getarticle.pl5?nn20050827a1.html
[7] Personal communication
[8] See Frank Upham's review essay, "Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary" in Law and Social Inquiry, 2005: 421-455.
[9] See Andrew Horvat and Gebhard Hielscher, eds. Sharing the Burden of the Past: Legacies of War in Europe, America and Asia, The Asia Foundation/Friedrich Ebert Stiftung (Tokyo 2003). Also: http://www.dwworld.de/dw/article/0,2144,1757323,00.html
[10] See Underwood articles on Chinese forced labor at Japan Focus, including "Chinese Forced Labor, the Japanese Government and the Prospects for Redress"

[11] Personal communication
[12] NBR (Nov. 5,2005) cited with author's permission.
[13] See: http://search.hankooki.com/1

http://search.hankooki.com/2

[14] Personal communication
[15] Personal communication
[16] Personal communication