Finding Justice

Corporate Accountability and Korean Wartime Forced Laborers

By Steven S. Nam

Since the end of the Second World War, successive Japanese governments and courts have thwarted efforts by victims of wartime forced labor to seek compensation Japanese companies they worked for.

But a landmark 2012 decision by the Supreme Court of South Korea, in a case brought by South Korean victims, has given fresh momentum to finding the long-sought transitional justice they have sought. Steven S. Nam argues that this could help heal the ‘memory politics’ that dogs bilateral relations between Seoul and Tokyo.

FROM MODEST BEGINNINGS in the early 1990s, the “transitional justice” process with respect to Korean wartime forced labor has evolved and gained renewed momentum in recent years. A landmark decision by the Supreme Court of South Korea issued in May 2012 called for a fundamental legal reassessment of corporate accountability on the part of Mitsubishi Heavy Industries (MHI), which in its previous incarnation had subjected the Korean plaintiffs to forced labor during the Second World War. In asserting the illegality of both Japan’s colonial occupation of Korea and of forced labor mobilization, the Court paid little heed to the contemporary wax and wane of political relations between the two countries.

The redress process for wartime forced labor is entering a decisive phase. At a minimum, it has come to represent a new iteration of the successful European model for wartime corporate accountability from which it receives inspirational and tactical sustenance. The Korean Supreme Court’s leadership in the forced labor issue paved the way for this development by shifting the restitution paradigm from resolution of disparate individual claims to collective redress. It furthermore has raised prospects for bilateral progress between Japan and South Korea through judicial and public engagement, in a process less beholden to shifting political interests and trends. Media coverage has noted that in future rulings the court may take into consideration fragile relations between Seoul and Tokyo, since a ruling against the Japanese companies could sour them anew, even as they slowly appear to be on the mend. Such rote analysis, however, underestimates the potential for a meaningful breakthrough and long-term closure in place of circular stopgap measures and political appeasement. A successful resolution of unprecedented class action litigation begun in mid-2015 on the tailwind of the Supreme Court decision could facilitate lasting bilateral progress through the labyrinth that is “memory politics.”

1995 TO 2009: SETBACKS IN HIROSHIMA, TOKYO AND BUSAN

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

On Dec. 11, 1995, plaintiff Pak Chang Hwan led five other Korean victims of forced labor in filing a lawsuit against the Japanese government and the present incarnation of MHI at the Hiroshima District Court. The plaintiffs sought a total of ¥66 million (approximately US$550,000) in outstanding wages, damages and compensation for forced conscription, forced labor at the Hiroshima MHI factory from September 1944 to August 1945, and illness linked to the atomic bomb. By May 1998, 46 more plaintiffs had joined the lawsuit, increasing the entire case’s claim to roughly ¥530 million (US$4.3 million). The Hiroshima District Court dismissed the lawsuit on March 25, 1999.

The court acknowledged that forced transport and forced labor had been carried out as an act of state authority, but also noted that they had occurred while the prior Meiji Constitution was in effect, absolving the current Japanese government from any responsibility to compensate. The Meiji Constitution prohibited citizens injured in the exercise of an official action or policy from suing the state for damages. With respect to MHI’s culpability, the court held that the 20-year statute of limitations had expired, and that the company too had no responsibility to compensate its forced laborers. Although the plaintiffs were permitted to toll the limitation period to 1965 — the year Japan and South Korea signed their Treaty on Basic Relations, restoring diplomatic ties — the elapsed period nevertheless failed to satisfy the Japanese Civil Code’s statute of limitations, precluding recovery of lost wages from MHI.

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

The November 2007 decision was at best a partial salve for the victims, MHI, and both the Japanese and Korean governments. It skirted an opportunity to recommend an across-the-board permanent “grand settlement” scheme that could have resolved conclusively the matter of wartime corporate accountability. Unlike the outcome of the forced labor lawsuits that targeted companies under the Nazi regime, neither acceptable redress for the victims nor reprieve from future lawsuits for MHI was achieved. Not long thereafter on Feb. 3, 2009, the Busan High Court in South Korea approved the final judgment of the Supreme Court of Japan (the MHI plaintiffs had filed the same claims in South Korea on May 1, 2000, following the Hiroshima District Court decision).

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

FINDING A VIOLATION OF GOOD MORALS AND OTHER SOCIAL ORDER

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

While Tokyo has maintained that treaties and agreements including the Annexation Treaty of August 22, 1910, became null and void upon the South Korea’s establishment in 1948 — meaning that they were valid during the Japanese occupation — Seoul in contrast has argued that such treaties and agreements were null and void from the time that they were concluded. In short, the Korean side viewed the Annexation Treaty as invalid because Korean sovereignty had never actually ceased to exist. The Supreme Court of Korea adhered to this position in holding that the Japanese occupation hence was illegal “from a normative perspective.”

The Supreme Court’s next move in finding a violation of South Korea’s “good morals and other social order” was to address the legality of Korean wartime forced labor under Japanese colonial rule. It cited Article 101 of the Addendum, which enables the national assembly’s right to enact special laws “punishing malicious anti-patriotic acts” that occurred prior to Aug. 15, 1945, the date Korea regained its independence upon Japan’s surrender in the Second World War. The court then declared that legal relations under the unlawful Japanese rule in violation of the spirit of the South Korean Constitution were invalid, effectively deeming the National Service Draft Ordinance to have been illegal and its implementation subject to tort claims. Tying together its previous points, the court said that the “Japanese judgment reasoning conflicts with [the] ROK Constitution’s value judgment which regarded [the] Japanese Occupation Period’s forced mobilization as illegal,” recognition of the Japanese judgment would violate South Korea’s good morals and other social orders, and therefore was rejected.

Finally, once-confidential documents comprising the 1965 Claims Agreement between South Korea and Japan were finally disclosed to the public in January 2005, and in August later that year, a Korean special public-private joint committee published its corroborative official view that the “damages claim right against torts against humanity in which Japanese state powers had been involved or related to the colonial rule was not addressed in the Claims Agreement.” In conjunction with Japanese legal measures that allegedly obfuscated whether or not the former Mitsubishi was identical to the contemporary defendant for legal purposes, the Korean Supreme Court concluded “that at least up to May 1, 2000, when Plaintiffs filed this case, there existed obstruction grounds why Plaintiffs could not exercise rights objectively in the ROK.” It held that dependence on the statute of limitations by MHI constituted an abuse of rights against the principle of good faith, and was therefore rejected.

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

PROGRESS AGAINST THE CURRENTS OF MEMORY POLITICS

In the three-plus years following the 2012 MHI decision by the Korean Supreme Court, district and appellate courts in Busan, Seoul and
Gwangju ordered MHI and other Japanese companies that used wartime forced labor to compensate Korean plaintiffs. The companies as well as Tokyo duly protested, insisting that the issue of compensation claims already had been laid to rest. While appeals have been lodged and are pending at the Supreme Court, the most striking development has been a class action lawsuit filed at the Seoul District Court in April 2015 by 1,004 Korean forced labor victims and family members. Under the banner of the civil society-based Asia Victims of the Pacific War Families of the Deceased Association of Korea, they have targeted MHI and 71 other Japanese companies, including additional large conglomerates such as Mitsui and Nissan. The class action is co-ordinated by a US law firm that helped secure the US$7.5 billion compensation fund settlement for Third Reich forced labor victims, a product of negotiations between the German and US governments and culpable German and Austrian companies. One hundred of the Korean plaintiffs held a press conference on the day the lawsuit was filed, and their comments echoed the substance of the 2012 Supreme Court decision. Maintaining that the “issue over private claims against Japan regarding the Korea-Japan Treaty is the biggest challenge to the peaceful settlement of historical issues between the two countries,” the plaintiffs criticized the persisting view that individual claims had been addressed by the 1965 Korea-Japan treaty and the claims agreement. Compensation sought for unpaid wages and damages totalled 100 billion won (US$92.3 million), the largest for a Korean wartime forced labor lawsuit to date.

In publicly decrying the treaty-based defense against their claims, the new class-action plaintiffs harnessed their mass numbers and the aegis of the 2012 Supreme Court decision, demonstrating how far they had come from the original redress efforts of those six victims who had filed in Hiroshima two decades earlier. The post-2012 redress paradigm is rooted in South Korea’s judiciary and civil society. Propelled by the Korean Supreme Court’s landmark decision, the contemporary redress model thus far appears less beholden to domestic or foreign government administrations, past or present. The Korean media have proven supportive of the forced laborers’ cause, helping to even a playing field that once skewed heavily towards powerful and influential corporate successors to the warfare companies. Western media too have not shied away from calling the array of transitional justice issues that continue to hamper improved South Korea-Japan relations.

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

**IMPROVED BILATERAL RELATIONS THROUGH JUDICIAL MEANS, WITH CIVIL SOCIETY BACKING**

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

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

A grand settlement, whether it arrives as a resolution to the ongoing class action or requires years of further legal maneuvers, could have an impact that endures beyond the periodic cycling of administrations in both Japan and South Korea. By effectively circumventing government agency in favor of reconciliation through judicial and the will of civil society, it also would bypass to a great extent the meddlesome of both Japanese hardliners as well as opportunistic Korean politicking. Doubtless there would be pushback from some quarters, such as from bureaucrats and politicians who might feel that any negotiations involving memory politics belong exclusively to the domain of foreign policy. However, the lack of progress and even regression that have resulted from stopgap government efforts towards bilateral reconciliation necessitate an approach that has a track record of success in transitional justice matters. It is no longer productive to agonize over whether unfavorable rulings or a grand settlement on wartime forced labor could damage bilateral relations. Rather, by directly confronting the 70-year-old elephant in

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**Japanese companies named in 2015 class-action lawsuit by wartime forced-labor victims**

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the room that is memory politics, culpable companies and forced labor victims would be acting in their mutual benefit, while gifting Seoul and Tokyo a rare bilateral breakthrough largely free of political repercussions.

SHAPING A REALISTIC BLUEPRINT
In July 2015, two noteworthy transitional justice developments concerning MHI caught the attention of observers and further brightened the prospects for a resolution to the issue of Korean wartime forced labor. The company first apologized to US prisoners of war who had been used as slave laborers, and then in the following week, it proposed a settlement with Chinese forced laborers in Chinese courts that would include an apology and a large compensation package. Previously, in November 2000, Japan’s Kajima Kumi Corporation agreed to create a US$4.2 million compensation fund for Chinese forced laborers, but the lawsuit had been brought to court before in Japan and was ultimately overturned by the Japanese Supreme Court. Hence, MHI’s well-received proposal before a foreign court was a singular one. Described as a catalyst for improved ties between Beijing and Tokyo, it is seen to have increased the likelihood of a bilateral summit in the near future, much as a similar deal would boost Seoul-Tokyo ties.

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

Influential non-governmental actors in both South Korea and Japan, from the courts to civil society, have revitalized the transitional justice process and recast corporate accountability so as to potentially shape a viable resolution. This shared opportunity, if seized and negotiated with the culpable Japanese companies to a mutually satisfactory conclusion, would come to represent effective redress for the victims, their families, and their supporters, as well as a permanent step towards rapprochement between the two countries.

Steven S. Nam is a Visiting Professor of Law at the University of California at Davis Law School and a researcher for the Columbia Global Policy Initiative.