

A Memorandum on Question 15i of “Replies to the list of issues(CCPR/C/JPN/Q/6)”

State redress for the unlawful arrest and detention in Japan

SNSRL (Support Network for State Redress Lawsuits in Japan)

List of Issues Para 15(i)

The existence of an effective and independent mechanism, with authority to promptly, impartially and effectively investigate all reported allegations of and complaints about acts of torture and ill-treatment of persons deprived of their liberty, including during interrogation (CCPR/C/JPN/6, paras. 132-134).

Relevant ICCPR Articles: Article 9 paragraph 5, and Article 14

Government replies to the question of LoI 15 (i) and the problems thereof (also see the 3rd Periodic Report of Japan*)

The Government reply to Question 15 (i) introduces the Committee for Inquest Prosecution, the Examination Committee on Review of Complaints from Inmates of Penal Institutions and the Penal Institution Visiting Committee and concludes in the final paragraph, that “any persons whose rights have been illegally violated may file a suit in the court.”

Regarding compensation for victims of unlawful arrest or detention, the 3rd Periodic Report (paras. 138-140)* explains that redress stipulated in Article 9 paragraph 5 may be provided under Criminal Compensation Law or the State Redress Law. The explanation has not been changed in subsequent Periodic Reports.

It is true that there are institutions such as the Committee for Inquest Prosecution as well as laws such as the Criminal Compensation Law or the State Redress Law to cover compensation claims for unlawful arrests and detentions. But in practice, there are many problems as shown below, and compensation remains insufficient.

Background information

First, it is true that when a defendant, who was prosecuted, is acquitted and the decision becomes final, he/she would be paid compensation under the Criminal Compensation Law from the national or local government based on the number of days in detention. But the compensation amount is 12,500 yen a day at maximum, and is not sufficient to compensate for the damages and mental pain suffered by the defendant.

Secondly, when the suspect, who is arrested and detained, is not prosecuted, compensation under the Regulation for Compensation for Suspects is left to the discretion of the Public Prosecutor. When the Public Prosecutor decides not to compensate, the suspect cannot appeal the decision. Also, neither the Criminal Compensation Law nor the Regulation provide for redress such as apologies for the wrongful detention, or measures to fully restore the harmed social reputation.

Thirdly, there are no ways of claiming compensation for detention that do not fall under the criminal justice procedures (for example, detention under the immigration control procedures, or detention of people with mental disabilities), even when it is subsequently found out that the detention was unlawful, except for the procedures under the State Redress Law explained below.

Because of these reasons, people who have been unlawfully detained would take legal action claiming compensation from the national or local government under the State Redress Law. The Law has the following problems.

First, in order to seek compensation for the arrest and detention, a person, who had been acquitted in a criminal case, would have to prove that the prosecution by the Public Prosecutor was unlawful under the State Redress Law. On June 29, 1989, the Supreme Court quashed the decision by the Tokyo Appeals Court, which allowed the compensation and dismissed the claims for compensation (case under the State Redress Law related to the death of a police officer during a general strike in Okinawa). It held that the prosecution was not unlawful, if the Public Prosecutor had found suspicions of guilt through reasonable decision-making process, based on the overall consideration of evidence materials. In many other judgments involving the State Redress Law, claims have been dismissed with similar reasoning. But since the finalization of the acquittal shows that the Public Prosecutor erred in prosecuting the person in question, the prosecution should be determined unlawful, unless the state sufficiently proves otherwise. The above Supreme Court case continues to prevent compensation for unlawful detention. Similar problems arise when claiming for compensation for unlawful arrests by the police.

Secondly, according to the above Supreme Court case, “evidence material” is limited to those, which the Public Prosecutor has obtained or could have obtained at the time of prosecution. However, the only materials held by the Public Prosecutor that is available to the former defendant or suspect (the plaintiff in a State Redress Law case) is those that were disclosed during the criminal justice procedures. (Most of those materials are evidence presented to prove conviction. Under the Code of Criminal Procedures, the Public Prosecutor is not required to disclose all evidence, which in itself is a violation of Article 14 paragraph 1 of the Covenant.) The reason is because there is no procedure for disclosure of other evidence held by the Public Prosecutors under the State Redress Law. It is therefore extremely difficult for the plaintiff to prove that the prosecution by the Public Prosecutor was unlawful.

Thirdly, there is the problem of the State Redress Law, when the suspect, who is arrested and detained, is not prosecuted. In December 2003, a person, who sustained a fracture in the right leg below the knee when he was unlawfully attacked by the police at the time of arrest, was detained at a

detention facility, and was interrogated. He was released 10 days after the arrest without being prosecuted. The person, who was arrested and seriously injured was of Nigerian origin. He had an emergency operation 3 days after his release, and although he was able to walk, his motor functions did not fully recover due to the aftereffects. He started legal action to claim compensation for the unlawful injury and damages for the detention under the State Redress Law. The First Petty Bench of the Supreme Court dismissed the appeals in March 2011. The ratification of the First Optional Protocol establishing an individual communication system has not progressed much, and the unjust situation is continuing.

There are only a few successful cases for compensation from the national or local governments for unlawful arrests or detentions in the 20 years from 1992 to 2012. The Supreme Court has yet to order compensation, including in cases in which it quashed the lower court's decision to recognize responsibility to compensate.

Miscarriages of justice continue to occur in Japan due to the frequent use of the "substitute detention system" (*Daiyo Kangoku*), the defect in the criminal procedures that became apparent in the limitations placed on contacts between the detained and their lawyers, or the overdependence on confessions by the courts. The State Redress Law in fact rarely functions in cases of unlawful detentions under the criminal procedures. Police or Public Prosecutors are never held responsible for unlawful arrests or prosecutions, and it is one of the reasons why miscarriages of justice continue.

The procedures under the State Redress Law follow those of the civil procedures. Many of the evidence materials are in possession of the Public Prosecutors, and access to evidence is not guaranteed for those who have been arrested or detained as suspects or defendants. The Public Prosecutors are not even required to disclose a list of evidence. .

Contrary to what was written in the 3rd Periodic Report of Japan, unlawful detentions are rarely compensated. With the above background, the problem of suspects being detained for long periods and being forced to confess continues. The problem, which is referred to as "hostage-taking justice," is one of the major factors leading to unjust criminal trials.

In conclusion, unlawful detention is not sufficiently compensated in Japan. It is also a cause of unjust trials. The situation is also a violation of Article 9 paragraph 5, Article 14 paragraphs 1 and 6 of the Covenant.

Suggestions to recommendations

1) The State party should revise the laws to ensure compensation according to Article 9 paragraph 5 for those who have been unlawfully detained.

2) The laws should be amended to realize compensation for the unlawful arrest and detention of not just those who were acquitted by the court but also for those who were not prosecuted.

3) The State party should amend the laws to require disclosure of all evidence, or at least the full list of evidence to ensure the transparency in the justice system, in order to wipe out unlawful

detention and eliminate miscarriages of justice.

*** The Third Periodic Report of the government states as follows in the section on Article 9, paragraph 138-140:**

138. Regarding article 9, paragraph 5, of the Covenant, article 17 of the Constitution provides that "Every person may sue for redress as provided for by law from the State or a public entity, in case he has suffered damage through illegal act of any public official", and the State Redress Law was enacted according to this provision. In its article 1, paragraph 1, the State Redress Law provides that "If a public official authorized to exercise the power of the State or of a local public entity has inflicted, intentionally or through negligence, any damage on any person through an illegal act, in the conduct of his official duties, the State or the local public entity concerned shall be under obligation to make compensation for it." Any person who is unlawfully arrested or detained by the intention or negligence of a public official in charge of the exercise of public power in the performance of his duty may demand compensation for damage from the State or a public entity in accordance with the provision.

139. Even in a case where the arrest or detention is not illegal, article 40 of the Constitution provides that "Any person, in case he is acquitted after he has been arrested or detained, may sue the State for redress as provided by law." Thus, the range of compensation has been expanded. In line with this provision the Criminal Compensation Law was enacted. The Law establishes compensation for damage caused by arrest or detention pending trial (Article 1, paragraph. 1) and for damage caused by execution of penalty and confinement (Article 1, paragraph. 2) for a crime of which the person concerned has been acquitted. The amount of compensation to be paid shall be determined by the court within the limits determined by the law (Article 4).

140. Also, as mentioned in the second periodic report, in the light of the seriousness of the economic, physical and mental disadvantages that an innocent person suffers as a result of arrest or detention even though he is not ultimately indicted, it is considered to meet the purport of article 40 of the Constitution and to agree with the idea of justice and equality that such person is compensated for his damage. It is for that reason that the Regulations for Suspect's Compensation (Instructions No. 1 of the Ministry of Justice dated 12 April 1957) were established. According to these regulations, compensation for damage caused by arrest or detention shall be made to the person who has not been prosecuted if there is a sufficient ground to recognize that he has not committed the crime. (CCPR/C/70/Add.1, paragraph. 138-140) Thus, the Japanese government has been reporting consistently in its Second and Third Reports that article 9-5 has been complied with. Furthermore, there is no reference to this issue in the Fourth or Fifth Report because of the fact that no comments were made in your reviewing of the Second and Third Reports.

**** Valentine Case on the State Address Law.**

On December 9, 2003, two men spoke to Mr. Valentine, who was handing out fliers for shop advertising in Shinjuku, Tokyo. While Mr. Valentine was guiding them into the shop, he heard someone crying, "Get away from them!" and ran away. He was then arrested in charge of violation of the Sex Industry Law. The two men were plain-cloth police officers who were working for the Metropolitan Police Department for undercover investigation. Mr. Valentine suffered a crush fracture under the knee of his right leg because of their assault. He was detained in the detention facility of the Shinjuku police station with no access to appropriate medical treatment of his injury and was subject to interrogation. He was released ten days later because of suspended reprimand. He was immediately hospitalized and told that he would be unable to walk without surgical operation. Surgery took place three days later. He had been in hospital for treatment until February 7, 2004. In April 2005, he received hospital treatment again for a week. Even after this, there still remained some physical problem at his right leg.

In August 2005, he filed a state redress lawsuit against the Tokyo Municipal government for payment of medical fee incurred in the meantime and reparations for unfair violence and detention. The police officers insisted that the injury took place because of his own hitting against a signboard while escaping and denied any injurious assault at the time of arrest. The medical record at the police hospital where he had first been examined was not disclosed despite the fact that the data were to be kept in record for a due period.

The first hearing at the Tokyo District Court sentenced to dismiss the case in March 2007. The decision was made based on the testimony of the plain-cloth police officers who had arrested Mr. Valentine and the doctors of the police hospital who examined and gave him cast treatment in the same evening. Then contended that the fracture was caused by his violently hitting against the metal frame of a signboard standing on the roadside or smashing himself against the road surface in losing his balance. There were several eyewitness testimonies accounting police officers' violent assault. The court sentence however manifested that their testimonies are not to be trusted because they are 'the members of the black people's community'.

In the appeal court, some documents and video which had been kept undisclosed by police were called for presentation. Part of them was then disclosed to bring to light the facts which were not coincident with the police's argument in the first trial. As for the cause of injury, two other doctors analyzed the case and reported in their expert evidence report that, if the cause had been as specified in the first trial, the injury would have been mostly likely associated with wound on the skin surface, open fracture and/or patella fracture. In addition to the statement of a new eyewitness for police's violence, the doctors testified that the plaintiff suffered fracture most likely because of police

officers' tramping on his leg, instead of hitting against the signboard, as they had scrutinized his medical record as well as a series of X-ray photogram showing the different stages of his injury and reached the conclusion as experts with abundant experience in surgery. The Tokyo Municipal government, meanwhile, filed the Ishiyama report which insisted that the fracture was caused by the shock due to flipping in midair and violently landing. Whereas Dr. Ikuo Ishiyama is a renowned forensic scientist known as a professor emeritus of Teikyo University, his 'analysis of impact force', which is by no means the subject within his professional area, is mostly based on his fanciful theory with little medical evidence. This is in fact the expert testimony in exact coincidence with the argument by the police. The injury is, according to this report, not the 'fracture because of bumping against the signboard', but is judged as the fracture due to the shock of jumping down from a little higher place. The testimony of the police officers who had arrested Mr. Valentine was revised in accordance with this report.

In June 2010, the Tokyo District Court gave a decision of dismissal of appeal sustaining the argument by the Tokyo Municipal government. The plaintiff appealed to the Supreme Court, but the appeal was quashed by the first petty bench at the Supreme Court on March 24 2011.

prepared by Support Network for State Redress Lawsuits in Japan
