Forget-Me-Not: A Comparative Study on the (Mis)Application of the Political Question Doctrine to the Claims of Comfort Women

By Janeca Naboya

LL.M. SHORT THESIS
Course: Elements of Comparative Constitutional Law
Professor: Mathias Moschel
Central European University
1051 Budapest, Nador utca 9.
Hungary

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For my family, who were unwavering in their support for me,

For my thesis advisor, Professor Moschel, whose advice was indispensable in the completion of this thesis,

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And lastly, for the women who have yet to attain justice, may this work serve as a beacon of hope and a tribute to your experiences, lest they ever be forgotten. May the world never forget your sufferings.

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ABSTRACT

For years since World War II ended, surviving comfort women have been struggling to find justice for the acts committed against them by the former Japanese soldiers. Being kidnapped and forcibly made to work as sex slaves in "comfort stations" these women have found little comfort the courts. Throughout the years, attempts at redress remain bleak at best, with lack of an official acknowledgement or apology from the Japanese government regarding the establishment of the comfort women system. Attempts at the Japanese courts, international law, and even domestic courts have remained unfruitful to date. Both the Supreme Court of the Philippines and the United States dismissed the claim of the comfort women, ruling that the determination of such an issue is a political question properly addressed to the Executive department, and thus precludes the Judiciary from taking cognizance of the case. This thesis, with the aid of jurisprudence, posits that the political question doctrine was misapplied by the courts in the comfort women case, and that the courts could have and should have properly taken cognizance of the case. The paper uses the example of South Korea in order to explain how and why, the political question was misapplied.

INTRODUCTION

"During a certain period in the not too distant past, Japan, following a mistaken national policy, advanced along the road to war, only to ensnare the Japanese people in a fateful crisis, and, through its colonial rule and aggression, caused tremendous damage and suffering to the people of many countries, particularly to those of Asian nations. In the hope that no such mistake be made in the future, I regard, in a spirit of humility, these irrefutable facts of history, and express here once again my feelings of deep remorse and state my heartfelt apology. Allow me also to express my feelings of profound mourning for all victims, both at home and abroad, of that history."

Tomiichi Murayama
President, Asia Women's Fund

World War II presented the world with atrocities that many people today still find difficult to fathom. The devastation of war was felt all over the world, and its effects on the victims can still be felt today. What is lamentable is that some victims, or some atrocities, have still gone unpunished and unheeded. While it is true that the brunt of atrocities was felt by Jews due to their mass persecution and execution, it cannot be denied that the devastating effects of the war were also felt in Asia. Perhaps one of the most striking examples of this is the mass abduction, torture, rape and sexual slavery of Asian women forced to work in "comfort stations" established by the Japanese forces in the territories occupied by Japan all over Asia.

Unbeknownst to many, the Japanese occupation did not just carry the usual casualties of war, but also brought with it a terror that was felt by the women who were forced to suffer silently. These women became known as "*comfort women*", as they were tasked to do household chores for the Japanese forces by day, and forced to have sex with the soldiers by night. The issue of the comfort women first came to light in 1991, when a Korean woman by the name of Kim Hak Sun came forth and filed a case against the Japanese Imperial Army, demanding

reparation and responsibility for the atrocities committed against all the comfort women.[1] In the Philippines, Maria Rose Henson was the first Filipina to come forward and share her experiences as a comfort woman.[2]

Part of what made the struggle so difficult for the victims is not only the shame and social stigma they would face, but also the fact that for many years, Japan had denied the existence of comfort women and the terrible acts committed against them. It was only after Kim Hak Sun, a former Korean comfort woman herself, came forward in 1991[3] that the world even came to know about the experiences of the former comfort women. Two years later, in 1993, the Japanese government, through Chief Cabinet Secretary Yohei Kono, issued a public statement expressing sorrow and remorse for the establishment of comfort stations and for the acts committed against comfort women[4] (more commonly referred to as the "Kono Statement"). While seemingly remorseful and committed to addressing the issue, the true dynamic between former comfort women and Japan has been far from smooth. All lawsuits filed by the former comfort women in the national courts of Japan praying for apologies and reparation have, to date, been dismissed.[5] Claims for reparation have been denied on the grounds of bilateral treaties and agreements entered into between Japan and the various governments. These treaties at times neither *included* nor *mentioned* comfort women. Thus, there is a struggle between true and long-deserved justice

[1] Available at http://www.awf.or.jp last accessed October 29, 2015
[2] Maria Rosa Henson, *Comfort Woman: A Filipina's Story of Prostitution and Slavery Under the Japanese Military*. (Lanham, MD : Rowman & Littlefield, 1999)
[3] Constitutional Court, 2006 Hun-Ma788, Aug 30, 2011 (23-2(A) 366, 385) (S. Kor.) Available at: http://search.ccourt.go.kr/ths/pr/eng_pr0101_E1.do?seq=1&cname=%EC%98%81%EB%AC%B8%ED%8C%90%EB%A1%80&eventNum=17450&eventNo=2006%ED%97%8C%EB%A7%88788&pubFlag=0&cId=010400. (Last accessed on December 10, 2015)
[4] Full text available at the Ministry of Foreign Affairs of Japan website: http://www.mofa.go.jp/policy/women/fund/state9308.html (last accessed on December 8, 2015)
[5] "Judicial Proceedings: Comfort Women" Available at: http://www.gwu.edu/~memory/data/judicial/comfortwomen.html. (Last accessed: February 18, 2016)

for the former comfort women, and the façade of justice entered into between the various governments.

Since the late 1990s, the surviving Filipina comfort women have been seeking assistance from the Executive in filing a case against Japan, to no avail. In a last desperate effort, the women filed a case with the Supreme Court asking that the Executive be compelled to espouse their claims against the Japanese government. Unfortunately, they were also unsuccessful in that respect. In the controversial case entitled *Vinuya vs. Romulo*[6], the Supreme Court ruled that they could not compel the Executive to espouse the claims of the women, as it was within the prerogative of the Executive alone to decide on questions relating to foreign relations. The Supreme Court based its decision on the political question doctrine, and cited the cases of *Baker v. Carr*[7] and *US v. Curtiss-Wright Export Corp*[8] to bolster the rationale behind its ruling. The Supreme Court reasoned that the separation of powers doctrine prevents an encroachment into decisions best left to the Executive, i.e. the conclusion of international treaties and the determination of their content.

The research becomes relevant because in light of the ruling of the Supreme Court of the Philippines, the author believes that there is a need to re-examine the political question doctrine and its application to human rights issues. It is important to examine what the Judiciary believes its role entails, and where it feels it should draw the line. Ironically, that line seems to be where political questions and human rights issues coincide. As the branch supposedly tasked with the

[6] G.R. No. 162230, promulgated on April 28, 2010. Available at:http://sc.judiciary.gov.ph/jurisprudence/2010/april2010/162230.htm (Last Accessed: October 29, 2015)
[7] 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Available at: https://www.law.cornell.edu/supremecourt/text/369/186 (last accessed on February 13, 2015)
[8] 299 *U.S.* 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936)

administration of justice and the protection of laws, it is difficult to comprehend why the mandate of the Judiciary could so easily be overruled by technicalities. Legally speaking, the Judiciary did have a valid reason to decline from ruling on the said issue. Ultimately however, this leads to a deadlock. So whom will the victims to turn to? The author aims to discover the possibility that perhaps, inherently, there is an incompatibility between the political question doctrine and human rights issues.

Jurisdictions

The jurisdictions to be studied are: the Philippines, South Korea (hereinafter, "Korea"), and the United States.[9]

South Korea is a jurisdiction to be studied primarily because a great number of comfort women were Korean nationals. Also, as mentioned above, the first comfort woman to come forward and file a case against Japan was from South Korea. A more important reason for examining this jurisdiction is because in August 30, 2011, the Korean Constitutional Court held that the (South) Korean Government violated the Constitution by failing to further the claims of the victims. Thus, they were ordered to take a more active role in claiming reparations[10]. This is a very important point because South Korea also adheres to the political question doctrine. However, they still ruled in favor of protecting and prosecuting the claims of their comfort women.

[9] The author will also use the "US" interchangeably with the "United States" throughout the paper

[10] Challenge Against Act of Omission Involving Article 3, Aug 30, 2011 / Case No. : 2006Hun-Ma788, KCCR : 23-2(A) KCCR 366 available at *http://english.ccourt.go.kr/cckhome/eng/decisions/majordecisions/majorDetail.do* (Last accessed: October 29, 2015)

The United States was chosen as a jurisdiction primarily because the legal system of the Philippines was patterned largely after the United States legal system, which is also the reason why we see the Supreme Court of the Philippines quoting landmark cases of the United States. The political question doctrine was also first introduced and elaborated in the case of *Baker v. Carr*,[11] written by the Supreme Court of the United States. Further, a group of comfort women also brought a case in the United States pursuant to the Alien Tort Claims Act, asking that the United States' court rule in favor of reparation. However, in the case entitled *Hwang Geum Joo v. Japan*,[12] the United States District Court also denied the petition based on the political question doctrine.

From the jurisprudence decided in the three jurisdictions, it is possible to examine the differing application of the political question doctrine. The very fact that there are different appreciations of the same doctrine point to the need to re-examine the political question doctrine and discover at what point it should, or should not be applied.

Methodology

The main sources will consist mainly of primary written sources. An extensive examination of relevant books on the topic will be used, as well as journal articles written on similar ideas. A comparison of the jurisprudential development of the political question doctrine will also be undertaken, mostly through cases decided by the Supreme Court of the Philippines, the Supreme Court of the United States, and the Constitutional Court of Korea.

[11] *Supra* note 7

[12] Hwang Geum Joo, et al v. Japan, 172 F. Supp. 2d 52 (D.D.C. 2001), *aff'd,* 332 F.3d 357 (D.C. Cir. 2003). Available at http://www.cja.org/downloads/HwangGeumJoo_v_Japan_ComfortWomen_DC_district_dismissal_1.pdf

CHAPTER 1: YESTERDAY ONCE MORE

This chapter will begin with a brief historical background on the establishment of the comfort women system by the Japanese all over Asia. This will give the reader a better understanding of the experiences of the comfort women and why there is still a need to pursue their claims and heed their call for justice despite the passing of the years. This chapter will also trace the development of the comfort women's call for justice, beginning with a glimpse at the first comfort women who had the courage to come forward and the suits that followed. Next, the chapter will look at the cases that the comfort women brought before the Japanese courts and will provide an explanation as to why they have all been unsuccessful to date. This lack of success in Japanese domestic courts is part of the main reason why many of the comfort women feel that justice has been denied to them. The chapter will also examine the case of the comfort women from an international law perspective because many of the acts committed against the comfort women arguably result in several violations against international law. In assessing the comfort women case through an international law perspective, we are able to study whether any comfort women claims brought under international law would render more fruitful results. Lastly, the chapter will end with a look at how the international community has responded to the issue of comfort women and the lack of justice connected therewith. It is important to look at the response of the international community because it will also give the reader an indication of the extent to which the international community also feels that justice has yet to be served to the comfort women.

Background of the Study

World War II and the Japanese Invasion of the Philippines

In 1941, the Japanese forces began their infiltration of the Philippines, only a few hours after their attack on Pearl Harbor. This was preceded by the withdrawal of the American forces from the Philippines, serving as an opening for the Japanese Imperial Army to advance its invasion of the Philippine islands. As a Commonwealth of the United States, as well as because of its strategic location in the Asia-Pacific region, the capture of the Philippines would serve a great many political and tactical advantages. The Japanese invasion of the Philippines did not only bring with it the withdrawal of the American forces, but also a new system of government. The Japanese claimed to be liberating the Philippines from the United States, claiming that self-governance and independence, ideas so longingly desired by the Filipino people, would be granted to them. Like most promises given to support occupation, these were not fulfilled. What appeared was a mere puppet government, with the Japanese Imperial Army ultimately governing the Philippines and its people.

The Japanese forces did not confine their invasion to the Philippines. In fact, their reach could be felt all across Southeast Asia. They also invaded parts of China, Hong Kong, Cambodia, Vietnam, Laos, and Indonesia.

Establishment of Comfort Stations

It is difficult to say with exact certainty how many women were involved in the comfort women system because relevant documents containing information on these women were either

hidden or destroyed at the end of the war.[13] In a work written by Toshiyuki Tanaka, it is estimated that one comfort woman was needed for every 40 soldiers. Statistics peg the number of Japanese soldiers sent to Southeast Asia at 3.5 million, therefore it is safe to estimate that at least 90,000 women were used for the comfort woman system.[14]

Having occupied a majority of Southeast Asia, it comes hardly as a surprise that the comfort woman system was comprised of women from the occupied territories of the Japanese forces such as Taiwan, Korea, China, Indonesia and the Philippines. It could be argued that at the time, Japanese *geishas*[15] or even Japanese prostitutes could have fulfilled the role designed for the comfort woman. However, scholars are quick to point out that Japanese prostitutes were considered to be higher in position than that of the comfort women of other nationalities.[16] Further, Japanese prostitutes served high-ranking officials, highlighting the idea that the comfort woman system was established as a means also to lower the morale of the occupied territories.

Internationally, the plight of the comfort women came to light in 1991, through the courage of a Korean woman named Kim Hak-Sun.[17] She was the first woman to publicly come forth as a comfort woman and the first to file a complaint against the Japanese Imperial Army in her own name, demanding that Japan take responsibility for the atrocities committed against her and her fellow comfort women. Soon after, the Philippines followed suit and in 1992, Maria Rosa Henson became the first Filipina woman to tell the world of her experiences as a comfort

[13] David Andrew Schmidt, *Ianfu – The Comfort Women of the Japanese Imperial Army of the Pacific War: Broken Silence* (New York : Mellen, 2000)
[14] Toshiyuki Tanaka, *Japan's Comfort Women: Sexual slavery and prostitution during World War II and the US Occupation.(*London: Routledge, 2002) 31
[15] *Id*
[16] *Id* at 32
[17] George Leon Hicks, *The Comfort Women* (St. Leonard\s, N.S.W.: Allen & Unwin, 1995) at 11.

woman. According to her narrative, Henson was fifteen when she was abducted by Japanese forces and was forced to become a sex slave for nine months.[18]

Complaints Filed Against the Japanese Government and their Response

Until the 1990s, the comfort women issue remained largely unknown due to several factors: 1) subterfuge by the Japanese government, 2) the status of women in Asian cultures and related Asian norms regarding sexual purity and defilement, and 3) lack of international pressure.[19] Due to the courage of Kim Hak Sun and the women who came forward with their stories, more and more women began seeking redress as victims of the Japanese comfort women system. In 1991, forty South Korean comfort women represented by Association of Pacific War Victims and Bereaved Families, brought suit in the Japanese domestic courts.[20] One year later, another group of South Korean comfort women filed a suit with another district court of Japan, this time asking for an apology in addition to compensation.[21] In a surprising turn of events, the district court actually ruled in favor of the women and awarded them 300,000 yen. However, upon appeal to the High Court, the decision was overruled. In 1993, the Japanese government, through Chief Cabinet Secretary Yohei Kono, issued a public statement expressing sorrow and remorse for the establishment of comfort stations and for the acts committed against comfort women[22] (more commonly referred to as the "Kono Statement").

[18] *Supra* note 2
[19] Susan Jenkins Vanderweert, "Seeking Justice for "Comfort" Women: Without an International Criminal Court, Suits Brought by World War II Sex slaves of the Japanese Army may Find Their Best Hope of Success in U.S. Federal Courts." 27 N.C.J. Int'l L. & Com. Reg. 141 2001-2002
[20] *Id* at 160
[21] *Id* at 161
[22] Full text available at the Ministry of Foreign Affairs of Japan website: http://www.mofa.go.jp/policy/women/fund/state9308.html (last accessed on December 8, 2015)

While seemingly remorseful and committed to addressing the issue, the true dynamic between former comfort women and Japan has been far from smooth. All lawsuits filed by the former comfort women in the national courts of Japan praying for apologies and reparation have, to date, been dismissed.[23] Claims for reparation have been denied on the grounds of bilateral treaties and agreements entered into between Japan and the various governments.[24] Of importance is the San Francisco Peace Treaty[25] where it was laid out that reparation would be paid to the Allied Powers and all other wartime claims would be waived. The various treaties "settled' the issue by establishing payments to the governments but not to the women themselves.

Establishment of Asia Women's Fund

After almost fifty years, and due in part to increasing pressure from the international community, the Japanese government decided to deal with the call for reparation, albeit on a non-governmental level. In 1994, Prime Minister Tomayuchi of Japan issued an apology for the war crimes committed by their country during the Second World War. He expressed his remorse for the plight of the comfort women and as a result of that statement, various political parties in Japan collaborated and launched the "*Project To Deal with Issues Occasion of on the Fiftieth Years After the War".*[26] A committee for the comfort women issue was formed in order to

[23] "Judicial Proceedings: Comfort Women" Available at: http://www.gwu.edu/~memory/data/judicial/comfortwomen.html. (Last accessed: February 18, 2016)

[24] See also: The 1965 Japan-South Korea Basic Treaty. Available at: http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/docs/19650622.T1E.html (Last accessed: February 29, 2016)

[25] Multilateral Treaty of Peace with Japan, Sept 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20136/volume-136-I-1832-English.pdf (Last accessed on March 1, 2016)

[26] Establishment of the Asian Women's Fund, available at http://www.awf.or.jp/e2/foundation.html. Last accessed March 1, 2016.

evaluate the compensation for the victims. Initially, various members of the Parliament have expressed their disagreement with the idea of compensating the victims due to the San Francisco Pact which already settled all the monetary obligations of Japan during the war, and it was deemed to have included the compensation and reparations for the comfort women.[27] But the disagreement came to a halt and a committee report was released. The Asian Women's Fund was established as a recognition of Japan's moral responsibility toward the victims. In 1995, 480 million yen was allocated by the Japanese government, collected from private donations, for the said fund. Thereafter, Chief Cabinet Secretary Kozo Igarashi announced the objectives of the Asian Peace and Friendship Foundation for Women, an organization that was formed as a beneficiary of the Asian Women's Fund. It aimed to collect donations from Japanese citizens in order to fund medical missions and services for the comfort women victims.[28] Also, one of its objectives was to put up a memorial that will be a repository of historical data in order to remind the Japanese society of lessons from the war. However, in 2007, the Fund was completely dissolved after the culmination of its projects in Indonesia.[29]

The Japanese government set up the Asia Women's Fund aimed at providing medical and welfare support for former comfort women *through private donations.* The gesture was counterproductive as some women felt they were being "paid off",[30] and the fact remained that there was no apology or acceptance of responsibility on the part of the government of Japan. Thus, it is easy to see the struggle between true and long-deserved justice for the former comfort women, and the façade of justice entered into between the various governments.

[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id*

Comfort Women vis-à-vis the International Community

Unsuccessful Attempts at Redress Under International Law

Crimes committed against the comfort women were largely unheeded because they only came to light years after being committed,[31] and when these issues finally surface, they are faced with many challenges that make it extremely difficult to find success using international law. One of the problems that face the comfort women when bringing their claims to the international arena is the fact that when the crimes of wartime slavery and rape were committed, these were not yet crimes under international law.[32] True enough, the Geneva Conventions of 1949,[33] the Declaration of the Elimination of Violence Against Women,[34] and the declaration of the U.N. ICTY[35] that rape was considered a war crime all occurred after the establishment of the comfort women system. However, a closer examination will reveal that the emergence of these documents is evidence of already existing customary international law.[36] International law jurisprudence[37] recognizes the concept that treaties and international documents are evidence of principles of customary international law. In such a case, the convention may be treated as customary international law, making it binding not only on parties to the treaty, but on the

[31] Afreen Ahmed, "The Shame of Hwang v. Japan: How the International Community has Failed Asia's Comfort Women," 14 Tex. J. Women & L. 121 2004-2005 at 127

[32] *Supra* note 17 at 228

[33] 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War. 75 UNTS 287/ 1958 ATS No 21. Available at: http://cil.nus.edu.sg/1949/1949-geneva-convention-iv-relative-to-the-protection-of-civilian-persons-in-time-of-war/ (Last accessed: February 28, 2016)

[34] Declaration on the Elimination of Violence Against Women. A/RES/48/104 Available at: http://www.refworld.org/docid/3b00f25d2c.html (Last accessed: March 1, 2016)

[35] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. U.N. SCOR, 48th sess., 3217th mtg, at 6, U.N.Doc S/RES/827 (1993)

[36] Timothy Tree. "International Law: A Solution or a Hindrance Towards Resolving The Asian Comfort Women Controversy?". 5 UCLA J. Int'l Foreign Aff. 461 2000-2001 at 490

[37] *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* 1984 ICJ REP. 392 June 27, 1986. Available at: http://www.icj-cij.org/docket/files/70/6503.pdf (Last accessed: February 28, 2016)

international community as a whole. In the case of Japan and the comfort women, it is clear that forcible rape and sexual oppression of these women constitute violations on the prohibition of slavery and forced labor. The international laws of war also prohibited rape, prostitution, abduction of minors, among others. However, Japanese officers were never indicted for violations of any customary international law that covered these acts.

Assuming that the retroactivity principle *does* apply and customary international law does not, it is further argued that Japan was a signatory to three documents which *do* cover the case of comfort women: The Hague Convention and Annexed Regulations Concerning the Laws and Customs of War on Land of 1907,[38] the 1921 International Convention for the Suppression of Traffic in Women and Children,[39] and the 1930 Convention Concerning Forced or Compulsory Labour.[40] All these conventions contain prohibitions on enslavement, taking of minors, and forced labour in all forms, all of which were blatantly present in the comfort women system. These conventions are proof that even before rape was considered a war crime, the sexual enslavement and forced prostitution of these women could have been ruled on using the abovementioned conventions that Japan was a party to before World War II. Even taking the retroactivity argument out of the picture, these conventions prove that the international courts could have easily ruled upon the guilt of Japan not only for violating customary international law, but for violating conventions that they had already been a party to. Yet again, however,

[38] The Hague Convention and Annexed Regulations Concerning the Laws and Customs of War on Land of 1907. Available at: https://www.icrc.org/ihl/INTRO/195 (Last accessed: February 27, 2016)
[39] International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921 9 L.N.T.S. 416
[40] Convention Concerning Forced or Compulsory Labour (1930). Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029 (Last accessed March 2, 2016)

former Japanese officers were not charged with violating any of the prohibitions contained in any of the conventions Japan was a signatory to.

The Tokyo War Tribunal

The International Tribunal for the Far East, also known as the Tokyo War Tribunal was established to try the high profiled Japanese war criminals. The court was composed of justices from the Philippines, Netherlands, Australia, Canada, China, France, Great Britain, India, New Zealand, Soviet Union and the United States.[41] The indictment pronounced that the accused have been involved in mass murder, ill-treatment of prisoners and civilians, forced labor, rape, torture and other forms of cruelties. [42] Out of the 80 suspects, 28 of them have been brought to trial and majority have been sentenced to death and life imprisonment.[43] In relation to the discourse of the comfort women issue, the crime of rape has been brought to the attention of the courts, but the crime committed against the comfort women is not only limited to rape. To label it as rape is an oversimplification of the crime committed and the Tribunal has failed to recognize such systematic and large scale form of sexual abuse. The pronounced judgments have cast these war crimes only in general terms by confining it to the nomenclature of crimes against peace.

Response of the International Community

In 1992, the Korean Council for the Women Drafted for Military Sexual Slavery submitted a petition to the United Nations Human Rights Commission seeking assistance in investigating crimes committed by Japan against the Korean women. As a response, U.N. Special Rapporteur Radhika

[41]Available at http://law2.umkc.edu/faculty/projects/ftrials/tokyo/tokyolinks.html. Last accessed March 20, 2016.
[42] *Id.*
[43] *Id.*

Coomaraswamy visited Korea and Japan and wrote a report about the comfort women situation. In her report, she concludes that the comfort women system was clearly a case of sexual slavery *prohibited under international law*, however also noting that Japan did not consider such as within the coverage of the Slavery Convention of 1926.[44]In 1998, Gay J. McDougall, the Special Rapporteur for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities also presented a report which included an appendix with an analysis of the liability of the Japanese government for the establishment of comfort women stations[45]. He states in his report:

> The "comfort stations" that were maintained by the Japanese military during the Second World War…and the "rape camps" that have been well documented in the former Yugoslavia..are particularly egregorious examples of sexual slavery. Characterizing such acts as international crimes of slavery, crimes against humanity, genocide, grave breaches of the Geneva Conventions, war crimes or torture is also essential. These crimes have particular legal consequences as *jus cogens* crimes that are prohibited at all times and in all situations.[46]

Unfortunately, despite the clear and unequivocal language of the report that the acts committed against the comfort women violate *jus cogens* norms under international law, such has seemingly fallen on deaf ears.

In 1998, the Women's International War Crimes Tribunal was convened. It was a tribunal organized by Asian women and human rights organizations and non-governmental organizations.[47] Its goal was simple – to adjudicate on the sexual violence committed against the victims and to bring those

[44] Radhika Coomaraswamy, *Report on the Mission to the Democratic People's republic of Korea, the Republic of Korea and Japan on the issue of Military Sexual Slavery in Wartime; Report of the Special Rapporteur,* U.N. ESCOR Hum. Rts. Comm., 52d. Sess., Prov. Agenda Item 9(a) U.N. Doc. E/CN.4?1996/53/Add.1 (1996)

[45] *An Analysis Of The Legal Liability Of The Government Of Japan For "Comfort Women Stations" Established During The Second World War* (Appendix); REPORT ON CONTEMPORARY FORMS OF SLAVERY: SYSTEMATIC RAPE, SEXUAL SLAVERY AND SLAVERY-LIKE PRACTICES DURING ARMED CONFLICT, Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights (Fiftieth Session) E/CN.4/Sub.2/1998/13 (June 22, 1998).

[46] Id at para 8.

[47] Chinkin, *Women's International Tribunal on Japanese Sexual Slavery*, 95 AM. J. INT'L. L. 335 (2001)

responsible to justice. Despite the conclusion of the tribunal finding the former Emperor Hirohito and the State of Japan guilty of crimes against humanity, the judgment remained without binding force.

Throughout the years, several governments have taken steps in addressing the violations committed against comfort women. For example, in 2007, US Representative Michael Honda of California introduced House Resolution 121 which called for Japanese action in light of the struggle for closure by former comfort women.[48] In December of the same year, the European Parliament drafted a resolution entitled, "Justice for Comfort Women"[49] which demanded not only an acknowledgment of responsibility but also the proper education of the past. Canada and the Netherlands likewise followed suit in drafting municipal resolutions against Japan.

[48] H.R. Res. 121, 110th Cong. (2007)

[49] European Parliament, Human rights: Chad, Women's Rights in Saudi Arabia, Japan's Wartime Sex Slaves, Dec. 17, 2007, http:// www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IMRESS&reference=20071210BRI14639&secondRef=ITEM-008-EN, last accessed March 28, 2015

CHAPTER 2: THE TIMES THEY ARE A-CHANGIN'

"Courts ought not to enter this political thicket."
Justice Felix Frankfurter, Colegrove v. Green[50]

This chapter will tackle the political question doctrine – its scope, application, and historical development in the United States, the Philippines, and South Korea. It will also look at how the doctrine has been applied throughout the jurisprudential history of the United States and the Philippines. It will focus on four cases from each jurisdiction: *Davis v. Bandemer, Vieth v. Jubelirer, Goldwater v. Carter* and *Japan Whaling Association v. American Cetacean Society* for the United States, and *Tanada v. Cuenco, Francisco v. House of Representatives, Marcos v. Manglapus,* and *Bayan v. Zamora* for the Philippines. The chapter will focus on four cases each from the two jurisdictions because they are illustrative of the difficulty of applying the political question doctrine in a strict, rigid manner. These cases will show how the different courts have applied the doctrine inconsistently with regard to similar subject matters, resulting in a lack of clear standards connected with the application of the doctrine. An examination of the equivalent of the political question doctrine as applied in Korea will also be done. However, it will not proceed in a parallel examination of jurisprudence and rather provide a historical analysis of the application of this doctrine.

Next, this chapter will also examine how the different national governments have dealt with the case of the comfort women when brought to the domestic courts. More specifically, the reasoning used by the domestic courts in resolving the comfort women case brought before them

[50] 328 U.S. 549 (1946) Available at: https://supreme.justia.com/cases/federal/us/328/549/case.html (Last accessed on February 9, 2016)

will be scrutinized. The use and application of the political question doctrine (by the United States and the Philippines' courts) will be examined vis-à-vis the ruling of the Constitutional Court of South Korea.

The Political Question Doctrine

The political question doctrine finds support in the concept of separation of powers. The doctrine exists in order to ensure that the Judiciary does not unnecessarily hamper or impede the powers which rightfully belong to the Executive. When an issue is present that requires the expertise of any of the other two branches of government, the Judiciary must exercise self-restraint and decline to rule on such an issue. The doctrine was first discussed by the United States Supreme Court in the landmark case of *Marbury v. Madison.*[51] The case arose when outgoing President John Adams, before exiting his office, appointed William Marbury as Justice of the Peace. The appointments were approved by the Secretary of State however the commission of Marbury was not delivered before Thomas Jefferson assumed the Presidency. As a result, Marbury was unable to assume his position. Marbury petitioned to the Supreme Court requesting that the Secretary of State be compelled to deliver his commission via a writ of mandamus. This case is of importance because it distinguishes between the two-pronged role of an Executive official: his ministerial role and his discretionary role. Matters concerning his ministerial duties, such as delivering commissions, are properly within the jurisdiction of the courts and are thus subject to judicial review. However, when it comes to matters which involve

[51] 5 U.S. (1 Cranch) 137 Available at: https://supreme.justia.com/cases/federal/us/5/137/case.html (Last accessed on January 8, 2016)

the use of discretionary powers, the Supreme Court of the United States held: "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court." Thus began the working definition of what later became the political question doctrine.

A more formal understanding of the political question doctrine is anchored on the landmark case of *Baker v. Carr*.[52] In this case, a resident of Tennessee, Baker, filed a case against the then Secretary of State of Tennessee, Joe Carr, for failure to redraw the legislative districts since 1901. Federal legislation required that districts be redrawn every ten years in order to determine seats in the general assembly. Baker alleged that the current distribution of seats did not reflect the growth in population, resulting in a violation of the Tennessee Constitution and ultimately, his right to have his vote equally represented under the Equal Protection Clause of the Fourteenth Amendment. The respondent, Joe Carr, moved to dismiss on the ground that the question of redrawing legislative districts was a political question.

The decision in the case was very important because it overturned a previous ruling applying the political question doctrine in reapportionment[53] and reformulated the instances when court intervention was allowable in what were previously understood as purely political affairs.[54]In

[52] *Supra* note 7
[53] *Id*
[54] *Id*

reaching its conclusion, the Supreme Court listed six factors to be considered in the determination of the presence of a political question:[55]

1. Is there a textually demonstrable constitutional commitment of the issue to a coordinate political department (i.e. foreign affairs or executive war powers)?
2. Is there a lack of judicially discoverable and manageable standards for resolving the issue?
3. The impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion.
4. The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government.
5. Is there an unusual need for unquestioning adherence to a political decision already made?
6. Would attempting to resolve the matter create the possibility of embarrassment from multifarious pronouncements by various departments on one question?

Applying these factors to the case, the Supreme Court ultimately held that the issue of redistricting was not a political question.

US Jurisprudential Developments

The first two cases focus on the United States' Supreme Court application of the political doctrine in cases concerning gerrymandering. The case of *Davis v. Bandemer*[56] involved a 1981 apportionment plane for the state of Indiana. The Democrats alleged that the new apportionment plan providing for equal senate and house membership diluted their votes by gerrymandering district lines. Apart from the issue of the application of the Equal Protection Clause, an issue that had to be addressed was also whether gerrymandering was cognizable by the courts or blocked

[55] *Supra* note 7 at 217
[56] 478 U.S. 109 (1986) Available at: https://supreme.justia.com/cases/federal/us/478/109/ (Last accessed on February 14, 2016)

by the political question doctrine. The Supreme Court of the United States held that the issue was not barred by the political question doctrine, as it did not involve matters which were within the powers of another branch of government to decide. The Supreme Court also held that the lack of a specific method such as "one person one vote"[57] does not mean that there is no judicially discernible and manageable standard by which gerrymandering cases can be decided. As we can see from the ruling, the Supreme Court harks back to the standards laid down in *Baker* to decide whether cases are justiciable or not.

Twenty years later, in 2004, the Supreme Court was faced with another gerrymandering case where they would rule in a rather different way than in the *Davis* case. In the case of *Vieth v. Jubelirer.*[58] the congressional districts in Pennsylvania had to be redrawn in order to accommodate the consensus passed in the year 2000 which gave Pennsylvania an additional two seats in Congress. The petitioners in this case were Democrats who alleged that the redistricting was an unconstitutional gerrymandering on the part of the Republican Party which diluted their vote in violation of the Equal Protection Clause, similar to the allegations of the Democrats in the *Davis* case. As with the previous case on gerrymandering, the United States Supreme Court again had to solve the question of whether the issue was barred by the political question doctrine. In a 5-4 opinion, the Supreme Court held that questions on political gerrymandering were *not* cognizable by the courts for being political in nature. The plurality opinion of the Supreme Court held that the issue was barred by the political question doctrine for "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking

[57] *See* Reynolds v. Sims, 377 U.S. 533 (1964)
[58] 541 U.S. 267; 124 S.Ct. 1769; 158 L.Ed.2d 546. Available at: https://www.law.cornell.edu/supct/html/02-1580.ZS.html (Last accessed: February 15, 2016)

them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided."[59]

The next set of cases will discuss the application of the political question doctrine to foreign relations. The case of *Goldwater v. Carter*[60] arose when then President Jimmy Carter nullified the Sino-American Mutual Defense Treaty with Taiwan (then the Republic of China). Senator Goldwater alleged that the act of President Carter of unilaterally nullifying the treaty was void as this required Senate approval, and thus the President had acted outside his jurisdiction. The Supreme Court had to decide whether the act of the President in nullifying the treaty was a political question which would preclude judicial review. The case was dismissed on the ground of non-justiciability. The Supreme Court held that issue on the propriety of the unilateral nullification of the treaty was a political question that should not be encroached upon by the courts. The Supreme Court reasoned that complications and nuances on the sharing of power between Congress and the President are political questions that cannot, and should not be answered by the courts but should be left to the political process. In this case, the issue of whether the President needs Senate approval with regard to foreign affairs and all questions relating to the resolution of such issue was held to be outside the scope of the courts.

The case of *Japan Whaling Association v. American Cetacean Society*[61] involved several international conventions that the United States had signed regulating whaling. Pursuant to the convention entered into by the United States, Congress thereafter enacted laws regulating

[59] *Id*
[60] 444 US 996 (1979) Available at: https://supreme.justia.com/cases/federal/us/444/996/case.html (Last accessed: January 28, 2016)
[61] 487 U.S. 221 (1986) Available at: https://supreme.justia.com/cases/federal/us/478/221/case.html (Last accessed on February 14, 2016)

potentially harmful fishing activities conducted by foreign nationals within its jurisdiction. Subsequently, an agreement was entered into between Japan and the United States whereby Japan was allowed to conduct commercial whaling in the United States despite the fact that a moratorium on commercial whaling had been internationally recognized and declared. Several groups filed a petition with the courts asking that the Secretary be compelled to certify to the President that indeed Japan had exceeded the quota for sperm whale fishing and was thus in violation of international conventions protecting whaling practices. The Supreme Court ruled contrary to the *Goldwater* case by ruling that interpreting and construing international treaties are not barred by the political question doctrine. Despite touching on foreign affairs, the Supreme Court reasoned that "the Judiciary's constitutional responsibility to interpret statutes cannot be shirked simply because a decision may have significant political overtones."[62]

Philippines' Jurisprudential Developments

The case of *Tanada v. Cuenco*[63] is one of the landmark cases on the application of the political question doctrine in the Philippines, because it gave the Supreme Court of the Philippines the opportunity to come up with a definition of the doctrine which would later serve as the working definition of the political question doctrine in Philippine jurisprudence. This case arose after the 1955 national elections, where the petitioner Tanada was the only senator elected from the opposition. Another petitioner, Macapagal, was a senatorial candidate who lost and who was contesting his loss to the Senate Electoral Tribunal. The Constitution of the Philippines provides that the Senate Electoral Tribunal should be composed of nine members, three of which

[62] *Id*

[63] 103 Phil 1051, 1068 (1957), Available at: http://www.lawphil.net/judjuris/juri1957/feb1957/gr_l-10520_1957.html (Last accessed on: February 18, 2016)

are to be appointed from the majority party and another three from the minority party[64]. In this case however, there was only one member from the minority party, the two other seats supposedly from the minority party were also filled by members from the majority party. The petitioners challenged the composition of the Senate Electoral Tribunal because its membership did not correspond to the constitutional requirements. The respondents moved to dismiss the petition on the ground that the issue was a political question, thus outside the jurisdiction of the courts.

Beginning first with a discussion on the history of the political question doctrine, the Supreme Court explained that political questions involved "questions which, under the Constitution, are to be decided by the people in their sovereign capacity; or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government. It is concerned with issues dependent upon the wisdom, not legality, of a particular measure."[65] While the issue involved the decisions of Senate, the Supreme Court held that at issue was not an official act of Senate, but rather whether the appointment of members to the Senate Electoral Tribunal was valid. Such question of validity was held to be a judicial question properly cognizable by the Judiciary. The Supreme Court held that since the rules on appointment to the Senate Electoral Tribunal are regulated by the Constitution, an issue arising therefrom was properly within the jurisdiction of the courts.

[64] The 1987 Constitution of the Republic of the Philippines ,Art VI
[65] 103 Phil 1051, 1068 (1957)

The case of *Francisco v. House of Representatives*[66] adjusted the definition and understanding of the political question doctrine as laid out in *Tanada.* The case of *Francisco* involved two impeachment proceedings being filed in the span of one year, against the then Supreme Court Chief Justice Hilario Davide. At issue in this case was not only the procedural question of whether or not the initiation of two impeachment proceedings within one year of each other was constitutionally permissible, but also whether the resolution of this procedural issue was barred under the political question doctrine. In deciding that the case was not barred by the political question doctrine, the Supreme Court made a distinction between political questions and *truly* political questions. The Supreme Court said:

> Truly political questions are thus beyond judicial review, the reason for respect of the doctrine of separation of powers to be maintained. On the other hand, by virtue of Section 1, Article VIII of the Constitution, courts can review questions which are not truly political in nature.
>
> […]In our jurisdiction, the determination of a truly political question from a non-justiciable political question lies in the answer to the question of *whether there are constitutionally imposed limits on powers or functions conferred upon political bodies*. If there are, then our courts are duty-bound to examine whether the branch or instrumentality of the government properly acted within such limits. This Court shall thus now apply this standard to the present controversy.[67] (*Emphasis supplied)*

Applying the standard to the case at issue, the Supreme Court held that it was bound to examine the constitutionality of the impeachment proceedings as no other agency had the power or the competency to do so. The *Francisco* case illustrates the difference between what the courts should consider political questions and *truly* political questions, while also emphasizing which aspect of the *Tanada* definition should be focused on when deciding *truly* political questions.

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66 G.R. No. 160261 November 10, 2003. Available at: **http://www.lawphil.net/judjuris/juri2003/nov2003/gr_160261_2003.html** (Last accessed February 18, 2016)

67 *Id*

The case of *Marcos v. Manglapus*[68] was a highly controversial case because it involved the right of the former dictator Ferdinand Marcos, to return to the Philippines. After being exiled to Hawaii for several years, the Marcos family sought to return to the Philippines, which request was denied by the then President Corazon Aquino. Before the Motion for Reconsideration was decided upon, Ferdinand Marcos passed away. The Marcos family then brought the case asking that the court issue a mandamus compelling the Executive Secretary to issue travel documents to allow the family to bring the remains of Ferdinand Marcos back to the Philippines. Then President Corazon Aquino refused to allow the Marcos' to return on the ground of national security concerns, as the state and its people at the time were still healing from the results of martial law. The Supreme Court had to decide whether the discretion exercised by the President in refusing the Marcos' return was reviewable by the court or was protected by the political question doctrine. The Supreme Court decided that the decision of the President was reviewable by the courts:

> The present Constitution limits resort to the political question doctrine and broadens the scope of judicial inquiry into areas which the Court, under previous constitutions, would have normally left to the political departments to decide. But nonetheless there remain issues beyond the Court's jurisdiction the determination of which is exclusively for the President, for Congress or for the people themselves through a plebiscite or referendum. We cannot, for example, question the President's recognition of a foreign government, no matter how premature or improvident such action may appear. We cannot set aside a presidential pardon though it may appear to us that the beneficiary is totally undeserving of the grant. Nor can we amend the Constitution under the guise of resolving a dispute brought before us because the power is reserved to the people.[69]

[68] G.R. No. 88211, October 27, 1989. Available at: http://www.lawphil.net/judjuris/juri1989/oct1989/gr_88211_1989.html (Last accessed on February 13, 2016)
[69] *Id*

The Supreme Court in the *Marcos* case thus held that three issues were barred for by the political question doctrine: 1) recognition of a foreign government, 2) pardoning power by the President, and 3) constitutional amendment.

The case of *Bayan v. Executive Secretary*[70] is an interesting example of flip-flopping application of the political question doctrine, despite being decided after the *Vinuya* case because it involves an examination into the validity of the Visiting Forces Agreement between the United States and the Philippines. The Visiting Forces Agreement is basically an offshoot of the Mutual Defense Treaty entered into between the Philippines and the United States in 1951, which ensured that the parties would respond to any attack on the territory of the other party and was aimed at strengthening the military ties between the two states. The Visiting Forces Agreement allows the United States to send military and civilian forces to the Philippines and grants such forces certain tax exemptions, as well as reserving the jurisdiction to try criminal offences committed in the Philippines with the United States. The petitioners were citizens and taxpayers alleging that the Visiting Forces Agreement constitutes an abdication of the sovereignty of the Philippines and violates the Equal Protection Clause of the Philippines Constitution. Without going into the merits of the case, one of the primary issues was that the President of the Philippines exceeded his discretion when he ratified the Visiting Forces Agreement. The Supreme Court here applied the political question doctrine, reasoning that questions arising from the field of foreign relations such as the Visiting Forces Agreement are properly left to the discretion and wisdom of the Executive. Thus we see a concrete application of the political question doctrine in the field of foreign affairs and foreign relations. Moreover, despite the

[70] G.R. No. 138570. October 10, 2000. Available at: http://sc.judiciary.gov.ph/jurisprudence/2000/oct2000/138570.htm (Last accessed on February 18, 2016)

pronouncement in *Marcos* of the three issues that were barred by the political question doctrine, the Supreme Court paid no heed to them and seemingly "added" another area to the *Marcos* pronouncement.

The Korean Experience – The Executive Prerogative Action Doctrine

The Constitution of the Republic of Korea contains a provision granting powers of judicial review to the Constitutional Court in the following circumstances:

1. The constitutionality of a law upon request of courts;
2. Impeachment of certain listed officials;
3. Dissolution of a political party;
4. Competence disputes between State agencies, between State agencies and local governments, and between local governments; and
5. Constitutional complaints prescribed by Act.[71]

An interesting aspect of the Korean Constitution is the dual review system, which grants all courts in Korea the power to review the constitutionality of actions of co-equal branches of government.[72]

The discourse on the political question doctrine is gaining relevance in the academic community in South Korea. Although it may not be accurate to say that there is an exact counterpart of the doctrine, it can be manifested by the well-known legal principle and government mechanism called the Executive Action Privilege.[73] This pertains to the non-interference by the courts on matters related to the competence of the executive branch. It is an exercise of self-restraint by the judiciary on issues that are within the jurisdiction of the latter.

[71] South Korean Constitution, Article 107, section 2
[72] Kim, Myeong-Sik, "An End to the Political Question Doctrine in Korea?: A Comparative Analysis" (2002). *LLM Theses and Essays.* Paper 24. Available at: http://digitalcommons.law.uga.edu/stu_llm/24
[73] *Id* at 2

For instance, in cases of pardon, the Korean President had pardoned a prisoner in 2000, and such decision was valid and binding. As a result, a case was filed before the Korean courts assailing the discretion of the President to exercise such power. The petitioner who was also a prisoner invoked the equal protection clause in order to avail of the benefits of pardon.[74] However, the Korean Constitutional Court strongly ruled that the pardon is an inherent power of the President and is not subject to review.[75] With this example, it can be deduced that the political question and the separation of powers are vibrant and dynamic.

The operability of the political question doctrine is not completely similar with the United States and the Philippines. In the United States, there has been no codification of the legal concept as it was only pronounced in the *Marbury* and *Baker*. These two decisions have blurred the concept rather than reinforce it with clarity, resulting in a lack of a hard-and-fast rule application of the concept. In the same manner, the Philippines had not developed its own set of guidelines in the doctrine of political questions. It mainly relied on the doctrines set forth by the *Baker* decision.

In Korea, the concept of political question does not find the same application. As a rule, the Korean courts must review all the decisions and acts of public officials from the different branches of the government. More importantly, the courts have an overarching role when the cases involve violations of basic rights. The Korean Constitution provides for a mechanism called the Constitutional Complaint Adjudication System which ensures the litigation of violation of basic rights. Thus, the Korean Constitutional Court cannot abdicate its power on the

[74] *Id* at 47 citing Seoul Administrative Court Decision No. 99 Gu 24405 (Feb 2. 2000)
[75] *Id*

ground of political doctrine.[76] Although the Korean Constitutional court is vested with the power to voluntarily determine whether a certain matter is well within the competence of another branch, it can still refuse to do so if there are compelling interests of the state.[77] In fact, whenever the constitutional court shall decide against a petition by reason of the political question doctrine, it must provide with logical and reasonable justifications. In effect, the rights of the people are held paramount. The Korean courts have also acknowledged that the executive action privilege shall be amenable to judicial review.[78] It may not be conclusive that this privilege has been repealed, but this goes to show that the judiciary is the last bastion of human rights protection.

With regard to the comfort women, Korea has rightfully espoused the claims of the Korean victims because the judiciary and state has placed such a high premium on the protection of human rights. In effect, legal technicalities nor governmental policies cannot impede nor relegate the state's policy of basic rights protection.

Comfort Women vis-à-vis the National Government

United States

The case of *Hwang Geum Joo v. Japan*[79] was an attempt by former comfort women to seek redress in the United States courts. Dissatisfied with the response of either their national government or the Japanese government, a group of fifteen women from Southeast Asia, including Korean and Filipino ones, decided to bring their claim to the courts of the United States. As with the petitions lodged with the various other national governments, the petitioners

[76] *Id*. citing Un Yong Kim, The Principles of Judicial Review, 484-419. (1998).
[77] *Id* at 55
[78] *Id* at 59
[79] *Supra* note 12

came before the United States District Court of Columbia demanding that Japan be held liable for the abduction, torture and rape of former comfort women. In their motion to dismiss, one of the arguments of Japan for the dismissal of the case was on the ground of the political question doctrine. Japan claimed that the issue regarding the claim of reparation by the petitioners was a non-justiciable political question. In this case, the District Court of Columbia upheld the claims of the Japanese government. Citing *Marbury v. Madison*[80], *Baker v. Carr*[81] and several other jurisprudential developments on the political question doctrine, the District Court held that, "prudential concerns together with the court's lack of judicial expertise strongly militate in favor of dismissal."[82] In this way, the United States' District Court ruled that the reparations for victims of war crimes committed by Japan is exclusively controlled and decided upon by the Executive, and declined to resolve the case. Thus, the petitioners' final attempt at justice on an international scale was rejected.

Philippines

The case of *Vinuya v. Romulo*[83] decided by the Supreme Court of the Philippines, was initiated by members of "*MALAYA LOLAS*[84]*"* (hereinafter "petitioners" or "victims") an organization founded to provide aid to former comfort women under the Japanese invasion. The victims asked the Supreme Court to issue a preliminary mandatory injunction[85] against several

[80] Supra note 50
[81] *Supra* note 7
[82] *Supra* note 12 at 217
[83]*Supra* note 6
[84] In Filipino, this is translated to mean, "Free Grandmothers".
[85] Rule 58, Section 1 of the Revised Rules of Court of the Philippines provides: ***Sec. 1.Preliminary injunction defined; classes****. – A preliminary injunction is an order granted at any stage of an action or proceeding prior to the judgment or final order, requiring a party or a court , agency or a person to refrain from a particular act or acts. It*

government offices, namely the Executive Secretary, the Department of Justice, the Secretary of the Department of Foreign Affairs and the Office of the Solicitor General (hereinafter, "Respondents"). The victims claimed that their requests for assistance in filing claims against Japanese military officials who had established comfort stations in the Philippines during World War II remained unheeded by the Philippine government. They asked that the Philippine government join their claims for reparations against Japan, and demand that Japan issue an apology for these crimes.

On the one hand, the petitioners came to the Supreme Court alleging abuse of discretion on the part of the officials and asked that the highest court of the land issue a mandatory injunction compelling the officials to join the victims' claims before the International Court of Justice and other international tribunals on their behalf. On the other hand, the Respondents argued that the claims of the victims had been settled pursuant to the San Francisco Peace Treaty and the Reparations Agreement entered into in 1956 between the Philippines and Japan. Moreover, they claimed that the reparations of the victims had been fully satisfied through the establishment of the Asia Women's Fund.

To the surprise of many, the Supreme Court denied the request of the *MALAYA LOLAS.* The Supreme Court denied the application of the victims on two grounds: first, that the Philippines was not under any international obligation to espouse the petitioners claims, and second, that the political question doctrine precluded any interference by the Judiciary into decisions solely reserved to the Executive. In the main, the Supreme Court began its discussion

may also require the performance of a particular act or acts, in which case it shall be known as a preliminary mandatory injunction. *(emphasis supplied)*

with the landmark case of *Baker v. Carr*,[86] where the political question doctrine was concretized. The Supreme Court then went on to cite national jurisprudence[87] where the cases were similarly denied on the basis of the political question doctrine. The Supreme Court explained that the question of espousing the petitioners against Japan was a foreign policy matter, which power to decide rightly and exclusively belongs to the Executive. Since the Executive decided that espousing such claims would be detrimental to foreign relations, it is not within the power of the Judiciary to question the wisdom behind such a decision.

Following its denial on the ground of the political question doctrine, the Supreme Court then went on to say that similarly, there was no obligation under international law compelling the Philippines to espouse the petitioners' claims. The Supreme Court reasoned that there was no showing that crimes committed by the Japanese forces violated *jus cogens* norms at the time they were committed, or that the duty to prosecute international crimes has even attained the status of *jus cogens.* Thus, the Supreme Court dispensed with the case of the comfort women even though it is supposedly tasked with interpreting the law and providing justice.

Korea

Former Korean comfort women came to the Constitutional Court of South Korea (hereinafter, "Constitutional Court") alleging that the government agency in charge of supervising foreign trade and foreign policies had failed in its duty to take an active part in solving the dispute between the interpretation of an agreement[88] entered into between the

[86] *Supra* note 7
[87] *See: Tanada v Cuenco*, 103 Phil 1051, 1068 (1957)
[88] Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan, Treaty No. 172, June 22, 1965

Republic of Korea and Japan.[89] What is interesting about this case is that while the Japanese government was of the opinion that any claims of the former comfort women might have already been settled by the agreement, the Republic of Korea claimed otherwise. Thus, this case was not one of women attempting to convince their government that Japan is still liable. Rather in this case, the government actually *agreed* with the claims of the former comfort women.

The petitioners came to the Constitutional Court not to convince their government to take up their cause, but because they felt that the government agency responsible for discerning the proper interpretation of the settlement agreement was not actively exerting enough efforts to resolve the issue. The petitioners in this case used Article 10 of their Constitution, which states that, "All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals."[90] This assurance of human dignity anchors the petitioners' claims on a constitutional value binding upon all government institutions[91], thus making it clear to the Constitutional Court that they were entitled to a remedy. In ruling for the petitioners, the Constitutional Court ruled that the respondent government agency's lack of swifter action regarding interpretation of the agreement did in fact violate the petitioner's fundamental rights.

[89] Constitutional Court, 2006 Hun-Ma788, Aug 30, 2011 (23-2(A) 366, 385) (S. Kor.) Available at: http://search.ccourt.go.kr/ths/pr/eng_pr0101_E1.do?seq=1&cname=%EC%98%81%EB%AC%B8%ED%8C%90%EB%A1%80&eventNum=17450&eventNo=2006%ED%97%8C%EB%A7%88788&pubFlag=0&cId=010400. (Last accessed on December 10, 2015)

[90] Article 10, Constitution of the Republic of Korea. Available at: http://www.wipo.int/wipolex/en/details.jsp?id=7145. (Last accessed on December 11, 2015)

[91] Constitutional Court, 2006 Hun-Ma788, Aug 30, 2011 (23-2(A) 366, 385) (S. Kor.) Available at: http://search.ccourt.go.kr/ths/pr/eng_pr0101_E1.do?seq=1&cname=%EC%98%81%EB%AC%B8%ED%8C%90%EB%A1%80&eventNum=17450&eventNo=2006%ED%97%8C%EB%A7%88788&pubFlag=0&cId=010400. (Last accessed on December 10, 2015)

The Constitutional Court reasoned that due to the virtual impossibility of seeking redress at Japanese courts and by virtue of the very heinous nature of the crimes committed against former comfort women, the duty of the government agency to take action is made clearer. Thus, the Constitutional Court found that there was indeed a violation of the Constitution, and proclaimed unequivocally that Korea has a duty to ensure and guarantee the petitioners right to a claim against the Japanese government.

CHAPTER 3: THE LONG AND WINDING ROAD

"For the master's tools will never dismantle the master's house. They may allow us to temporarily beat him at his own game, but they will never enable us to bring about genuine change."
Audre Lorde

This chapter will discuss the application of the political question doctrine in human rights litigation, and will attempt to uncover whether it is possible for the doctrine to be a protector of human rights, or whether the doctrine in fact serves as a hindrance to successful human rights litigation. The chapter will begin with the Alien Tort Claims Act (hereinafter, "ATCA") as a starting point for human rights litigation in the United States, and will proceed with a brief jurisprudential history of the use (whether successful or not) of the ATCA for victims of human rights abuses. The ATCA is an important piece of legislation and is also important for this thesis because it is the statute which allowed the case of *Hwang* to even be filed in the US courts.

Next, the chapter will look at how the political question doctrine has been applied to human rights litigation filed in the United States under the ATCA, with an examination on whether the doctrine has been applied consistently, thus shedding light as to the propriety of the dismissal of the *Hwang* case.

This chapter will be limited to an examination of how the political question doctrine has been applied (or misapplied) to human rights cases brought under the ATCA because there is no such equivalent both in the Philippines and in Korea. However, the assertion of this thesis is that, at least with regard to the Philippines, if the political question doctrine had been applied with clearer standards (or not applied at all) in human rights litigation, then the outcome would have

been far different in the *Vinuya* case. As regards Korea, it is suggested that their use of different standards in applying such a doctrine serves a far better purpose than that of the other two jurisdictions. The fact that Korea does not adhere to a political question doctrine has paved the way for a more successful journey in terms of the justice that the comfort women seek.

The Alien Tort Claims Act and its Development

The ATCA[92] is a statute that allows victims of international law violations such as torture, genocide, and war crimes, among others, to seek redress with US federal courts.[93] Basically, it allows victims to bring civil claims to US courts for violations of international law, despite being committed outside the territory of the United States. This gave victims of human rights violations a renewed hope at finally attaining justice in the US courts. However, as will later be shown in this chapter, "what initially appeared to be a ground-breaking step toward creating accountability for human rights violations became less than satisfying in the subsequent ATCA litigation…..due to the Executive Branch's new utilization of the political question doctrine."[94]

In order to further understand the application of the ATCA and the use of the political question doctrine, it is necessary to look at the development of the law through its application by the courts in jurisprudence. The first important case is the case of *Filartiga v. Pena-Irala*[95] which involved the kidnapping and torture of Joelito Filartiga by Inspector Pena-Irala of the

[92] Also referred to as the Alien Tort Statute, 28 U.S.C §1350 (2006)
[93] *Id.* "The district courts shall have original jurisdiction of any civil action by an alien for a tory only, committed in violation of the law of nations or a treaty of the United States"
[94] Shelley Buchanan "Questioning the Political Question Doctrine: Inconsistent Applications in Reparations and Alien Tort Claims Act Litigation" 17 Cardozo J. Int'l & Comp. L. 345 2009 at 346
[95] Filartiga v. Pena-Irala 630 F.2d 876 (2d Cir. 1980)

Paraguayan police force. Joelito Filartiga's sister discovered that Pena-Irala was living in New York and informed the Immigration agency, who then proceeded to arrest Pena-Irala on the ground of over-staying. Pena-Irala was thereafter served with summons alleging that he had caused the untimely death of Joelito Filartiga through torture. The petitioner in this case, Joelito Filartiga's sister, anchored her claim on the ATCA, asserting that the said act granted the courts jurisdiction to hear the claim despite the act of torture being committed outside the territory of the United States. While ultimately, the court in *Filartiga* dismissed the case, the court did hold that for a claim for reparation to be successful under the ATCA, the following elements must be present:

(1) A human injustice must have been committed;
(2) it must be well-documented;
(3) the victims must be identifiable as a distinct group;
(4) the current members of the group must continue to suffer harm; and
(5) such harm must be causally connected to a past injustice.[96]

The case further tells us that "torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."[97] The case of *Filartiga* was important because it opened the gates to aliens being able to sue in US courts not only for cases of tort, but also for human rights violations committed all over the world.

[96]Shelley Buchanan "Questioning the Political Question Doctrine: Inconsistent Applications in Reparations and Alien Tort Claims Act Litigation" 17 Cardozo J. Int'l & Comp. L. 345 2009 (citing Roy L. Brooks, *The Age of Apology, in* When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice 8(Roy L. Brooks ed., 1999)
[97] *Supra* note 95 at 880

The case of *Sosa v. Alvarez-Machain*[98] decided in 2004 concerned the meaning and scope of "the law of nations." In this case, the defendant was accused of allegedly kidnapping an agent of DEA. A case was filed against him by the US, however, he was within the territory of Mexico. An extradition case was subsequently filed but it was to no avail. The United States government resorted to hiring Mexican nationals to abduct and bring him to the United States. As a result, the defendant filed a case against the government under the ATCA. The Supreme Court ruled that the ATCA was inapplicable in the case because the scope of the ATCA was only limited to crimes against the law of nations. The subject of the case filed by the defendant was arbitrary detention which, according to the interpretation of the US Supreme Court, does not fall within the category of the crimes against the law of nations.

While the case of *Sosa* seems to have limited the types of claims that may be brought under the ATCA, the case of *Alperin v. Vatican Bank*[99] decided just one year later seems to recant against such a harsh and narrow application of the ATCA. In this case, a class suit was filed against the Vatican Bank for allegedly being involved in the laundering of gold and money from the Nazi leaders in Croatia. The petitioners were victims of the Holocaust and that they are seeking for reparations against the Vatican Bank which allegedly kept the loot of the Nazi regime. The defendants raised that the issues brought up by the petitioners would be tantamount to a political question. However, the US Supreme Court ruled in the negative stating that they are not precluded from issuing a judgment because the issues brought before them were not solely confined within the realm of a specific political branch, and that the decision to take cognizance

[98] 542 U.S. 692, 732 (2004)
[99] 410 F.3d 532, 560 (9th Cir. 2005)

over ATCA litigation could be done through a contextual analysis also. In other words, claims brought under the ATCA is not subject to automatic dismissal.

A final case that illustrates the difficulty of coming up with clear standards in ATCA litigation is the case of *Kiobel v. Royal Dutch Petroleum.*[100] Here, a case was brought against Dutch, British and Nigerian oil companies for allegedly aiding and abetting crimes against humanity, torture, and several other violations of crimes against humanity. At issue in this case was whether the presumption against territoriality applies to claims brought under the ATCA, to which the Supreme Court of the United States held that claims brought under ATCA must "touch and concern the territory of the United States."[101] However, Pollock writes that the "touch and concern" standard applied by the Supreme Court in *Kiobel* is hardly binding, considering that the courts have come up with inconsistent results, and concludes that it will take time before the meaning of this requirement becomes clear.[102]

The ATCA, the Political Question Doctrine, and its Misapplication to Comfort Women

The history of the political question doctrine and its application in ATCA litigation is colorful to say the least. The ATCA was enacted in order to allow victims a means by which their claims may be addressed and even vindicated. However, the lack of a clear guidelines in the applicability of the ATCA has made it difficult for these victims, despite being equipped with the supposed grant of jurisdiction, to find justice in United States courts. This in part is due to the

[100] 133 S. Ct. 1659, 1661-62 (2013)
[101] *Id* at 1669
[102] Stewart Pollock, "A Political Embarrassment: Jurisdiction and the Alien tort Statute, Foreign Sovereign Immunities Act, and Political Question Doctrine" 51 Cal. W. L. Rev. 225 2014-2015 at 233

ease with which a claim can be dismissed under the guise of a political question. We can see that the political question doctrine has not necessarily paved the way for the success of human rights litigation.

The political question doctrine was enacted as a tool to hinder the concentration of power with a single branch of government, and to ensure the proper separation of powers. However, as its very name suggests, it is sometimes used as a tool for a more "political" agenda. Historically, claims brought under the ATCA enjoyed support from the Executive Branch as evidenced by the ruling in *Filartiga*.[103] However, resembling a type of Reagan formalism, the Bush administration drastically changed the picture of ATCA litigation.[104] Buchanan writes,

> The administration's especially vocal criticism of ATCA litigation led to a substantial backlash against adjudicating human rights claims in American courts.
>
> ……
>
> In 2003, the State Dpeartment;s then Legal Adviser William H. Taft IV even testified before the Senate stating that ATCA litigation is "inequitable, unpredictable, [and] occasionally costly to the U.S. taxpayer and damaging to foreign policy and national security goals of this country." This resistance by the [then] Executive Branch to ATCA litigation has led many courts to dismiss ATCA claims under the political question doctrine out of deference to the State Department.[105]

It should come as no surprise therefore, that the *Hwang* case, decided in 2005 under the Bush administration, was dismissed. The political question doctrine was used as a cloak to shield the political situation and agenda of the time, and since the administration was openly against ATCA litigation, the doctrine was conveniently used to conform to the political agenda of the Executive.

[103] *Supra* note 96 at 355, *see also* Kadic v. Kardzic, where the Executive gave deference to the Judiciary and proclaimed that the political question doctrine was not applicable to the case
[104] *Id* at 356
[105] *Id* at 357

The political question doctrine has been used both to the detriment and to the success of ATCA litigation. Earlier discussion have shown how the political question doctrine, because of its very nature, is volatile and can be applied according to the interpretation (and sometimes caprices) of the judges sitting in courts. This is evidenced by the lack of clear cut standards in jurisprudence to apply the doctrine.

Similarly, it has been discussed how ATCA litigation also does not enjoy a set of black-and-white guidelines within which to properly dismiss or take cognizance of a case. Oftentimes, the decision is left to the court, and oftentimes dismissal is grounded upon the political question doctrine. Through a reflection on the brief historical development of ATCA litigation, we are able to see that like the political question doctrine, the judiciary has not developed any hard-and-fast rules regarding the applicability or inapplicability of ATCA.

The political question doctrine is used in ATCA litigation to defer to the Executive, particularly as regards foreign policy considerations. However, no less than *Baker v. Carr* has proclaimed that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[106] Further, the *Alperin* case discussed above supports this stand, with the US Supreme Court even going so far as to say, "whether a court should defer to political branches is a case-by-case inquiry."[107] To allow the Judiciary to take cognizance of cases involving human rights litigation would not be a violation of the political question doctrine. The case of the comfort women should not have been dismissed on the ground of presenting a political question, and this can be explained by examining the factors laid down in

[106] *Supra* note 7
[107] *Supra* note 99 at 549

Baker as applied to the comfort women case.[108] First of all, taking cognizance of the case would not run counter to the first factor[109] laid down in *Baker* because the judgment on whether the issue belongs to another department is in part discretionary on the judiciary, and is decided on a case-by-case basis. This is supported by the very statement that a mere foreign policy issue does not automatically divest the judiciary of jurisdiction.

The second and third factors according to *Baker* would also not warrant dismissal because there are in fact standards which the court could have used in order to resolve the case. Prior to the case of *Hwang,* decades of human rights litigation alleging torture, genocide and war crimes were brought and were successful in US courts.[110] The courts could have, and should have turned to the long host of ATCA litigation cases in order to resolve the case. The third factor is and of itself inapplicable, merely because at the time, there was no policy in existence that required any sort of policy determination. The court in the case of *Hwang* reasoned that dismissal was proper because the resolution of the case required the court to move "beyond its judicial expertise."[111] However, what is truly at issue here is completely within the expertise of the judicial department – and that is whether or not these women are legally entitled to

[108] Zahchary M. Vaughan, "Reach of the Writ: Boumediene v. Bush and the Political Question Doctrine" 99 Geo. L.J. 869 2010-2011 at 894. *See also* Amy Endicott, "The Judicial Answer? Teratment of the Political Question in Alien Tort Claims" 28 Berkeley J. Int'l L. 537 2010

[109] For ease, the six factors laid down in Baker are reproduced hereunder: (1)Is there a textually demonstrable constitutional commitment of the issue to a coordinate political department (i.e. foreign affairs or executive war powers)?(2)Is there a lack of judicially discoverable and manageable standards for resolving the issue? (3)The impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion.(4)The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government.(5)Is there an unusual need for unquestioning adherence to a political decision already made? (6)Would attempting to resolve the matter create the possibility of embarrassment from multifarious pronouncements by various departments on one question?

[110] *See In re Nazi Era Cases Against German Defendants Litigation*, 198 F.R.D. 429 (D. N.J. 2000), *In re* Holocaust Victim Assets Litig., 105 F. Supp. 2d 139, Hohri v. U.S., 847 F. 2d 779 (D.D.C. 1988)

[111] *Supra* note 12 at 21

compensation due to the acts committed against them. As with any other case, the question merely becomes one of legality, and the corresponding effect of a finding of legality or illegality. It becomes at its purest form, a question of law that is completely and rightfully within the power of the judiciary.

The last three factors all concern deference of the Judiciary out of respect for the Executive, or, more simply, it represents the more "political" aspect of the political question doctrine. These factors were put in place in order to avoid embarrassment, or to ensure that the Judiciary does not use its power to undermine the Executive. As we have seen from the application of the political question doctrine in ATCA litigation, in US Jurisprudence, and even in Philippines' jurisprudence, this doctrine is sometimes as a means to avoid coming to a ruling which would go against the policies or wishes of the Executive. In the case of the comfort women, coming to a positive ruling would surely affect the relations between Japan and the US, as well as Japan and the Philippines, and that is probably the reason why the Judiciary chose to approach the issue with self-restraint. However, this self-restraint should also be exercised with caution, not every issue that involves the policies of the Executive should warrant deference, "respect due to coordinate branches of government factor only goes so far: there exists certain actions that a political branch could take that are so beyond the pale that they override the prudential concerns at the heart of the final three *Baker* factors."[112] The claim of the comfort women should have overridden these concerns both in *Hwang* and in *Vinuya.*

[112] Supra note 108 at 899 citing Nixon v. United States, 506 U.S. 224,253 (1993)

A Few Final Words (or Conclusion)

The political question doctrine was enacted in order ensure the smooth functioning of government, and to a certain extent, functions as a vanguard of democracy, drawing its relevance on the separation of powers. While it cannot be denied that the doctrine does indeed serve its purpose, it is also important to remember that it does so only when it is applied *to serve its purpose*. For example, in the case of the comfort women, the political question was applied in the United States and in the Philippines as a means to avoid litigating on the topic; it was adopted by the courts in order to protect foreign policies of the government and to maintain policies of the government, and not to protect the separation of powers as it was originally envisioned to do. Undoubtedly, the Executive of the Philippines needed to maintain good relations with Japan, having relied heavily on Japanese investments and trade. Lamentably but not surprisingly, the Supreme Court of the Philippines decided in favor of the Executive, under the guise of the political question. The same, perhaps, could be said of the United States.

The difference between the Philippines and the United States vis-à-vis Korea, is the way the political question doctrine has been applied. It has been discussed that the doctrine, or its Korean equivalent, is not held paramount over the interests of individuals and their rights. This is why the comfort women have been successful in Korea. This means that legalities cannot be used as a cloak to hide a more political agenda, which is one of the lessons that both the United States and the Philippines can learn from Korea – that legal technicalities cannot defeat the protection of individual human rights.

The Philippines has succumbed to the primacy and rigidity of laws which erodes the core of human rights protection. The failure of the Philippines to raise the claims of the Filipina comfort women may be indicative not only of the structural impediments but also of its diplomatic and political relations with Japan. On the one hand, it can be viewed that the Philippine judiciary had inhibited itself from actively seeking justice for the comfort women because doing so would create numerous political repercussions, such as the non-recognition of the agreement between the Philippines and Japan. Needless to say, the Philippines has a miniscule bargaining power over Japan, and that the claim for more reparations would be seemingly futile in reality. However, this reason should not be an excuse to disregard the rights of the Filipina comfort women. Every government is duty bound to protect its people especially in cases of human rights violations, and the silencing of the victims and the passive participation of the Philippine government should be remembered in history.

Bibliography

Ahmed, Afreen. 2005. “The Shame of Hwang v. Japan: How the International Community has Failed Asia’s Comfort Women,” *Texas Journal of Women & Law* 121-149.

Buchanan, Shelley. 2009. "Questioning the Political Question doctrine: Inconsitient Applciations in Reparations and Alien Tort Claims Litigation." *Cardozo Journal of International & Comparative Law* 345-373.

Endicott, Amy. 2010. "The Judicial Answer? Treatment of the Political Question doctrine in Alien Tort Claims." *Berkeley Journal of International Law* 537-554.

Henson, Maria Rosa. 1999. *Comfort Woman: A Filipina's Story of Prostitution and Slavery Under the Japanese Military.* Lanham, MD: Rowman & Litlefield.

Hicks, George L. 1995. *The Comfort Women.* St. Leonard’s, N.S.W.: Allen & Unwin.

Kim, Myeong-Sik, "An End to the Political Question Doctrine in Korea?: A Comparative Analysis" (2002). *LLM Theses and Essays.* Paper 24

Pollock, Stewart. 2015. "A Political Embarassment: Jurisdiction and the Alien Tort Statute, Foreign Sovereign Immunties Act, and Political Questions." *California Western Law Review* 225-262

Schmidt, David Andrew. 2000. *Ianfu - The Comfort Women of the Japanese Imperial Army of the Pacific War: Broken SIlence.* New York: Mellen.

Tanaka, Toshiyuki. 2002. *Japan's Comfort Women: Sexual slavery and prostitution during World War II and the US Occupation.* London: Routledge.

Tree, Timothy. 2001. "International Law: A Solution or a Hindrance Towards Resolving The Asian Comfort Women Controversy?". *UCLA Journal of International Foreign Affairs* 461-498.

Vanderweert, Susan J. 2002. "Seeking Justice for "Comfort" Women: Without an International Criminal Court, Suits Brought by World War II Sex slaves of the Japanese Army may Find Their Best Hope of Success in U.S. Federal Courts." *North Carolina Journal of International Law and Commerical Registration* 141-183.

Vaughan, Zachary M. 2011. "The Reach of the Writ: Boumediene v. Bush and the Political Question Doctrine." *The Georgetown law Journal* 869-900.

Cases

Alperin v.Vatican Bank. 2005. 410 F.3d 532, 560 (9th Circuit)

Baker v. Carr, 1962. 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (Supreme Court)

Bayan v. Zamora. 2000. G.R. No. 138570. (Supreme Court, October 10, 2000)

Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America). 1986. 1984 ICJ REP. 392 (International Court of Justice, June 27, 1986)

Challenge Against Act of Omission Involving Article 3, 2006Hun-Ma788, KCCR : 23-2(A) KCCR 366. 2011. (Constitutional Court, Aug 30, 2011)

Davis v. Bandemer. 1986 . 478 U.S. 109 (Supreme Court)

Filartiga v. Pena-Irala. 1980. 630 F.2d 876 (Supreme Court)

Francisco v. House of Representatives. 2003. G.R. No. 160261 (Supreme Court, November 10, 2003)

Goldwater v. Carter. 1979. 444 US 996 (Supreme Court)

Hwang Geum Joo, et al v. Japan. 2003. 172 F. Supp. 2d 52 (D.D.C. 2001), *aff'd,* 332 F.3d 357 (District Court).

In re Nazi Era Cases Against German Defendants Litigation, 198 F.R.D. 429 (D. N.J. 2000)

In re Holocaust Victim Assets Litig., 105 F. Supp. 2d 139, Hohri v. U.S., 847 F. 2d 779 (D.D.C. 1988)

Japan Whaling Association v. American Cetacean Society 487 U.S. 221 (1986)

Kiobel v. Royal Dutch Petroleum Company. 2013. 133 S. Ct. 1659, 1661-62 (Supreme Court)

Marcos v. Manglapus. 1989. G.R. No. 88211, (Supreme Court, October 27, 1989)

Reynolds v. Sims (194) 377 U.S. 533 (Supreme Court)

Sosa v. Alvarez-Machain. 2004. 542 U.S. 692, 725 (Supreme Court)

Tanada v Cuenco, 1957. 103 Phil 1051, 1068 (Supreme Court)

U.S. v. Curtiss-Wright Export Corp. 1936. 299 *U.S.* 304, 57 S. Ct. 216, 81 L. Ed. 255 (Supreme Court)

Vieth v. Jubelirer 541 U.S. 267; 124 S.Ct. 1769; 158 L.Ed.2d 546 (Supreme Court)

Vinuya v. Romulo. 2010. 162230 (Supreme Court, April 28).

Websites

Constutional Court of Korea. "Constitutional Court, 2006 Hun-Ma788, Aug 30, 2011 (23-2(A) 366, 385) (S. Kor.)" Last accessed on December 10, 2015. http://search.ccourt.go.kr/ths/pr/eng_pr0101_E1.do?seq=1&cname=%EC%98%81%EB%AC%B8%ED%8C%90%EB%A1%80&eventNum=17450&eventNo=2006%ED%97%8C%EB%A7%888788&pubFlag=0&cId=010400.

European Parliament, Human rights: Chad, Women's Rights in Saudi Arabia, Japan's Wartime Sex Slaves, Dec. 17, 2007. March 28, 2015. http:// www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IMRESS&reference=20071210BRI14639&secondRef=ITEM-008-EN

Ministry of Foreign Affairs of Japan. "Kono Statement". Accessed December 8, 2015. http://www.mofa.go.jp/policy/women/fund/state9308.html
Memory and Reconcilitation in the Asia Pacific. "Judicial Proceedings: Comfort Women" February 18, 2016 http://www.gwu.edu/~memory/data/judicial/comfortwomen.html.

"The 1965 Japan-South Korea Basic Treaty." Last accessed: February 29, 2016 http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/docs/19650622.T1E.html[1]

Multilateral Treaty of Peace with Japan, Sept 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

Asia Women's Fund. "Establishment of the Asian Women's Fund." March 1, 2016 http://www.awf.or.jp/e2/foundation.html.

Treaties and Conventions

Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan, Treaty No. 172, June 22, 1965

Convention Concerning Forced or Compulsory Labour (1930).

Declaration on the Elimination of Violence Against Women. A/RES/48/104

1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War. 75 UNTS 287/ 1958 ATS No 21.

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. U.N. SCOR, 48th sess., 3217th mtg, at 6, U.N.Doc S/RES/827 (1993)

The Hague Convention and Annexed Regulations Concerning the Laws and Customs of War on Land of 1907.[1] International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921 9 L.N.T.S. 416

Reports

Radhika Coomaraswamy, *Report on the Mission to the Democratic People's republic of Korea, the Republic of Korea and Japan on the issue of Military Sexual Slavery in Wartime; Report of the Special Rapporteur,* U.N. ESCOR Hum. Rts. Comm., 52d. Sess., Prov. Agenda Item 9(a) U.N. Doc. E/CN.4?1996/53/Add.1 (1996)

Gay J. McDougall, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *An Analysis Of The Legal Liability Of The Government Of Japan For "Comfort Women Stations" Established During The Second World War* (Appendix); REPORT ON CONTEMPORARY FORMS OF SLAVERY: SYSTEMATIC RAPE, SEXUAL SLAVERY AND SLAVERY-LIKE PRACTICES DURING ARMED CONFLICT, Commission on Human Rights (Fiftieth Session) E/CN.4/Sub.2/1998/13 (June 22, 1998).

Laws

Alien Tort Statute 28 U.S.C §1350 (2006)

The 1997 Revised Rules of Court of the Philippines

The 1988 Constiution of the Sixth Republic of South Korea, February 25, 1988