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Citation: International Circumstances in the Asia-Pacific Series, Japan Digital Library (March 2016), [http://www2.jiiia.or.jp/en/digital\\_library/korean\\_peninsula.php](http://www2.jiiia.or.jp/en/digital_library/korean_peninsula.php)

**Series:**

**2015—Analysis and Outlook for Japan-South Korea Relations**

**Examining Japan-South Korea Relations at 50th Anniversary of Diplomatic Normalization (4)**

## **South Korean Judiciary Shakes Japan-South Korea Relations\***

Hideki Okuzono\*\*

### **I. Japan-South Korea Relations at the Lowest Point since Diplomatic Normalization**

Since normalizing their diplomatic relations in 1965, Japan and South Korea have repeatedly experienced rough patches in their bilateral relations due to historical, territorial and other issues. However, in all instances, centripetal forces generated by common interests in such areas as national security and the economy were strong enough to outweigh the centrifugal forces that tugged at the two nations. Consequently, while occasionally experiencing significant shaking, bilateral relations always gradually returned to their original trajectory.

However, Japan-South Korea relations cooled rapidly after then-President Lee Myung-bak set foot on Takeshima Island (referred to as “Dokdo” in South Korea) on August 10, 2012. Subsequently, both sides set off centrifugal forces that sent bilateral relations into a serious slump that did not allow centripetal forces to function as before. While it was hoped the birth of new administrations in both countries would provide an opportunity for pressing the “re-set button” in bilateral relations, the outcome has dashed such expectations. In the nine months since taking office, President Park Geun-hye has actively engaged in summit talks with such major countries as the United States, China, the European Union and Russia. But President Park Geun-hye has adamantly refused to hold talks with Prime Minister Shinzo Abe of neighboring Japan on grounds of differences in the “understanding of history.”

Time and again, it has been seen how friction between the two countries can fan anti-Japanese sentiments in South Korea, which can in turn encourage the espousal of extreme positions within the

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\* *This article was originally published as 奥蘭秀樹「韓国司法が揺るがす日韓関係」(“Kankoku Shihou ga Yurugasu Nikkan Kankei”) 『東亜』第559号、2014年1月、96-105頁 (“Toua” [East Asia] no.559, 96-105, January 2014).*

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movement. However, the visit of then-President Lee Myung-bak to Takeshima followed by the persistent repetition of blatant and strident anti-Japanese statements by President Park Geun-hye to both domestic and international audiences has invited a rapid deterioration of Japanese sentiments toward South Korea. Japanese sentiments have steadily moved from “anti” to “hate” and finally to the current state of “loathing” of South Korea, leading to the conclusion that Japan-South Korea relations are now at their lowest point since the normalization of bilateral diplomatic relations.

## **II. Judicial Decisions in South Korea Structuralize Japan-South Korea Conflict**

There is no debate that the landing of then-President Lee Myung-bak on Takeshima triggered the emotionally charged conflict between Japan and South Korea. However, the discord that followed on such issues as the understanding of history and settlement of the past has clearly become structuralized. Differences in interpretation of the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation between Japan and the Republic of Korea (“Claims Settlement Agreement”), which stands at the center of the 1965 normalization of diplomatic relations between the two countries, stands at the pivotal point of this discord, while this discord is driven by South Korea’s judicial decisions that at times prompt changes in the exercise of power and official statements of the administration in power.

Former President Lee Myung-bak has explained that his decision to visit Takeshima was influenced by the refusal of Prime Minister Noda of the Democratic Party of Japan to actively engage in efforts to resolve the comfort women problem.<sup>1</sup> But the undeniable truth is that, prior to this, the Lee Myung-bak Administration had left this issue untouched and had brought it up in its diplomatic exchange with Japan only after the Constitutional Court of Korea rendered a decision in August 2011 to the effect that the government’s omission of action on the issue was unconstitutional. Furthermore, in its ruling of May 2012, the Supreme Court of Korea upheld the right of individuals drafted to work in Japan’s wartime factories to sue for compensation. Following this decision, a number of South Korean courts have ordered Japanese companies to compensate the former drafted workers. By threatening to render the Claims Settlement Agreement meaningless, these rulings carry the risk of destabilizing the foundation of bilateral relations. It can thus be said that bilateral friction is being structuralized by South Korean judicial decisions.

## **III. Interpretations of the Claims Settlement Agreement and Problems of Postwar Disposal**

At the root of the judicial decisions that are shaking Japan-South Korea relations are differences in interpretation of the Claims Settlement Agreement and the scope of this agreement.

The Japanese government takes the position that all property and claims issues with South Korea were resolved with the signing of the Claims Settlement Agreement. Article 2 paragraph 1 of the Claims Settlement Agreement does in fact state that the signatories confirm that problems concerning claims between the two countries and between their peoples “have been settled completely and finally.” Moreover, under Paragraph 2 of the Agreed Minutes to the Agreement on the Settlement of Problems Concerning Property and Claims and on the Economic Co-operation between Japan and the Republic of Korea, the signatories confirm that problems that have been settled completely and finally include all claims falling under the eight items contained in the Outline of the Claims of the Republic of Korea against Japan submitted by South Korea, and that “no contention can be made” with respect to these claims. And Item 5 of the Outline of the Claims of the Republic of Korea against Japan explicitly mentions “amounts receivable,

compensation, and other rights of claim of drafted South Korean workers.”

Responding to this, the government of South Korea under the Roh Moo-hyun Administration acted in 2005 to release the diplomatic documents related to treaties between Japan and South Korea, at which time a Joint Private-Government Committee on Measures Pursuant to the Publication of Documents on South Korea-Japan Talks was formed. The Committee subsequently published its views on the scope of the legal effectiveness of the Claims Settlement Agreement and policies of government measures related to this matter.<sup>2</sup>

The Committee concluded that several issues did not come under the scope of the Claims Settlement Agreement, including the problems of the Japanese military’s comfort women, Korean nationals in Sakhalin, and atomic-bomb victims. The Committee argued that these could not be deemed to have been resolved and that the Japanese government remained legally liable in these matters. On the other hand, the Committee concluded that compensation for individuals forced into labor was comprehensively included in grants-in-aid received from Japan. It then stated that, notwithstanding its moral obligation, the government of South Korea in some respects cannot be said to have allotted an adequate amount of the grants received to the compensation of such individuals. Subsequent to this decision, a special law was enacted based on this understanding, and assistance was provided to claimants through payments of gratuities, the settlement of receivables and provision of medical support.

#### **IV. Two Judicial Decisions that Shook Japan-South Korea Relations**

Two specific rulings handed down by South Korean courts will be examined, keeping in mind the developments outlined above.

First among these rulings is the decision rendered by the Constitutional Court of Korea on August 30, 2011 in response to a constitutional appeal regarding the right of claim of former comfort women who served the Japanese military, and atomic-bomb victims. In its ruling, the Court concluded that, notwithstanding the difference in interpretation of the Claims Settlement Agreement that existed between Japan and South Korea, the government’s failure to follow established procedures for dispute resolution constituted omission of action on the part of the government of South Korea, and that this in turn violated the basic rights of citizens as ensured under the Constitution. As such, the ruling determined the inaction of the government to be unconstitutional.<sup>3</sup> The government responded to this ruling by repeatedly requesting the Japanese government to engage in discussions, including the conveyance of a verbal note proposing the holding of bilateral consultations. The Japanese government has rejected all such overtures on the grounds that all related problems have already been resolved. This has led to a deadlock in bilateral relations.<sup>4</sup> Running out of patience, South Korean atomic-bomb victims and former comfort women launched legal actions against both governments in August 2013, two years after the ruling of the Constitutional Court.<sup>5</sup> Comprising class action suits and petitions for civil mediation, these actions pushed the South Korean government to adopt an increasingly forceful stance toward the resolution of the comfort women problem.

The second ruling in question was rendered by the Supreme Court of Korea on May 24, 2012 in cases involving former drafted workers who had sued Japanese companies to collect unpaid wages. The lower court had rejected the plaintiffs’ claims in a ruling that was consistent with decisions handed down in Japanese courts. However, the Supreme Court quashed the original ruling and ordered the case sent back to the High Court.<sup>6</sup> The reasoning of the Supreme Court was as follows. It stated that the decisions of the Japanese courts were based on the assumption that Japan’s colonial rule was legal, and concluded that such decisions clearly could not be accepted as they contradicted the basic values of the Korean

Constitution that deemed Japanese rule to have been an illegal occupation. Article 2 of the Treaty on Basic Relations between Japan and the Republic of Korea had evaded the conflicting positions of the two sides on the legality of colonial rule through the deliberate ambiguity of stating that all treaties or agreements concluded between the two countries prior to the signing of the Japan-Korea Annexation Treaty “are already null and void.” The Supreme Court ruling now cast doubt on this fundamental tenet.

The Supreme Court went on to rule on the Claims Settlement Agreement, noting that the Agreement represented nothing more than a resolution of bilateral claims and liabilities reached through a political agreement. Arguing that claims of compensation arising from colonial rule were not subject to the provisions of the Agreement, the Supreme Court stated that the right of individuals to claim compensation for forced labor and other illegal acts enforced by Japanese state powers had not become null and void, concluding therefore that the right of claim of former drafted workers against Japanese companies had not been rendered null and void by the Claims Settlement Agreement. This obviously contradicted the position taken by the Japanese government that all matters had already been settled. But it was also incompatible with the position that over the years had been taken by the South Korean government. That is to say, with regard to the right of claim of compensation by individuals who had been forced into labor (as opposed to the right of claim of former comfort women), the government of South Korea had in the first instance determined that the matter had already been resolved through bilateral diplomacy in the form of the Claims Settlement Agreement. However, having admitted the “inadequacy” of its actions, the government had enacted domestic laws to meet its moral obligations and had provided support and assistance to the victims in accordance with the provisions of these domestic laws.

Once the case was remanded to the lower court, the original ruling was revoked in line with the decision of the Supreme Court, and the Japanese companies in question were ordered to pay compensation for damages.<sup>7</sup> While the Japanese companies have appealed the ruling, it is highly probable that the Supreme Court will immediately find in favor of the plaintiffs. As this will compel the governments of both countries to revise their standing interpretations of the Claims Settlement Agreement, it may well shake the foundations of bilateral relations. Attention is now focused on how the South Korean government will react once the ruling has been finalized.

## **V. Democratization of South Korea and “Reconstruction of History”**

What lies in the background of these judicial decisions in South Korea? It must be pointed out that developments in democratization movements in contemporary South Korean history and the efforts of “reconstruction of history” have played an important role.

It was during the Chun Doo-hwan Administration that the “6/29 Declaration” was released on June 29, 1987 by Roh Tae-woo, Representative of the ruling Democratic Justice Party. This declaration marked the start of South Korea’s “age of democratization.” The ruling and opposition parties subsequently agreed on a constitutional amendment instituting direct presidential elections. Following a national referendum, the amendment was ratified and the present Constitution of the Republic Korea was formally promulgated and implemented.

The successive administrations that came to office following the process of democratization—namely, Prime Minister Roh Tae-woo, a popularly elected president with a military background, characterized his administration as the “Sixth Republic,” President Kim Young-sam committed to “Civilian Government,” President Kim Dae-jung to “Government of the People,” and President Roh Moo-hyun spoke of “Participatory Government”—engaged in a process of re-evaluating the past South Korean politics which the preceding “administrations of the day” had justified. Together, this comprised the

“reconstruction of history” (Kim Young-sam Administration) or the process of resolving the past. A long list of historical events were re-assessed starting with the December 12 military coup d'état (1979) that occurred as Chun Doo-hwan grabbed power after the assassination of Park Chung-hee and the Gwangju Uprising of 1980 that followed. Further re-assessment targeted the structure of power-based corruption under the Chun Doo-hwan Administration, the Jeju Uprising of 1948 that occurred shortly after liberation from Japanese colonial rule, the Kim Dae-jung kidnapping that occurred under the Park Chung-hee Administration, and the examination of the activities of pro-Japanese individuals who betrayed the national cause during the period of colonial rule and the seizing of their assets as property of the state. Each phase of this process was influenced by the current domestic politics and was driven by the specific beliefs and needs of the “current administration” as each judged the past and endeavored to reconstruct history from its own particular perspective.

While the “reconstruction of history” focused on domestic events of the past, the successive incidents of friction between Japan and South Korea on historical issues can be viewed as representing the extension of the effects of the reconstruction of history to bilateral relations.

In countries throughout the world, as the process of democratization advanced and the Cold War moved toward its terminus, doubt was increasingly being cast on the traditional emphasis on nationalism, state power and ideology. In their place, a heightened awareness of human rights was being manifested in various forms. In South Korea, the normalization of relations with Japan had focused almost exclusively on promoting national economic development and little attention had been paid to compensating individual victims. It was no coincidence that individuals dissatisfied with their treatment as victims stood up to claim their rights at this particular time in history. This can be seen as an effort to rectify the “contradictions” latent in the diplomatic normalization that had been forced on the people by forces of state supremacy.

Moreover, it should not be overlooked that these developments were taking place against the backdrop of major transformations in the international order surrounding East Asia. The basic pattern of Japan as a major economic power unchallenged as the sole advanced country of the region and the world's second largest economy, South Korea as a country bent on catching up with Japan, and China as the sleeping giant had long since been broken and discarded. While Japan suffering an extended period of economic stagnation and political confusion, South Korea had made dramatic progress. Its international position had risen remarkably and the nation had acquired great confidence. Meanwhile, China had rapidly emerged as a giant in terms of economic prowess, political influence and military might, and was now projecting an overwhelming presence. The age in which Japan was essential and indispensable to South Korea had come to an end, and the relative position of Japan in South Korea's diplomacy had clearly declined. Needless to say, the relative importance of China had increased sharply.

It was in this environment that criticism and opposition to the basic framework of the 1965 normalization of Japan-South Korea relations surfaced. Confronting a Japan that had seen its international presence deteriorate significantly, it was as though a newly confident South Korea was now declaring, “We are not the South Korea of the past!” From the South Korean perspective, it seemed that the time had come to rectify its “unequal relations” with Japan and to correct the treaties and agreements that it had had no choice but to accept during its period of weakness.

## **VI. South Korea's Democratization and Characteristics of Its Judiciary**

The sight of the South Korean government perplexed by the series of judicial decisions gives the impression of the judiciary mounting an uprising against political power. What lies in the background is the

peculiar relationship between power and the judiciary in contemporary South Korean history.

Under the long line of authoritarian rule enforced by presidents with military backgrounds, the South Korean judiciary had been forced to function as a “tool of state power” and a “means for governance.” It is said that for this reason, the judiciary is particularly anxious to assert its independence and maintain its distance from the centers of political power. Similarly, the judiciary is characterized by a strong sense of vigilance and a commitment to restraining state powers. Past failures to protect democracy and the basic rights of the people has engendered a sense of remorse and a quest for redemption that has been deeply etched into the South Korean judicial culture. It is said that as a result, the judiciary has adopted the “realization of social justice” as its mission, and has a tendency to place emphasis on social conditions and public sentiment and to reflect these sentiments in its rulings. This directly exposes the judiciary to the criticism that its rulings are informed by current trends and not by the law, and is the reason why critics of the judiciary have said, “The law of public sentiment stands above the Constitution.”<sup>8</sup>

Taking these developments into consideration, the present “1987 Constitution” can be said to have been “won by the public” after long years of struggle with “military dictatorships.” As for the Constitutional Court of Korea, which was re-instituted after a lapse of 26 years that followed the military coup d'état (1961), it can certainly be held up as a symbol of the victory of democratization.

To prevent a repetition of the past when the judiciary had fallen to functioning as a tool of state power, the Constitutional Court was established as an entity separate from the Supreme Court. Born out of the people's demands for democracy with no disgraceful history or restraints, the Constitutional Court can boast of its “legitimacy” and has won the public's confidence and trust as a judicial institution that renders judgments based on constitutional values and principles. All of this means that rulings of the Constitutional Court exert a special weight on the government.

## **VII. South Korean Judiciary Challenges the Claims Settlement Agreement**

It can thus be seen that a number of intertwined factors are at play in the “reconstruction of history” that targets Japan and is being played out through the judiciary. These include the judiciary's quest for redemption from its inaction during the “age of military dictatorship,” the transition from prioritizing the state to a growing awareness of the importance of individual human rights, burgeoning confidence rooted in the remarkable progress achieved by South Korea and the resultant rise in its international standing, and resurgent anti-Japanese sentiments incited by Japan's “drift to the right.” The outcome has been that the South Korean government finds itself confronted by a series of judgments that threaten to scrap agreements that have been entered into between governments.

However, this process is no longer being driven by the arbitrary inclinations of a “current administration” acting on its own political calculus. Unlike in the past, the principal actors are now victimized “individuals” and the “judiciary.” Under the new pattern, action is initiated through lawsuits filed by individuals, which then prompts the judiciary to take the lead in confronting government administration with the “reconstruction of history.” Considering that victims were using the constitutional review system to directly file claims in the Constitutional Court, and that Japan and South Korea had confirmed that complete and final settlement had been reached on the “nation-to-nation” and “people-to-people” levels in the course of normalizing their diplomatic relations, it can be said that it was inevitable that litigation would take the form of “individuals versus corporations” as victims filed lawsuits against Japanese companies.

As previously noted, the Japanese government has refused to engage in discussions on the grounds

that everything has been settled under the Claims Settlement Agreement. In face of this refusal, the South Korean government has taken a dual stance. First, it has requested bilateral talks with Japan on the problem of comfort women and other issues on grounds that these matters lie beyond the scope of the Agreement. Second, with regard to the problem of drafted workers, the government has not given up its previous position that there is no alternative but to accept the matter as already having been “settled.” As such, for individual victims, the critical question revolves around how the government can be forced to change its standing position and to positively engage in the “reconstruction of history.” The method chosen by individual victims to win compensation has been to directly petition the Constitutional Court or to use the framework of “individual versus corporation” and “individual against state” litigation to force the government to accept individual claims, even while the government retains the framework of the Claims Settlement Agreement.

## **VIII. Two Judicial Decisions and the Search for Resolution**

What is the key to breaking out of the present impasse? The answer must be found in how the two governments opt to respond to judicial decisions on the following two problems.

### **1. Comfort Women Issue**

Needless to say, Japan and South Korea both have a very keen interest in the comfort women issue. But the problem is now being carefully watched by the United States and many other countries as well. Moreover, this has developed into an extremely complex diplomatic issue. In addition to the government, many non-governmental players have become deeply involved, including parliaments, courts, politicians, NGOs, the media, academic researchers and citizens. The issue is a domestic problem, but also at the same time a question that goes to the core of universal human values.

When these points are taken into consideration, the Abe Cabinet’s obsession with the debate over whether or not the Japanese military was formally involved and whether or not coercion was factor has no impact whatsoever on the fact that extremely serious human rights violations were being committed openly. It must be concluded that, on the international stage, the arguments being presented are unconvincing and totally lacking in persuasiveness. Japan would have very little to gain from attempting to back-pedal on the “Kono Statement” and the “Murayama Statement” that were released as the official positions of the Japanese government. In any case, it is difficult to think that this would be a wise policy for Japan to pursue. At its core, the issue of comfort women is a problem involving postwar settlement between Japan and South Korea. At the same time however, in the eyes of the international community, it has come to represent a universal problem of the violation and utter negation of the human rights of women during wartime. Japan should not forget that this is not an issue that only involves its past history with the Korean people but rather a compelling issue for the present and the future, which the Western countries are observing with keen interest. As such, the phenomenon of comfort women cannot be justified in any way. It would be no exaggeration to say that this is a problem that allows for almost no room for debate.

Under the administration of the Democratic Party of Japan’s Noda Cabinet, the following “three point program” was proposed by Japan. First, the Ambassador of Japan to South Korea would apologize to former comfort women. Second, the prime minister would directly explain a set of “humanitarian measures” to the President of South Korea. Third, these “humanitarian measures” would be implemented with the government of Japan defraying all the costs from the national treasury. Articles based on interviews with the persons involved in this exchange indicate that while progress was made in consultations

with the Lee Myung-bak Administration based on this program, the talks came to naught when the House of Representatives of Japan was dissolved shortly before an agreement could be reached.<sup>9</sup> It remains to be seen whether the Abe Cabinet is willing to re-submit the Democratic Party of Japan's offer, and whether the administration of President Park Geun-hye stands on a solid enough foundation to accept the offer. At this point, it would be best to avoid any speculation.

The unyielding stance that the Abe Cabinet adopted in its treatment of the Act on the Protection of Specially Designated Secrets has increased the opacity of the domestic political situation surrounding the Abe Cabinet. Similarly, the forthcoming increase in the consumption tax rate makes it difficult to forecast the outlook for the Japanese economy. In the international sphere, Japan-China relations have been affected by the face-off involving China's Air Defense Identification Zone, and bilateral tensions have risen to the level where there is growing concern for the possibility of a serious contingency. If the administration of President Park Geun-hye were to accept a formulation of the proposed "three point program" that does not contain an unambiguous form of state compensation, President Park would almost certainly come under strong criticism from the Korean Council for Women Drafted for Military Sexual Slavery by Japan, the organization that has been playing a leading role in the comfort women problem. It is questionable whether President Park would be able to confront and convince the Council, and whether she would be able to win the media and public opinion to her side. On the other hand, what is amply clear at this point is that it would by no means be easy to create an environment in which Prime Minister Abe and President Park can exercise the necessary leadership for settling this problem.

## **2. Issue of the Compensation of Former Drafted Workers**

Once the Supreme Court of Korea finalizes the judgment on compensation for former drafted workers, the next question will be how the respective Japanese corporations respond. If they refuse to pay compensation, the courts would order compulsory execution, which opens up the possibility of the seizure of the assets of these corporations in South Korea. Because the scope of seizure would extend to accounts receivable and other assets held in South Korea, an order of seizure would affect the counterparties of these corporations and would unavoidably result in serious damages in both countries. On the other hand, if the Japanese corporations were to readily submit to the payment of compensation, this would be tantamount to negating the Japanese position that everything has been resolved by the Claims Settlement Agreement. Given that the South Korean government has formally recognized about 220,000 drafted workers, and the number of companies that used drafted workers is around 300,<sup>10</sup> it is feared that this could open the doors to an endless series of litigation against Japanese companies.

On November 6, 2013, Japan's three major economic associations led by the Keidanren and the Japan-Korea Economic Association jointly released a highly unusual statement in the names of their respective representative officers stating that the economic relations between Japan and South Korea had developed steadily on the premise that all property and claims issues between the two countries have been settled completely and finally under the Claims Settlement Agreement. The statement went on to express the deep concern of the signatories that the successive judicial decisions could undermine the good economic relations between the two countries and hamper investment and business in South Korea.<sup>11</sup> In total, the statement is a plea for cooperation between the governments and business communities of the two countries to reach an early resolution so as to avoid the grave possibilities of deterioration in South Korea's "country risk" and shrinkage of bilateral trade and investment, all of which would have a serious impact on bilateral economic relations.

The principal focus revolves around how the South Korean government will choose to act once the

judicial ruling is finalized. If the government opts to adhere to its previous position and makes it its own responsibility to resolve the issue as a domestic matter, the bilateral relation of trust based on the Claims Settlement Agreement would be maintained. Conversely, if the government decides to modify or retract its traditional position that “all has been settled through diplomacy,” this would convey the message that the government of South Korea no longer intends to adhere to the basic bilateral framework (the “1965 system”) that is founded on the Treaty on Basic Relations between Japan and the Republic of Korea and the Claims Settlement Agreement. By acknowledging the right of claim of “individuals versus corporations,” judicial rulings have created a situation in which “government-to-government” agreements are being effectively ignored. The government’s affirmation of this situation would rob the Claims Settlement Agreement of its meaning and may be taken to be a negation of the “1965 system” and the progress made by the two countries in the ensuing years. This would destroy the very foundations of bilateral relations of trust.

Should the situation go that far, what options would the Japanese government and corporations have in searching for a path to resolution? The first possibility would be to apply for mediation under the provisions of Article 3 of the Claims Settlement Agreement. However, that could instigate the government of South Korea to take action in the process of considering whether disputes related to comfort women should be submitted to a mediation committee. Therefore, this option should be considered with extreme caution. The second option would be to submit the matter to the International Court of Justice for resolution. But this is not a realistic approach because submission requires the consent of both countries. As another option, mention has been made of applying for arbitration to the World Bank International Center for Settlement of Investment Disputes under the terms of the Japan-South Korea Investment Agreement. However, it is unclear whether the World Bank would mediate this type of case.

The Korean Bar Association, which has been supporting the plaintiffs in their litigation, has proposed resolution through a “foundation approach.” Under this concept, the governments and related companies of both countries would contribute funds to create a “foundation,” which would then provide former drafted workers with compensation.<sup>12</sup> From the Japanese side, the Korean Bar Association has called for the participation of Japan Steel & Sumitomo Metal Corporation and Mitsubishi Heavy Industries, both of which were the defendants of the litigation for unpaid wages, and other companies involved in employing drafted workers. From the South Korean side, the idea is for corporations that have directly benefited from economic assistance provided under the Claims Settlement Agreement to contribute to the foundation. This would include such corporations as POSCO, Korea Railroad Corporation, Korea Expressway Corporation and Korea Electric Power Corporation. The proposed foundation is scheduled to be established in January 2014 with a contribution of 2 billion won from the South Korean government. At the same time, the government will also call on related Korean corporations to contribute to the fund.<sup>13</sup> However, it is difficult to imagine that the Japanese government would agree to join the foundation. Similarly, the possibility of the participation of Japanese corporations is extremely low given the difficulty they would have in justifying to their shareholders the contribution of funds without due legal basis.

President Park Geun-hye has called on Japan to “pursue positive change and to act responsibly.”<sup>14</sup> She has also stated that a “fundamental undertaking is necessary.”<sup>15</sup> However, the specifics and extent of this demand are not clear at this point. Given that President Park Geun-hye is stalked by a persistent image of being “pro-Japanese,” any political decision that may be taken to be a “concession” to Japan carries a very high risk for her. The rising value of the won has resulted in a slowdown in exports, and there is no clear outlook for alleviating the economic hardships of the common people. These difficulties

may well prove to be fatal blows for the Park Geun-hye Administration. Furthermore, the unlawful intervention of intelligence organizations and the military in the previous presidential election have very seriously impacted the Park Administration and have caused a downward slide in the administration's approval rating.<sup>16</sup> The first nationwide local elections to be held since the start of the Park Geun-hye Administration are scheduled for June 2014. The crucial question in this environment is whether President Park Geun-hye will be able to face the forthcoming election with a well-considered response that is appropriate in light of South Korea's international standing and which upholds the nation's international agreements even while paying due respect to the decisions of the Supreme Court and the underlying spirit of the Constitution. It can be expected that the decision will be an extremely difficult one to make.

## **IX. Evaluating the “1965 System” and “2015”**

It has been said “Japan-South Korea relations are now at their lowest point ever.” There is no question that as the two countries approach the 50th anniversary of the normalization of relations in 2015, the “1965 system” that has defined the framework of bilateral relations has become laden with a wide range of problems. Many of the bilateral problems are rooted in the “1965 system” that was agreed to by “military regimes” during the Cold War. Some observers have commented that the “1965 system” has outlasted its usefulness now that South Korea has been democratized, the Cold War has ended and a new international order has almost taken form in Asia.

Under the Cold War framework, South Korea simultaneously pursued two objectives. The first was to ensure national security as a principal player in the confrontation with North Korea in a deeply divided peninsula. The second was to promote nation-building through economic development. For the achievement of these goals, priority was assigned to obtaining economic assistance from Japan. It is argued that diplomatic normalization was pursued while neglecting full national apology for the colonial rule and the compensation of individuals, and that this in itself is the source of problems. This argument is to a certain degree convincing. Questions and suspicions related to hasty normalization directly leads to criticism of President Park Chung-hee who forcefully pushed the process forward, and can become material for attacking his daughter, the current President Park Geun-hye. Thus, it is conceivable that the risks of diplomatic engagement with Japan will become even more elevated.

Be that as it may, due caution must be paid to riding on the coattails of those who advocate the review or annulment of the Treaty on Basic Relations between Japan and the Republic of Korea. Such a choice would destroy the trust fostered between the two countries and send everything back to the starting point. In the outcome, both countries would try to pressure the other into accepting a completely new game. South Korea should be fully aware that these are issues that directly affect the trust that the international community has come to place in it.

While both Japan and South Korea have shown keen interest in evaluating their respective alliances with the United States and restructuring the alliance to meet the needs of a new age, it cannot be denied that the two countries have been negligent in their efforts to adjust their mutual relations, which are interlinked through alliances with the United States at the hub, to the requirements of the current environment. Japan and South Korea should calmly review their past. Instead of fixating on the problems of the “1965 system,” all that was accomplished under the “1965 system” should be properly appreciated. The two countries should come together to examine how to address the challenges that remain and to present a vision for bilateral relations in the next 50 years.

As the first step toward this goal, it will be necessary for the leaders of both countries to arrive at a

consensus for maintaining the “1965 system.” Next, the key to breaking out of the impasse that currently surrounds their bilateral relations lies in how the leaders of the two countries will be able to resolve the problem of the individual compensation of former comfort women and drafted workers. It is hoped that Prime Minister Abe will state unequivocally that the “Murayama Statement” will be unconditionally maintained and carried forward, that he will face the comfort women problem squarely as a human rights issue, and that he will be able to muster the courage to render a political decision from a higher perspective. Conversely, it is hoped that President Park Geun-hye will make a flexible and strategic decision to develop new relations with Japan within the basic framework of the “1965 system,” while at the same time respecting the spirit of the Constitution as expressed in recent judicial decisions. From the perspective of maintaining the “1965 system,” it may be worth considering the option of jointly resolving the two problems by referring these matters to arbitration as provided for under the Claims Settlement Agreement. While both leaders continue to maintain approval ratings of around 50 percent, it is true that their ratings are declining. From this it can be said that the achievement of the above objective requires careful timing and fostering an environment that is conducive to rendering political decisions.<sup>17</sup> How to create such an environment will be the key point going forward.

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- 1 “President’s Statement at the Luncheon with the Chairman of National Assembly of the Republic of Korea and Others” (August 13, 2012): website of the Republic of Korea Blue House (Spokesperson Briefing), <http://www.president.go.kr> [in Korean].
  - 2 “Meeting of the Committee on Measures Pursuant to the Publication of Documents from South Korea-Japan Discussion” (August 26, 2005): Briefing materials of the Office of Government Policy Coordination [in Korean].
  - 3 “Confirmation of the Unconstitutionality of Omission of Action on Article 3 of the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation between Japan and the Republic of Korea (No. 788 of 2006 헌마)” (August 30, 2011): <http://www.court.go.kr/home/storybook/storybook.jsp?eventNo=2006헌마> [in Korean], and “Confirmation of the Unconstitutionality of Omission of Action on Article 3 of the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation between Japan and the Republic of Korea (No. 648 of 2008 헌마)” (August 30, 2011): <http://www.court.go.kr/home/storybook/storybook.jsp?eventNo=2006헌마> [in Korean].
  - 4 Rengo News transmissions of September 15, 2011, November 15, 2011 and August 29, 2013 [in Korean].
  - 5 Nihon Keizai Shimbun Internet edition, August 12, 2013 and August 13, 2013 [in Japanese].
  - 6 “Supreme Court of Korea: Ruling of the First Petty Bench on Case No. 22549 of 2009 다 on Claim for Compensation” (May 24, 2012) [in Korean], and “Supreme Court of Korea: Ruling of the First Petty Bench on Case No. 68620 of 2009 다 on Claim for Compensation” (May 24, 2012) [in Korean].
  - 7 “Seoul High Court: Ruling of the 19th Civil Bench on Case No. 44947 of 2012 다 on Claim for Compensation” (July 10, 2013) [in Korean], and “Pusan High Court: Ruling of the 5th Civil Bench on Case No. 449 of 2012 다 on Claim for Compensation” (July 30, 2013) [in Korean].
  - 8 JoongAng Ilbo, August 13, 2005 [in Korean].
  - 9 “Interview with Kim Tae-Hyo, Former Foreign Policy Strategy Coordinator of the Blue House,” Asahi Shimbun (February 22, 2013) and “Interview with Tsuyoshi Saito, Former Deputy Chief Cabinet Secretary” Asahi Shimbun Digital (October 8, 2013) [in Japanese]. Note that former-Prime Minister Yoshihiko Noda is quoted as saying, “Absolutely no report came to me that an agreement was imminent. I had no impression that the distance between the two sides had been reduced” in “Interview with former-Prime Minister Yoshihiko Noda” appearing in Nihon Keizai Shimbun Internet edition of November 24, 2013.
  - 10 Nihon Keizai Shimbun Internet edition, November 7, 2013 [in Japanese].
  - 11 Tokyo Shimbun, November 7, 2013 [in Japanese].
  - 12 Nihon Keizai Shimbun Internet edition, November 2, 2013 [in Japanese].
  - 13 Yomiuri Shimbun, December 5, 2013 [in Japanese].
  - 14 “Speech at the 94th Anniversary of the March 1 Movement” (March 1, 2013): website of the Republic of Korea Blue House,

Speeches of the President [in Korean].

- 15 Park, Guen-Hye, "A Plan for Peace in North East Asia." Wall Street Journal Asia (November 13, 2012).
- 16 According to the results of a regular weekly opinion poll for the first week of September (September 2-6) and the first week of December (December 2-6) conducted by Realmeter, an opinion polling organization, positive evaluation of the execution of domestic policies by President Park Geun-hye declined from 67.0% to 53.2% (a drop of 13.8 percentage points) over this three month period. During the same period, negative evaluation increased from 23.1% to 39.1% to close in on the 40% mark. <http://www.realmeter.net/>
- 17 According to Nihon Keizai Shimbun Internet edition, December 9, 2013 [in Japanese], the approval rate for the Abe Cabinet decreased after the enactment of the Act on the Protection of Specifically Designated Secrets following the forcing of the vote. For the first time under the second Abe Cabinet, the approval rate dropped below the 50% mark to hit 47.6%.