FROM INDIVIDUAL TO COLLECTIVE RESTITUTION: RECASTING CORPORATE ACCOUNTABILITY FOR KOREAN FORCED LABOR IN THE SECOND WORLD WAR

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I. INTRODUCTION

From modest beginnings in the early 1990s, the "transitional justice" process with respect to Korean wartime forced labor has evolved and gained renewed momentum in recent years.[1] A landmark decision by the Supreme Court of South Korea issued in May 2012 called for a fundamental legal reassessment of corporate accountability on the part of Mitsubishi Heavy Industries (hereafter "MHI"), which in its previous incarnation had subjected the Korean plaintiffs to forced labor during World War II.[2] In asserting the illegality of both Japan's colonial rule over Korea and of forced mobilization,[3] the Court paid little heed to the contemporary wax and wane of political relations between the two countries.

There is a dearth of Asia-Pacific transitional justice studies relative to coverage of Africa, Europe, and Latin America; moreover, within the existing Asia-Pacific transitional justice literature, studies concerning Cambodia, East Timor, and Japan constitute the bulk of regional research.[4] Most English-language publications on Korean transitional justice initiatives have addressed the "comfort women" issue or domestic human rights violations committed by past autocratic Republic of Korea (hereafter "ROK") regimes against their own citizens in the decades prior to democratization.[5] Meanwhile, the redress process for wartime forced labor

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[1] "Transitional justice" customarily has been defined as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes." Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003).

[2] *See* Supreme Court [S. Ct.], 2009Da22549, May 24, 2012 (S. Kor.).

[3] *Id.*

[4] Renée Jeffery & Hun Joon Kim, *New Horizons: Transitional Justice in the Asia-Pacific*, *in* TRANSITIONAL JUSTICE IN THE ASIA-PACIFIC 1, 2-3 (Renée Jeffery & Hun Joon Kim eds., 2014).

[5] *See, e.g.*, Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 BERKELEY WOMEN'S L.J. 174 (2001), Wui Ling Cheah, *Walking the long road in solidarity and hope: A case study of the comfort women movement's deployment of human rights discourse*, 22 HARV. HUM. RTS. J. 63 (2009), Kuk Cho, *Transitional Justice in Korea: Legally Coping with Past Wrongs after Democratization*, 16 PAC. RIM L. & POL'Y J. 579 (2007), In-Sup Han, *Kwangju and Beyond: Coping with Past State Atrocities in South Korea*, 27 HUM. RTS. Q. 998 (2005), Shellie K. Park, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, 3 ASIAN-PAC. L. & POL'Y J. 2 (2002).

is entering a decisive phase. At a minimum, it has come to represent a new iteration of the successful European model for wartime corporate accountability from which it receives inspirational and tactical sustenance.[6] The Korean Supreme Court's leadership in the forced labor issue paved the way for this development by shifting the restitution paradigm from resolution of disparate individual claims to collective redress. Its initiative furthermore has raised prospects for bilateral progress between Japan and South Korea via judicial and public engagement, in a process less beholden to shifting political interests and trends. Media coverage has noted that, in future rulings, the Court "may be taking delicate diplomatic aspects into consideration since a ruling against the Japanese companies would surely hurt bilateral relations" that appear to be on the mend.[7] Such rote analysis, however, underestimates the potential for a meaningful breakthrough and long-term closure in place of stopgap measures and shortsighted political appeasement.

This article aims to review the Korean Supreme Court's decision of May 24, 2012, and its ramifications for corporate accountability in the wartime forced labor redress process, and to illustrate how achieving transitional justice in that context could affect long-term relations for Japan and South Korea. First, this article examines the buildup to the decision before focusing on its content, which recast Mitsubishi's wartime corporate accountability as unextinguished by treaty or by time. The Court's reasoning—including its emphasis that both Japan's occupation of Korea and forced mobilization were illegal—is probed in conjunction with its rejection of the statute of limitations defense. Second, this article assesses how a successful resolution of unprecedented class action litigation begun in mid-2015 on the tailwind of the Supreme Court decision could facilitate lasting bilateral progress through the labyrinth that is "memory politics."

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[6] S*ee* Soon-Won Park, *The Politics of Remembrance: The Case of Korean Forced Laborers in the Second World War*, *in* RETHINKING HISTORICAL INJUSTICE AND RECONCILIATION IN NORTHEAST ASIA: THE KOREAN EXPERIENCE 55, 64 (Gi-Wook Shin et. al eds., 2007) ("[V]ictims of forced labor in the Nazi armament industry, an estimated 7.8 million mostly Eastern European laborers, and some Jewish Holocaust survivors achieved remarkable results in class-action lawsuits filed in New York state courts during 1997-8 . . . . The German businesses promised to recognize their responsibility, apologize, and set up a reparations base fund, worth 10 billion marks (around US $5 billion), from combined donations of the German government and around sixty-five private companies . . . inspiring other redress movements elsewhere in the world.").

[7] Kentaro Ogura, *Again, South Korean Court Orders Japanese Company to Pay*, NIKKEI ASIAN REVIEW (June 24, 2015), *available at* http://asia.nikkei.com/Politics-Economy/International-Relations/Again-South-Korean-court-orders-Japanese-company-to-pay.

II. THE COURT DECISIONS ON KOREAN FORCED LABOR LITIGATION AGAINST MITSUBISHI

A. Early Setbacks in Hiroshima, Tokyo, and Busan from 1995 to 2009

The conservative estimate frequently cited by Japanese and Korean scholarship for the total number of Korean forced laborers in Japan between 1939 (when national conscription came into effect) and 1945 is 700,000 to 720,000 workers,[8] with some estimates of up to 1.2 million or more.[9] Of the recruits, roughly half were assigned to coal mining, while the second largest contingent was forced to work in factories,[10] including the plaintiffs of the MHI litigation. Harsh management surveillance and police brutality punctuated dangerous, often fatal working conditions. Factory managers extended laborers' contracts as they saw fit while keeping unpaid wages and compulsory savings.[11] Out of at least 200,000 Korean civilian employees who were conscripted for forced labor from 1944 to 1945, approximately 70,000 were reported dead after the war.[12]

On December 11, 1995, plaintiff Pak Chang Hwan led five other Korean victims of forced labor in filing a lawsuit at the Hiroshima District Court against the Japanese government and MHI,[13] specifically its present incarnation.[14] The plaintiffs sought a total of ¥66 million (approximately US $550,000) in outstanding wages, damages, and compensation for forced conscription, forced labor at the Hiroshima MHI factory from September 1944 to August 1945, and illness linked to the atomic bomb. By May 1998,

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[8] *See* Naitou Hisako, *Korean Forced Labor in Japan's Wartime Empire*, *in* ASIAN LABOR IN THE WARTIME JAPANESE EMPIRE: UNKNOWN HISTORIES, 90, 98 (Paul H. Kratoska ed., 2005); *see also* Park, *supra* note 6, at 56.

[9] Choe Sang-Hun, *South Korean Court Tells Japanese Company to Pay for Forced Labor*, N.Y. TIMES, July 31, 2013, at A9; *see also* Hisako, *supra* note 8, at 98 (noting that a "probable reason for the discrepancy is the higher estimate's inclusion of family members who later joined the originally recruited laborers").

[10] YAMADA SHŌJI ET AL., KINGENDAISHI NO NAKA NO NIHON TO CHŌSEN [ISSUES OF RECENT HISTORY CONCERNING JAPAN AND KOREA] 178 (1991) (according to the author Yamada, a leading Japanese authority on wartime forced labor, Korean forced laborers assigned to factory work numbered 199,573).

[11] Park, *supra* note 6, at 56.

[12] *Id*. at 55.

[13] George Washington Univ. Sigur Ctr. for Asian Studies, *Mitsubishi Heavy Industries, Hiroshima*, MEMORY & RECONCILIATION IN ASIA-PAC., http://www.gwu.edu/~memory/data/judicial/POWs_and_Forced_Labor_Japan/MHI_Hiroshima.html (last visited Nov. 3, 2015).

[14] *See* S. Ct., 2009Da22549, May 24, 2012 (§ 1(E)) (S. Kor.) (noting that the current Mitsubishi Heavy Industries, Ltd. was established in 1964 through a merger of the three companies into which the original MHI had been divided in the postwar breakup of Japan's *zaibatsu* [business conglomerates]).

46 more plaintiffs had joined the lawsuit, increasing the entire case's claim to roughly ¥530 million (US $4.3 million).[15] The Hiroshima District Court dismissed the lawsuit on March 25, 1999.[16]

The court acknowledged that forced transport and forced labor had been carried out as an act of state authority but also noted that they had occurred while the prior Meiji Constitution was in effect, absolving the current Japanese government from any responsibility to compensate.[17] The Meiji Constitution prohibited citizens injured in the exercise of an official action or policy from suing the state for damages. With respect to MHI's culpability, the court held that the twenty-year statute of limitations had expired[18] and that the company too had no responsibility to compensate its forced laborers.[19]

Following an appeal by the plaintiffs, the Hiroshima High Court, on January 19, 2005, held that "it is illegal for the state not to have granted the allowance to the survivors of atomic bombing who now live abroad" and ordered the government to pay for damages related to the plaintiffs' atomic bomb exposure; at the same time, it rejected those demands for compensation from MHI related to forced labor, upholding the statute of limitations rationale used by the district court.[20] The Supreme Court of Japan, on November 1, 2007, affirmed the entirety of the Hiroshima High Court's ruling after an appeal by the Japanese government.[21]

The November 2007 decision was at best a partial salve for the victims, MHI, and both the Japanese and Korean governments. It skirted an opportunity to recommend an across-the-board permanent "grand

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[15] George Washington Univ. Sigur Ctr. for Asian Studies, *supra* note 13.

[16] *Id*.

[17] According to article 27 (second clause) of the Meiji Constitution: "Measures necessary to be taken for the public benefit shall be any provided for by law." This language heavily qualified the "inviolate" property rights of Japanese subjects that were described in the prior clause. DAI NIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [CONSTITUTION], art. 27 (Japan), *translated in* Nat'l Diet Library, *The Constitution of the Empire of Japan*, BIRTH CONST. JAPAN, http://www.ndl.go.jp/constitution/e/etc/c02.html (Ito Miyoji translation) (last updated May 3, 2004).

[18] Article 724 of the Civil Code of Japan provides that "[a] right to claim compensation for the damage which has arisen from an unlawful act shall lapse . . . if twenty years have elapsed from the time the unlawful act was committed." MINPŌ [MINPŌ] [CIV. C.] art. 724 (Japan).

[19] *See* George Washington Univ. Sigur Ctr. for Asian Studies, *supra* note 13.

[20] *Japan: Supreme Court Orders Compensation for Korean A-Bomb Survivors*, ASIA-PAC. HUM. RTS. INFO. CENTER (Nov. 2, 2011), http://www.hurights.or.jp/archives/newsin brief-en/section1/2007/11/japan-supreme-court-orders-compensation-for-korean-a-bomb-survivors.html.

[21] Saikō Saibansho [Sup. Ct.] Nov. 1, 2007, 2005 (Ju) 1977 no. 8, 61 SAIKŌ SAIBANSHŌ MINJI HANREISHU [MINAHU] (Japan).

settlement" scheme that could have resolved conclusively the matter of wartime corporate accountability. In contrast to the outcome of the forced labor lawsuits that targeted companies under Nazi rule,[22] neither acceptable redress for the victims nor reprieve from future lawsuits for MHI was achieved. Not long thereafter on February 3, 2009, the Busan High Court in Korea approved the final judgment of the Supreme Court of Japan (the MHI plaintiffs had filed identical claims in Korea on May 1, 2000, following the Hiroshima District Court decision).[23]

The Busan court's ruling—perhaps surprising given its domestic backdrop—is better understood in the context of South Korea's political environment at the time. President Lee Myung-Bak's conservative administration was pursuing a policy of détente with Tokyo during the global economic downturn.[24] The preceding liberal Roh Moo-Hyun government conversely had created a conducive environment for legal action punishing pro-Japanese Koreans' activities during the colonial period.[25] In the case of the MHI plaintiffs, however, it certainly did not help their cause that less than a year before the Busan High Court's decision, President Lee and dovish Japanese Prime Minister Yasuo Fukuda were pursuing great strides in their countries' bilateral ties on a multitude of issues including North Korea policy, trade, and joint history research.[26] Lee went so far as to announce during their press conference in April 2008: "[W]e must avoid being so attached to the past that it impairs our ability to forge ahead to the future . . . . The cooperation of our two nations is extremely important for maintaining the peace of Northeast Asia and we both acknowledge the value of that future, and therefore intend to advance toward it."[27] Nearly two decades after the original MHI lawsuit was filed in Hiroshima, the stage was set for an appeal to the Supreme Court of Korea.

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[22] *See* Park, *supra* note 6.

[23] *See* S. Ct., 2009Da22549, May 24, 2012 (§§ 1(G), 4(D)(2)) (S. Kor.).

[24] *See* Paul Midford, *Historical Memory Versus Democratic Reassurance: The Security Relationship Between Japan and South Korea*, *in* CHANGING POWER RELATIONS IN NORTHEAST ASIA 77, 89 (Marie Soderberg ed., 2011).

[25] Cho, *supra* note 5, at 604.

[26] Lee Myung-Bak, President of the Republic of South Korea, Joint Japan-ROK Leaders' Press Conference in Tokyo (April 21, 2008), *available at* http://japan.kantei.go.jp/hukudaspeech/2008/04/21kyoudou_e.html.

[27] *Id.*

B. The May 24, 2012 Decision by the Korean Supreme Court: Finding a Violation of Good Morals and Other Social Order

1. The Japanese Occupation of Korea was Illegal from a Normative Perspective

The Korean Supreme Court's dismantling of the earlier MHI decisions was comprehensive, and its deconstruction was predicated on a test in a key rule of civil procedure. Under Article 217 of South Korea's Civil Procedure Act (or Code of Civil Procedure) relating to the "Effect of Foreign Judgment," any "final and conclusive judgment by a foreign court shall be acknowledged to be valid, only upon the entire fulfillment of the following requirements . . . 3. That such judgment does not violate good morals and other social order of the Republic of Korea."[28] In finding a conflict with Article 217, first the Supreme Court held that, with respect to the Korean Constitution, the whole of Japan's colonial rule over Korea "constitutes illegal occupation from a normative perspective."[29]

The Court's reasoning rested on its dual interpretations of the Korean Constitution and the historical origins of the Republic of Korea. In its view, South Korea's "current Constitution states that 'our country with long history and tradition succeeded the ROK provisional government founded with the Samil Movement'"[30]—and hence the contemporary ROK government founded in 1948 was a continuation of the provisional government produced by the March First *Samil* Independence Movement of 1919 (which in turn evolved from an insurgency that predated and continued after Korea's annexation in 1910).[31] Such a stance clashed fundamentally with Tokyo's perspective, which has posited that the current South Korean government's inception was in 1948.[32]

The implications of this distinction strongly figure into the "normative perspective" stressed by the Court. Article 2 of the 1965 Treaty on Basic Relations Between Japan and the Republic of Korea, which normalized diplomatic relations between the two countries, reads: "It is confirmed that all treaties or agreements concluded between the Empire of Japan and the

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[28] Minsasosongbeop [Civil Procedure Act], Act. No. 3, Apr. 4, 1960, art. 217 (S. Kor.).

[29] S. Ct., 2009Da22549, May 24, 2012 (S. Kor.) (section 3).

[30] *Id.*

[31] PETER DUUS, THE ABACUS AND THE SWORD: THE JAPANESE PENETRATION OF KOREA, 1895-1910 223-228 (1995).

[32] *See* Etsusaburō Shiina, Foreign Minister of Japan, Session of the House of Councillors (Oct. 16, 1965) ("The Japan-Korea Annexation Treaty became null and void when Korea's independence was implemented, namely, on August 15, 1948. Treaties concluded previously became null and void when their respective provisions for nullification were met.").

Empire of Korea on or before August 22, 1910, are already null and void."[33] While Tokyo has maintained that the affected treaties and agreements, including the Annexation Treaty of August 22, 1910, became null and void upon the ROK's establishment in 1948—meaning that they were valid during the Japanese occupation—Seoul in contrast has argued that such treaties and agreements were null and void from the time that they were concluded.[34] In short, the Korean side viewed the Annexation Treaty as invalid because Korean sovereignty had never actually ceased to exist. The Supreme Court of Korea adhered to this position by holding that the Japanese occupation hence was illegal "from a normative perspective."

2. The Mobilization of Koreans for Forced Labor was Illegal

The Court's next move in finding a violation of South Korea's "good morals and other social order" was to address the legality of Korean wartime forced labor under Japanese colonial rule. It referenced the Japanese judgment's holding that the "Korean peninsula became Japanese territory under her governance," and thus "Plaintiffs' draft under the National Service Draft Ordinance and law at that time is not a tort. Further, a draft procedure is not unlawful as long as it follows the National Service Draft Ordinance."[35]

In juxtaposition with its holding that the Japanese occupation of Korea was illegal, the Korean Supreme Court undertook a methodical, step-by-step line of reasoning beginning with Article 100 of the ROK Constitution's Addendum, which asserts the validity of current laws unless they violate the Constitution.[36] The Court next cited Article 101 of the Addendum, which enables the national assembly to enact special laws "punishing malicious anti-patriotic acts" that occurred before August 15, 1945, the date Korea

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[33] The August 22, 1910 date referenced in the 1965 Treaty on Basic Relations was the date on which the Japan-Korea Treaty of 1910 (or Japan-Korea Annexation Treaty) was sealed, whereby Japan officially annexed Korea. For a full English version of the text of the 1965 Treaty on Basic Relations, archived by "The World and Japan" Database Project at the University of Tokyo, *see* Treaty on Basic Relations Between Japan and the Republic of Korea, Japan-S. Kor., June 22, 1965, *available at* http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/docs/19650622.T1E.html.

[34] *1910 Korea annexation pact must be rendered void, Tokyo is told*, THE JAPAN TIMES, May 12, 2010, *available at* http://www.japantimes.co.jp/news/2010/05/12/national/1910-korea-annexation-pact-must-be-rendered-void-tokyo-is-told/#.VZsOvvnkAZM; *see also* Kim Seung-Uk, *"Hanilbyeonghap muhyeo" euiwon 75 myeong, ilchongri e keoneui* [*"Japan–Korea Annexation Treaty Is Invalid". Suggestion to the Japanese PM By 75 Congressmen*], YEONHAP NEWS (S. Kor), June 23, 2010, *available at* http://www.yonhapnews.co.kr/politics/2010/06/23/0502000000AKR20100623068200001.HTML.

[35] S. Ct., 2009Da22549, May 24, 2012 (§ 3) (S. Kor.).

[36] *Id.*

regained its independence upon Japan's surrender in World War II.[37] The Court then declared that legal relations under the unlawful Japanese rule in violation of the spirit of the ROK Constitution were invalid,[38] effectively deeming the National Service Draft Ordinance to have been illegal and its implementation subject to tort claims. Tying together prior points, the Court stated that the "Japanese judgment reasoning conflicts with ROK Constitution's value judgment which regarded the Japanese Occupation Period's forced mobilization as illegal"; recognition of the Japanese judgment would violate the ROK's good morals and other social orders, and therefore was rejected.[39]

The once-common notion that the 1965 Treaty on Basic Relations Between Japan and the Republic of Korea had extinguished Koreans' rights to all damage claims relating to the Japanese occupation has proven controversial.[40] While the parallel Claims Agreement signed in 1965 included under the Korean claims to be relinquished any amounts due to forced laborers and reparations for damages to persons drafted for the war, Tokyo in the past has professed that the Agreement only applied to diplomatic protection rights—barring the Korean government from pursuing a claim—and did not bar individual claims.[41] The Supreme Court of Korea went a step further and elaborated that the "ROK and Japanese government did not agree on the nature of Japanese Korean peninsula rule" at the time of the Agreement's signing and "claim rights for tort against humanity involving Japanese government power or colonial rule tort damages were not addressed in Claims Agreement. Thus, the individual damages claim right has not expired due to the Claims Agreement. ROK's diplomatic protection right was also not abandoned."[42] In preserving even the Korean

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[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id*. § 4; *see also Japan: Supreme Court Orders Compensation for Korean A-Bomb Survivors*, *supra* note 20 ("the [Japanese] Supreme Court dismissed the plaintiffs' claim concerning compensation for abduction, referring to the 1965 Treaty between Japan and the Republic of Korea concerning Claims, which invalidated individual claims").

[41] *See* Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation between Japan and the Republic of Korea, Japan-S. Kor., June 22, 1965, *available at* http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/JPKR/19650622.T9E.html; *see also* Shunji Yunai, Director General, Ministry of Foreign Affairs Treaties Bureau, Session of the Japanese House of Councillors' Budget Committee (April 27, 1991) (clarifying the Claims Agreement: "This is a mutual abandonment of the diplomatic protection rights possessed by Japan and the Republic of Korea as states. So it does not cause the liquidation of the claim rights of individuals with respect to domestic law. It means that the governments of the two countries cannot raise these matters with respect to each other by exercising their diplomatic protection rights.").

[42] S. Ct., 2009Da22549, May 24, 2012 (§ 4(C)) (S. Kor.).

government's diplomatic protection right with respect to occupation-related damage claims, which ostensibly had been signed away via the Claims Agreement, the Supreme Court of Korea further curbed the chilling effect that the normalization of ROK-Japan relations had rendered upon colonial-era Korean victims of human rights violations.

3. MHI's Allegation that the Statute of Limitations had Expired was in Contradiction of the Principle of Good Faith and Prohibition of Abuse of Rights

In its 2009 decision on the MHI lawsuit, the Busan High Court held that "even if ROK law is applied, Plaintiffs' tort damages claim right expired under the statute of limitations"[43] per the Japanese judgments that tolled the limitation period until 1965.[44] The Korean Supreme Court's overruling of this position centered on the principle of good faith and abuse of rights by the "debtor" MHI, having already established that its use of forced labor had been illegal and subject to tort damages.[45] Specifically, the Court stated that "in a case where acknowledgement of refusal of debt payment is considerably unfair, the debtor's assertion of an expired statute of limitation is not allowed against the principle of good faith and abuse of rights," given that "good reasons hindering the creditor's right to exercise objectively exist."[46]

The Court shed light on the "good reasons" that thwarted the Korean plaintiffs. For decades following the 1965 ROK-Japan Treaty on Basic Relations, it had been "a generally accepted view within ROK that issues of the ROK citizen's individual claim right against Japan or Japanese citizens" had been "comprehensively resolved by the Claims Agreement," but the Court asserted that by the time the plaintiffs filed their original lawsuit in Japan in 1995, the opposite view had become prevalent.[47] Previously confidential documents comprising the Claims Agreement were finally disclosed to the public in January 2005, and in August later that year, a Korean special public-private joint committee published its corroborative official view that the "damages claim right against torts against humanity in which Japanese state powers had been involved or related to the colonial rule was not addressed in the Claims Agreement."[48]

Also noting Japanese legal measures that allegedly obfuscated whether

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43 *Id.* § 4(A).

44 *See supra* Part II.A.

45 *See supra* Part II.B.2.

46 S. Ct., 2009Da22549, May 24, 2012 (§ 4(D)(2)) (S. Kor.).

47 *Id.*

48 *Id.*

or not the former Mitsubishi was identical to the contemporary defendant for legal purposes,[49] the Korean Supreme Court concluded "that at least up to May 1, 2000 when Plaintiffs filed this case, there existed obstruction grounds as to why Plaintiffs could not exercise rights objectively in the ROK."[50] It held that dependence on the statute of limitations by MHI constituted an abuse of rights against the principle of good faith and was therefore rejected.

In sum, the Court comprehensively overruled the Busan High Court through a judgment that had sweeping ramifications for the transitional justice and redress process addressing Korean forced labor in wartime.

III. THE NEW COLLECTIVE REDRESS MODEL AND A POTENTIAL BREAKTHROUGH AGAINST THE CURRENTS OF MEMORY POLITICS

A. The 2012 Supreme Court Decision has Recast the Restitution Paradigm into One of Broad-Based Collective Redress

In the three-plus years following the 2012 MHI decision by the Korean Supreme Court, district and appellate courts in Busan, Seoul, and Gwangju ordered MHI and other Japanese companies that used wartime forced labor to compensate Korean plaintiffs. The companies, as well as Tokyo, duly protested, insisting that the issue of compensation claims already had been laid to rest.[51] While appeals have been lodged and are pending at the Korean Supreme Court,[52] the most striking development has been a class action lawsuit filed at the Seoul District Court in April 2015 by 1,004 Korean forced labor victims and family members. Under the banner of the civil-society-based Asia Victims of the Pacific War Families of the Deceased Association of Korea, they have targeted MHI and 71 other Japanese companies, including additional large conglomerates such as Mitsui and Nissan.[53]

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[49] The Court was referring to Japan's Company Accounting Temporary Measure Law and the Corporation Reconstruction and Reorganization Act, which it alleged was "enacted for the Japanese domestic special purpose of handling problems after the war and compensation debt." *Id.* § 4(B).

[50] *Id.* § 4(D)(2).

[51] Ogura, *supra* note 7; *see also South Korean court orders MHI to pay Korean women for forced labor*, THE JAPAN TIMES, Nov. 1, 2013, *available at* http://www.japantimes.co.jp/news/2013/11/01/national/crime-legal/south-korean-court-orders-mhi-to-pay-korean-women-for-forced-labor/#.ValkYPmpshR.

[52] Sam Kim, *WWII Lawsuits Muddy Effort to Ease Japan-South Korea Tension*, BLOOMBERG, June 25, 2015, *available at* http://www.bloomberg.com/news/articles/2015-06-25/legal-battles-muddy-attempts-to-ease-japan-south-korea-tensions.

[53] *Forced labor victims file suit against Japanese companies*, THE DONG-A ILBO (S. Kor.), April 22, 2015, *available at*

The class action is being co-helmed by a U.S. law firm that helped secure the $7.5 billion compensation fund settlement for Third Reich forced labor victims, a product of negotiations between the German and U.S. governments together with culpable German and Austrian companies.[54] One hundred of the Korean plaintiffs held a press conference on the day the lawsuit was filed, and their comments echoed the substance of the 2012 Korean Supreme Court decision. Maintaining that the "issue over private claims against Japan regarding the Korea-Japan Treaty is the biggest challenge to the peaceful settlement of historical issues between the two countries," the plaintiffs criticized the persisting view that individual claims were barred through the 1965 Korea-Japan Treaty and the Claims Agreement.[55] Compensation sought for unpaid wages and damages totals 100 billion won ($92.3 million), the largest amount for a Korean wartime forced labor lawsuit to date.[56]

In publicly decrying the treaty-based defense to their claims, the new class action plaintiffs harnessed their mass numbers and the aegis of the 2012 Korean Supreme Court decision, demonstrating how far they had come from the original redress efforts of those six victims who had filed in Hiroshima two decades earlier. Each of the Japanese judgments on forced labor lawsuits that predated the 2012 decision had dealt with disparate circumstances spanning factories, mining, construction, and even the failed maritime repatriation of 6,000 Korean forced laborers in August 1945 on the *Ukishima-maru*, which sank after an unsolved explosion.[57] Regardless of whether these lawsuits were rejected or settled, there appears to have been little normative progress beyond a constant reliance on the statute of limitations defense by Japanese courts. The Korean Supreme Court's leadership transformed the restitution paradigm by shifting it from an ad hoc, piecemeal handling of individual claims against various companies—that at most had led to out-of-court settlements absent official recognition or apologies—to a collective redress model. Under this post-2012 model, illegal forced labor during the illegal Japanese occupation period is considered to have constituted a grave violation of human rights for every Korean condemned to it,[58] and requires commensurate broad-based

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http://english.donga.com/srv/service.php3?biid=2015042276128.

[54] United States-Germany Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, U.S.-F.R.G., 39 I.L.M. 1298. For analysis of the litigation leading up to the compensation fund's establishment, *see* Detlev Vagts & Peter Murray, *Litigating The Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT'L. L.J. 503 (2002).

[55] *Forced labor victims file suit against Japanese companies*, *supra* note 53.

[56] *Id.*

[57] *See* Park, *supra* note 6, at 62-63.

[58] For estimates of the total number of victims, *see supra* Part II.A.

resolution and restitution. The new paradigm is not zero-sum but rather could end the stalemate over Korean wartime forced labor for the benefit of all involved parties.

B. Prospects for Bringing Lasting Closure to the Wartime Forced Labor Issue and for Resultant Bilateral Progress between Japan and the ROK

1. Seeking a Permanent Resolution through Corporate Accountability

Environmental factors prior to the advent of the new collective redress model heavily favored Japanese companies. Scholarship that followed the dismissals of *In Re World War II Era Japanese Forced Labor Litigation* by the Northern District Court of California and the Ninth Circuit Court of Appeals from 2000-2001—wherein claims had been brought by allied POWs, U.S. civilians, and Korean, Chinese, and Filipino plaintiffs—was pessimistic towards the Asian forced laborers' outlook for securing the kind of justice achieved in Europe; a lack of U.S. government support was cited as a key chilling factor against favorable judicial decisions.[59] Washington at the time demonstrated that its interests were best served by siding with the defendants (and Tokyo by proxy). Culpable Japanese companies also enjoyed silence from Japan's mainstream media over the original forced labor lawsuits, which in turn prevented greater public awareness and sympathy.[60]

In contrast, the post-2012 redress paradigm is rooted in South Korea's judiciary and civil society. Propelled by the Korean Supreme Court's landmark decision, the contemporary redress model thus far appears less beholden to domestic or foreign government administrations, past and present.[61] The Korean press has proven supportive of the forced laborers' cause, helping to even a playing field that once skewed heavily towards powerful and influential corporate successors to the war-era Japanese companies.[62] Western media too has not shied of late from referencing the array of transitional justice issues that continue to hamper improved ROK-Japan relations.[63]

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[59] *See*, *e.g.*, John Haberstroh, Note, *In re World War II Era Japanese Forced Labor Litigation and Obstacles to International Human Rights Claims in U.S. Courts*, 10 ASIAN L.J. 253 (2003).

[60] *See* F. T. McCarthy, *The Cost of Japan's Murky Past Catches Up,* THE ECONOMIST, July 8, 2000.

[61] *See* Kim, *supra* note 52.

[62] *See*, *e.g.*, *supra* notes 34, 53, *infra* note 79.

[63] *See*, *e.g.*, *supra* notes 9, 52, and 60.

Changed environs provide a number of opportunities for both sides. The culpable Japanese companies, at last through a twist of legal circumstance, have been consolidated into a position in which they could emulate their German counterparts and offer a united statement of apology and reconciliation in addition to reparations through a mutually acceptable resolution.[64] The victims could accept long-sought acknowledgment and contrition from Japanese companies that had violated their human rights, along with suitable compensation for lost wages and damages. In return, just as the German companies were afforded protection from future lawsuits following their settlement,[65] penitent Japanese companies likewise would be shielded from a yearly influx of new lawsuits. Furthermore, reputational benefits could bring them economic rewards, given that ill will related to contentious historical issues between Japan and its Northeast Asian neighbors has had negative spillover effects on Japanese products.[66] A successful permanent resolution to the class action lawsuit ultimately would serve the interests of both sides, as it did in the German case.

2. Political Quicksands vs. a Judicial Bedrock with Civil Society Backing for Improving Japan-ROK Ties

The Korean courts' progressive decisions in recent years, combined with the efforts of galvanized civil society actors,[67] have paved the way for an alternative process towards a lasting rehabilitation of bilateral ties—one that bypasses the customary political channels. Unlike fragile government efforts to resolve "memory politics" between Seoul and Tokyo that were mothballed following short-lived administrations and factional discord, the union of civic power and judicial action within both countries has set precedents of successfully overcoming inertia in matters of transitional

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[64] Clara Sandoval & Gill Surfelet, *Corporations and Redress in Transitional Justice Processes*, *in* CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE, 93, 106 (Sabine Michalowski ed., 2013) (noting that corporate settlements "should not be limited to compensation as a form of reparation; rather, they should take due account of the harm inflicted on groups of people, ethnic groups, and communities. Doing so lessens the focus on providing individual reparation and incorporates a collective dimension.").

[65] *See In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 142-143 (E.D.N.Y. 2000).

[66] *See, e.g.*, Sheila A. Smith, *President Obama and Japan-South Korean Relations*, The Asan Forum, March 25, 2014, http://www.theasanforum.org/president-obama-and-japan-south-korean-relations/ (noting that "the political frictions are beginning to take their toll . . . a drop in economic activity between Japan and South Korea was visible in 2013," following "a growing sense that the Japanese government is reneging on past statements of remorse for World War II"); *see also* Sandoval & Surfelet, *supra* note 64, at 107 (on culpable corporations avoiding further reputational damage).

[67] *See*, *e.g.*, *supra* Part III.A.

justice.

The Japan-ROK Joint History Research Project exemplified the limitations of government-centric reconciliation initiatives. Launched during the Junichiro Koizumi and Kim Dae-Jung administrations in October 2001, it held some promise initially and led to the publication of a collaborative report in June 2005.[68] However, the second joint research phase that commenced during the subsequent Shinzō Abe administration ground to a halt with the collapse of Abe's government in 2007, necessitating a pledge in April 2008 between Prime Minister Yasuo Fukuda and President Lee Myung-Bak to resume research.[69] After Fukuda too resigned from his post after one year, the Project remained inactive.[70] Furthermore, a fundamental disagreement between the two governments already had cast a pall over the first research phase; Tokyo rejected Seoul's demand for the joint research results to be reflected in the textbooks of the two nations,[71] dimming prospects for government-level conciliatory changes spurred by the academics' findings.

An analysis of ultra-conservative strands in Japanese politics and their influence is beyond the scope of this article, but they certainly have hampered Tokyo's ability to push for a permanent resolution to the history problem with Seoul that would require meaningful concessions. Yasuo Fukuda's administration was widely perceived to be more interested in working with China and South Korea than catering to Japanese nationalists,[72] and it duly folded after a year, without a lifeline from this key constituency of the ruling Liberal Democratic Party. In turn, the Korean government, during conservative as well as liberal rule, has been accused of often "moving the goalposts" in memory politics vis-à-vis Japan and never being sated, with the intent of routinely using the troubled past for domestic

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[68] *See* MINISTRY OF FOREIGN AFFAIRS OF JAPAN, DISCLOSURE OF THE REPORT BY THE JAPAN-ROK JOINT HISTORY RESEARCH COMMITTEE (2005), *available at* http://www.mofa.go.jp/region/asia-paci/korea/report0506.html (describing how Kim and Koizumi "confirmed the importance of promoting mutual understanding concerning accurate facts and recognition of history. And, to this end, agreed to establish a forum for experts to discuss the issue. The experts of Japan and the ROK have conducted joint research through a number of period-specific working groups: ancient history, medieval and modern history, and modern and contemporary history.").

[69] Yasuo Fukuda, Prime Minister of Japan. *See* Lee *supra* note 26.

[70] Shinichi Kitaoka, *The Abe Administration: Beyond 100 Days,* 20 ASIA-PACIFIC REVIEW 1, 9 (2002).

[71] *S.K.-Japan joint history project to be revived*, THE HANKYOREH (S. Kor), April 26, 2007, *available at* http://english.hani.co.kr/arti/english_edition/e_international/205534.html.

[72] *See, e.g.*,William Pesek, *Disaster may help bring Asian economies closer together*, N.Y. TIMES, May 16, 2008, *available at* http://www.nytimes.com/2008/05/16/business/worldbusiness/16iht wbjoe17.1.12950183.html?_r=0.

political purposes.[73] It is little wonder that, with respect to bilateral reconciliation efforts to date, a dependence on severely self-compromised government channels has brought about unsatisfactory results.

The combined efforts of civil society and the judiciary, on the other hand, have achieved notable successes related to transitional justice in South Korea as well as in Japan. Demanding justice for human rights violations perpetrated by past autocratic regimes, Korean civil society's "people power" helped bring about the trials and convictions of two former generals-turned-presidents—one of whom had overthrown via coup a legitimate civilian government with the support of the second.[74] The language of the Korean Supreme Court's 2012 decision that deemed illegal Japan's occupation of Korea was reminiscent of its ruling on April 17, 1997, against former Presidents Chun Doo-Hwan and Roh Tae-Woo, whereby the Court declared: "It cannot be tolerated under any circumstances under our constitutional order to stop the exercise of the authority of constitutional state institutions and grasp political power by violence."[75] Segments of Japanese civil society too have proven active in pushing for legal redress in matters of transitional justice, including conscientious attorneys and civic groups that helped collect 104,000 signatures in a petition presented to the Fukuoka District Court in support of Chinese victims of forced labor; the court ruled for the plaintiffs in 2002.[76] The Japanese Supreme Court, for its part, dismissed an appeal by the Japanese government against compensation for Korean survivors of the atomic bombings, asserting that "it is illegal for the state not to have granted the allowance to the survivors of atomic bombing who now live abroad."[77]

A grand settlement, whether it arrives as a resolution to the ongoing class action or requires years of further legal maneuverings, could have an impact that endures beyond the periodic cycling of administrations in both Japan and South Korea. By effectively circumventing government agency in favor of reconciliation through judicial and civil society will, it also would

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[73] Kuni Miyake, *Stop Moving the Goal* Posts, JBPRESS, Aug. 9, 2013, *available at* http://jbpress.ismedia.jp/articles/-/38417.

[74] Cho, *supra* note 5, at 582-584.

[75] Decision of April 17, 1997, 96 Do 3376 (Korean Supreme Court).

[76] *See* Maeumi Mitsuhiro, *Chūgokujin Kyōsei Renkō, Kyōsei Rodō Jiken Fukuoka Saiban kara, Ayamachi wo Mitome, Tsugunai, tomo no Ayamu Ajia no Rekishi wo!* [*From the Fukuoka Trial on Chinese Forced Labor and Mobilization, Walking Toward an Asian History that Admits Mistakes and Compensates!*], 624 SHINPO TO KAIKAKU [PROGRESS AND REFORM] 39, 42 (2003).

[77] *Japan: Supreme Court Orders Compensation for Korean A-Bomb Survivors*, *supra* note 17. The lower courts in Japan also have demonstrated progressive leadership in the past, such as when the Niigata District Court in March 2004 ordered the Japanese government and a private corporation to jointly compensate ten Chinese forced laborer plaintiffs in an unprecedented decision. *See* Park, *supra* note 6, at 63.

bypass to a great extent the meddling of both Japanese hardliners as well as opportunistic Korean politicking. Doubtless there would be pushback from some quarters, such as from bureaucrats and politicians who might feel that any negotiations involving memory politics belong exclusively in the domain of foreign policy. However, a static lack of progress and even regression that have resulted from stopgap governmental efforts towards bilateral reconciliation necessitate an approach that has a track record of success in transitional justice matters. It is no longer productive to agonize over whether unfavorable rulings or a grand settlement on wartime forced labor could damage bilateral relations, if ever it was.[78] Rather, by directly confronting the seventy-year-old elephant in the room that is memory politics, culpable companies and forced labor victims would be acting in their mutual benefit, while gifting Seoul and Tokyo a rare bilateral breakthrough largely free of political repercussions.

VI. CONCLUSION—SHAPING A REALISTIC BLUEPRINT

In July 2015, two noteworthy transitional justice developments concerning MHI caught the attention of observers and further brightened the prospects for a resolution to the Korean wartime forced labor issue. The company first apologized to U.S. prisoners of war who had been used as slave laborers, and then, in the following week, it proposed a settlement with Chinese forced laborers in Chinese courts that would include an apology and a large compensation package.[79] Previously in November 2000, the Japanese Kajima Kumi Corporation had agreed to create a $4.2 million compensation fund for Chinese forced laborers, but the lawsuit originated in Japan and ultimately was overturned by the Japanese Supreme Court.[80] MHI's well-received recent proposal before a foreign court hence was a singular one. Described as a catalyst for improved ties between Beijing and

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[78] *See supra* note 7 and accompanying text.

[79] *Mitsubishi to compensate Chinese wartime laborers, ignores Korean victims*, THE DONG-A ILBO, July 25, 2015, *available at* http://english.donga.com/srv/service.php3?biid=2015072517358 ("[MHI] proposed to admit its historical responsibility as the employer, express a sincere self-reflection and apology, pay about 16,000 U.S. dollars to each victim, donate 100 million yen (806,519 dollars) for building a monument, raise 200 million yen (1.6 million dollars) for investigation of missing victims, and pay about 2,000 dollars to the victims to invite them to a memorial ceremony . . . . Both sides plan to sign an agreement in Beijing soon. Japan mobilized some 39,000 Chinese people for forced labor during World War II. Among them, 3,765 people worked at coal mines run by Mitsubishi. About 1,500 of them or their bereaved families have been identified."); *see also* Nozomu Hayashi & Tomoyuki Izawa, *Mitsubishi Materials moving to settle wartime forced labor issue with China*, THE ASAHI SHIMBUN, Aug. 4, 2015, *available at* http://ajw.asahi.com/article/behind_news/social_affairs/AJ201508040093.

[80] *See* Park, *supra* note 6, at 62, 74.

Tokyo, it is seen to have increased the likelihood of a bilateral summit in the near future,[81] much as a similar deal would boost Seoul-Tokyo ties.

Yet impediments to the initiation of proposals and negotiations in the Korean case remain. The size of the potential Chinese market for Mitsubishi products—and for products made by many of the other Japanese companies named in the 2015 Seoul District Court class action lawsuit—dwarfs that of South Korea, meaning there existed greater financial incentives to settle with Chinese forced labor victims. In a more troubling turn, a major Korean newspaper reported that Mitsubishi was dissuaded by the Japanese government from seeking reconciliation with Korean forced labor victims out of Tokyo's belief that doing so could roll back supposed protections under the 1965 normalization treaty.[82] The potential for continued political restraints on the corporate front cannot be discounted, as government ties with and influence upon big business in Japan historically have been strong.[83] With this caveat in mind, the role of civil society in Japan and Korea will be all the more critical going forward—not only in terms of judicial advocacy, but also for the purpose of shoring up public support in both countries. The more public awareness and displeasure towards Tokyo's discouragement of corporate reconciliation with wartime Korean forced laborers becomes ingrained (especially in light of both sides' willingness to compromise), the more costly it would become for the Japanese government to maintain such a position.

An animated film that centers on the life of Dr. Jiro Hiroskoshi—MHI's chief engineer of the Mitsubishi A6M Zero fighter aircraft—was the top-grossing film of 2013 in Japan.[84] Written and directed by world-acclaimed filmmaker Hayao Miyazaki, *The Wind Rises* does not directly reference wartime forced labor but traces the intensifying human costs of the war. In one poignant scene, the protagonist Jiro mentions that a prototype aircraft's design with respect to its weight could be perfected if its weapons were left out. While his idea is met with laughter from his subordinates, he remains expressionless, and Miyazaki's point is made. Throughout the film, MHI's pragmatic leanings clash with rigid government dogma in an uncanny parallel to today's impasse over the wartime Korean forced labor issue. By the film's conclusion, Jiro dreams that he is walking away from a graveyard of Zero fighter planes and is reminded by other characters that he must live.

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[81] *Mitsubishi to compensate Chinese wartime laborers, ignores Korean victims*, *supra* note 79.

[82] *Id.*

[83] For an authoritative work on time-honored ties between Tokyo and Japanese big business, *see* CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE (1982).

[84] Kevin Ma, *The Wind Rise tops 2013 Japan B.O.*, FILM BUSINESS ASIA, Jan. 1, 2014, *available at* http://www.filmbiz.asia/news/the-wind-rises-tops-2013-japan-bo.

Today's Mitsubishi, too, continues to navigate its history in the midst of its business operations. Meanwhile, influential non-governmental actors in both South Korea and Japan, from the courts to civil society, have revitalized the transitional justice process and recast corporate accountability so as to potentially shape a viable resolution. Their shared opportunity, if seized by both sides and negotiated to a mutually satisfactory conclusion, could give rise to effective redress for the wartime forced laborers, their families, and their supporters, closure for the culpable companies as well as those that were wronged, and a permanent step towards rapprochement for Japan and South Korea.