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Enforced reconciliation without justice: The absence of procedural, retributive, and restorative justice in the "Comfort Women" Agreement of 2015

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ABSTRACT

Using a combination of theory and case study analysis, this article aims to show that the "Comfort Women" Agreement, ratified on December 28, 2015 between South Korea and Japan, lacks procedural, retributive, and restorative justice, with subsequent effects on the chances of reconciliation between the two countries and of restoring the honor and dignity of victims. This outcome prompts important questions regarding the role of agency and authority in reconciliation, namely, whether a government has the right to reconcile on behalf of victims, and whether the views of survivors and involvement of the public should be excluded in favor of confidentiality and efficiency. In discussing these matters, this article seeks to provide a solution to the "comfort women" issue, while illuminating its implications for the future relationship between South Korea and Japan.

1. Introduction

On December 28, 2017, 2 years after South Korea and Japan had ratified the so-called "Comfort Women" Agreement, relations between the two countries began to break down following the findings of a South Korean government task force appointed to review the agreement. Set up under the direct supervision of the South Korean Foreign Minister, the task force revisited the overall process through which the two sides had reached the 2015 Comfort Women Agreement (the 2015 Agreement), which had been intended to resolve outstanding issues concerning wartime sexual slavery. Despite that intention, the task force found that "the agreement was finalized mostly based on government views without adequately taking into account the opinions of victims" (Choe, 2017).

In response to this South Korean report, the Japanese Prime Minister, Shinzo Abe, asserted that Japan would make no concessions on the original version (Sim, 2018). Given the change in government following the impeachment of President Geun-hye Park, many suspected that South Korea might set aside the unpopular 2015 Agreement. However, on January 9, 2018, the South Korean Foreign Minister, Kyung-wha Kang, asserted the legitimacy of the agreement and affirmed that the South Korean government had no plans to renegotiate it. Nevertheless, Kang was critical of the bilateral agreement, and urged Japan to provide a "voluntary, heart-felt apology" (Kikuchi & Osaki, 2018). Kang further revealed that the review of the agreement had found flaws in both its process and content, thus concluding that "the 2015 'Agreement, which did not reflect the victims' voice, cannot truly resolve the issue of the victims who were forced into sexual slavery by the Japanese military." As well as imploring Japan to "accept this fact," Kang suggested that the parties "continue to make efforts to restore the honor and dignity of victims and help heal their emotional wounds" while announcing South Korea's plans to "collect opinions from the victims, relevant organizations and the South Korean public to find a solution that caters to the victims' needs" (Kikuchi & Osaki, 2018). Considering South Korea's diplomatic relations with Japan and the United States, Kang emphasized that South Korea would not abrogate the agreement itself.

Kang's comments were met with disapproval in Tokyo. For both domestic and international audiences, Kang's remarks were even more confusing than the original 2015 Agreement. Meanwhile, the Japanese government has continued to maintain that the agreement would not be revisited or renegotiated, and that further discussion was unnecessary. Nonetheless, opposition to the agreement remains widespread in South Korea. Furthermore, on March 27, 2017, the surviving victims filed a constitutional appeal claiming their basic rights had been violated by the so-called Comfort Women Agreement, and related resolutions are still pending parliamentary approval (Tatsumi, 2018).

Despite the relatively short period since its ratification, multiple studies on the significance and effectiveness of the 2015 Agreement, from political, diplomatic, and legal perspectives, have already been conducted, including a comprehensive analysis of the agreement's content as well as the legal significance of the negotiation process and of the joint press conference held on December 28, 2015 (Kim, 2016, pp.

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45–77). The agreement has been reviewed from an international law perspective (Cho, 2016, pp. 79–103), and criticized from the global governance of human rights perspective (Shin, 2016, pp. 282–309). It has been contended in another study that there could be problems with the agreement from the perspective of victims' rights and legal procedures (Yang, 2016, pp. 13–44). Bang has provided a comprehensive analysis of its constitutional elements through reviewing constitutional issues in the negotiation process and the outcomes of the agreement, even suggesting possible constitutional lawsuit options (Bang, 2015, pp. 18–47; Bang, 2016, pp. 105–144).

Several scholars believe that the 2015 Agreement was the positive result of a strategic and diplomatic decision in favor of South Korea's national interests. Noting that South Korea has regularly engaged in negotiations with Japan, Sohn claimed that the 2015 Agreement was yet another dimension of such negotiations between the two countries. Given that the United States recognized that a deteriorating Korea–Japan relationship would harm trilateral ties between the United States, Korea, and Japan, which would inevitably lead to China's rise in Northeast Asia, Sohn contended that South Korea's awareness of United States willingness to step in and resolve issues between South Korea and Japan meant that choosing to cooperate with Japan was the best decision available to Korea (Sohn, 2018, p. 171). The policy shift leading to the agreement can be explained using the concept of "the economic–security–identity nexus," in which a deterioration of bilateral ties would lead to a reduction in Korea–Japan trade and economic loss, and a resulting escalation of anxiety, which required the South Korean government to act to avoid this scenario and seek a change in policy (Goh, 2019). Chang (2016) similarly argues that, when considering South Korea's national security situation, the 2015 Agreement was a wise decision on South Korea's part. Chang sought to provide empirical proof of a positive correlation between people's concerns regarding the threat of North Korea and their support for the 2015 Agreement. Although certain views concerning historical events carry significant weight in South Korean society, there can be concessions when national security is at risk. According to Chang, despite the 2015 Agreement not being made publicly available, due to overwhelming criticism, Korean nationals who felt that the threat to national security was more significant tended to support the 2015 Agreement, a sentiment that the Park administration drew upon strategically.

The legal nature of the 2015 Agreement has also been scrutinized. As it was announced through a joint press conference, without an actual agreement document being presented, there are conflicting views as to whether the 2015 Agreement is a legally binding treaty or merely a political statement or gentleman's agreement without any legal force.[1] While trying to reach a definitive conclusion in this area can be complex, the overwhelming majority of treaties between countries at the working level exist in written form. Moreover, having been agreed upon following formal procedures, such treaties usually stand above international law (Bang, 2016, p. 116). According to Clause 2 of the Vienna Convention on the Law of Treaties, to which both South Korea and Japan are party, a treaty is "an international agreement in written form, regardless of its title, consisting of a single document or two or more related documents and governed by international law." This definition provides grounds that an agreement cannot be regarded as a treaty if it does not exist in written form.

Therefore, reading the agreement at a press conference without officially publishing the document makes it difficult to consider the 2015 Agreement as a valid treaty. Indeed, South Korea's Foreign Ministry has officially acknowledged that the 2015 Agreement only exists in the form of a postmeeting report that details the results of a meeting of foreign ministers and of the press conference that followed. The South Korean Foreign Ministry describes the 2015 Agreement as "an official promise between foreign ministers who represent both governments" and as "a verbal announcement not a treaty," noting that "there are no memoranda or letters that were exchanged in regards to the announced content" (Ministry of Foreign Affairs, 2018). In other words, no agreement exists in written form with the signatures of those representing both governments.

Moreover, for an agreement to be acknowledged as a valid treaty in South Korea, it needs to be confirmed at a cabinet meeting and, in some cases, an agreement can only be accepted as a legally binding treaty following parliamentary approval and ratification. However, such procedures were not followed prior to the South Korea–Japan foreign ministers' meeting. Therefore, the press conference and announced agreement could be understood as a political indication that the two foreign ministers would work on securing a binding treaty in the future.

As such, the 2015 Agreement has stimulated considerable debate in South Korea, with many disagreeing that it is "final and irreversible" (see for example: Cho, 2016, pp. 79–103; Kim, 2016, pp. 45–77; Lim, 2018; Shin, 2016, pp. 282–309; Yang, 2016, pp. 13–44; Bang, 2016, pp. 105–144). However, in signing the agreement, the two governments reached a political compromise and obliged the surviving victims to reconcile with Japan and offer forgiveness, compounding their existing pain. This study first provides a theoretical framework to analyze how procedural, retributive, and restorative justice can help to effect reconciliation between South Korea and Japan, while acknowledging the honor and dignity of the victims. Using this theoretical framework, this study then demonstrates that the 2015 Comfort Women Agreement lacks procedural, retributive, and restorative justice, resulting in an enforced reconciliation without justice. Finally, this study suggests a solution to the comfort women issue and the implications involved for the ongoing relationship between South Korea and Japan.

2. Theoretical framework

This study used a framework of procedural, retributive, and restorative justice to examine the Japan–Korea Comfort Women Agreement of 2015. While these three types of justice are independent, true reconciliation can only be realized when each type is individually acknowledged. In other words, in order to achieve the final goal of reconciliation between two countries, adequate consideration and effort need to be made in all these three areas of justice.

First, procedural justice has been defined as being "concerned with making and implementing decisions according to fair processes," with the generally agreed understanding that fair processes provide the best guarantee for a fair outcome (Deutsch, 2000, p. 45). Moreover, the exercise of procedural justice offers important clues concerning how legal systems and institutions can effectively manage disputes. An examination of why people focus on procedural justice offers insight into the nature of the psychological connections between victims, authorities, and rules, revealing how people think about law and legal institutions (Tyler & Lind, 2001, p. 65). This insight enables greater understanding of why victims place such importance on procedural justice, as well as why they are often willing to voluntarily accept decisions that they might otherwise disagree with or feel are unfair.

Procedural justice also suggests that victims are willing to accept outcomes they deem undesirable and even unfair without reducing their support for social and political authorities. The key to successful social functioning of any organization is to ensure that decisions can be made in ways that are viewed as fair by those affected (Tyler & Lind, 2001). In other words, dispute resolution is considered fair in proportion to its elements, such as the quality of the decision-making process, the parties' control of that process, as well as the dignity and respect that authorities afford those involved in the process. Therefore, matters of participation and the trustworthiness of authorities have a mutually supportive significance; for example, victims value their right to be heard only inso-

[1] Treaties are distinct from non-treaties, which include political agreements, joint declarations, non-binding agreements, informal agreements, and memoranda of understanding. Unlike treaties, non-treaties are not legally binding (see Bae, 2009, pp. 31–32).

far as authorities appear to take their views into serious consideration (Fontanelli & Busco, 2016, pp. 1–23).

Procedural justice ensures the effectiveness of legal proceedings, increases their perceived legitimacy, and signals their correctness and acceptability. In sum, the literature on procedural justice suggests that procedure can contribute considerably to perceptions of fairness (Tyler, 2003; Tyler et al., 1997).

Second, retributive justice essentially refers to the working of justice through the unilateral imposition of punishment (Wenzel et al., 2008, p. 375). Retribution is a passionate reaction to the violation of a rule, norm, or law that evokes a desire for the punishment of the violator (Sanders & Hamilton, 2001). In general, for retributive justice, the severity of the punishment is proportionate to the seriousness of the crime, and it is considered an older and more primitive, universal, and socially significant form of justice (Hogan & Emler, 1981, p. 131). Retributive justice research has largely focused on the role of punishment (Darley, 2002, pp. 314–333; Feather, 1999, pp. 86–107; Hogan & Emler, 1981; Tyler et al., 1997; Vidmar, 2001, pp. 31–63). These studies address issues of how and why people punish offenders, in which justice has been identified as a prime motivation (Wenzel et al., 2008, pp. 375–389). Victims seek justice to restore their honor and self-image (Vidmar, 2001). According to such studies, feelings of disrespect are often at the heart of experiences of injustice, while retaliation constitutes a victim's attempt to reassert themselves and thus restore their identity and dignity (Vidmar, 2001).

On a normative basis, retributive justice functions as a morally corrective mechanism in relation to those who have committed unacceptable actions against the society in question (Hoogenboom & Vieille, 2008). However, Ahtisaari (2004) argues that the purpose of a trial is not simply to prosecute and sentence a suspect. Rather, trial and punishment should include the possibility of acquittal, otherwise these processes merely become a symbolic gesture aimed at ratifying a predetermined outcome. Moreover, many argue that, in the decades following mass human rights violations during international conflicts, retributive justice has been crucial in bringing those who perpetrated war crimes and human rights abuses to justice. Indeed, some believe that retribution is the only method of justice appropriate after conflict, and that the key lies in undoing past abuses and creating an effective rule of law through retributive justice (Teitel, 2015, p. 28). Proponents of retributive justice also support international war crimes tribunals because they can aid the reconciliation process in three ways: through seeing that justice is done, establishing the truth about crimes committed, and individualizing guilt (Clark, 2008, p. 332).

Finally, where retributive justice is mainly concerned with the unilateral punishment of transgressors, restorative justice focuses on restoring the relationship between perpetrators and victims. Restorative justice can be defined as "a system of criminal justice which focuses on the rehabilitation of offenders through reconciliation with victims and the community at large" (Zehr, 1990, p. 271). The basis of restorative justice is that it considers offences as conflicts that occur between victims and offenders, and that these parties ought to participate in their resolution (Wenzel et al., 2008, pp. 375–389). At the core of restorative justice is a dialogical process geared toward making offenders accept accountability for the harm they have caused, show remorse, and offer an apology; victims are, at least implicitly, encouraged to overcome their resentment and offer forgiveness (Retzinger & Scheff, 1996, pp. 315–316; Sherman & Strang, 2007; Zehr, 2006). The evidence suggests that restorative justice programs tend to reduce the incidence of reoffending (Braithwaite, 2000, pp. 185–194; Latimer et al., 2005, pp. 127–144; Sherman & Strang, 2003, pp. 15–42), and that victims feel more satisfied with restorative justice programs than they do with the retributive process (Latimer et al., 2005, pp. 127–144; Sherman & Strang, 2003, pp. 15–42).

However, restorative justice has value beyond this procedural element "of bringing together all stakeholders in an undominated dialogue about the consequences of an injustice" (Braithwaite, 2000, pp. 185–194), as it primarily places emphasis on healing rather than punishment (Wenzel et al., 2008, pp. 375–389), and focuses on restoring the dignity of the victims. Furthermore, an important and influential form of restoration involves apology. Indeed, a considerable body of literature concludes that apologies can contribute to forgiveness and reconciliation, and may well make the failure to obtain retributive justice palatable (Gibson, 2002, p. 543). In sum, restorative justice involves the application of justice through reaffirming a shared value consensus via a bilateral process, rather than through the unilateral imposition of punishment.

3. The absence of procedural, retributive, and restorative justice from the 2015 Agreement

3.1. Procedural justice

South Koreans were both surprised and upset by the announcement of the Comfort Women Agreement in 2015. This negative response was due to both the agreement's content and the secrecy of the bilateral negotiations. In fact, the majority of South Koreans were entirely unaware that such discussions had been taking place. As such, procedural justice was ignored in the process of constructing this agreement, making any form of social consensus on the matter extremely difficult to achieve.

The "comfort women" issue came to light after a former Korean victim, Kim Hak-Sun, in 1991, gave a public testimony of her experiences. After her testimony, the public began acknowledging the comfort women issue, and many other victims were encouraged to testify, putting enough pressure on the Japanese government to investigate the military comfort women system. In 1992, when Prime Minister Miyazawa visited South Korea, the issue was brought up in the meeting between the Prime Minister and the then President Mr. Roh Tae Woo, in which the Korean side strongly requested that relevant facts be brought to light (Cabinet Councillors' Office on External Affairs, 1993). In accordance with the study and fact-finding, the Japanese government released the Kono Statement in 1993 and established Asia Women's Fund (AWF) in 1995. In the Kono statement, the Japanese government acknowledged that "The then Japanese military was, directly or indirectly, involved…administrative/military personnel directly took part in the recruitments" (Kono 1993). Likewise, the AWF tried to deliver USD 18,000 to each survivor, accompanied by letters or apology from the Prime Minister and the AWF president (Hashimoto, 1996).

However, the victims and civic groups did not welcome such solutions and continued striving for compensation and an apology from Japan. The international community actively backed their appeals.[2] Indeed, a series of documents published by members of the international community defined Japan's comfort women policy as a crime against humanity and a violation of international laws forbidding slavery. These countries declared it legal common sense that Japan accept the truth in this matter as a country, apologize, compensate, implement history education that properly reflected their wartime crimes, and prosecute individuals involved in perpetrating these crimes.

On August 26, 2005, following proactive action by domestic and foreign groups, the South Korean government established a private and public joint committee to discuss follow-up measures after papers of the Korea–Japan meeting were released. This committee stated that,

[2] United Nations, Doc. S/2003/45, "Report of the Special Rapporteur on Violence Against Women", March 4 1994; Linda Chavez, UN Doc. E/CN.4/Sub.2/1996/26, "Contemporary Forms of Slavery: Preliminary report of the Special Rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflict", July 16, 1996; Gay J. McDougall, UN Doc. E/CN.4/Sub.2/1998/13, "Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: Final Report", June 22, 1998. Additionally, see the 2001 final verdict of "The Women's International War Crimes Tribunal 2000 on the Japanese Military's Use of Sexual Slavery".

The illegal crimes against humanity involving the Japanese government and military such as the Japanese comfort women issue cannot be seen as resolved through the reparation agreement, and the Japanese government still has legal responsibility over the matter.[3]

However, despite growing expectations that a breakthrough in the comfort women issue was imminent, the South Korean government did not follow up by pressing Japan to take legal responsibility. In 2006, the victims filed a constitutional appeal claiming that the South Korean government's omission was a violation of the constitution. Consequently, on August 30, 2011, the Constitutional Court found that:

[A] dispute in interpretation exists as the Japanese government claims the right to request for compensation by the victims of sexual slavery to the Japanese military expired after the reparation agreement was signed in 1965, while the South Korean government claims that the victims' right to request for compensation was not included in the reparation agreement. The South Korean government had an obligation to resolve this difference in interpretation based on Article 3 of the reparation agreement on resolving disputes, however the South Korean government did not carry out this duty and hence violated the basic rights of the victims, which is a violation of the constitution.[4]

Later, during the administrations of Presidents Lee Myung-bak and Park Geun-hye, resolving the comfort women issue became one of the most important items on the South Korea–Japan relations agenda.

While the Sasae framework was proposed in March 2013, [5] the two governments were unable to reach an agreement due to differences in opinion, resulting in a further 12 rounds of director-level discussions and eight foreign minister meetings. The leaders of South Korea and Japan met informally during the South Korea-China-Japan summit in November 2015, where they agreed to accelerate discussions and resolve the comfort women issue as soon as possible. Finally, on December 28, 2015, the two countries announced an agreement to resolve the issue of women who had been forced into sexual slavery by the Japanese military during the Second World War (1939–1945) in a joint press conference.

The pressure from the United States should be considered a contributing factor in the sudden forging of this agreement. The Obama administration officials, including the president himself, intervened at pivotal points 2 preceding years to help bring Abe and Park closer together. The United States tried to foster an environment that made it possible for the two countries to settle their lingering grievances over the "comfort women." Repairing the Japan–South Korea relationship was essential to United States for two key reasons. First, a closer alliance between the two could help counterbalance China's growing military and economic influence in East Asia, and, second, it could help prevent North Korean aggression (Eilperin, 2016).

From a legal perspective, the 2015 Agreement was a follow-up measure to the verdict delivered by the South Korean Constitutional Court in 2011, which ruled that each individual "comfort woman" had the right to request reparation from the Japanese government. The court also found that the South Korean government's failure to uphold their obligations to protect the rights of these citizens violated the victims' basic rights and the constitution.[6] As such, the process lacked procedural justice.

The absence of procedural justice can be observed in three ways. First, there was no parliamentary approval. As the right to conclude a treaty resides with the president, the president needs to be the final agent confirming such an agreement for it to be legally binding. In this process, the Foreign Minister must first sign a treaty draft before submitting it to the National Assembly. Once parliamentary approval has been obtained, the president is in a position to ratify an agreement (Bang, 2016, pp. 105–144). If the president does not follow this process and signs an agreement behind closed doors, then it does not have legal effect in South Korea as it has not been concluded and promulgated according to constitutional requirements.

This lack of appropriate process has led to an ongoing backlash in parliament. Since the official announcement of the 2015 Agreement, various resolutions urging for a renegotiation and seeking to nullify the existing agreement have been proposed on the basis of the absence of procedural justice, avoidance of appropriate formalities, and failure to reflect the principles of human rights.[7] The issues raised in these resolutions included the following matters:

The agreement excludes the victims and was not ratified by the National Assembly, hence is not procedurally just, and, without a joint declaration, it is also insufficiently in compliance with the required formalities, and even the contents of the agreement completely rule out human rights principles centered around the victims.[8]

The above agreement did not obtain approval from the National Assembly and lacks a joint written agreement so is procedurally unjust, and the contents are insufficient for it does not reflect the principles of human rights centered around the victims.[9]

These criticisms were based on the process through which the administration came to an agreement, which involved intentionally excluding parliament's right to approve or decline such an agreement and ruling out steps to ascertain public opinion.

Further issues remain regardless of whether the purpose of the 2015 Agreement was to create a breakthrough with a nonbinding agreement that had no legal force. The South Korean government cannot readily dismiss criticism that it ignored the gravity of the comfort women issue in its attempts to obtain a nonbinding agreement. An important issue concerning international law, such as that involving the comfort women, needs to be dealt with in the form of a treaty. Governments choose nonbinding agreements for varying reasons such as speed, convenience, confidentiality, and suitability. However, as noted, since this is an issue concerning the basic rights of the victims and based on the principle of legal and parliamentary reservation, even nonbinding agreements need to go through parliamentary approval.[10] However, because these processes were absent, the outcome can be viewed as a violation of constitutional procedure.

The National Assembly can scrutinize agreements, especially if there is insufficient popular support within the country. This process forms part of a democratic control system grounded in democratic legitimacy. The exercise of state power by a state institution can be regarded as representative of the will of the people and acting on their behalf, but only when the democratic legitimacy of this process is acknowledged. Moreover, even if an institution exercises state power according to the

[3] The Office for Government Policy Coordination, "Private-public joint committee to discuss follow-up measures after the revealing of the Korea-Japan meeting", August 26, 2005.

[4] Constitutional Court, Verdict 2006788, Law Report 23–2 (August 30, 2011).

[5] The Sasae framework to facilitate resolution was proposed by Kenichiro Sasae, the vice Foreign Minister of Japan, in March 2013. This proposal included the Japanese ambassador visiting South Korean victims to apologize on the grounds of "moral responsibility," as well as the provision of funding for humanitarian assistance programs by the Japanese government. However, the South Korean government found this proposal to be incomplete and rejected it.

[6] Constitutional Court, Verdict 2006788, Law Report 23–2 (August 30, 2011).

[7] Twenty South Korean lawmakers led by Nam In-soon submitted "a resolution confirming the invalidity of the 'comfort women issue agreement' between the governments of South Korea and Japan" and proposed its renegotiation, No. 2000046 (30 May 2016). Seventeen South Korean lawmakers led by Kim Jong-dae submitted a similar resolution, No. 2000181 (10 June 2016). Twenty-two South Korean lawmakers led by Lee Won-Took submitted "A resolution declaring complete invalidity of the 'comfort women agreement' between the two governments" and sought renegotiation through parliamentary approval, No. 2005202 (20 January 2017).

[8] Submitted resolution No. 2000046 (May 30, 2016).

[9] Submitted resolution No. 2000181 (June 10, 2016).

[10] Submitted resolution No. 2005202 (January 20, 2017).

principle of popular sovereignty, the people need to have appropriate influence over that institution in order for it to be acknowledged as acting on behalf of the people. However, South Korea's Foreign Ministry failed to submit the 2015 Agreement to the necessary domestic procedures in this regard. Consequently, the agreement lacks all mandatory national requirements for concluding a treaty, including deliberation by the Office of Legislation, review at a Cabinet meeting, and an announcement in the official gazette.

Second, there was significant lack of communication with "comfort women" victims in reaching the agreement.[11] Indeed, what the victims find most difficult to accept about the Comfort Women Agreement is that they could not take part in the negotiation process from the outset. A review published by the foreign ministry task force stated that the Park administration failed to make adequate efforts to listen to the victims before reaching the agreement. The task force further added that "the agreement was finalized mostly based on government views without adequately taking into account the opinions of victims in the process of negotiation" (Korea Herald, 2017).

These former "comfort women" were abducted by the Japanese during the country's colonial rule of Korea, and their rights to life, human dignity, and liberty were violated. Constitutionally, the South Korean government is charged with actively protecting the fundamental rights of its citizens. Thus, the government's first step should have been to listen to the opinions of the Korean victims prior to negotiating with Japan, before reaching decisions in relation to the victims in the draft of the agreement.

Here, the victims forced into sexual slavery by the Japanese military were legally entitled to be notified of the "comfort women" issue negotiation process. This "right to know" is part of the right to expect state protection, as derived from Article 10 of the Constitution, in relation to the "right to pursue happiness" and "the duty of the State to confirm and guarantee the fundamental inviolable human rights of individuals" (Bang, 2016, pp. 105–144). Therefore, the government's decision not to notify the victims and listen to their opinions before negotiating with Japan was a violation of the victims' right to know, a basic procedural right intended to protect fundamental human rights.

Third, there was a failure to consult public opinion. On June 13, 2015, the South Korean President, Park Geun-hye, announced important progress in resolving the comfort women issue, emphasizing that "the issue must be resolved quickly at a level that the victims and the South Korean people can accept," after her first summit with Japan on November 2, 2015 (McCurry, 2015). Later that year, the media reported that an agreement between the two foreign ministers was imminent. At some point during this process, there was an absolute need to reveal the rough outlines of the agreement and ascertain public opinion. However, not only were no steps taken to ascertain public opinion, but absolutely no information regarding the negotiation process between Korea and Japan was made available to the public. Indeed, most South Koreans only learned of the negotiations when President Park addressed the nation immediately after the 2015 Agreement was announced. As the president noted,

This agreement is a result of our utmost best efforts to resolve this issue considering its urgency and other realistic factors as most victims are very senior and nine passed away this year alone leaving only 46 alive today…I ask of the victims and other Korean nationals to please understand this agreement in the wider context of improving South Korea–Japan ties.

Indeed, the gist of the president's address was to ask the "comfort women" victims and the public for their understanding. There were no attempts made to explain or provide information prior to announcing the agreement. As such, all activities related to ascertaining public opinion, such as public opinion polls, and the involvement of civic society were initiated after the 2015 Agreement was announced. According to a public opinion poll conducted after the agreement was disclosed, 75.8% thought that the agreement should be set aside and that the two countries should renegotiate the terms. Such results indicated that many Koreans felt that the 2015 Agreement failed to reflect the views of the victims. Furthermore, more than half of the respondents noted that the 2015 Agreement did not state Japan's legal responsibility nor its need to undertake reparations and, thus, they questioned the sincerity of Prime Minister Abe's apology.

Parts of civic society reacted to the surprise announcement with debate and protest. For example, university students across the nation spent the night guarding statues symbolizing the "comfort women" victims, worried that the South Korean government would remove them as part of the bilateral agreement. Participation in movements to erect more such statues and weekly "Wednesday Protests" to support the victims continued to grow across the country. On January 14, 2016, around 400 organizations and individuals formed a nationwide action group, and continually held protests and civic group activities to pressure the government to abandon the Comfort Women Agreement and replace it with a just resolution. Funded by voluntary donations, a group of South Korean citizens and victims launched The Foundation for Justice and Remembrance for the Issue of Military Sexual Slavery, on January 14, 2016. Moreover, movements to have the 2015 Agreement scrapped spread to the United States, Europe, and Japan, with overseas Koreans and locals holding protests outside Japanese embassies.

As such, the 2015 Agreement cannot be accepted as a formal treaty due to its lack and neglect of procedural justice. Despite the constitutional right to know of both the victims and the South Korean public, the government pursued and announced a unilateral agreement without providing any details about the negotiation process or the expected agreement in advance. In doing so, the government precluded any opportunity for public dialogue. As such, the South Korean government ignored procedural justice in three significant ways, resulting in an agreement without public consent and support.

4. Retributive justice: legal responsibility

Implementing retributive justice and punishing the perpetrators are not the only ways to resolve the comfort women issue. However, from a human rights perspective, these factors are essential in confirming the perpetrators' wrongdoings and revealing the truth in court. The only effort to recognize and address the Japanese military's culpability in a legal setting occurred in the context of the International Military Tribunal for the Far East (the Tokyo Trial), which was held in Tokyo from April 29, 1946 to November 12, 1948. While more than 60 people were tried for war crimes, only 28 were charged, and 25 eventually convicted. The Tokyo Trial was the final judicial process for putting wartime criminals on trial in East Asia in relation to World War Two. However, despite having adequate information on the "comfort women" issue, the suspects involved were not accused of sexual violence and rape at the Tokyo Trial (Shin, 2016, p. 295), and faced no legal consequences.

The results of the Tokyo Trial were challenged by the actions of the civic groups fighting for a resolution to the comfort women issue. These groups placed greater emphasis on compensation and apologies for victims than on punishment of the guilty. However, people have become increasingly aware of the continuing human rights violations of women in the form of wartime sexual violence, alongside a growing awareness of the lack of recognition of previous cases and of appropriate punishments that left perpetrators unpunished (Shin, 2016, pp. 293–294). Held in April 1993, the Fourth Asian Peace and the Role of Women Symposium instigated a dialogue regarding there being "no time limitation for crimes that violate human rights." Subsequently, demands for those responsible to be tried in court and punished accordingly began to grow. In October 1993, such demands reached the international stage through

[11] Justice from the victims' perspective is explored further in "Restorative Justice". Only aspects relevant to procedural justice are mentioned here.

the Second Asian Solidarity Conference.[12] Clause 5 of the resolution of this conference declared what needed to be done, as follows:

The Japanese government must publicly acknowledge those who were responsible. They must be punished. Victimized nations must work toward signing the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity to contribute to the development of relevant international law.[13]

As a result of the strong interest shown by the international community, efforts to track down and punish the perpetrators began in earnest in 1998. In 1998, Gay McDougall, the former Special Rapporteur of Human Rights at the UN, declared that "the incorrect custom of not prosecuting sexual violence in armed conflict must disappear," urging the international community to help ensure that the Japanese military personnel responsible for the "comfort stations" were punished. In doing so, McDougall further noted that "it is especially important for the highest-level policy makers in each respective government to have the willingness to resolve sexual violence issues in armed conflict situations."

However, Japan has continued to ignore legal responsibility, though acknowledging the existence of forced sex slaves. They argued that the peace treaties concluded in the 1950s, including the San Francisco Treaty with the Allies and bilateral treaties with South Korea, Indonesia, and the Netherlands, had terminated all claims; and that the individuals had no rights under international law to claim reparations. Although survivors have brought further lawsuits to the Japanese courts, they have had no success to date (Chinkin, 2001, p. 335). The Japanese government claims that they have apologized on a number of occasions, and fulfilled their "ethical responsibilities" at the highest level of government. As such, the Japanese government believes that adequate apologies were made by Prime Minister Miyazawa in 1992; by Chief Cabinet Secretary Yohei Kono in 1993; by Prime Minister Murayama in 1994; and by Prime Minister Hashimoto in 1996, when he released a letter of apology and made provisions for a national fund to provide support.

At the 1998 Asian Women's Solidarity Conference in Seoul, Japan proposed the establishment of a Women's International War Crimes Tribunal, which was agreed to by the other delegates from China, Taiwan, the Philippines, Indonesia, and South and North Korea (Chinkin, 2001, p. 336). The tribunal arose out of the work of various women's non-governmental organizations (NGOs) across Asia. The instigator was the Violence Against Women in War Network, Japan (VAWW-NET, Japan), which was founded in 1998, following an International Conference on Violence Against Women in War and Armed Conflict Situations held in Tokyo in 1997.

The 2 years of preparation involved significant discussions regarding which type of court process would best address the issue. Broadly speaking, there were two choices, namely, a truth and reconciliation committee or a criminal court. The "truth and reconciliation committee" approach had been used in South Africa to identify those responsible for the country's apartheid system and the crimes committed under it. This approach places more focus on investigating the truth and seeking reconciliation than on punishing those responsible. In contrast, bringing the issue to a criminal court would result in greater focus on the criminal nature of the "comfort women policy" and clarify the criminal liability of those involved. Ultimately, the criminal court approach was selected, with the groups placing more weight on the importance of punishing those responsible. A criminal court can deal with the criminal liabilities of both individuals and the state, with the former including those having responsibility for the planning, ordering, and implementation of sexual slavery, as well as the culpability of a superior for the crimes committed by their subordinate. The state's liability could include postwar failures such as not acknowledging the violation of international law during prior armed conflict, illegally concealing such violations, and failing to punish those responsible for such acts and compensating the victims.

From December 8–12, 2000, a people's tribunal known as the Women's International War Crimes Tribunal sat in Tokyo, Japan. This tribunal was established to consider the criminal liability of leading high-ranking Japanese military and political officials and the separate responsibility of Japan for rape and sexual slavery as crimes against humanity resulting from Japan's military activity in the Asia Pacific region in the 1930s and 1940s (Chinkin, 2001, p. 335). Prosecution teams from ten countries presented indictments. The prosecutors argued that,

[T]rials at the end of the Second World War with respect to the Japanese conduct of war, including the proceedings of the International Military Tribunal for the Far East, were incomplete in that they had inadequately considered rape and sexual enslavement and had failed to bring charges arising out of the detention of women for sexual services. (Chinkin, 2001, p. 337).

Accordingly, this tribunal could be seen as a continuation of earlier proceedings and the named indicted persons were those who had been tried earlier. However, there was one major exception: this tribunal named Emperor Hirohito as one of the accused.

The final statement of the Women's International War Crimes Tribunal concerning the Japanese military's use of sexual slavery was issued at The Hague on December 3 and 4, 2001. After a year of court hearings, all ten of the indicted individuals were convicted, including Emperor Hirohito.[14] However, the 2000 Women's International War Crimes Tribunal remained only a people's tribunal. Although conducted as an actual trial with a real case, a people's tribunal does not have any legal force. A people's tribunal cannot impose sentences or order reparations. Thus, while the final statement may have contributed to the realization of justice, helped restore the victims' human rights, and aided the development of international law regarding such issues, there was no legal force to push the Japanese government to act.

Indeed, since the first lawsuit filed in Japan, the Japanese Department of Justice has consistently ruled that the accused had no legal responsibility to respond. While the international community had made significant efforts to overcome the limitations of Japan's domestic legal environment through supporting a people's tribunal to investigate the issue, there is still a long way to go before retributive justice can be achieved. Such justice requires meticulous investigation and punishment of those involved, which are requirements that a people's tribunal cannot satisfy.

Furthermore, the content of the agreement failed to serve retributive justice by neglecting to clearly state Japan's legal responsibilities. In the Agreement, the Japanese government had accepted its "responsibility" in the "comfort women" issue. However, the question remains regarding whether this refers to legal or only nonlegal responsibilities. Stating that Japan "acknowledges responsibility" fails to clarify whether this refers to ethical responsibility or legal responsibility. Victims and related groups have been urging Japan to explicitly acknowledge its "legal" responsibilities in the "comfort women" issue. Although Japan is well aware of this request, they have consistently avoided using the term "legal" responsibility, which is enough to raise questions regarding their true motives.

Moreover, the agreement does not mention the details of the illegality and enslavement of the "comfort women"; instead, it mentions the Japanese military's involvement and admits responsibility from this perspective. Indeed, the expression "feels responsibility," used by the Japanese government, merely means "legal" responsibility. It does not

[12] Founded in the early 1990s, the Asian Solidarity Conference is a transnational solidarity conference involving victim support groups from South Korea, Japan, and other parts of Asia who work to resolve the comfort women issue. This conference is held annually or every two to three years, usually in South Korea or Japan.

[13] Resolution of the 2nd Asian Solidarity Conference, October 22, 1993.

[14] International Organizing Committee for the Women's International War Crimes Tribunal on the Japanese Military's Use of Sexual Slavery, "Judgement on the Common Indictment and the Application for Restitution and Reparation" (Hague: The Hague, 2001).

signify that they acknowledge the grave act of violating human rights according to international law, nor does it signal that they plan to assume their legal duties to compensate the victims, guarantee the prevention of its reoccurrence, and punish those responsible. As a result, the Japanese government is free from duties of punishing war criminals and legislating a Special Act related to "comfort women."

5. Restorative justice: reinstating the victims' dignity

While retributive justice achieves justice through punishing the perpetrator, restorative justice focuses on the expectations and rights of the victims and, thus, constitutes the primary means of realizing justice. A standard aspect of the restorative justice model involves dialogue and discussion between the victim and perpetrator in order to reach a resolution. Victims and perpetrators "share their perspectives" through dialogue, agreements, self-reflection, and forgiveness, making it possible for the victims to restore their honor and for justice to be realized. However, the 2015 Agreement lacked restorative justice from the victim's perspective: care for the victims and opportunities for their voices to be heard were entirely excluded.

This outcome was contrary to international norms and recommendations. In accordance with UN General Assembly Resolution 60/147,[15] victims of gross violations of international human rights and/or international humanitarian laws should be provided with full and effective reparation, as laid out in principles 19–23, which includes the following features: restitution, compensation, rehabilitation, satisfaction, and guarantees of nonrepetition. First, restitution should restore the victim to their original situation. Restitution includes the restoration of liberty; enjoyment of human rights, identity, family life and citizenship; return to one's place of residence; restoration of employment; and return of property. Second, compensation should be provided for any economically assessable damage resulting from gross and serious violations of international human rights law.[16] Third, rehabilitation should include medical and psychological care, as well as legal and social services. Fourth, satisfaction should include any or all of the following: an official declaration, public apology, and appropriate commemoration. Finally, guarantees of nonrepetition should include measures contributing to prevention.[17] Evidently, various measures are in place in the international community to help victims recover from gross violations of international human rights and/or international humanitarian laws. Nonetheless, it would be difficult to claim that such measures were reflected in the 2015 Agreement.

Moreover, it is important to note that the victims' rights to participate in the agreement were ignored in the negotiation process. The International Criminal Court's (ICC) "Rules of Procedures and Evidence" notes numerous measures for the victims of gender violence and of their rights, providing a detailed list of how human rights victims can participate in each proceeding. For example, a victim can request to express their opinion or concerns through a letter to the court registrar and can freely choose their own legal representative. The victim's legal representative then has the right to attend the court and participate in the hearings. Furthermore, the prosecutor or the defendant's lawyer must be allowed to respond to the victim and their legal representative's verbal or written representation. As such, the ICC's procedural rules guarantee victims an opportunity to participate comprehensively in trials and agreement procedures, either in person or through a legal representative.

Victim-focused participation is intended to allow victims an opportunity to provide their opinions and obtain answers to any questions they may have. Being involved in the discussion and having adequate opportunity to testify is important in the process to allow victims to recover and return more readily to society. Through being able to reveal the truth about the harmful acts to which they have been subjected, having others acknowledge that their rights were violated, and knowing that their voices can be heard in the process, victims can feel that their dignity and rights are being restored.

From this perspective, the 2015 Agreement is open to criticism that it was established without bearing the victims in mind. Neither the victims nor their legal representatives were deeply and substantially involved in the process preceding the reaching of an agreement with the Japanese government. No efforts were made to contact the "comfort women" or their representatives in order to seek their opinions on the matter or to fine-tune details, nor were the victims given an opportunity to deliver their opinions on the agreement before it was made public. The victims did not express consent to the final agreement through signing it.

In fact, the South Korean government only started reaching out to the victims after the Comfort Women Agreement was made public. On February 3, 2016, the South Korean Foreign Ministry claimed that they had individually visited 28 of the surviving 46 victims since 11 January 2016, as well as separately contacting four victims living abroad through their respective embassies. According to an interview with a foreign ministry official, 18 of the 28 victims contacted agreed to a meeting. Nine victims agreed to meet in person, while the others agreed to do so through a guardian.[18] As such, the South Korean government was only able to hear directly from nine of the victims.[19]

Furthermore, considering that restorative justice presupposes mutual understanding between the perpetrator and the victim, there should have been contact and negotiations between the Japanese government and the victims. However, there was absolutely no contact between the Japanese government and the comfort women victims, and all negotiations were conducted at the government level. As the South Korean government negotiated on the victims' behalf, the Japanese government did not regard the individual victims as party to the negotiation process. As such, the concepts of "restoring" and "healing" were not acknowledged or realized, and only negotiation and diplomacy took place between the two governments.

Therefore, from a restorative justice perspective, the victims were unable to participate as key contributors to the discussion, meaning that the 2015 Agreement failed to reflect the views of the victims and was unable to provide restorative justice. Neither the negotiation process nor the final agreement considered what the victims truly wanted, which was a sincere apology, restoration of their identity and dignity, and transition from injustice to justice. A process that would have allowed the victims to heal and forgive in a more appropriate way, through involving both the victims and the perpetrators in the realization of justice, was completely ruled out. Consequently, the 2015 Comfort Women Agreement does not provide restorative, procedural, or retributive justice.

[15] United Nations, Doc. A/RES/60/147, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: Resolution", December 16, 2005.

[16] For example: physical or mental harm; lost opportunities, including employment, education, and social benefits; material damages and loss of earnings; moral damage; costs required for legal or expert assistance; medicine and medical services; as well as and psychological and social services.

[17] For example: ensuring effective civilian control of military and security forces; strengthening the independence of the judiciary, promoting the observance of codes of conduct and ethical norms, and promoting mechanisms for prevention; as well as reviewing and reforming laws contributing to or allowing gross violations of international human rights law.

[18] As stated by a South Korean Foreign Ministry representative in an interview with the author, Seoul, September 15, 2017. The author was unable to obtain the views of ten victims; four due to old age and six who refused an interview.

[19] The South Korean Foreign Ministry explained that, of the eighteen victims who agreed to meet, fourteen showed positive responses to the government's agreement, while four showed negative responses. As stated by a South Korean Foreign Ministry representative in an interview with the author, Seoul, September 15, 2017.

6. Conclusion

The so-called “comfort women” issue has been a sticking point in diplomatic relations between South Korea and Japan for the last few decades. The nature and complexity of the issue with regard to its history and implications for politics, human rights, women’s rights, and justice make it hard to resolve. It is an issue requiring extensive dialogue between the perpetrators and the victims for a resolution to be achieved. However, as the leaders of South Korea and Japan tried to take a government-led and government-centric approach to resolving the issue, they limit the views and possible participation in the process of survivors and the public for the sake of political necessity. As such, the domestic backlash following the announcement of the deal was to be expected, and improvement in bilateral ties has since stalled.

Only 16 former “comfort women” are still alive in South Korea in 2020. Only once they are able to confront their trauma, heal, and recover their rights can they look toward the future, and this is what is needed for South Korea and Japan to reconcile on this issue. What the victims truly want is not a coerced agreement, but an environment that will make it possible for them to accept an apology from the perpetrators and forgive them. This realization has led to a call for a change in Japan’s attitude. The “comfort women” survivors who remain unhealed due to injustices suffered have become a mirror reflecting the potential future of South Korea–Japan ties. The two governments need to bear this in mind when approaching the “comfort women” issue in the future.

I would like to offer some policy suggestions, based on the framework of procedural, retributive, and restorative justice. First, a procedural justice approach largely depends on the South Korean government assuming responsibility for the negotiation process. The government should seek to gather opinions of the victims, and others involved, pursuing an increasingly victims-centered approach. A realization of this is conceivable, as the current Moon administration have criticized the former Park administration, who made the agreement in 2015. Second, retributive justice can be realized through efforts made by the Japanese government, such as creating the Special Act, which, so far, has not failed. However, considering the conservative government, apology-fatigue, and the anti-Korean sentiment in Japan, retributive justice seems difficult to attain; especially, as the people responsible for past wrongdoings pass away. Lastly, both the South Korean and Japanese governments should make appropriate efforts to promote restorative justice. The two governments should place emphasis on the victims’ dignity and seek to restore their rights as they pursue an agreement or resolution. Unfortunately, cooperation related to “comfort women” issues between two countries currently seems unlikely as their bilateral ties remain in stalemate.

Nonetheless, the two governments need to cooperate on security and economic issues, including the nuclear threat posed by North Korea and the bilateral currency swap deal. Accordingly, a “two-track” approach might present a realistic policy option that could separate historical disputes from constructive cooperation regarding North Korea and economic prosperity. President Moon and the new ambassador to Japan emphasized that historical matter, such as the “comfort women” issue, should not be allowed to hamper the important objective of fostering cooperative relations between South Korea and Japan (Yonhap News, 2017). Regular summits between the leaders of the two countries and more frequent high-level security meetings are required to engender greater understanding of and trust in each other.

It is no easy task trying to resolve a historical problem such as the “comfort women” issue, especially through short-term diplomatic negotiations of political compromise. Therefore, long-term efforts should be prioritized to ensure the fostering of values, awareness, and education for future generations. This is essential to influence the political environment and establish an amicable sentiment, domestically. Since it is a long process, the two governments should consider how to best manage and resolve their historical conflict and prevent escalating mutual dissent.

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