

The Challenges in Pursuit of Reconciliation of Jeju Historical Injustice: Some Observation on Taxonomy of Reparations and the Process of Reconciliation

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Abstract

There are many reparations cases in East Asia, especially relating to Japanese invasion and colonization, such as those on forced slave labor, comfort women, Chinese massacres; 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 of the courts. In this paper, the Jeju April 3rd massacre has been taken close up as one of the Asian reparations cases. Thus I'll try to discuss how to deal with this past injustice compared to other related reparations cases and point out the challenges we are facing relating to this horrifying historical injustice in the 1940s-50s in this peaceful Jeju island. First, international as well as domestic reparation cases will be surveyed in depth. Second we'll deal with why the legal cases have been unsuccessful so far in Japan, and the ways to overcome legal obstacles. Then we will discuss the mechanism of reparations and its goal: reconciliation and a change of the international and racial relationship. The important role of an apology will also be considered.

Key words : reparations; reconciliation; apology; tort law; amnesty approach; restorative justice

[I] Introduction: Overview of the Jeju Massacre

(A) The Aim of Reparations Research

Let me state by examining the purpose and the aim of the reparations¹ study: it's related

¹ The term of 'reparations' is not strict and its denotation is blurring. Usually it is the remedies for mass torts that infringe basic human rights and relate to ethnic and racial conflicts, most typically war or other inhuman brute acts mainly in international contexts, but in domestic / internal contexts as well. For example, one dictionary defines it as 'compensation for an injury or wrong, esp.

to the following questions: First, how can we change the cycles of hatred to reconcile the relationship between antagonistic nations/ for wartime damages or breach of an international obligation' (BRYAN GARNER, BLACK'S LAW DICTIONARY(4th pocket ed.)(West, 2011)645). It is often used with regard to international human right law.

But I'll try to locate 'reparations' as one of the most important fields of tort law in the 21st century as well. Oddly enough, reparations cases are not included in the ordinary tort law casebooks even in the American legal scholarship despite lots of important discussions.

groups?² How's the process of building normalized relationship? For the good example of the cycles of hatred, think about the recent tension between South and North Korea regarding the sinking of Korean patrol boat in March, 2010 and the bombardments at Yeonpyeongdo(延坪島) Islands in November, 2010. The recent divided issue of the \$970 million (9.8 trillion won) construction of the Gangjeong(江汀) Naval Base in Jeju as a home to 20 warships, including submarines: whether the peaceful island should be militarized to confront the arms race of China, North Korea, and the U.S. in an increasingly tense region is also based on the similar cycles of distrust.³

² For this perspective, see, e.g., MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (Beacon Press, 1998); MARTHA MINOW ED., *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR* (Princeton U.P., 2002). See also, ELIZABETH SPELMAN, *REPAIR: THE IMPULSE TO RESTORE IN A FRAGILE WORLD* (Beacon Press, 2003).

³ On the Gangjeong Naval Base issue, see, Christine Ahn, *Unwanted Missiles for a Korean Island*, *The New York Times*, August 5th, 2011; Choe Sang-Hun, *Island's Naval Base Stirs Opposition in South Korea*, *The New York Times*, August 18th, 2011. See also, Gwisook Gwon, *National and International Protests Challenge Naval Base Construction on Jeju Island, South Korea*, *The Asia-Pacific Journal: Japan Focus*, August 14th, 2011. On top of the critical problem of the 'peace notion' in terms of arms race instead of demilitarization, in the Gangjeong case, there are some other crucial issues such as (1) the undemocratic procedure: the lack of the consent of Gangjeong villagers (e.g., 95% of local residents opposed to the base in the April 2007 poll, and even after the new governor Woo Keun-Min's win-win policy since July 2010, 75% of them are hard-line protesters) and (2) the insufficient investigation of the environmental effects by a decision to revise the designation of the coastal area's protected status. *Id.*



(The entrance of the Gangjeong Naval Base Construction Site: The sign reads "The Naval Base in this beautiful Jeju Island is unacceptable historical crime")

If you look beyond Korea, there are abundant vengeance cases from Greek tragic mythology (e.g., Trojan war) through the September 11 terrorist attack of WTC in NY, then the Iraq, Afghanistan bombing, or the recent turmoil in Kirgiz (May, 2010), and the Northern Africa, especially Egypt (January- February, 2011) (the collapse of Mubarak government(February 11th)), Libya(February, 2011~) and Syria(March, 2011~). In the Asian context, think about the latest exacerbated tension between China and Japan regarding the ship accident near the Pinnacle Islands, i.e. Diaoyu in Chinese and Senkaku in Japanese(尖閣諸島) (September, 2010) and the announcement of acquisition by Tokyo Municipality and its nationalization afterwards (April, 2012), and the long-term tension between Japan and Korea regarding Liancourt Rocks and the related refusal of Japanese visit at Ulleung-do Island (鬱陵島) (July, 2011).

Then the second question is how reparations are related to reconciliation and peace building. Reparations are the term for remedies of mass tort. The purposes of tort

law is usually considered in three ways : (i) (ex-post)monetary compensation, (ii) (ex-ante) prevention of tortious behavior, and (iii) punishments/sanctions of tortious act. However, there's another important function, that is, (iv) atonement, even though it has been marginalized by usual legal practices. The importance of 'apology' as opposed to monetary compensations, especially in the reparations contexts has also been neglected. That's why there are a lot of unsuccessful legal remedies in this area.

Regarding reparations arguments, to get the perspectives mentioned above, I have learned a lot from the American legal scholarship at the turn of the 21st century when there was a peak in terms of the number of the legal articles. However, the reparations scholarship within the legal academia has seemed to be dwindling for the past decade, even though discussions, especially on apology, have attracted interdisciplinary attentions among sociologists and psychoanalysts etc as this paper will discuss later⁴.

(B) The Overview of the Jeju Mass Killing and its Recent Reparations Efforts

The Jeju mass killing in 1948--1954: the April 3rd Uprising and the Grand Massacre⁵

⁴ For the moment, e.g., NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION*(Stanford U.P., 1993); AARON LAZARE, *ON APOLOGY*(Oxford U.P., 2005); NICK SMITH, *I WAS WRONG: THE MEANINGS OF APOLOGIES*(Cambridge U.P., 2008).

⁵ See, Chang-Hoon Ko & June-Ho Kim, Jeju Island as the Center for Human Rights and Peace in the 21st Century, 5 *PEACE ISLAND* 98(2009). On the topic of the U.S. responsibility, see also, Ko Chang Hoon, US Government Responsibility in Jeju April Uprising and Grand Massacre: Islanders' Perspective, 8(2) *KOREAN J. OF LOCAL GOV'T STUD.* 123, at 130- (2003). The number of victims is

is the leading Korean reparations case. An estimated 30,000 islanders were massacred by September 1954, and 80,000 islanders were killed by 1957. In those days, when the Korean peninsula was at the forefront of the Cold War, Jeju Island was considered the "Red Island," i.e., the island of communists. The island was targeted by Korean and U.S. Army-backed ultra-right wing groups, such as the Northwest Adolescent Group (called "Seuchon"), that detested the northern communist state.

Against the backdrop of the preceding tension and persecution, the revolt of around 300 people erupted in April 3, 1948. When

usually considered around 30,000, but for example, a famous writer, Mr. Kim Sok-pon argues that the number was from 50,000 to 80,000(KIM SOK-PON ET AL., *WHY DID YOU WRITE ABOUT THE TRAGEDY, AND WHY DID YOU KEEP SILENT ABOUT IT?: MEMORY AND LITERATURE ABOUT JEJU APRIL 3RD TRAGEDY*(Naze Kakituduketekitaka? Naze Chinmokusitekiteka?) (Heibon Co., 2001)172-, 256). See also, Yan Sol Il, Explanation, in: Kim Sok-pon, *The Death of Crow/ The Dream in Deep Bush* (Syougakkan, 1999)259(A third of the Jeju islanders in those days, i.e. 80,000 people, were terminated).

For the facts of the Jeju massacre, see, e.g., HUH YOUNG-SUN (translated by Hiroe Oikawa et al.), *JEJU APRIL 3RD*(Saisyuu 4/3)(Democratic Movement Memorial Event Org., 2006); MUN KYONGSU, *THE JEJU APRIL 3RD INCIDENT: THE STORY OF DEATH AND RESURRECTION OF THE ISLAND* (Saisyuu-tou 4/3 Jiken: Shima no Kuni no Shi to Saisei no Monogatari)(Heibon Co., 2008). The English version of the truth-telling official report has been recently published with the aid of Prof. Eric Yamamoto(*THE NATIONAL COMMITTEE FOR INVESTIGATION OF THE TRUTH ABOUT THE JEJU APRIL 3 INCIDENT, THE APRIL 3 INCIDENT: INVESTIGATION REPORT*(Jeju April 3 Peace Foundation, 2013) and it should be indispensable materials for Anglo-American readers.

the peace agreement was almost reached, the victims totaled around 50 to 60. In May 1948, the South Korean election was rejected by Jeju islanders. The islanders, as left-wing progressives like the North Korean people, pursued the unified government as the “trust territory” originally planned by the Yalta Conference. Then the South Korean government was eager to suppress the progressive revolt group. After negotiations failed, a thousand people were killed. Furthermore, the “scorched earth” policy was implemented from October 1948 through March 1949, resulting in the deaths of 2500 people in penitentiaries and other violent civilian slaughters at various places (80% of the victims were killed during this period). Three hundred villages were set on fire, and about 20,000 households (40,000 buildings) were damaged by such drastic measures (84 so-called “disappeared ghost villages” can be noticed in Jeju Island). After the summer of 1950 through September 1954, a thousand more people were killed as a “preliminary arrest” when Mt. Halla was still off-limits. The present-day Jeju Airport area used to serve as the dumping site of victims’ corpses--its excavation started only in September 2008.

Such horrendous Jeju mass killing had long been a taboo under the dictator government since 1961. However, President Roh Moo-Hyun paid a visit to Jeju for the first time to make a sincere apology in October 2003, after special statute for the truth finding and the recovery of the reputation of the victims of the April 3rd massacre was made in December 1999. The report of the truth finding was publicized simultaneously (October 2003). The beautiful peace park, the inspiring memorial as well as the informative April 3rd museum have been established afterwards as parts of the reparations, the problems still exist: (a) the monetary compensations are very limited; (b) the left-wing victims still can’t get any reparations because of their allegedly

reproachable status as the core group of ‘communist guerillas’ that instigated the April 3rd revolt, how miserably they were slaughtered; (c) the U.S. secondary responsibility has not been discussed legally at depth yet, despite they also played an important role for this genocide. Unlike Art. 14th of the San Franciscan Peace Treaty (1951) that has exempted the U.S. from legal responsibility with regard to Japan and Japanese citizens, Art.23 section 5 of the U.S. –Korea SOFA Agreement (Status of Forces Agreement) in 1966, which promulgates the 1954 Mutual Defense Treaty, states that the U.S. takes the three fourths of the American responsibility ((e) (i)), while in the case of the joint responsibility, both governments take responsibility equally((e) (ii)).



(Memorial Hall)



(Victims' Tombs)

However, it doesn't apply to the Jeju massacre that occurred before the enactment

of SOFA and thus the U.S. should take full responsibility with regard to exculpatory clause of international treaty, although there might be other hurdles such as statutes of limitation and state immunity. Anyway, it's a remarkable case and late President Roh's apology address has been impressive!

(C) The Jeju Tragedy and Japan/ Hokkaido

As this paper discusses, the Jeju tragedy is and will be an important Korean and American reparations case, but let me explain why this case has attracted the attention of Japanese nationals so far.

First, in responding to the Peace Island Network project advocated by Professor Ko⁶, I want to stress the similarity between the two islands of Jeju and Hokkaido: right now both of them are famous as resort and leisure islands, but they were formerly the islands of tragedies. In Jeju mass killing was perpetrated from the late 1940s while in Hokkaido there were so many slave labor sites. 58 out of 135 Chinese slave labor sites were located in Hokkaido and there were 150,000 Korean slave labors deported from the Korean peninsula shortly before the end of WWII. Furthermore, Hokkaido itself is the land of conquest for the Ainu, the indigenous people in Japan who have a miserable history there.

Second, there has been a strong relationship between Jeju Island and Japan, especially in the Osaka area. 150,000 Korean residents in Japan out of 580,000 total are either from or related to Jeju. This high percentage is contrasted with the fact that the population of Jeju Island is less than 1% of the total Korean population. The migration from Jeju to Japan

⁶ His summer seminar and Peace Island Forum at Jeju National university organized by the World Association for Island Studies(WAIS) from 2000 is a good example.

is partially due to the transportation network by "Kimigayo maru" (君が代丸) (Gundaehwan in Korean) running between Jeju and Osaka from 1922 to 1945. And of course it is easily surmised that many Jeju islanders moved to the Osaka area to escape the Jeju massacre⁷. The famous poet, Kim Shi-jong (金詩鐘), who narrowly escaped Jeju in 1949 is a good example⁸. Thus research on the Jeju tragedy started earlier in Japan, because the subject was taboo in Korea in those days. I myself joined such grassroots investigation movements.

Third, the Korean army backed by the U.S. Army used to belong to the Japanese army and I would say that there is some continuance and affinity between them. The number of victims, that is 30,000 to 80,000 and the way they were slaughtered was shocking, and I feel sorry about the horrendous mass killing in Jeju that could be noticed as the continuation of the Nanjing and Pingdingshan massacres for example⁹.

[II] Legal & Theoretical Analyses: Legal Obstacles and How to Overcome them¹⁰

⁷ See, e.g., ASAHI SHIMBUN, March 5th, 2010, p.10
⁸ See, e.g., ASAHI SHIMBUN, April 3rd, 2010, p.e1, e2.

⁹ For the Nanjing massacre and Pingdingshan massacre, see, Kunihiro Yoshida, Some Thoughts at the Tragic Site of Nanjing Massacre (Nankin Jiken Atochi deno Guukan), 95 QUARTERLY J. ON CHINA (KIKAN CHUUGOKU) 49(2009); do., Legal Studies of War Reparations Regarding Japanese Invasion in China and the Sino-Japan Friendship-Building (Chuugoku Shinryaku no Sensou Higai Hosyuu Hougaku Kenkyuu to Nichuu Yuukou), 105 QUARTERLY J. ON CHINA (KIKAN CHUUGOKU) 21, at 23-(2011).

¹⁰ For the detailed version, see, Kunihiro Yoshida, Reparations and Reconciliation in East Asia as a Hot Issue of Tort Law in the 21st Century: Case Studies, Legal Issues, and Theoretical Framework,

¹¹ JOURNAL OF KOREAN LAW 101(2011).

(A) Japanese Cases and their Problematique

If you move to Japanese historical injustice and follow the concrete analysis of Japan-related mass tort cases such as slave labor, comfort women, and bombing cases, you'll understand that the extent to which reconciliation and reparations has been attained is very limited, especially in the cases of international and racial/ethnic conflicts, except for the Korean atomic bomb victims' case.

Specifically, (i) legal claims for reparations, in most of the cases, have been denied. Furthermore, (ii) even the historical facts of mass killing 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 of 2007¹¹.

On the other hand, (iv) the ultra-conservative (ultra-right) movement that tries to deny and ignore those 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, the Japan-Brazilian workers in the Chubu area).

Nevertheless, there are some important caveats regarding the recent developments in reparations case law. First, even in the ¹¹ Japanese Supreme Court case of April 27th, 2007, 61(3) SUPREME COURT CASE REPORTER (CIVIL CASES) 1188.

Nishimatsu Chinese slave labor decision (note 11), the leading Japanese Supreme Court decision, the Supreme Court Justices themselves, who dismissed the legal reparations claims by pointing to the exemption clause of the Sino-Japanese Joint Declaration in 1972, have suggested and even exhorted the moral reparations by the voluntary settlement of the Nishimatsu construction company and the victim laborers and their descendents. This is a remarkable exception from the reparations/reconciliation process theory stated later.

Second, I gave a lecture for the Justices and law clerks at the Korean Supreme Court in October 2011 on the comparative study of Japanese and Korean civil law, especially on reparations and the reaction of the Korean law clerks, unlike the Japanese judges, were surprisingly attentive to the positive legal reparations¹².



(Lecture at the Korean Supreme Court)

It is not surprising that revolutionary developments occurred afterwards: (1) The political inaction with regard to comfort women (sex slave) practice that infringes the basic human rights of the victims has been considered unconstitutional by the decision of Korean ¹² See, Kunihiko Yoshida, The Challenges for the Japanese and Korean Civil Law: Focusing on the Issues of Tort Law (Nikkan Minjiho no Kadai: Tokuni Huhoukouihou no Syomonndai), 62(6) HOKKAIDO LAW REVIEW 1317(2012).

Constitutional Court on August 30th, 2011; and (2) the reparations for slave labor at Shin-Nitetsu & Mitsubishi Steel Company have been admitted, because the reference of prescription is deemed “abuse of right” and the issue is considered “outside of the immunity clause” of the Japan-Korea Treaty in 1965 by the decision of the Korean Supreme Court on May 24, 2012. The similar judgments have followed at lower levels¹³.

Both of these recent advancements in Japanese and Korean adjudication are definitely conducive to the positive enhancement regarding Jeju massacre reparations.

(B) Contrasting World Trends towards Reparations and the Isolation of Japan¹⁴

¹³ E.g., Seoul High Court Decision of July 10th, 2013 (Shin-Nitetsu case. 100 million won [about 9 million yen] damages per victim); Busan High Court Decision of July 30th, 2013 (Mitsubishi Steel case. 80 million won [7.2 million yen] damages per victim); Kwangju District Court Decision of November 1, 2013 (Mitsubishi Steel Co. case).

¹⁴ See, e.g., ELAZAR 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).

Incidentally, as the background of this ‘moral shift’ for reparations worldwide, Professor Abraham has cynically and trenchantly mentioned that the post-Westphalian global capitalism world does not provide its inhabitants greater opportunities for citizenship and its benefits due to the absence of democratic forms, and that international human rights regime has been pushed out as ethical rather than political precept. See, David Abraham, *The Boundaries and Bonds of Citizenship*, in: MARC RODRIGUEZ ET AL. EDS., *MIGRATION IN HISTORY: HUMAN MIGRATION IN COMPARATIVE PERSPECTIVE* (U. Rochester P., 2007) 217-218. His view on reparations might be

But notice that the Japanese position is isolated from world trends in historical reconciliation. As I mentioned regarding the many cases of reparations from all over the world at the beginning of this paper, it is now the ‘age of apology’ and the ‘moral shift’ in favor of historical reconciliation is going on, 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 reparations are increasing and thus the adjudicatory position should also be reexamined. But in this context, moral reparations should also be emphasized holistically¹⁵.

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 cannot follow suit regarding reparations, even though

pessimistic, because, according to the Abraham’s theory, the political powers of traditional nation states for their democratic redistribution become weaker due to the proliferation of worldwide neo-liberal capitalism, and it has also become difficult to attain political/legal reparations, as opposed to ethical reparations, that require political democratic powers of respondents’ nation states. However, I think, the endeavor to reconsider legal and moral principles regarding reparations should also be required from the civil law side, in pursuit of the ethical as well as political/legal aspirations even if they are imperfect. Besides Germany, developed nations such as U.S. A., E.U. and Japan etc. should play the leading role in this humanitarian reparations sphere.

¹⁵ In this respect, see, BROOKS, *ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS* (U. California P., 2004) 141-(2004).

it is called developed country and peaceful nation?

The key to this systemic problem, i.e., the systemic lack of movement towards reparations, in spite of its ubiquitous brutal deeds in neighboring countries, might be found in the process of drawing up the Japanese Constitution. According to Professor Shoichi Koseki¹⁶, when Douglas MacArthur (1880-1964) proposed the complete relinquishment of war clause, Article 9 of the Japanese Constitution, his real intention was to avoid/ hide the problem of war responsibility, especially the Emperor's responsibility, by attracting people's attention to the world-famous clause, 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 & should be theoretically discussed separately.

[III] Legal Obstacles: Why Have Legal Claims Been Dismissed in Many Cases?

In Japan, legal claims for reparation have been denied in most cases, except the Korean atomic victims' case, and the Hansen's disease patients' case. The same thing can be said about the German holocaust cases.

The reasons why legal reparations have not been accorded easily are: (1) passing of time and lack of evidence as a factual matter, (2)

¹⁶ SHOICHI KOSEKI, WHY THE ART. 9 OF JAPANESE CONSTITUTION WAS DRAFTED?(Kenpou 9 Jou wa Naze Seitei saretaka) (Iwanami Booklet)(Iwanami, 2006).

legal principles related to the passage of time (prescription and limitation of action), (3) the other problem related to the passage of time, especially, the need for the re-evaluation of unpaid salaries, (4) the state immunity doctrine, (5) the waiver clause in international treaties.

But we have to realize that each reason can be critically reexamined. For example, as for 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! Furthermore, the starting point for calculation could be postponed, considering the 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!

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. 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.

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 reparations, as well as the governmental right of reparations, has been nullified by the treaties. However, 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?

In conclusion, we should realize that legal reparations are 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 reparations, even if they are important, are not a panacea for the past tragedies, and not the only solution for reconciliation.

[IV] The Variety of the Reparations Remedies: Comparisons of Legal and Moral Reparation/Responsibility

(1) Expansion of the Reparations Functions

The expansion of the remedies functions leads to an increase in the kinds/types of remedies as follows: (a) When monetary compensation is the only function of the tort, monetary damages have been the only remedy as Art. 722 Sec.1 of the Japanese Civil Code indicates. (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 the nation, as well as ③ symbolic actions of apology in front of victims themselves (ex. 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.

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'¹⁷. 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.

(2) Comparison of Moral and Legal Reparations

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 reparations are the base of legal reparations, whereas moral reparations have 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, and (c) legal

¹⁷ Professor Brooks (supra note 15) calls this the 'tort model' as opposed to the 'atonement model'.

reparations can be coerced, whereas moral reparations are performed voluntarily. 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 presuppose the moral reflection /remorse, thus they are more foundational.

(3) Different Taxonomy of Reparations: Symbolic Reparations v. Economic Reparations

According to the taxonomy of the famous reparations politics advocate and sociologist John Torpey¹⁸, reparations cases are divided into commemorative/symbolic reparations cases and anti-systemic/economic reparations cases:

- (a) the former include holocaust reparations, Japanese-American internment reparations, comfort women reparations, 'stolen generation'/'boarding school' issues reparations and slave labor reparations.
- (b) the latter include slavery and Jim Crow related reparations, post-apartheid reparations('Black Economic Empowerment'), and other indigenous peoples' reparations.

As he rightly describes, even in the former case, there is a strong need for reparations as Holocaust reparations and the Japanese-American internment cases show. In this sense, the need for symbolic reparations as opposed to monetary reparations is related to the importance of moral reparations mentioned above. However, on the other hand, we have to admit that in the actual cases, both of his categories sometimes converge. For example, when I met with Korean slave labor survivors,

¹⁸ JOHN TORPEY ED., POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES (Rowman & Littlefield Pub., Inc., 2003)10-. See also, do., Making Whole What Has Been Smashed: Reflections on Reparations, 73(2) JOURNAL OF MODERN HISTORY 333(2001).

many of them expressed their dissatisfaction about non-payment of their salaries. Thus despite his classification, I suspect this case requires two pronged analysis.

[V] Theoretical Frameworks: The Process of Reparation and Reconciliation

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

(I) Fact-findings → (II) Admission of Past Injustice & Historical Responsibility →

(III) Reparation & Apology → (IV) Forgiveness by Victims

*Notice that the latter stage is presupposed by the former stage!

*This chart descriptively shows the normal process of reconciliation and thus (IV) does not follow necessarily from (III), because (IV) should be done voluntarily¹⁹. However, there's no genuine reconciliation ((IV)) without sincere (I)(II)(III). To put it differently, (I)(II)(III) are necessary conditions , but are not sufficient conditions for true reconciliation(IV).

Through this theoretical framework,

¹⁹ For example, the amnesty approach taken in the TRC in South Africa for the apartheid injustice should be noticed in the sense that they are often effective to incite perpetrators' sincere truth telling and genuine admittance of responsibility about their past deeds. However, on the other side, there could be dissatisfaction from the victim's side if this system is coerced. For this problem in the context of Judaism, see, Robert Rosen, The Victimizer's Path to Forgiveness: A Jewish Perspective, in: ARVIND AGRAWAL ET AL. EDS., PEACE, JUSTICE AND DEVELOPMENT(Hart P., 2013) (forthcoming)(Victimizers should not underestimate the difficulties of the path to forgiveness).

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 the Abe's expression of apology to George Bush sounded to the victims. Furthermore, ② in other cases, such as the bombings cases, Japanese government officials have been trying to avoid dealing with factual issues, by attacking only the legal discourse.

[VI] The Problem of Inheritance of Historical Responsibility²⁰

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

²⁰ See, DAVID MILLER, NATIONAL RESPONSIBILITY 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 15, at 152-153.

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.

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 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.

[VII] Ending Remarks: Getting Back to the Jeju Mass Killing

(A) Internationalization of Reparations

Returning to the case of the Jeju April 3rd Uprising and Grand Massacre, Koreans are moving toward historical reconciliation in the right way, even though the present stage is still imperfect and unfinished! The same thing can be said about other countries' cases: for example, the post Apartheid situation.

On the other hand, 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 the era of moral enhancement of the 21st century.

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 are important. In No Gun Ri case, where around 300 civilians and another 1000 political prisoners were killed by the joint U.S. –Korean Army in central Korea, and their international solution of reparation could usher in the internationalization of the reparation debate. The special statute to redeem the victims' honor and provide them with reimbursement of their medical expenditure was made in 2004, but as in the Jeju mass killing, 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 of the U.S.-Korea governments and by the expression of sorrow of President Clinton, the apology and damages were rejected. The relatives of victims also rejected this proposal²¹. 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 to re-infect a dying woman in a syphilis study that caused the deaths of 83

²¹ See, e.g., Takao Matsumura, The Massacre of No Gun Ri, Korea in 1950 (Kankoku Nogunri niokeru Gyakusatsu), in: TAKAO MATSUMURA ET AL. EDS., THE SOCIAL HISTORY OF MASS SLAUGHTERS IN THE 20TH CENTURY (Tairyogyakusatsu no Syakaisi: Senritsu on 20 Seiki)(Minerva Pub. Co., 2007)119-.

people²². President Obama has already semi-officially apologized to Guatemala's president for this egregious fact and international reparation measures will be expected.

Slavery reparations could also be internationalized. In Jamaica, where more than 90% of the population is African black and historically related to millions of slave labor in sugar plantations, a slavery reparations commission has been recently (November 2012) reconvened to examine their international reparations request to UK of trillions of dollars considering the vast difference of economies between the New World and Old World their slave labor contributed. The Caribbean slavery reparations debate is now in the vanguard of the international reparations in the 21st century²³.

(B) The Need for Reparations in the Jeju Mass Killing case

²² See, e.g., The Associated Press, Panel Reveals New Details of 1940's Experiment, The New York Times, August 29th, 2011.

²³ See, The Associated Press (David McFadden), Jamaica Revives Slavery Reparations Commission: Historians Say Slave Labor Made a Vast Difference to the New and Old World. In Jamaica, Most Were Forced to Work on Sugar Plantations, The Miami Herald, November 2nd, 2012, 7A. In 2004, a coalition of Rastafarians (Jamaican Blacks) already asked Britain and other European countries formerly involved in the slave trade, to pay 72.5 billion British pounds to resettle 500,000 Jamaican Rastafarians in Africa. But British government rejected the claim, saying that it could not be held accountable for wrongs in past centuries. For the recent Caribbean slavery reparations movement, see, e.g., VERENE SHEPHERD ET AL., JAMAICA AND THE DEBATE OVER REPARATION FOR SLAVERY (Pelican Publishers Ltd., 2012); HILARY BECKLES, BRITAIN'S BLACK DEBT: REPARATIONS FOR CARIBBEAN SLAVERY AND NATIVE GENOCIDE (Univ. of the West Indies P., 2013)esp.211-.

Recently a critical theoretical argument has been made that reparations should be limited to cases where historical injustice endures as present injustice²⁴. Jeju Island is presently famous as a resort island and the misfortune here is forgotten or unknown among many Koreans, let alone most of the Americans. And many islanders themselves lead their lives irrespective of the Jeju massacre. Thus, should the mass killing in Jeju be considered an event in the past which has little to do with income redistribution matters, unlike the slavery and Jim-Crow problems in the U.S., and therefore reparations should be neglected as Spinner-Halev suggests?

I disagree with his argument. It is true that the Jeju case is generally classified as a commemorative/symbolic reparations case as opposed to an anti-systemic/economic reparations case, according to the taxonomy of the famous reparations politics advocate John Torpey²⁵. But it requires reparations as he

²⁴ JEFF SPINNER-HALEV, *ENDURING INJUSTICE* (Cambridge U.P., 2012)5-6.

²⁵ JOHN TORPEY ED., *supra* note 17. According to his taxonomy, Spinner-Halev only admits the latter case and, I think, the Ainu reparations should be classified as the latter.

Slavery and the Jim Crow related reparations, most recently Pigford \$50,000 per case reparations regarding discriminatory lending for African American farmers by the Agricultural Department until the 1980s and 90s are typical examples of the latter category. For its settlement in 1999, see, Tadlock Cowan & Jody Feder, *The Pigford cases: USDA Settlement of Discrimination Suits by Black Farmers*, Congressional Research Service 7-5700(2013)(<http://www.crs.govRS20430>). The settlement has been expanded to Native American and Hispanic discrimination cases by the executive branch despite the negative position of the adjudicatory branch since 2010. However, the economic adversity of Hispanics by the migration, for example, could be distinguished from the

indicates.

Jeju islanders are still wounded mentally and distrust persists among their communities due to the desperate destruction of communal relationships by this sad event in the late 1940s and 50s and the longstanding silence of endurance afterward through the 1990s, even though it looks apparently calm and superficially peaceful with little sign of past violence as in the massacre sites of African-Americans in the early 20th century²⁶. The enhancement of reparations as a social healing process²⁷ is still required.

systemic/institutional discrimination faced by African Americans. For the critical analysis of the recent expansion, see, Sharon LaFraniere, *Federal Spigot Flows as Farmers Claim Bias*, *The New York Times*, April 26th, 2013, A1, A20-A21.

²⁶ There was a series of massacres of African-Americans in the early 20th century, most notably in Tulsa, Oklahoma(1921) and Rosewood, Florida(1923). Reparations efforts have been made: the reparations unsuccessful lawsuit in 2003 in the former case and legislative reparations under the name of restitution in 1994 in the latter case. By the Rosewood reparations, \$150,000 each was paid for survivors totaling \$2.1 million compensation, while there was no land return for displaced people. However, the mode of silence/reticence about past injustice is still dominant. See, e.g., ALFRED BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION* (Oxford U.P., 2002); AnneMarie Mingo, *Restoring Rosewood: Movements from Pain to Power to Peace*, 5 *PRACTICAL MATTERS* 1, at 7-(2012); MARVIN DUNN, *THE BEAST IN FLORIDA: A HISTORY OF ANTI-BLACK VIOLENCE* (U.P. Florida, 2013)97-.

²⁷ Professor Yamamoto stresses this process in his recent work. See, Eric Yamamoto & Ashley Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 *ASIAN AMERICAN LAW JOURNAL*

It is also important to realize the meaning of peace for Jeju Island in a reconciliation process when a naval base is being constructed on Jeju despite the strong opposition of the local residents, due to the cycle of anxiety/hatred in an era of exacerbated territorial disputes in East Asia. Furthermore, because of the restrictions to the Jeju reparations legislation so far, which still does not recompense medical expenditure for the victims, not a few physically damaged residents and their families have fallen into poverty through this formidable mass-killing tragedy. In this sense, we must not forget there is a component of monetary/ economic reparations here.

(C) The Problems of Bilateral Mass Torts

There is a different type of hurdle in the Jeju case. Japan- related reparations cases, such as the Japanese invasion and a series of massacres and air raids in China, the colonization of the Korean peninsula and the deportation of many Koreans and Chinese can be seen as unilateral mass torts, so to speak, in spite of the Japanese casualties. Thus it is not difficult to assume Japanese responsibility and reparation.



(Fact-finding Reports on the Jeju Massacre)

However, war is much more complex in many contexts. In the case of the Jeju April 3rd Uprising and Grand

5(2009); Eric Yamamoto, Miyoko Pettit and Sara Lee, Unfinished Business: A Joint United States and South Korea Jeju 4.3 Tragedy Task Force to Further Implement Recommendations and Foster Comprehensive and Enduring “Social Healing Through Justice”(unpublished paper, 2013) .

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 guerrillas. In this sense, the mass violence is bilateral, and the same thing can be said about the 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 the moderate Hutus were also killed²⁸.



(Proof of the U.S. Backing toward the Jeju Massacre)



(Memorial of the Bukchon Ri Massacre: Several hundred (circa 450-550) of villagers out of 1200, including lots of children and elderly, were

massacred in the elementary school nearby on January 17th, 1949.)



(Bukchon Ri Elementary School)

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 it? If so, isn't this a partial rescue of the victims of the tragedy? Or should all the victims refrain from monetary compensation, as the Special statute on the Jeju mass killing in 2003 proposes? I think such argument should be reconsidered critically in a positive direction.

First, the civil law discussion on the mutual torts should be referred to in this context. Off-setting in a tort law context is prohibited in civil law (Art.509 of Japanese Civil Code; Art.496 of Korean Civil Code) and this position is extended to mutual torts such as traffic accidents or ship accidents, according to the traditional scholars. Recent scholars also support this idea in order to gain the realistic protection of victims by taking account of insurance contracts. With this backdrop in mind, the factual reparations for the victims including the reimbursement for medical expenditure are also needed in the Jeju massacre context.

Second, we have to consider guarantees for

an individual soldier's liability, because of the difficulty of their identification and their funding capacity. Thus, it's easy to prosecute vicarious liability for brutal Korean soldiers' deeds against Korean and American government. But how do you handle the killings done by the local protesters? Were they really tortfeasors in its true sense? The Guerrilla 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 Japanese Civil Code (Art.761 of Korean Civil Code), even though immunity with regard to the third party damage has been criticized by prominent scholars²⁹. 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/prominent cause of the mass killings can be seen to be the overwhelming attack by the Korean-U.S. Army, then it can be argued that the victims of the guerillas should equally be protected by both governments' monetary compensation. Frankly stated, this is out of the ambit of ordinary tort law and is a matter of legislation.

Anyway, this is my proposal, and truth findings 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 reparations process. But we should keep moving in the same direction pursuing the protection of victims in spite of the difficulty of bilateral wars, because they are victims of the Jeju tragedy anyways.

(D) The Importance of the International Support for Reparations

Now readers can realize that the moral shift for reparations is world-wide, by thinking of various examples dealt with in this paper: from Holocaust reparations in Europe to post-

apartheid affirmative action in South Africa to post-dictatorship development in Latin American countries and now through international slavery reparations movement in the Caribbean countries.

However, in the East Asian context, Japan is still far behind the goal of historical reconciliation with neighboring countries and on the longstanding systemic and structural stalemate in many war reparations cases, most notably the comfort women (Japanese army sex slaves) case. Similarly there are still so many challenges in the Jeju mass killing case in Korea due to its oppressive taboo treatment for several decades. The political fractions are still divided and confronted with each other regarding Jeju mass killing even after President Roh's apology. The grave infringement on the basic human rights of many Jeju people and the need for the redemption of their honor is a universal matter of moral conscience.

In this situation, outside pressure from the international community is important and effective. Professor Eric Yamamoto, a pioneering scholar of Japanese American interment and Native Hawaiian reparations, stresses this point with regard to democratic legitimacy committed to basic human rights in the comfort women case³⁰. Now he is proposing an international task force to attain reconciliation and social healing through justice (see note 27). In this international pressure movement, we should note that many Japanese people, especially Korean residents in Japan related to Jeju Island, are worrying internationally about the oppressive political structure on the Jeju mass killing, still continuing in the 21st century.

When Presidents Park Geun-hye and Barack Obama internationally and reasonably identify the North Korean human right abuses and the Japanese political inaction about comfort women issues³¹, logically from the same ground of reparations theory, they should also

self-critically reconsider the aftermath of the grave human rights infringement during the Jeju mass killing. Both presidents might acknowledge and pursue historical reconciliation and social healing for the many wounded Jeju islanders.