

Revisiting Historical Injustice

Legal Implication of Korean Labour Mobilisation under Japanese Colonial Rule

Hidehiko Adachi

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Japan annexed the Empire of Korea through the Japan-Korea Annexation Treaty on 22 August 1910. In 1937, Japan began a war with China. Due to a shortage of domestic labor, the Japanese government recruited (from 1939), arranged (from 1942), and mobilized (from 1944 to 1945) male laborers from the Korean peninsula, making them work in mines, construction sites, factories, and other locations in Japan and Korea. Additionally, women were forced to work in Japanese factories as part of the 'Women's Volunteer Labour Corps'.

Japan and South Korea concluded the 'Treaty on Basic Relations Between Japan and the Republic of Korea' on 22 June 1965, establishing diplomatic relations between the two countries. Article 2 of the treaty stipulates, "It is confirmed that all treaties or agreements concluded between the Empire of Japan and the Empire of Korea on or before 22 August 1910 are already null and void." This wording was adopted as a compromise because the Korean side regarded the Japan-Korea Annexation Treaty of 1910 as "null and void from the beginning," while the Japanese government regarded it as valid "at the time," and the two sides were unable to resolve their differences.

At the same time as the conclusion of the Japan-Korea Basic Treaty, Japan and South Korea also concluded the 'Agreement Between Japan and the Republic of Korea Concerning the Settlement of Problems in Regard to Property and Claims and Economic Cooperation'. Article 2, paragraph 1 of the Agreement stipulates that "The High Contracting Parties confirm that the problems concerning property, rights, and interests of the two High Contracting Parties and their peoples (including juridical persons) and the claims between the High Contracting Parties and between their peoples, (...) have been settled completely and finally," and paragraph 3 of the same article stipulates that "no claims shall be made with respect to the measures relating to (...) all the claims of either High Contracting Party and its people (...)." This presentation will examine the validity of these provisions.

Starting in 1992, the aforementioned laborers first filed lawsuits in Japanese courts, and then in Korean courts. For example, two men (X1 and X2) who had been mobilized to work at Nippon Steel's (the company's name at the time) factory filed a lawsuit on 24

December 1997 against New Nippon Steel (the company that succeeded Nippon Steel) and the Japanese government, seeking an apology, unpaid wages, and compensation for emotional distress. However, on 9 October 2003, the Supreme Court of Japan finally rejected the plaintiffs' appeal.

On 28 February 2005, X1 and X2, along with X3 and X4, who had been mobilized to other Nippon Steel factories, filed a lawsuit with the Seoul Central District Court demanding that Nippon Steel pay compensation. The court dismissed the plaintiffs' appeal, recognizing the binding force of the Japanese court's decision. The Seoul High Court also made a similar decision. However, on 24 May 2012, the Supreme Court of Korea overturned the original judgment and remanded it to the Seoul High Court. On 10 July 2013, the Seoul High Court ordered Nippon Steel to pay compensation of 100 million won each to the plaintiffs. On 30 October 2018, the Supreme Court of Korea rejected the defendant's appeal by a majority of 11 to 2, thereby confirming the plaintiffs' victory.

Several issues were discussed by the Supreme Court of Korea, but the central issue was the interpretation of Article 2, Paragraphs 1 and 3 of the 1965 Japan-Korea Agreement on Claims. Of the 13 judges, 11 accepted the plaintiffs' claim. Of these, 7 judges stated the following:

"The plaintiffs' claim for damages is a claim for compensation from Japanese companies by victims of forced mobilization, which is based on the premise of the inhumane illegal acts of Japanese companies that are directly linked to the Japanese government's illegal colonial rule of the Korean Peninsula and the conduct of aggressive war."

"The Agreement on Claims was not an agreement to claim compensation for Japan's illegal colonial rule, but... one to resolve financial and civil claims and debt relationships between Korea and Japan through political agreement."

"During the negotiation process for the Claims Agreement, the Japanese government fundamentally denied legal compensation for the forced mobilization of victims, without acknowledging the illegality of colonial rule. Under these circumstances, it is difficult to accept that the claim for compensation for forced mobilization was included in the scope of application of the Claims Agreement."

Summarizing the reasoning of the seven judges, we can say the following:

1. Claims for damages caused by Japan's illegal colonial rule are not included in the claims that are extinguished by the Japan-South Korea Claims Agreement (because at the time of the conclusion of the Claims Agreement, the Japanese and South Korean governments did not agree on the legal nature of the colonial rule).
2. The plaintiffs' claim for compensation is based on the damage caused by Japan's illegal

colonial rule.

3. Therefore, the plaintiffs' claim for compensation is not included in the claims that are extinguished by the Japan-Korea Claims Agreement.

I support the opinion of the Supreme Court of Korea that the plaintiffs' claim for damages is valid. However, I believe that the above reasoning of the majority of the Supreme Court is particularly wrong in (1). Article 2, Paragraph 1 of the Japan-Korea Claims Agreement stipulates that issues concerning claims between the two countries and their citizens have been "settled completely and finally," and Paragraph 3 of the same article stipulates that "no claim shall be made" regarding those claims, without limiting the scope of claims that are extinguished. Therefore, we must consider that the plaintiffs' claim for damages is included in the "claims" of Article 2, Paragraphs 1 and 3.

In order to recognize the plaintiffs' right to claim compensation, it is necessary to deny the validity of the agreement itself. The Supreme Court of Korea has denied the validity of the Japan-Korea Annexation Treaty by stating that Japan's colonial rule was illegal. There seems to be no reason why the Japan-Korea Claims Agreement, which is also a Japan-Korea treaty, cannot be denied.

On what basis can the legal nature of the Japan-South Korea Claims Agreement be denied? I believe that the argument is provided by Radbruch's formula. In 1946, in 'Statutory Lawlessness and Supra-Statutory Law,' Gustav Radbruch first pointed out that there are cases where the validity of a law should be denied because the contradiction of the positive law to justice is so extreme. However, according to him, it is not possible to draw a clear line between such unjust laws and unjust but valid laws, but in the following cases it is possible to draw such a line:

"Where there is not even an attempt at justice, where equality, which forms the core of justice, is deliberately betrayed in the laying down of positive law, then the statute is not even merely 'flawed law'—rather, it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice."

The first half of the above, which denies the validity of unjust laws, would later become known as the 'Intolerability Formula,' and the part that denies the legal nature of laws that denied equality at the time of their enactment would become known as the 'Denial Formula.'

According to Radbruch, the core of justice is equality. He distinguishes between two types of justice, 'commutative justice' and 'distributive justice,' relying on Aristotle. Commutative justice refers to absolute equality between goods, for example, between work and wage, damage and compensation. Distributive justice refers to proportional

equality in the treatment of people. If we regard private law as the law between equals, and public law as the law between superiors and inferiors, then the justice of private law is commutative justice, and the justice of public law is distributive justice.

The court case introduced above is a dispute between a former Korean laborer and a Japanese company, so it is a dispute between private persons. Private persons are equal. The idea of commutative justice is that if one private person causes damage to another, the former must make reparations to resolve the resulting inequality. This inequality is not resolved by a third party (e.g., the Korean government) paying money to the victim on behalf of the perpetrator. This is because the idea of commutative justice requires the perpetrator to bear the burden.

At the time of the conclusion of the Japan-Korea Claims Agreement, the President of South Korea was Park Chung Hee, who came to power through a military coup in 1961. He appears to have placed importance on the economic recovery of South Korea in order to maintain his regime, rather than on the rights of his own people. The Japanese prime minister at the time was Eisaku Sato of the Liberal Democratic Party (LDP), and the LDP did not question the legality of Japan's colonial rule over Korea. They sought to annul individual claims in exchange for economic cooperation for Korea's recovery, avoiding the term "reparation." In other words, it can be inferred that both the Japanese and Korean governments were intent on extinguishing the claims of their citizens. This implies that equality, which is at the heart of justice—especially commutative justice—was consciously denied by both parties when the Japan-Korea treaty was drawn up.

Based on Radbruch's denial formula, such a treaty is not law. Therefore, it should be considered that the claims of the Japanese and Korean people have not been extinguished.