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# Reparations and Reconciliation in East Asia as a Hot Issue of Tort Law in the 21st Century: Case Studies, Legal Issues, and Theoretical Framework*

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## Abstract

*Reparations and reconciliation issues have been still marginalized in tort law in spite of their pragmatic and theoretical importance in East Asian legal scholarship. On the other hand, there are already many reparations lawsuits, especially relating to Japanese invasion and colonization, on forced slave labor, comfort women, massacres in China. In this article, first, we'll deal with why these legal cases have been unsuccessful so far in Japan, and the ways to overcome legal obstacles. Second, we will discuss the mechanisms of reparation and its goal: reconciliation and changes in international and racial relationship. The important role of an apology, comparison of legal and moral reparations and the related issues will also be considered.*

## I. Introduction

Among the numerous topics concerning tort law, such as traffic accidents, medical malpractice, air pollution, product liability etc.,[1] reparations and reconciliation issues have been, oddly enough,

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1) For the typological analysis of modern tort law in Japan, see, e.g., KUNIHIKO YOSHIDA, LECTURE NOTES ON TORT LAW (HUHOUKOUIHOU NADO KOUGIROKU) (Shinzan Pub. Co., 2007) 52-. This is the first discussion in Japanese tort law textbooks of reparations issues. *Id.* at 126-.

marginalized. This is in spite of their pragmatic and theoretical importance in East Asian legal scholarship, where such issues are more prominent than in the U.S. In this essay, I'll develop a theoretical framework for reparations based on concrete cases in an East Asian context, and demonstrate coming 21st century developments in this field.

There are many reparations cases in East Asia, especially relating to Japanese invasion and colonization, on forced slave labor, comfort women, massacres in China; and a number of related lawsuits have to date been filed. However, most of these legal cases have been turned down, even though a limited number of cases (e.g., the Hanaoka and Nishimatsu Chinese forced labor cases) have been resolved outside the courts.[2)]

In this article, first, we'll deal with why these legal cases have been unsuccessful so far in Japan, and the ways to overcome legal obstacles. Second, we will discuss the mechanisms of reparation and its goal: reconciliation and changes in international and racial relationship. The important role of an apology will also be considered.

## II. Legal & Theoretical Analyses: Legal Obstacles and How to Overcome them

### *1. Introduction: From Case Analysis*

#### *1) Results*

A concrete analysis of Japan-related mass tort cases such as ① Korean and Chinese slave labor, ② Korean, Taiwanese, and Filipino comfort women, ③ massacres, bombings and bio-war in China, demonstrates the extent to which reconciliation and reparations have been attained is very limited, except for the Korean atomic bomb victims' case.

Specifically, (i) legal claims for reparations, in most of the cases, have

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2) For the details, see, Kunihiko Yoshida, Property, Housing Welfare, and Reparation Problems in the Multicultural Age (Tabunka Jidai to Shoyuu/Kyojuu Hukushi/Hoshou Mondai) (Yuhikaku Pub. Co., 2006) chap. 8; do., Urban Welfare, Disaster Recovery, War Reparations and a Critical 'Rule of Law' (Toshi Kyojuu/Saigai Hukkou/Sensou Hoshou to Hihanteki 'Hou no Shihai')(Yuhikaku Pub. Co., 2011) chap 5~8.

been denied. Furthermore, (ii) even the historical facts of mass torts, for example, the Nanjing massacre, the Chongqing bombing and bio-war, are not known by most Japanese, especially among Japanese youngsters, and this is a crucial obstacle when we pursue what is called 'historical reconciliation' in Asia. Therefore, (iii) there are not many arguments about moral reparations, except for the limited Chinese slave laborers' settlement cases after the Nishimatsu Supreme Court decision on April 27th of 2007.

On the other hand, (iv) the ultra-conservative (ultra-right) movement that tries to deny and ignore these historical tragedies is vocal, salient, and strategically influential among politicians in terms of lobbying, even though such movements are academically nonsensical. It's been emphasized that ultra-conservative groups such as 'Zaitokukai' have become active, and that they intimidate, harass, and oust racial minorities (for example, school kids of resident Koreans in Kansai, Japan-Brazilian workers in the Chubu area).

*2) Contrasting World Trends towards Reparations and the Isolation of Japan*[3)]

But notice that the Japanese position is isolated from world trends in historical reconciliation. Judging from many cases of reparations from all over the world, we are now in the 'age of apology' and a moral shift in favor of historical reconciliation is occurring, despite of course the many conflicts.

Reparations are at the juncture of civil law and international law, and more specifically, international human right law. Against this backdrop of a moral shift towards reconciliation, legislative reparation is increasing and thus the adjudicatory position should also be reexamined. But in this context, moral reparations should also be emphasized holistically.[4)]

As is often said, there are conspicuous differences between Germany and Japan with regard to moral reparations, even though legal reparations have been unsuccessful in both nations. It's really puzzling! Why Japan

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3) See, e.g., Barkan, the Guilt of Nations: Restitution and Negotiating Historical Injustices (Norton, 2000); Barkan et al. eds., Taking Wrongs Seriously: Apologies and Reconciliation (Stanford U.P., 2006).

4) In this respect, see, Roy Brooks, Atonement and Forgiveness: A New Model for Black Reparations (U. California P., 2004) 141-.

cannot follow suit regarding reparations, even though it is called developed country and peaceful nation?

The key to this systemic problem, i.e., the lack of movement towards reparations, in spite of brutal deeds in neighboring countries, is perhaps to be found in the process of drawing up the Japanese Constitution. According to Professor Shoichi Koseki,[5] when Douglas MacArthur (1880-1964) proposed the complete relinquishment of war clause, Article 9 of the Japanese Constitution, his real intention was to hide the problem of war responsibility, especially the Emperor's responsibility, in order to maintain the Japanese Emperor System to integrate the Japanese nation. I think this concealment might be the harbinger of the present situation.

The argument regarding the responsibility of the Japanese Emperor had become taboo already by the late 1950s: For example, even Professor Emeritus Masao Maruyama stopped mentioning it at that time. However, putting aside the Emperor's liability, state responsibility can be and should be theoretically discussed separately.

## 2. *Legal Obstacles: Why Have Legal Claims Been Dismissed in Many Cases?*

In the previous section, we have seen that legal claims for reparations have, with a few exceptions,[6] been denied. Next, we are going to think about the reasons why legal reparations have not been accorded easily and to critically reexamine whether they are understandable.

### *1) The Passing of Time and Lack of Evidence as a factual matter*

Most of the reparation cases mentioned above refer to incidents that occurred during WWII and more than 65 years have passed! As a factual matter, it is true that, because of the passing of time, the evidence is limited, and that it is not easy to find expert witnesses.

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5) Shouichi Koseki, Why was the Art. 9 of Japanese Constitution Drafted? (Kenpou 9 Jou wa Naze Seitei Saretaka) (Iwanami Booklet) (Iwanami Pub. Co., 2006).

6) The exceptional cases are the Korean atomic victims' case and the Hansen's disease patients' case. On this issue, see, Yoshida, *supra* note 2(2006) chap. 5, do., *supra* note 2(2011) chap. 5.

For example, the difference in the number of slave labor litigations filed by the Chinese and Koreans can be explained by the existence of a thick report of Chinese cases, even though it is filled with false data.

Then a question arises! How come the litigations were not filed earlier?

First, the delay in starting litigations can be explained by the political situation in neighboring countries. The victims found difficulties in filing lawsuits, and it was at certain points impossible due to political unrest, for instance, the 'cultural revolution' in China and the violent military dictatorship in Korea.

Furthermore, it's also explained by changes in international law. Formerly, international law used to focus on the relationship between nations, but it has now extended to the protection of individual human rights. Thus, the merging of the fields of international law and civil law has become an important issue, and there is growing awareness of rights among the related individuals!

Sometimes, it might be difficult to identify the defendant. In cases where the defendant is a private corporation, no matter the degree of continuity, it often denies the (formal) identity of the corporation due to the passage of time, as a defense. If issues of legal reparations are dependent on such an 'identity defense', then the legal solution is clearly formalistic and thus different from a commonsensical solution.

However, by the same token, that is, by passage of time, the number of the victims, for example, comfort women, slave laborers, foreign atomic bomb victims, and so forth, has been decreasing, with those in similar situations passing away without any protection or reconciliation, and we have to make haste to solve this problem; that is, to attain reparations and reconciliation as soon as possible!

*2) Legal Principles related to the Passage of Time: Prescription and Limitation of Action*

The legal principles related to the passage of time are those of prescription and limitation of action, and they are often a big hurdle when plaintiff victims demand relief. But we have to notice that there are, on the other hand, exceptional cases where those defenses have been overcome.

The way we can overcome this hurdle is as follows:

First, the latter part of Art. 724 of the Japanese Civil Code, on the 20 years' limitation, should be interpreted as prescription (the mainstream interpretation of academics), rather than as case law does, as a statute of limitation (limitation of action). Compared to 'limitation of action', 'prescription' is more flexible and matches with the requirement for justice when we try to protect the right of restitution for the vulnerable party.

Second, in cases of prescription, the defendant has to 'refer' to the legal institution of prescription in order to be immunized from legal responsibility. However, in cases of the hideous mass tort, such as the holocaust, or the Nanjing massacre, we could argue that the defendant's right of 'referral' should be restricted. As a matter of fact, we have such an international treaty regarding the holocaust!

Third, in cases of prescription, the starting point for calculation could be postponed, considering the factual difficulties relating to litigations mentioned above. For example, in China, ordinary victims came to realize the possibility of filing litigations, at the grass-root individual level as opposed to the nation state level, only when the Chinese government officially admitted the possibility of private litigation in the mid 1990s. In these cases, we could calculate the term of prescription from that point instead of from the time of the mass tort!

*3) The Other Problem related to the Passage of Time: the Need for the Re-evaluation of Unpaid Salaries*

The other remaining problem related to the passage of time is the re-evaluation problem. The 99 yen (the pension premium) returned to a Korean who used to work at the Mitsubishi Steel Corporation in Nagoya, awarded by the Japanese government at the end of 2009, is a good example. Through a series of interviews with former slave laborers, I have realized that the unpaid salary issue is still an unresolved problem.

Putting aside the problem of the interpretation of international treaties, that is, whether the individual laborer's legal and moral/natural right to demand unpaid salary still exists in spite of the waiver clause (see, (5) below), in cases of repaying the unpaid salary, we should re-evaluate and re-caculate the unpaid amount as part of damages.

*4) The State Immunity Doctrine*

The state immunity doctrine is also often quoted as a legal defense, when the defendant is Japanese government; for example, in the comfort women cases, Nanjing massacre case, Chongqing bombing case, and the bio war case. In that sense, this is also a big hurdle and there are many cases that have applied this defense.

However, it is curious to make recourse to this outdated doctrine in the era of abundant governmental liability, to the effect that its application is against public policy in my opinion. Furthermore, it's been clear that the immunity doctrine was already out of date at the time of the old administrative law a hundred years ago. We know it was criticized already before WWII.

*5) The Waiver Clause in International Treaties and the Recent Movement of Moral Reparations Settlements to Overcome it*

The interpretation of the waiver clause in international treaties has become one of the most critical issues, and has attracted a lot of attention lately. The leading Supreme Court decision in the Nishimatsu case mentioned above in 2007 has rejected the request for legal reparations by adopting this defense: the individual right of reparation, as well as the governmental right of reparation, has been nullified by the treaties.

Such a waiver clause is against public policy and invalid by the standards of domestic Japanese civil law. Is it OK to adopt a different position in cases of the interpretation of international law?

We should pay attention, on the other hand, to the fact that the Supreme Court justices themselves have admitted that practices of slave labor and comfort women are tortious acts and they suggested the voluntary payment of damages as moral reparations, or as natural obligation to use the civil law term. Therefore settlements have been made one after another since October 2009.

Incidentally, a similar judgment was also made this year (February, 2011) for Chinese slave dock laborers in Sakata, Yamagata Prefecture, which rejected the request of 150 million yen damages and apology by the waiver clause of the 1972 joint declaration. However the lower courts, especially the district court, admitted the infringement of the security

obligations by the company (Sakata Transportation Co.) as well as the Japanese government and remarkably the Sendai High Court in 2009 suggested to both parties that voluntary remedies should be undertaken, considering the great loss the victims suffered physically and mentally in those days. Notice that the moral responsibility of the Japanese government is also implicated in this case.

Governmental responsibility is much more important because the related private company is not financially big enough to undertake financial reparations. However neither the Japanese government nor Sakata Transportation Co. has taken any action toward reconciliation. Sakata City is traditionally famous for its marine commerce and it is overwhelmed by local merchants somewhat like a company town. Thus the reparation litigators and their supporters have been ostracized in this local conservative community and the reality there is far from international reconciliation.

In conclusion, we should realize that legal reparation is partial, and sometimes contingent on many accidental factors. Of course, we have to re-examine the related legal doctrines critically, but it should be noted that legal reparation, even if it is important, is not a panacea for the past tragedies, and not the only solution for reconciliation.

### *3. The Purposes and Varieties of Remedies: Comparison of Legal and Moral Reparations*

#### *1) Expansion of the purposes of Tort Remedies*

The purposes of tort remedies are usually considered (i) damage compensation, and (ii) prevention of tortious behavior, and (iii) punishment of torts. Above all, the monetary compensation factor ((i)) has been examined closely in legal reparations. However, following recent discussions on reparations, we've realized that the purpose of remedies has expanded and especially in the case of reparations, (iv) the atonement factor, that is, the regret, repentance, and remorse aspect after admitting legal and moral responsibility for past insidious deeds has been emphasized: in this sense, the apology rather than the monetary compensation has become much more important.

*2) The Variety of the Reparations Remedies*

The expansion of the remedy functions leads to an increase in the kinds of remedies as follows:

(a) When monetary compensation is the only function of the tort, monetary damages has been the only remedy as Art. 722 Sec. 2 of the Japanese Civil Code and Art. 763 of the Korean Civil Code indicate.

(b) However, if the function of tort remedies is expanded to include the atonement function which presupposes the admission of tort and tortious responsibility by tortfeasors, then the kinds of remedies have also increased to include, in addition to monetary damages, for example, ① history education, or ② constructions of memorials, because of the importance of the acknowledgment of the past injustice by the perpetrators and their nation, as well as ③ symbolic actions of apology in front of victims themselves, for example, in front of comfort women themselves, instead of George Bush, ④ return of remains to relatives, or ⑤ rituals for tragedies and genocides, because of their importance for the consolation of the victims' damaged feelings and their forgiveness about past injustice.

Of course, in the context of reparations, the monetary damages themselves are important to show the sincerity of the acknowledgement of historical responsibility and the apology.

(c) In this sense, the educational function of reparations litigations should be emphasized more.

Incidentally, the governmental action that is indifferent to fact-findings, even after governmental change, as in the cases of the Chongqing bombings, or of germ warfare should be strongly criticized in this context.

I think many lawyers, and even activists or advocates for victims are exclusively focused on the conventional thought of remedy, that is, what we might call 'monetary damages centralism.' Professor Brooks calls this the 'tort model' as opposed to the 'atonement model'

From this critical perspective, you can fully understand why the plaintiff leader of the Hanaoka litigation was upset about how his lawyers proceeded towards a damages-oriented settlement, and why all of the Korean comfort women rejected the proposal made by the Asian Women Fund in which a sincere apology with an admission of legal responsibility was lacking.

*3) Comparisons of Legal and Moral Reparations and Responsibility*

At this stage, let's compare legal reparations with moral reparations and point out the features of each. Of course, both of them are connected with each other and their consequences are overlapping, compared to the conventional distinctive understanding of both responsibilities. In my opinion, moral reparation is the basis of legal reparation, whereas it has been regarded as non-legal responsibility until recently.

But there are several differences between them:

(a) Legal protection is partial, whereas moral responsibility is more holistic and basic.
(b) Legal responsibility is more official.
(c) Legal reparations are coerced and can be harsh, whereas moral reparations are performed voluntarily and symbolically. In this sense, the former could be performed without sincere regret (see, the insincere comment by the defendant, Kashima Corporation shortly after the Hanaoka settlement), while the latter presupposes the moral reflection and remorse, thus it is more foundational.

| Legal Reparations/Responsibility | ——Moral Reparations/Responsibility |
|---|---|
| partial /accidental | holistic/basic |
| official | |
| coercive/ harsh | voluntary/ symbolic |
| (sometimes without sincerity) | (remorse) |

*4) A Broader View of the Critical Model of the 'Rule of Law'*

Put differently, if you look at the 'rule of law' in this field of reparations law, the traditional image of monetary damages centrism that still overwhelms legal practitioners as well as traditional civil law scholars is of

the legal positivistic type and sometimes the self-complacent statist type of the 'rule of law'[7]. It might be distinct from moral reparations and from the commonsensical method of restorative justice that fits well with the reconciliation process stated above. That's why the Hanaoka Settlement pleased legal practitioners on the one hand, but infuriated the leader of the slave laborer plaintiffs Geng Chun on the other. It also explains why the Asian Women's Fund's solution of monetary provision with the denial of legal responsibility enraged many comfort women in Korea and Taiwan.

To use the phrase of the late Professor Robert Cover, the statist impasse in constitutional creation comes to an end when undisciplined jurisgenerative impulses and some movement toward a resistance vision in the face of indifference or opposition of the state will reach the judges. Constitutionalism based on equality of individual right, respect for human right, and the international pursuit of peace may legitimize communities other than the state, and movements within a different framework, and bring forth a new world. Legal meaning is a challenging enrichment of social life, a potential restraint on arbitrary power and violence by listening to the marginalized voice of redemptive narratives from the excluded people.[8]

Getting back to reparations, the 'rule of law' should be always interconnected with a basic theory of a moral reparations / reconciliation process and reexamined critically and broadly to take into account the marginalized, morally commonsensical voices of the victims in mass torts. Even if the legal world has some limits, this legal and moral analysis should be done holistically and both legal and moral reparations linked to each other in spite of their differences.

### *4. Theoretical Frameworks: The Process of Reparations and Reconciliation*

To make my theoretical assertions understood more clearly, I'll show you the theoretical framework for reparations and historical reconciliation

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7) This term is used by Professor Radin to criticize the Ronald Dworkin's image of rule of law (DO., LAW'S EMPIRE (Harvard U.P., 1986)). See, Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 BOSTON U.L. REV. 781, at 813-(1989).

8) Robert Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, at 67-68(1983), also in: NARRATIVE, VIOLENCE, AND THE LAW (U. Michigan P., 1992).

as follows:

> (I) Fact-findings → (II) Admission of Past Injustice & Historical Responsibility → (III) Reparations & Apology → (IV) Forgiveness by Victims
> *Notice that the latter stage is presupposed by the former stage!

Through this theoretical framework, you can easily understand how badly and poorly Japan has been proceeding toward real reconciliation. For example, ① in the comfort women case, former Premier Abe and other cabinet members denied the facts of coerciveness, and even the existence of the notorious institution itself in spite of numerous testimonies by comfort women. Against this backdrop, you can imagine how empty Abe's expression of apology to George Bush sounded to the victims. Furthermore, ② in other cases, such as the bombing cases, Japanese government officials have been trying to avoid dealing with factual issues, by attacking only the legal discourse.

On the other hand, in the case of the Jeju April 3rd Uprising and Grand Massacre from 1948, where reportedly 30,000 islanders had been brutally killed by September 1954, and 80,000 killed by 1957, Koreans are moving toward historical reconciliation in the right way, even though the present stage is still imperfect and unfinished: The Jeju tragedy had long been a taboo under authoritarian government since 1961. But finally President Roh Moo-Hyun paid a visit to Cheju for the first time to make a sincere apology in October 2003, after a special statute for truth finding (fact-finding) and the recovery of the reputations of the victims of the April 3rd tragedy was made in December 1999. The report of the commission was published in October 2003.[9] The memorial peace park and the informative April 3rd museum have been established afterwards as reparations. However, problems still exist: (a) monetary compensation is very limited; (b) left-wing victims still can't get access to reparations; (c) U.S. secondary responsibility

9) See, The Report of Truth Finding of Jeju 4・3 Event (Jeju 4・3 Sakeon Jinsangjosa Bogoseo) (The Fact-Finding Committee of the Jeju 4・3 Event and Redeeming Honor of the Victims, 2003).

has not been discussed legally at depth yet, despite the important role played in this massacre.[10)]

Similar reparations cases exist across the world in other countries, for example, the post-Apartheid situation in South Africa and the Native Hawaiian reparation problem in the U.S., but the same thing can be said about them.

## *5. The Justifications for Reparation*

Now let's think about justifications for reparations. That is to say, why do we have to proceed with the process of reparations?

### *1) Corrective Justice Reasoning*

First of all, corrective justice reasoning has been the primary deontological grounds for reparations since the era of Aristotle. The same thing can be said about tort law in general. Perpetrators should compensate victims and repair their material as well as emotional damage. To do justice, the requirement of 'causation' rather than 'negligence' or 'prescription' has been historically focused, and it's the primary element of law in torts and reparations in this sense. Kantian moral philosophers also argue along similar grounds.

### *2) Utility Reasoning[11)]*

However, utilitarian thinkers might also justify reparations by other

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10) Unlike Art. 14 of the San Franciscan Peace Treaty (1951) that has exempted the U.S. from legal responsibility, Art. 23 section 5 of the U.S. –Korea SOFA Agreement (Status of Forces Agreement) in 1966, promulgated on the back of the 1954 Mutual Defense Treaty, states that the U.S. takes the three fourths of American responsibility ((e)(i)), while in the case of the joint responsibility, both governments take responsibility equally((e)(ii)). However, this doesn't apply to the Jeju tragedy that occurred before the enactment of SOFA and thus the U.S. should take full responsibility with regard to exculpatory clauses of international treaties, although there might be other hurdles such as the statute of limitations and state immunity. Anyway, it's a remarkable case and late President Roh's apology address was impressive! On this issue, see also, Ko Chang Hoon, *US Government Responsibility in the Jeju April Uprising and Grand Massacre: Islanders' Perspective*, 8(2) Korean J. of Local Gov't Stud. 123, at 130-(2003).

11) See, e.g., Suzuki Ken, *Reparation after the War from the Chinese side (Chuugoku kara mita Sengohosyou)*, in Yasuhiro Okuda et al., Joint Research: Reparation for the War in China (Kyoudou Kenkyu: Chugoku Sengohoshou) (Akashi Pub. Co., 1994) 187-188.

reasoning. The utility reasoning goes as follows: by way of reparations and reconciliation in its true sense, the vicious cycle of hatred between China and Japan will be dissolved and both nations will become friendly with each other. Thus Japan will be able to gain access to the huge market of China and bilateral trade will increase dramatically. In this sense, reparations could be beneficial to Japan from the Benthamite consequential perspective.

*3) The Problem of Inheritance of Historical Responsibility*[12)]

Here, we have to look at the philosophical question when we move onto the alteration of generations with the passage of some 65-100 years after past injustices, such as the colonization of the Korean peninsula or the Japanese invasion of China: that is, the problem of whether we inherit and succeed to the historical responsibility when most of the perpetrators themselves have already passed away. This is actually the focal point on which great philosophers have disagreed with each other!

For example, the Kantian reparations theorist, Roy Brooks, paradoxically denies inheritance at the personal level under the influence of Kantian individualistic notion of moral responsibility, even though he emphasizes moral reparations from conscience. But notice that even Brooks affirms the inheritance and continuity of moral responsibility at the national level!

Historically, at the time of the Sino-Japan Joint Declaration in 1972, Mao Zedong himself denied the war reparations of ordinary Japanese citizens, worrying about the heavy inherited burden of reparations on the future generations. Was Mao also under the influence of Kant? Or was he just thinking about the German experience after WWI with its painfully heavy burden of war reparations?

On the other hand, David Miller and Michael Sandel are deliberately opposed to the predominant moral philosophy of such individualism and acknowledge the possibility of the inheritance of responsibility about historical atrocities and mass torts at the personal level from their communitarian perspective. They even argue that such a positive stance about personal moral responsibility in terms of community matches with

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12) See, David Miller, National Resposibility and Global Justice (Oxford U.P., 2008) 135-; Michael Sandel, Justice: What's the Right Thing to do (Penguin Books, 2010) 208-, 223-. Compare BROOKS, *supra* note 4, at 152-153.

the long standing philosophical notion of 'goodness' since Aristotle, before Kant proposed the modern idea of responsibility.

Now you'll understand just how big jurisprudential issues have been lurking in reparations debates and that they have been highlighted even among prominent philosophers outside of legal circles. Anyway, putting aside the debated inheritance of responsibility at the personal level, almost nobody theoretically denies the moral responsibility and reparations at the national or corporate level. In this sense, the reparations process mentioned above can be admitted without noticeable objections.

## III. Ending Remarks: Some Challenges

### *1. Reasons for the lack of arguments on reparations in Japan*

But we have to face the fact that Japan is far behind the goal of historical reconciliation according to my theoretical framework of reconciliation and reparations mentioned above.

To conclude, I'll analyze the reasons why we have had this structural problem of an irresponsible system, to use the term of Professor Masao Maruyama,[13] regarding war reparations for the last 65 years.

(a) First, the discussion of Emperor's war responsibility had already become taboo in the 1960s. Compare the critical remarks by Prof. Maruyama in the mid 1950s. Recall that Douglas MacArthur himself tried to hide the Emperor's responsibility when he proposed the war relinquishment clause as Art. 9 of Japanese Constitution.

(b) Second, what is called the "reverse course" taken by the U.S. in the era of the cold war has played an important negative role. Most of the A-ranked war criminals were freed from Sugamo prison in the 1950s. They mistakenly felt exempted from moral responsibility.

Notice that, in spite of affinity to the results of release from prison, the 'Renzui' (認罪) practice in the Fushun penitentiary in northeastern China,

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13) Masao Maruyama, *The Structure of Political Decision-Making (Maturigoto no Kouzou)*, in: The Selection of Works by Masao Maruyama (Maruyama Masao Shuu) vol. 12 1982~1987 (Iwanami Pub. Co., 1996) (originally in 1985).

which asked the war criminals there to confess their atrocities and to admit their moral responsibility, is quite different in terms of atonement.

Most Japanese have forgotten the moral aspect of war responsibility and conceive of this through a narrow notion of justice, equating moral responsibility with legal responsibility. The diplomatically successful attainment of the waiver clause regarding reparations with many countries has unfortunately enabled Japanese to ignore the need for moral atonement through reparations.

(c) Thirdly the long-term continuance of the conservative Liberal Democratic Party could also be a cause of the petrifaction of the negative stance on reparations.

Remember that chief members of the LDP were relatives of the wars perpetrators! Even though the reparations process should be followed by every human being as a matter of conscience, it's a misfortune for Japan that compared to a world- wide moral enhancement in this field, it has anomalously become the focal point of political contestation by the strategic and unscientific arguments of the ultra-right pressure groups.

(d) Fourth, the dominance of indifference to this topic by the younger generation is also a salient cause. They tend to argue that inheritance of reparations should be denied. But as I mentioned above, you'll understand now that such a Kantian argument is partial and it can't exclude the need for moral reparations. In addition, the lack of education about past injustices in the 20th century has exacerbated the situation.

*2) The Challenges for the Future*

The agendas and challenges facing us regarding reparations and reconciliation is daunting!: For example, (i) Huge gap in historical knowledge between Japan and neighboring countries; (ii) Systemic avoidance of reparations for the last 65 years; (iii) Ambiguous interpretations of the considerable economic assistance so far. Why has it not been performed as reparations? Finally, let's consider if there are any ways to overcome this situation.

First, it is important to increase education about historical injustice. This is related to the first stage of the reparations process as I mentioned. Museums and memorials play an important role in this respect.

Second, a policy change as to reparations should be the imminent

agenda for the new cabinet. In this regard, the remarks by former Chief Cabinet Secretary Yoshito Sengoku were remarkable, when he referred to governmental (political) responsibilities over the reparations issue in July 2010.

But it's a shame that even after political change, the Kan government is also at a deadlock over the reparations process, partly because of the presence of conservative congressman in his cabinet. We have to note again that the correct understanding of the reconciliation process is important, considering the current situation in Japan!

Third, there are grassroots movements toward reparations such as (a) consciousness- raising among religious groups and the voluntary return of remains of victims and (b) the networking of young people across nations regarding reparations issues, and (c) some efforts by NGO's to attain negotiations among related people in pursuit of reparations and reconciliation. In this regard, the mini-reparations proposed in the U.S.[14] in the case of the holocaust, native Hawaiian reparations and slavery reparations should be extended to East Asian matters as well. In this context, the need for reparations to the Ainu people should be recognized at the grassroots level as mini-reparations, considering their environmentally progressive idea in the 21st century.[15]

Furthermore, (d) coordination between public officials and grassroots movements is of course ideal. The recent movement in Higashikawa, a town neighboring Asahikawa in Hokkaido, in pursuit of historical reconciliation in the case of slave labor, is such an exceptional case. Even though more than a thousand Koreans were forced to work to construct artificial lakes to warm irrigation water there in the mid 1940s, such a gruesome truth regarding Korean labor had been hidden until recently behind the famous facts regarding some 300 Chinese slave laborers and the many monuments for Chinese victims there. However, due to the painstaking efforts of the Korean investigation committee of forced labor

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14) See, e.g., Kaimipono David Wenger, *"Too Big to Remedy?": Rethinking Mass Restitution for Slavery and Jim Crow*, 44 Loyola of LA L. Rev. 177, at 217-(2010).

15) On this point, see, e.g., Kunihiko Yoshida, *The Reparations for the Ainu people: A Critical Analysis of the Recent Commission's Report from the Civil Law Perspective (Ainu Minzoku no Hoshou Mondai—Minpougaku karano Kinji no Yuushikisha Kondankai Houkokusho no Hihanteki Kousatu)*, 28 Nomos (Kansai Univ.) 19, at 33-35, 39-41.

since the mid- 2000s, the Korean tragedy there has also been brought to light, and frequent bilateral visits have started from the grassroots level. Remarkably the town's mayor Shirou Matsuoka, municipal officials as well as local companies are also positive towards a reconciliation regarding their local historical injustice, which is quite anomalous in Japan.[16)]

*3) A Hope for Globalization and Internationalization of Racial/Ethnic Conflict Reparations?*

As I discussed before, we have to take notice of the one-sidedness and partiality of American discussions on racial and ethnic reparations: all of the cases mentioned above, including the Japanese-American internment case, the native Hawaiian case, the American Indian case, and the slavery case, are domestic reparations cases, although in a multi-racial/ethnic, and multi-cultural society like the U.S. even domestic reparations looks somewhat international. And truly international reparations relating to U.S. wars, such as the Hiroshima-Nagasaki bombing cases, the Spraying of Agent Orange by U.S. Army in the Vietnam War,[17)] and the Afghan and Iraq Wars etc. have been rarely mentioned in reparations debates so far.

On the other hand, holocaust reparation could be regarded as one of the limited international reparations cases. Even the Japanese Official Development Assistance [ODA] that includes monetary lending (3 trillion 316.5 billion yen), donation (151 billion yen), and technical assistance (161.8 billion yen), totaling around 6 trillion yen cumulatively in 2007 with regard to China, for example,[18)] could be seen as an indirect method of international

16) Such cooperation between the municipal government of Higashikawa and local citizens' NPOs at the grassroots level has been recently covered in depth in the Korean newspaper. See, THE HANGYOREH NEWSPAPER, August 10th, 2010, at 1, 8-9.

On the Chinese slave labor in Higashikawa, see, SHIZUO KANAMAKI, THE MATTER OF CHINESE SLAVE LABOR: A REPORT ABOUT THE LABOR SITE OF HIGASHIKAWA, HOKKAIDO (CHUGOKUJIN KYOUSEIRENKOU JIKEN: HOKKAIDO/HIGASHIKAWA JIGYOUJOU NO KIROKU) (2nd ed.) (Miyama Pub. Co., 1976) 64-.

17) On this topic, see, GORO NAKAMURA, AGENT ORANGE IN THE BATTLEFIELD (SENJOU NO KAREHAZAI) (Iwanami Pub. Co., 1995). The documentary named "Questions from the next Generations of Vietnamese and Americans: Looking for Traces of Agent Orange (Karehazai no Konseki wo mitsumete—Amerika/Betonamu no Jisedai karano Toikake) (NHK ETV), aired on January 30th, 2011, has also attracted attentions.

18) On these data, see, for example, http://www.mofa.go.jp/mofaj/gaiko/oda/shiryo/

financial reparations, even though Japan hasn't followed the reparations process explicated in this article. Such international reconciliation efforts are also going on.[19)]

The nationalism of each country is a big hurdle and international reparations will be difficult. We have to admit that the conservative movement is resilient, but I think that reparations should be extended to the international level in this era of globalization, the unification of multiple countries like in the EU, and in a 21st century era of moral enhancement.

In this context, Korean international cases such as the Jeju Massacre in 1948-54 mentioned above and the No Gun Ri (老斤里) massacre of 1950, where around 300 civilians and another 1000 political prisoners were killed by the joint U.S. – Korean Army in central Korea, and their international solutions to reparations could usher in the internationalization of the reparations debate. A special statute to redeem the victims' honor and provide them with reimbursement of medical expenditure was made in 2004, but as in the Jeju case, the debate on U.S. responsibility is still ongoing: Although the American government promised to build a memorial and scholarship program to honor the Korean War's civilian victims in 2001 under the Statement for Mutual Understanding by the U. S.-Korea governments and through the expression of sorrow made by President Clinton, the apology and damages were rejected. The relatives of the victims also rejected this proposal.[20)] It is really an imminent topic in the 21st century.

Another quite recent international case is the disclosure of U.S. medical human experiments done in Guatemala from 1946-48, including a decision

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kuni/08_databook/pdfs/01-04.pdf. The monetary lending was abolished in 2008, when the Olympic game was first held in China because of its recent economic development.

19) See, Pierre Hazan, Judging War, Judging History: Behind Truth and Reconciliation (Stanford U.P., 2010) chap. 2. It also states the tension between the international neo-Kantian utopia that underpins the international justice, and the process of the judicialization of international relations on the one hand, and the neo-Hobbesian political opportunism with force based on the nation state and under the pressure of neoliberal globalization on the other hand after September 11, 2001. *Id.* at 59-62.

20) See, e.g., Takao Matsumura, *The Massacre of No Gun Ri, Korea in 1950 (Kankoku Nogunri niokeru Gyakusatsu)*, in: Matsumura et al. eds., The Social History of Mass Slaughters in the 20th Century (Tairyou Gyakusatsu no Shakaishi: Senritsu no 20 Seiki) (Minerva Pub. Co., 2007) 119-.

to re-infect a dying woman in a syphilis study that caused the deaths of 83 people.[21] President Obama has already semi-officially apologized to Guatemala's president for this egregious fact and international reparations measures will be expected.

*4) The Problems of Bilateral Mass Torts*

The Japan related reparations cases, such as the Japanese invasion and series of massacres and air raids in China and the colonization of Korea peninsula as well as the deportation of many Koreans and Chinese can be seen unilateral mass torts, so to speak, in spite of the casualties suffered by Japanese soldiers. Thus it is not difficult to assume Japanese responsibility and reparations. However, war is much more complex in many contexts.

For example, in the case of the Jeju April 3rd Uprising and Grand Massacre, around 90% of the victims were killed by the Korean Army and a supportive U.S. Army, but the rest (10%) were the victims of local protest guerrillas. In this sense, the mass violence is bilateral, and the same thing can be said about war in the Balkans between the Serbian and Croatian people in 1992-95 and the tragedy of Rwanda between Hutu and Tutsi people in the mid 1990s, where more than a million people were massacred within 100 days and most of the victims were Tutsi people, but with the moderate Hutus also killed.[22]

How can we proceed with reparations? Will the victims of local Jeju resident guerillas and their relatives have to give up reparations, whereas the victims of the Korean army can prosecute? If so, isn't it partial restitution for the victims of the tragedy? Or should all the victims refrain from monetary compensation, as the Special statute on the Jeju tragedy in 2003 proposes? I think such arguments should be reconsidered critically in a positive direction.

First, civil law discussion on mutual torts should be referred to in this context. Off-setting in a tort law context is prohibited in civil law (Art. 509

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21) See, e.g., The Associated Press, *Panel Reveals New Details of 1940's Experiment*, The New York Times, August 29th, 2011.

22) On the Rwanda Genocide, see, e.g., Philip Gourevitch, We Wish to Inform you that Tomorrow We will be Killed with Our Families: Stories from Rwanda (Farrar, Straus and Giroux, 1998) (Japanese translation: Hills of GenocidE: Hidden Truth of Rwanda Massacres (1) (2) (Jenosaido no Oka) (Wave Pub. Co., 2003)).

of the Japanese Civil Code; Art. 496 of the Korean Civil Code) and this position has been extended to mutual torts such as traffic accidents or ship accidents, according to traditional scholars. Recent scholars also support this idea in order to gain the realistic protection of victims by taking into account insurance contracts. With this backdrop in mind, factual reparations for the victims including the reimbursement for medical expenditure are also needed in the case of the Jeju tragedy.

Second, we have to consider for the issue of an individual soldier's liability, because of the difficulty of identification and their funding capability. Thus, it's easy to prosecute vicarious liability for brutal deeds of Korean soldiers against the Korean and American governments. But how do you handle the killings done hopelessly by the local protesters? Were they really tortfeasors in its true sense? The Guerrillas themselves were also victims in a sense, besieged and surrounded by a U.S.-Korean joint Army and with flames of fire. There's an immunity clause in the case of legitimate self defense in Art. 723 of the Japanese Civil Code (Art. 761 of the Korean Civil Code), even though immunity with regard to the third party damage has been criticized by prominent scholars.[23] The application of such clauses to the desperate acts of the Jeju guerrillas might be a vulnerable argument, but it's worth reconsideration. If the dominant and prominent cause of the tragedy can be seen to be the overwhelming attack by the Korean-U.S. Army, then it could be argued that the victims of the guerillas should equally be protected by both governments' monetary compensation. Frankly speaking, this is out of the ambit of ordinary tort law and is a matter of legislation.

Anyway, this is my proposal, and discovering truth and redeeming the honor of the victims by means of a sincere apology should be prioritized. In this sense, the former Roh government proceeded in the right direction and matches with the reparation process. But we should keep moving in the same direction pursuing the protection of victims in spite of the complexities of bilateral wars.

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23) See, Tooru Ikuyo, *The Legitimate Self Defense and Emergent Action and the Third Parties' Damage in Civil Law (Minji jouno Seitoubouei /Kinkyuhinan to Daisansya Higai)*, Hogaku vol. 48 no. 3 (1984); do., *Japanese Tort Law Restatement Art. 720*, 918 Jurist 84-85 (1988).

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