DELAYED JUSTICE: THE CASE OF THE JAPANESE IMPERIAL MILITARY SEX SLAVES

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I. INTRODUCTION

On April 17, 1998, the Shimonoseki Branch of the Yamaguchi District Court in Japan ordered the Japanese government to pay ¥300,000.00 (equivalent to U.S $2,270.00) each to three South Korean *Jugun ianfu*, or military comfort women,[1] who were forced to provide Imperial Japanese soldiers sexual service during World War II.[2] The court ruled that upon examination of the evidence, the comfort women system was outright discrimination based upon gender and ethnicity, which was in this case Korean. The court further found that the system vio-

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The authors dedicate this article to the members of the KAN-PU SAIBAN O SHIEN SURU KAI (The Organization that Renders Support for the Kan-Pu Trial) whose composition includes Christians, young Korean residents in Japan, and grassroots activists concerned with women's rights.

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1. *Jugun* means "attached" (or accompanying or following) the military. The word *Ian* (comfort) is adequate to convey the meaning that the soldiers who received sexual pleasure but quite contrary to express *Fu* (women) who are actually sex slaves of the soldiers to endure the forced prostitution and sexual subjugation with continuous rape on an everyday basis during the war.

2. KAN-PU SAIBAN HANKETSUBUN JENBUN-KENKOGUKAWA SAISHU JUNBI SHOMEN SHUROKU [WRITTEN JUDGMENT IN ITS ENTIRETY - INCLUSION OF FINAL PREPATORY DOCUMENTS BY PLAINTIFFS] 46 (Hanabusa Toshio, ed., 1998) [hereinafter HANABUSA].

lated fundamental human rights guaranteed by Article 13 of the Japanese Constitution.[3]

In his ruling, Presiding Judge Chikashita Hideaki opined that the government should have pushed legislation through the Japanese Legislature, the Diet, to compensate the women after it had admitted in 1993 that it was involved in the planning of front-line brothels.[4] Legislative nonfeasance, according to the ruling, meant that the government was negligent in fulfilling its obligation to help the plaintiffs recover for their wartime suffering.[5]

The suit, known as the "Kan-Pu Trial,"[6] was instituted on December 25, 1992 by ten South Korean women: three former comfort women and seven former members of *Joshi kinro teishintai* ("Female Labor Volunteer Corps").[7] The plaintiffs brought the action in Shimonoseki, a city at the western extremity of the island of Honshu, which served as the regular port for sea links to the Korean port of Pusan when Japan governed the Korean peninsula as its colony from 1911 to 1945.

The plaintiffs sought an official apology and compensation from the Japanese government for acts committed prior to 1945 and awards for their suffering after the war.[8] In the final judgment, the claims by members of the Female Labor Volunteers Corps who, unlike comfort women, were forced to work in the factories of Japan during the war, were rejected.[9] The court also rejected forcing the Government to offer an official apology, which was another remedy sought by all of the plaintiffs.[10]

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3. *Id.* at 42. Article 13 reads: "All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs." As to the English text of the 1946 Constitution, *see* 2 KODANSHA ENCYCLOPEDIA OF JAPAN 9-13 (Kodansha ed., 1983).

4. *Id.* at 45.

5. *Id.*

6. *Kan* is an abbreviation of Shimonoseki while *Pu* is an abbreviation of Pusan.

7. Three cases under the names of "Ko" (A), and "Otsu" (B) and "Hei" (C) were tried together but separated under the names of three *Jugun ianfu* (the military comfort women) plaintiffs and seven *Joshi kinro teishintai* (Female members of labor volunteer corps) plaintiffs. The trial concluded on September 29, 1997. See HANABUSA, *supra* note 2, at 12.

8. *Id.* at 13.

9. The primary reasoning is that they did not suffer as compared to the comfort women's suffering. *See id.* at 46. In this connection, it is worthwhile to note for the future litigation of the lost plaintiffs, that the automobile company Volkswagen has agreed to set up a fund to compensate workers who were forced into slave labor in World War II. For this report, *see VW flip-flops, will repay its W.W.II slave laborers*, SAN DIEGO UNION-TRIBUNE, July 8, 1998, at A12; *VW Acts To Pay Wartime Slaves*, SAN DIEGO UNION-TRIBUNE, Sept. 13, 1998, at A24.

10. *Id.* at 45.

The Shimonoseki court decision received immediate media attention in the West[11] and in Japan,[12] partly because non-citizens were allowed as plaintiffs in a regular Japanese court and, more generally, because an issue of fundamental human rights, transcending national boundaries, was treated in depth by the Japanese court.

In this article, we intend to fulfill four objectives. We hope to first put the comfort women controversy into a historical perspective; second, consider three topics that are useful in comprehending the contents of the judgement; third, discuss four legal issues that the court considered; and fourth, make concluding remarks on the subject matter.

II. THE COMFORT WOMEN ISSUE IN A HISTORICAL PERSPECTIVE

In 1978, Senda Kako, a Japanese writer, published the first extensive expose on the subject of comfort women who were forced to act as sex slaves for the Japanese Imperial military from 1937 through 1945.[13] Senda observed that former Japanese military personnel kept confidential the fact that comfort women were used to satisfy the sexual needs of soldiers on the frontline.[14] The reason for this secrecy was that the revelation of the comfort women scheme would damage the honor of the Emperor's sacred army.[15] Furthermore, they did not want the Japanese general public to know that the military managed prostitution stations with the national budget as a temporary military expenditure.[16] Senda estimated the number of sex slaves mobilized during this period came to approximately 84,000 in light of the military strength deployed during the war.[17] Recent

11. *Japan Ordered to Compensate 3 Sex Slaves*, L.A. TIMES, Apr. 28, 1998, at A8; Yuri Kageyama, *One-Time Sex Slaves Win Fight In Court: Japanese Judge says 3 Korean Women Are Entitled To Payments*, SAN DIEGO UNION-TRIBUNE, Apr. 28, 1998, at A2.

12. *Court tells Government To Pay 'Comfort Women'*, YOMIURI SHIMBUN (English ed.), Apr. 28, 1998, at 1; *Moto ianfu sosho [Former Comfort Women Trial]*, ASAHI SHIMBUN, Apr. 28, 1998, at 1; *Ianfu sosho [Comfort Women Trial]*, YOMIURI SHIMBUN, Apr. 28, 1998, at 27. Major Japanese newspapers carried the editorials. *See Rekishi o masuguni miyo [Look at history straight]*, ASAHI SHIMBUN, Apr. 29, 1998, at 5; *Kyotsu no rekishi ninshiki o fukametai [Wishing to an in-depth understanding of a common history]*, Apr. 29, 1998, at 3.

13. Senda Kako, JUGUN IANGU SEIHEN [MILITARY COMFORT WOMEN ORIGINAL EDITION] (1978).

14. *Id.*

15. *Id.*

16. *Id.*

17. The number of comfort women are hard to estimate. The plaintiffs estimate approximately 20,000, see HANABUSA, *supra* note 2, at 63. The following two writings use this estimation. *See* THE TRUE STORIES OF THE KOREAN COMFORT WO-

studies indicate that 80 to 90 percent of the comfort women were Korean.[18] The primary duty to line up young Korean women through deception and coercion rested on the Japanese Governor-General, which was the Japanese colonial regime in Korea.[19] These plans were highly sensitive, and Senda reports that when he attempted to obtain a copy of the mobilization report of the Japanese colonial office which contained detailed figures on the number of drafted women even after the war, it was to no avail.[20]

Senda's 1978 pioneering study has stimulated numerous writings on the subject, primarily based on war records, personal interviews with former military men, and anonymous former comfort women.[21] More horror stories appeared through personal accounts of former Japanese soldiers.[22] The most illustrative is the story of numerous young conscripted Korean women who were taken to the rugged mountainous northern Burmese front lines.[23] These women were abandoned as the Japanese army retreated, their fate unknown in an unfamiliar land with an unbearable climate and hostile natives.[24]

In several interviews with former comfort women, anonymity was used[25] because interviewees refused to disclose their identity.[26] In general, most wished to maintain their equilibrium

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MEN (Keith Howard ed., 1995); Karen Parker & Jennifer F. Chew, *Compensation for Japan's World War II War Rape Victims*, 17 HASTINGS INT'L & COMP. L. REV. 497, 498 (1994). A military planner estimated the need of 20,000 comfort women for 750,000 soldiers (one woman to 40 soldiers). 3,200,000 soldiers were deployed throughout Japanese occupied territories resulting in a number that spirals upwards to 85,000 women. *See* Senda, *supra* note 13, at 167.

18. CHIN SUNG CHUN, *the Origin and Development of the Military Sexual Slavery Problem in Imperial Japan*, *in* THE COMFORT WOMEN: COLONIALISM, WAR AND SEX 227-8 (Chungmoon Choi ed., 1997). Senda estimates the numbers of Korean comfort women to be 65,000. *See* Senda Kako, JUGUN IANFU SOKUHEN [THE MILITARY COMFORT WOMEN CONTINIUNG EDITION] 11 (1978).

19. Senda, *supra* note 13 at 11.

20. Senda believes that the report is hidden in the safe of the successor agency of the Government General's Tokyo liaison office. If this document were available, it would be easier to figure out how many Korean comfort women were conscripted. *See id.*, at 11-12.

21. As to a selected annotated bibliography on the subject, *see* GEORGE HICKS, THE COMFORT WOMEN 277-280 (1994).

22. *Id.*

23. Senda, *supra* note 13, at 163. Senda estimates that there were approximately 2,800 Korean comfort women in Burma at the time.

24. As to the plight of these women, *see* Senda Kako, JUGUN IANFU: KEIKO [THE MILITARY COMFORT WOMAN: KEIKO] 269-277 (1985).

25. As to a sad story disclosed without true identity of the victim, *see* Kawada Fumiko, AKAKAWARA NO IE: CHOSEN KARA KITA JUGUN IANFU [RED TILE HOUSE: THE MILITARY COMFORT WOMAN FROM KOREA] (1987). Another story of a former comfort woman, alias Pong Gi, was reported by SAN DIEGO UNION-TRIBUNE, Nov. 24, 1991, at A41.

26. *Id.*

in their present lives.[27] Korean women, in particular, are loathe to share their unpleasant past experiences with others (even to their immediate family members) due mainly to their upbringing in a Confucian society where a woman's chastity is a prime virtue.[28] Thus, in spite of increased studies on the subject, the real hindrance to knowing the full story has been the lack of disclosure of the victims' identities. One courageous woman, however, broke the embarrassed silence of this stalemate.

In 1991, Kim Hak Sun told in horrendous detail of how, at the age of 17, she was abducted and served as a slave in a military run brothel.[29] Her testimony brought forth more former military sex slaves into the public arena.[30] An advisory organization was formed to demand an official apology and compensation from the Japanese government.[31] Until her death at the age of 74 in December 1997, Kim Hak Sun was a tireless advocate of making Japan accountable for its inhumane wartime brutality against Asian women.[32]

As of February 1993, according to various sources, there were 103 surviving former comfort women in South Korea and 123 in North Korea.[33] This leads to a disturbing question: Why did the Tokyo War Crime Trials not prosecute the perpetrators of the Asian comfort women program? Only the Dutch took action against the Japanese for forced prostitution on behalf of Dutch women;[34] however, there was not a single Indonesian comfort woman who was the subject of the Batavia Trials.[35] Chungmoo Choi, a professor of cultural studies and Korean literature at the University of California, Irvine, gives a sad commentary with the following explanation:

> [U]nder the assumption of Western humanism, which was the philosophical basis of the Nuremberg and Batavia Trials,

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27. HICKS, *supra* note 21, at 21.

28. *Id.*

29. *Id.* at 11. Kim Hak-Soon, SAN DIEGO UNION-TRIBUNE, Dec. 17, 1997, at B.10. Her story in English under the heading of "Bitter memories I am loath to recall" appears in THE TRUE STORIES OF THE KOREAN COMFORT WOMEN, *supra* note 17, at 32-40.

30. HICKS, *supra* note 21, at 11.

31. The Korean Council for Women Drafted into Military Sexual Slavery by Japan was organized. As to the activities of the Korean Council, *see* CHIN SUNG CHUNG, *supra* note 18, at 234-241.

32. SAN DIEGO UNION-TRIBUNE, *supra* note 29 at B10.

33. Hyunah Yang, *Revisiting the Issue of Korean "Military Comfort Women:" The question of Truth and Positionality*, *in* THE COMFORT WOMEN: COLONIALISM, WAR AND SEX 68 (Chungmoo Choi ed., 1997). 200 former comfort women have registered with an advocacy group in South Korea. *See* SAN DIEGO UNION-TRIBUNE, *supra* note 29, at B10.

34. HICKS, *supra* note 21, at 168-9

35. *Id.*

> Asians did not belong to the category of humanity and were all the more excluded therefrom. In this light, the comfort women issue is not simply a matter of a wartime use of women or an event of the past, nor is it a matter just between Asian countries. The politics surrounding the silent history of the comfort women threatens the fundamentals of humanity.[36]

Ever since the wartime sex slave issue publicly surfaced, the Japanese government has stubbornly denied the military's involvement with the comfort women system.[37] Furthermore, it asserted that the 1965 Korea-Japan Treaty covered the comfort women issue.[38] However, in January 1992, Japanese denial of involvement reached a critical phase when a Japanese professor unveiled the Japanese government's linkage to the recruitment and operation of the comfort women stations.[39] The professor located classified wartime correspondence between Japanese military authorities in China and the War Ministry in Tokyo, which revealed that the military had established these brothels with the knowledge of the government.[40] This new discovery forced the Japanese government to order various government agencies to investigate.[41] Subsequently the government released its findings in July 1992.[42] Documents gathered by the government agencies cogently portrayed the comfort women houses as a sinister facet of the Japanese military's wartime effort and showed how the Japanese military organized and managed brothels in occupied territories and kidnapped and/or misled women into sex slavery.[43]

Release of the 1992 Japanese government findings was followed by the announcement of Cabinet Chief Secretary Kono Yohei who acknowledged Japanese government involvement with the operation of comfort women stations throughout the war.[44] Kono stated that the government took this opportunity to offer its deepest apology and sense of self-reproach to all the women for their irreparable mental and physical suffering and injuries.[45] Kono went on to promise that the government would study means of compensation.[46]

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36. Guest editor's introduction in THE COMFORT WOMEN: COLONIALISM, WAR AND SEX vi (Chungmoo Choi ed., 1997).

37. *Japan Says Army Forced Korean Women to Serve as Prostitutes*, SAN DIEGO UNION-TRIBUNE, Jan. 14, 1992, at A2.

38. *Id.* HICKS, *supra* note 21, at 169-172.

39. *Id.* at 205-9.

40. *Id.*

41. *Id.* at 220-228.

42. *Id.* at 220-228.

43. *Id.*

44. *Id.* at 265.

45. *Id.*

46. *Id.*

In 1996, the Japanese government decided to establish a fund named The Asian Women's Friendship and Peace Foundation to collect donations from the public as well as private "sympathy" money (*Mimaikin*).[47] Through the private foundation, the government planned to circumvent its confession of wrongdoing, thus, some believe, preventing the restoration of the victims' dignity as human beings.[48] Many of the women have refused to accept money from the fund and wish to see the government express genuine remorse for its violent wartime acts.[49] Meanwhile, the South Korean government decided to directly compensate the South Korean former sex slaves.[50]

III. THREE RELEVANT TOPICS

There are three germane topics which can help one better understand this case. The first is Japan's constitutional "duty to be a moralistic society;" second, the credibility of plaintiffs' testimony, and third, the concept of *Jori*, or natural reason.

A. JAPAN'S "DUTY TO BE A MORALISTIC SOCIETY."

Unlike the 1949 German Constitution,[51] there is no provision included in the Japanese Constitution to compensate for wartime suffering and damage.[52] To fill this gap, the plaintiffs brought forth the argument that Japan has a "duty to be a moralistic society" under the Constitution. According to the arguments presented by the plaintiffs, the concept provides a legal basis for an official apology and compensation for past and present suffering of the plaintiffs.[53] As for the theoretical basis of this concept, the plaintiffs advance three authorities. The first is the

47. SAN DIEGO UNION-TRIBUNE, *supra* note 11, at A2. As to critical views expressed on the creation of the fund, *see* Totsuka etsuro, *Kan-Pu Saiban de moto "ianfu" ni shoso hanketsu* [*Winning decision on former "Comfort Women" in the Kan-Pu Trial*] HOGAGU SEMINAR No. 523, July 1998, at 39.

48. *Id.*

49. *Id.*

50. SAN DIEGO UNION-TRIBUNE, *supra* note 11, at A2. As of this date, there is no official figure available as to the amount of compensation.

51. Article 74 (Areas of Concurrent Legislation)

9. War damage and restitution.

10. Pensions for war-disabled persons and dependents of war victims as well as assistance for former prisoners of war.

As to the English text of the Basic Law of the Republic of Germany, promulgated on 23 May 1949 as amended in January 1994, *see* GISBERT H. FLANZ, *Germany in 7*, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein and Gisbert H. Franz eds., 1994).

52. HANABUSA, *supra* note 2, at 92-96.

53. *Id.*

1941 Cairo[54] and the 1945 Potsdam Declarations.[55] These authorities elaborate ideals such as the "expulsion of militarism," an "elimination of barriers to restore the strength of Democratic tendency," and a "freedom of press, religion, and thought and the respect of fundamental human rights."[56] These ideals are the backbone of the duty argument.

The second authoritative affirmation cited by the plaintiffs is the preamble of the Japanese Constitution which states that it is ". . . resolved that never again shall [Japan] be visited with the horrors of war throughout the action of government."[57] This manifestation, in light of the Potsdam Declaration, is not a mere denial of war based on humanitarian ideals but should also be interpreted as the expression of Japan's reflection on its past invasions, wars, and Colonial rule.[58]

The third provision advanced by the plaintiffs is Article 9 of the Japanese Constitution, which in part states that " . . . the Japanese people forever renounce war as a sovereign right of a nation. . . . "[59] The plaintiffs argue that the renouncement of war, which was stipulated in the constitution does not merely mean achieving peace without war. Instead, the article is interpreted as imposing a duty on the people of Japan to engage in a positive eradication of structural violence like wars waged by the State.[60] These three authorities push Japan into fulfilling its duty of being a moralistic society.[61] In essence, the plaintiffs urge that these three elements force Japan to be morally responsible for its acts committed during the war and its remaining effects after 1945.[62]

B. Credibility of Plaintiffs' Testimony

The plaintiffs' briefs include gruesome testimony concerning their plight as sex slaves.[63] Because there is no jury system in Japan[64] judges, like their counterparts in any civil law country, find facts through the method known as the *free proof*, or in-

54. As to the Japanese text of the Cairo Declaration, *See* Mohan Roppo [Model Six Codes] 2168 (Ohsumi Kenichiro ed., 1991).

55. As to the Japanese text of the Potsdam Declaration, *see id.* The Cairo and Potsdam Declarations defined the terms for Japanese surrender by the Allied powers.

56. Hanabusa, *supra* note 2, at 92-93

57. As to the English text of the 1946 Constitution, *see* 2 Kodansha Encyclopedia Of Japan, *supra* note 3, at 9-13.

58. Hanabusa, *supra* note 2, at 93

59. *Id.* As to the English text of the Article, *see* 2 Kodansha Encyclopedia Of Japan, *supra* note 3, at 10.

60. Hanabusa, *supra* note 2, at 94.

61. *Id.*

62. *Id.*

63. *Id.* at 66-71.

64. Chin Kim, Selected Writings on Asian Law 456 (1982).

dependent mental exercise, process.[65] In the instant case, the plaintiffs were born into poverty-stricken families; they were uneducated and had limited Japanese language capability.[66] They were induced and coerced into sex slavery under unusual circumstances and have presently reached an advanced age.[67] Recollection of what happened several decades ago is indeed very difficult. Prolonged proceedings over the span of more than six years attest to the predicament of the judges. Because of the aforementioned concern, a judge ruled that:

> the lack of details does not weaken the credibility of remarks and testimony. . .comfort women plaintiffs had to hide their shameful past for such a long time and the fact that their past has been revealed for the first time in this trial considered to be heavily weighed. Their remarks and testimonies are of undeniable personal experiences and their credibility is highly valued. Since there is no counter proof, all of them are adopted[68]

C. JORI

In reaching the desired outcome of a civil trial, Japanese judges apply *Jori* as a standard of interpretation.[69] *Jori,* translated into English as "natural reason," means the "right" or the "correct way of things." This concept originated from Confucian teachings.[70] In Japanese legal practice, *Jori* has been in existence since 1875 as a guide for judges in civil trials.[71] In general, *Jori* could be used as a standard of interpretation in a civil trial where there is no statutory provision or customary law.[72] Since Japan is based on the civil law tradition, *Jori* serves a useful purpose. Where there is a need to fill a void, for example when there is no written or customary law, a judge may use a standard of interpretation of the right or correct way of things to achieve justice.[73] *Jori*, according to a legal scholar, is similar to the Swiss Civil Code, which prescribes that if there is no statutory or customary law a judge functions as if he were a legislator.[74]

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65. Chin Kim, SELECTED WRITINGS ON COMPARATIVE AND PRIVATE INTERNATIONAL LAW 137 (1995).

66. HANABUSA, *supra* note 2, at 66-71

67. *Id.*

68. *Id.* at 23.

69. *See generally*, Endo Hiroshi, Jori, 4 KODANSHA ENCYCLOPEDIA OF JAPAN 75 (Kodansha, ed. 1983); THE JAPANESE LEGAL SYSTEM 125 (Hideo Tanaka ed., 1976).

70. Jori, HORITSU GAGU SHOZITEN SHINPAN [A CONCISE DICTIONARY OF LEGAL STUDIES, NEW EDITION] 581 (Kaneko Hiroshi et al. eds., 1994).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

According to Judge Chikashita, the violation of the comfort women's human rights occurred prior to the enactment of the Japanese Constitution.[75] As there is no written law to warrant an assumption of defendant liability, he had to seek an alternative way to compensate the victims and thus deployed *Jori*.[76] Judge Chikashita's reasoned:

> However, in such an instance, as a standard of interpretation of law or as *Jori*, it is generally allowed that the preceding invasion of legal interest imposes upon the said invader of legal interest to exercise the duty to protect. If this is the case, even to the Imperial state acting prior to the enactment of the Japanese Constitution, the defendant who bears the same identity of the State is subject to the duty to perform its legal duty pursuant to *Jori* to prevent any further increment of damage provided that the invasion of legal interest is genuinely grave. The defendant's duty became heavier after the enactment of the Japanese Constitution, which specifically deals with respect for the individuals and human dignity as basic values negatively reflecting the militarism of Imperial Japan. This necessitates the adoption of certain measures of damage restoration for the victims. However, the defendant naturally knew the existence of the comfort women system, did not perform such a duty for many years after the enactment of the Japanese Constitution, and left the women alone; thus doubling their suffering. Such nonfeasance itself became a new act of inaction which hurt their human dignity.[77]

IV. FOUR LEGAL ISSUES

Four legal issues were addressed in the Judge's opinion.[78] Each claim made by the plaintiffs and the court's opinion thereto is outlined below.

A. Liability Based on Japan's Duty to be a Moralistic Society

1. Plaintiffs' arguments

As discussed earlier, the plaintiffs argued that the Cairo and Potsdam Declarations and the Preamble and Article 9 of the Japanese Constitution impose upon the defendant state a duty to be a moralistic state. This duty thus provides a concrete basis for requiring an apology and compensation for the victims of invasion, war, and colonial control.[79] Therefore, the plaintiffs de-

75. Hanabusa, *supra* note 2, at 43
76. *Id.*
77. *Id.*
78. Hanabusa, *supra* note 2, at 31-45, 48-49.
79. *Id.* At 92-95

manded an official apology and compensatory damages by applying *mutatis mutandis* - the State Compensation Law.[80]

2. *Court's ruling*

It is doubtful that the plaintiffs were able to succeed in proving Japan's duty to be a moralistic state.[81] In a nutshell, as to the question of whether the Constitution requires the State to directly apologize or to compensate the victims of the past Imperial Japanese war and colonial rule, it is difficult to recognize the present legal liability for an official apology and compensation based on the Preamble and Article 9 of the Constitution as the only sources.[82]

B. STATE LIABILITY FOR REPARATION BASED ON TORTUOUS ACTS

1. *Plaintiffs' argument*

As a component of Japan's duty to be a moralistic society, high Japanese government officials, pursuant to the dictate of the Constitution, were obliged to conduct factual investigations into the comfort women matter and to draft legislation for the compensation of the victims of the invasion, war, and colonial rule.[83] However, the officials consistently denied their responsibility, and refused to acknowledge the state's involvement with the comfort women regime.[84] Furthermore, the Minister of Justice, Nagano Shigemon, on April 28, 1992, stated that " . . . comfort women were public prostitutes at that time."[85] In the eyes of many victims, his statement clearly violated the concept of Japan's duty to be a moralistic state.[86] Therefore, an official apology and compensation in accordance with the state liability law were sought. At the same time, the forgoing Nagano assertion

80. *Id.* Article 1 (1), Kokabaisho Ho (State Compensation Law), Law No. 125, October 27, 1947, reads: "(Tortious Act of Public Official, Liability of Compensation and Right to Seek Compensation) When a public official who exercises public power of the State or of a public entity has, in the course of performing his/her duties, illegally inflicts damage upon another person either intentionally or negligently, the State or the public entity concerned shall be liable to compensate such damage." As to the Japanese text of the article, *see* MOHAN ROPPO, *supra* note 54, at 229. As to a general discussion of the subject, *see* Narita Yoroski, Government Compensation, 3 KODANSHA ENCYCLOPEDIA OF JAPAN 54-5 (Kodansha ed. 1983). *See also* HORITSU GAGU SHOZITEN SHINPAN, *supra* note 70, at 381.

81. HANABUSA, *supra* note 2, at 34-38.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

irreparably damaged the honor of the plaintiff comfort women.[87] Compensation for this damage based on the state liability law was also sought.[88]

2. *Court's ruling*

The court ruled that because the Japanese Constitution does not impose a duty upon Japan to engage in legislative activities, requiring direct apology and compensation for the victims of the war and colonial control, there is no duty to draft legislation and to conduct a fact-finding investigation under the Constitution.[89] Therefore, the government high officials did nothing contrary to the Constitution.[90] As far as the statement by the former Minister of Justice is concerned, it was his evaluation of historical data and systematic consideration of the comfort women issue.[91] Even if his statement was erroneous, his assertion was not directed to the plaintiff comfort women and was not intended to degrade the honor of the plaintiffs.[92]

C. Claims Based on Article 27 of the 1889 Constitution of the Japanese Empire[93]

1. *Plaintiffs' arguments*

The plaintiffs assert that because of Imperial Japan's national policy of war and colonial rule, they were forced to work as comfort women through deception and physical force. As a result, their right to human dignity and their property rights had been violated through irreparable physical and psychological damage.[94] Imperial Japan's national policy of open "public good" deprived plaintiffs of human dignity and property rights.[95] The sacrifices were serious violations of the plaintiffs' rights.[96] Acts that caused the violation of freedom of human dignity and deprivation of property rights were committed under the Meiji

87. *Id.*
88. *Id.*
89. *Id.* at 48-9.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* Article 27, the 1889 Meiji Constitution, reads: "The right of property of every Japanese subject shall remain inviolate. Measures necessary to be taken for the public benefit shall be provided by law." As to the English text of the Meiji Constitution, *see* 2 Kodansha Encyclopedia Of Japan 7-9 (Kodansha ed., 1983).
94. Hanabusa, *supra* note 2, at 99-104.
95. *Id.*
96. *Id.*

Constitution.[97] Therefore, based on Article 27 of the said Constitution, claims for the damages and reparations were sought.[98]

2. Court's ruling

The Meiji Constitution is no long valid because of the enactment of the post World War II Constitution[99] and because there is no transitional clause in the modern Constitution that would provide effectiveness to the Meiji Constitution.[100] Assuming that it is still effective consistent with the Japanese Constitution, it lacks specificity whether or not general compensation is allowed for an imposed restriction on property rights for the cause of public good.[101] On this point, there is a general consensus that there should be a specific provision in the statute dealing with the claim based on compensation for the damages.[102] Court decisions for compensation or damages under the Meiji Constitution have consistently held that there should be a specific provision in the statute.[103] The plaintiffs argue that the Meiji Constitution should properly be interpreted from the present time frame and apply to the claim presented. This argument comes close to the recognition of *ex post facto* law.[104] Therefore, the claim to compensation directly originates from Article 27 of the Meiji Constitution. This claim cannot be allowed since there is no compensation provision in any statute.[105]

D. Liability for State Compensation Based on Legislative Nonfeasance

1. Plaintiffs' arguments

The Preamble and Articles 9, 14, 17, 29 (1) & (3), 40, and 98(2) of the Japanese Constitution clearly indicate that the Constitution imposes upon the members of the Diet the duty to legislate for post war reparations and compensation for the victims of the invasion, war, and colonial rule.[106] The members of the Diet have neglected this legislative task for more than 50 years.[107] Moreover, the plaintiffs' search for an official apology and com-

97. *Id.*
98. *Id.* at 38-9.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. Hanabusa, *supra* note 2, at 105-113. As to the English text of the preamble and articles, *see* 2 Kodansha Encyclopedia Of Japan, *supra* note 3, at 9-13.
107. *Id.*

pensation emanates from legislative nonfeasance in accordance with Articles 1(1), and 4 of the State Compensation Law[108] and Article 723 of the Civil Code.[109]

2. Court's ruling

First, the court discussed the 1985 Supreme Court decision which recognized "exceptional instances" where members of the defendant Diet may be subject to the application of Article 1(1) of the State Compensation Law.[110] However, the court expressed a different opinion about "exceptional instances." The Court opined that " . . . as far as legislative nonfeasance is concerned, when there is an invasion of fundamental human rights relative to the basic values under Japan's Constitutional order as an exceptional interpretation, the question of illegality under the State Compensation Law can be raised."[111]

The Court made the following interpretation in light of the grave violations of human rights toward comfort women and the seriousness of suffering that continues until today:

> [T]he comfort women system has been a strongly suspected violation under the International Convention for the Suppression of the Traffic in Women and Children (1921) and the Convention Concerning Forced Labour (1930). Furthermore, like the plaintiff comfort women, by targeting minor women in the colony and occupied territories they were taken to the comfort women stations through flattery and coercion against their will and a systematic policy forced them to engage in sexual intercourse under the direct or indirect control of the comfort women stations by the former Military. These ugly acts are clearly anti-humanitarian even as reflected by the civilized standards of the middle of the 20th century. Against this trend, Imperial Japan, not only its former military but also the government itself, participated in this scheme; thus creating a grave invasion of human rights and human damage. This act made plaintiff comfort women and other women alike change

108. *Id.* As to article 1 (1), *see supra* note 80. Article 4 of the law reads: "In addition to the provisions of the preceding three articles, those of the Civil Code shall apply to the liability of the State or of a public entity to compensate the damage." As to the Japanese text of the article, see MOHAN ROPPO, *supra* note 54, at 229.

109. HANABUSA, *supra* note 2, at 105-113. Article 723 of the Civil Code, Law No. 89, Apr. 27, 1896 as amended Law No. 111, July 1, 1966, reads: "(Special Provision of Defamation) If a person had damaged the reputation of another, the Court may, on the application of the latter, make an order requiring the former to take appropriate measures for the restoration of the latter's reputation either in lieu of or together with compensation for the damage." As to the Japanese text of the article, *see* MOHAN ROPPO, *supra* note 54, at 175.

110. HANABUSA, *supra* note 2, at 39-40. As to the English text of Article (1) of the State Compensation Law, *see supra* note 80.

111. HANABUSA, *supra* note 2, at 40-1.

> their subsequent life. Even after World War II, they were obliged to re-enter into the rest of their life shamed. Even now, 50 years after the enactment of the Japanese Constitution, they are in never ending agony.[112]

Following this line of reasoning, the Court used *Jori* as a standard of interpretation as discussed.[113] After illustrating apologies and remedies made by Germany, Canada, and the United States for the foreigners who suffered during WWII,[114] the Court went on to rule that

> in light of the trend set by these advanced nations, the comfort women system was a serious violation of human rights that could be equivalent to the barbaric conduct of the Nazis. It could be considered that the failure to attend to the suffering of so many women who were forced to become comfort women is a grave violation of human rights. At the earliest point, when the Cabinet Secretary made an announcement on August 4, 1993, what began as a duty to perform was transformed into a constitutional duty to enact special compensation legislation for the restoration of the damages suffered by the plaintiff comfort women. This message was clearly raised to the Diet to undertake a legislative task. And, from the time of this announcement until the end of August 1996, a reasonable period of three years during which such legislation could have been enacted has elapsed. It is considered that such legislative nonfeasance has become illegal under the State Compensation Law.
>
> Since the members of the defendant Diet easily understood such an announcement they are clearly negligent in not enacting the legislation.
>
> In light of forgoing analysis, the plaintiff comfort women have the right to seek compensation for mental damage caused by the defendant pursuant to Article 1(1) of the State Compensation Law since the members of the defendant Diet illegally neglected their duty to specifically enact compensation legislation. As to the amount of damages, taking into consideration restoration by way of future legislation, it is appropriate to award ¥300,000.00 to each plaintiff.
>
> Furthermore, the plaintiff comfort women seek an official apology. As to the form of the apology, the matter should be decided by the judgement and discretion of the political department, and the judicial court cannot participate in this. The propriety of such a claim is still questionable, and its necessity cannot be recognized at the present time.[115]

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112. *Id.* at 43.
113. *Id.*
114. *Id.* at 44-5.
115. *Id.* at 45.

V. CONCLUDING REMARKS

In this article, two areas of the comfort women controversy were addressed. First, the Kan-Pu Trial was put into a historical context. Second, three topics relevant to the decision were discussed to better understand Judge Chikashita's decision. Finally, the authors then proceeded to look into four legal issues that were considered by the court in reaching its decision.

In reading the Chikashita decision, it becomes clear that the domestic Japanese court will entertain claims of foreign individual plaintiffs when there is an alleged grave violation of fundamental human rights. This type of litigation was traditionally reserved for state-to-state negotiations and settlements. In the saga of the comfort women controversy, the critical momentum began when the former sex slaves themselves came forward to call public attention to their undeniable agony within a never ending nightmare. The public gradually became aware of how serious their suffering was and continues to be. In response, the Japanese government established a fund to promote cultural exchanges with countries of the Asia-Pacific region, which includes addressing the comfort women issue. There is no doubt that cultural exchanges are valuable, but the comfort women issue is highly individual and personal by nature. This issue cannot be mixed with cultural exchanges.

To seek an amicable solution in this protracted, controversial issue, the authors suggest five measures: first, a thorough investigation and identification of the locus of responsibility through a special office created within the Diet library directed by a commission composed of government officials and private citizens; second, a sincere apology expressing genuine remorse to the victims; third, payment of monetary compensation for the past and present suffering of the victims and their successors with the establishment of pension fund; fourth, the creation of a memorial dedicated to unknown and known former military comfort women, preferably in Shimonoseki; and fifth, serious reflection on the comfort women issue in the Japanese educational textbooks as a means of reminding future generations.

In its final judgement, the Court rejected three arguments presented by the plaintiffs, but on the fourth issue gave partial relief based on a sense of justice (*Jori*). The Chikashita decision will have bearing on similar cases now pending in other district courts throughout Japan.[116] Judge Chikashita's admirable reasoning, based on his insightful perception of the present reality of

116. YOMIURI SHIMBIN (English ed.), *supra* note 12, at 1, reports that since the end of the war, six lawsuits have been brought by former comfort women.

fundamental human rights with specific reference to the plaintiff comfort women, is highly commendable. Of particular interest to the authors is the fact that the judge is in his mid-forties, and therefore his judgment reflects the view of a person born after 1945.[117]

On May 8, 1998, the defendant decided to appeal the Chikashita decision.[118] Certainly, the government will argue that the decision, which recognized the state's liability based on legislative nonfeasance, is contrary to the prior Supreme Court decision that set up a range of legislative nonfeasance. Another issue the defendant can be expected to raise will be the question of why the starting of legislative nonfeasance began in July 1992 when the Cabinet Secretary acknowledged the government involvement with the comfort women system.[119] The plaintiffs will need to fortify their arguments as to why a public apology is necessary.[120] On the issue of legislative nonfeasance, the plaintiffs need to back up their arguments by studying what forces set the legislature in motion.[121] Helpful illustrations may be found in pollution litigation, product liability litigation, litigation on the unbalanced number of Diet members, and proposed legislation to create non-smoking areas.[122]

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117. Ichigawa Sokusui, *"Ianfu hanketsu" ikaseruka* [*"The Comfort Women Decision" needs to be sustained*], ASAHI SHIMBUN, May 25, 1998, at 4.

118. In Japan, the party who lost in the final judgment in a first instance civil case may file Koso appeal and expect to see the trial as if the proceedings below are reopened and continues. Meryll Dean, JAPANESE LEGAL SYSTEM 418 (1997) quotes the following statement by using Supreme Court, OUTLINE OF CIVIL TRIAL IN JAPAN 13-16 (1995):

> In the Koso appeal, the Court goes into the fact the same way as the trial in the first instance. The appellate court inquires into the fact and law once more to the extent necessary the reasons for dissatisfaction by the parties regarding the decision of the court in the first instance. The oral proceedings are a continuation of the original trial and the procedures accomplished during the first trial continues to maintain force. In the Koso instance, the materials added newly in the Koso instance form the basis of the judgement of the Court of Appeals. . ..

119. The defendant State may argue that statutory limitation ran out for the victims to sue the government based on the Civil Code. However, this argument may become weaker as the plaintiffs' damage (suffering) is presently continuing.

120. Official, genuine and remorseful public apology is needed to be reflected in school text books which would teach the generations born after 1945 that these kind of violations should never happen again. The coming generation should have a clear and firm consciousness of their history. On this issue, text book editing processes as well as curriculum organization in the schools are highly relevant. For the discussion of this issue, *see* Uchida Masatoshi, *Sengohosho o kangaeru* [*Thought about Post War Reparation*] 190-4 (1994). As to the report on the German general public postwar reparations to the foreign victims of war, *see* Jonah Goldhagen, *Europe's Success Story: Germany has done more than most Countries to confront its Past*, NEWSWEEK, June 15, 1998, at 38.

121. Nomura Jiro, NIHON NO SAIBANKAN [JUDGES IN JAPAN] 136-9 (1994).

122. *Id.*

Since the defendant's appeal, no noteworthy development has been reported. Two factors have created the prolonged and dragged out trial proceedings. First, the Japanese appellate proceeding requires a *de novo* hearing with often renewed factual findings. Second, as discussed earlier, a Japanese trial is typically very slow. The Chikashita decision itself took more than six years to be adjudicated, from December 25, 1992 to April 17, 1998, when the final judgment was rendered.

The Chikashita decision illustrates the fact that the countries that carried out post war reparation for individuals skipped state-to-state treaty arrangements. In this connection, two recent developments in the United States are noteworthy. First, on July 25, 1997, Congressman William O. Lipinski of Illinois introduced legislation urging the Japanese government to extend a formal apology and pay reparation of at least $40,000 to, among other victims, those sexual slaves of the Imperial Japanese military as compensation for their extreme pain and suffering.[123] Secondly, the United States government will provide compensation to Japanese who were taken from their homes in Latin America and held in U.S. internment camps during World War II. Internees are to receive an official apology and a payment of $5,000 each under the 1998 Federal law.[124]

While the Chikashita decision is important in Japan's maturation into a responsible member of the world community, it is nonetheless only a small step. With the Japanese media's continuing portrayal of Japan as a victim of atomic holocaust, combined with its current economic woes, there is no significant internal movement for the redress of comfort women. As a result, Japan's lack of contrition and interest makes the path towards true reconciliation nearly invisible.

123. House Concurrent resolution 126 is now before the House International relations Committee which will conduct a hearing session where witnesses may be brought in for testimony. *See* 2 CONGRESSIONAL INDEX, 105th Congress, 1997-1998 (CCH) Sec. 31,009.

124. *Internees will get apology, $5,000*, SAN DIEGO UNION-TRIBUNE, June 12, 1998, at A9. *U.S. Will Pay Reparations to Former Latin American Internees*, N.Y. TIMES, June 15, 1998, at A19, reports that some 2,264 Latin Americans of Japanese ancestry were taken by United States military from 13 Latin American countries pursuant to the orders of President Roosevelt to ". . .secure the Western hemisphere from internal threats. . ."