

NOTES

REPATRIATION OF KOREAN CULTURAL PROPERTY LOOTED BY JAPAN—CAN A SINCERE APOLOGY RESOLVE THE CENTURIES-OLD KOREA/JAPAN DISPUTES?

*Melissa (YoungJae) Koo**

I. INTRODUCTION

Disputes surrounding looted cultural property have frequently arisen in the last decades. The topic of whether such property should be returned has been actively discussed worldwide.¹ Although illicit removal of cultural property from Europe and its repatriation mechanisms have received extensive scholarly treatment, looted cultural property and its legal implications in Asia have not received much spotlight especially in the realm of legal studies. However, more frequently, world attention has been drawn to the treatment of cultural property in Asia.² Recent legal disputes surrounding cultural artifacts allegedly looted from Cambodia, for example, have been in the spotlight, especially through the media.³

This Note will focus on the disputes between Korea, both North and South Korea, and Japan surrounding Korean cultural property looted by Japan and will explore concrete solutions for resolving such issues through alternative dispute resolution—more specifically, an apology. It will consider two predominant exam-

* Articles Editor, *Cardozo Journal of Conflict Resolution*; B.A. 2011, University of Pennsylvania; J.D. Candidate 2015, Benjamin N. Cardozo School of Law. The author would like to thank her parents and friends for their unending love and support.

¹ See Gao Sheng, *International Protection of Cultural Property: Some Preliminary Issues and the Role of International Conventions*, 12 SINGAPORE Y.B. INT'L L. 57, 57 (2008).

² See Geoffrey R. Scott, *Spoliation, Cultural Property, and Japan*, 29 U. PA. J. INT'L L. 803, 805 (2008).

³ See Tom Mashberg & Ralph Blumenthal, *The Met Will Return a Pair of Statues to Cambodia*, N.Y. TIMES, May 3, 2013, available at <http://www.nytimes.com/2013/05/04/arts/design/the-met-to-return-statues-to-cambodia.html>; Tom Mashberg & Ralph Blumenthal, *Legal Tussle Over Statue Turns Nasty*, N.Y. TIMES, Sept. 13, 2013, available at <http://www.nytimes.com/2013/09/14/arts/design/legal-tussle-over-statue-turns-nasty.html>.

plies of cultural property looting, which occurred during Japanese invasions of Korea—first, at the end of the sixteenth century and, the second, from 1910 to 1945. Additionally, Japan has frequently been characterized as being a “significant market” for stolen cultural property.⁴ It is reported that there are at least 34,157 objects of Korean origin in Japan, according to Korea’s Cultural Properties Administration.⁵ Korean cultural properties that are currently overseas were mostly taken out of Korea by Japan during the two periods mentioned above and auctioned at Christie’s and Sotheby’s. Further, Japan is perceived to have a relatively loose export policy regarding cultural properties that are not National Treasurers, which has led to the illicit overseas transfers of many Korean cultural objects held in Japan.⁶

Section II of this Note summarizes historical backgrounds of the relationship between the two East Asian neighbors, Korea and Japan. Section III discusses what has been done to repatriate the cultural objects both in the international context as well as in the domestic context in Korea and Japan. The section also highlights problems and obstacles of the repatriation efforts. In addition, the section will lay out the available ADR options both inside and outside the two nations and problems of the conventional ADR mechanisms in resolving the current issue. Section IV provides a proposal and a guideline to resolve the disputes in possibly the most effective, however unconventional ADR method between Korea and Japan—a sincere apology from Japan to Korea.

II. HISTORICAL BACKGROUND BETWEEN KOREA AND JAPAN

A. *Migration of People and Cultural Exchange from Korea to Japan from the Fourth to Eighth Century CE*

There is anthropological and historical evidence that people and cultural objects constantly passed from Korea to Japan during

⁴ See *Global Effort Should be Mounted for Recovery*, ASAHI NEWS SERVICE, Apr. 22, 2003.

⁵ Brad Glosserman, *Japan Slams the Door on Stolen Artwork*, JAPAN TIMES ONLINE Dec. 4, 2002, available at <http://www.japantimes.co.jp/opinion/2002/12/04/opinion/japan-slams-the-door-on-stolen-artwork/#.UlpGvGS4E0M>.

⁶ See Park Younbok, Dir. Gyeongju National Museum, Republic of Korea, Cultural Property Forum: The Export Policies of China, South Korea, and Japan, Japan Society, New York (Apr. 9, 2003), available at <http://www.japansociety.org/resources/content/1/6/5/2/documents/gallery%20transcript.pdf>.

the period of 300–700 CE.⁷ During the period of the tomb culture in Japan (300 CE–600 CE), excavated entombed objects of the period include symbols of Japanese imperial authority such as, iron swords, bronze mirrors, and comma-shaped jewels, which are similar to those made in ancient Korea and in northeast Asia.⁸ In the fifth century, Korean scholars brought Confucian texts and Chinese characters to Japan which at the time had been without a writing system of its own. In the mid-sixth century, Buddhism reached Japan through Korea. With the imperial blessing, Korea became the vehicle for the transmission of Chinese civilization to Japan in 604 CE.⁹

Faced with the archaeological theories and evidence of cultural migrations from Korea to Japan, it is difficult to determine who has historical claim to whose land or cultural property in East Asia.¹⁰ Given the evidence, the two countries have differing interpretations. While the Japanese perceive it to mean that Japan conquered Korea and brought Korean slaves and artisans to Japan, Koreans believe instead that Korea conquered Japan and that the founders of the Japanese Imperial family were Korean.¹¹ This difference in perspective plays an important role in Japan's understanding during its colonization period of Korea in the early twentieth century, which will be discussed below.

B. *Japanese Invasion of Korea—Imjin War (1592–1598)*

From ancient times, Japanese arts and crafts were greatly influenced by the introduction of techniques and aesthetics from Korea. Particularly, Japan's development of its ceramics is owed to a large number of skilled Korean craftsmen and artisans who were forcibly brought into Japan when Toyotomi Hideyoshi invaded the Korean peninsula at the end of the sixteenth century.¹² Toyotomi Hideyoshi is one of, if not the most, celebrated *daimyo* or territorial lord and warrior who completed the unification of feudal Japan

⁷ Jared Diamond, *Japanese Roots*, 19 DISCOVER MAGAZINE (June 1998), available at <http://discovermagazine.com/1998/jun/%20japaneseroots1455/?searchterm=japanese%#roots>.

⁸ FREDERICA M. BUNGE, JAPAN, A COUNTRY STUDY 5–6 (4th ed. 1983).

⁹ *Id.* at 6.

¹⁰ Diamond, *supra* note 7.

¹¹ *Id.*

¹² Sachiko Tamashige, *Japanese Brothers who Championed Korean Ceramics*, THE JAPAN TIMES, AUG. 25, 2011, available at <http://www.japantimes.co.jp/culture/2011/08/25/arts/japanese-brothers-who-championed-korean-ceramics>.

in the late sixteenth century.¹³ Hideyoshi had an ambition to conquer China and planned to form an alliance with Joseon Korea's King Seonjo to request permission for his Japanese troops to pass through the Korean peninsula on their way to China.¹⁴ When Korea refused Hideyoshi's request, he commenced two invasions of Korea as the first step toward the conquest of China in 1592 and 1598.¹⁵ The invasions, also known as the Seven Year War or *Imjin War*, took place during the Joseon Dynasty in Korea.¹⁶

Although the supposed objective of Hideyoshi's invasion of Korea was to reach and conquer China, another main objective of the assault was the plunder of Korean cultural property:

The Japanese deployed six special units with orders to steal books, maps, paintings, craftsmen (especially potters) and their handicrafts, people to be enslaved, precious metals, national treasures, and domestic animals. Meeting little resistance, the Japanese ravaged the civilian population. Entire villages were swept up in the raids. Japanese merchants sold some of their loot to Portuguese merchants anchored offshore and took the rest to Japan.¹⁷

Furthermore, according to South Korean Cultural Properties Administration officials, various objects from the Goryeo Period¹⁸ were brought into Japan by those who accompanied Hideyoshi during the first invasion in 1592.¹⁹ Although Hideyoshi's expedition to Korea was initially successful, it was frustrated by the combined Ming Chinese and Joseon Korean forces.²⁰ The joint forces drove out the Japanese, but the retreating Japanese troops burned much of the capital *Hanseong*—present day Seoul—including the Gyeongbok Palace, the Changdeok Palace, and many other build-

¹³ See BUNGE, *supra* note 8, at 12–13.

¹⁴ *Id.* at 13; see also WILLIAM CARAWAY, KOREA IN THE EYE OF THE TIGER, ch. 12, <http://koreanhistoryproject.org/Ket/TOC1.htm>.

¹⁵ CARAWAY, *supra* note 14, at ch. 13.

¹⁶ The Joseon Dynasty was formed in 1392 and lasted for over 500 years until the Japanese annexation of Korea in 1910. See generally KOREAN HISTORY: DISCOVERY OF ITS CHARACTERISTICS AND DEVELOPMENT (Korean National Commission for UNESCO ed., 2004) [hereinafter Korean National Comm'n].

¹⁷ CARAWAY, *supra* note 14; Scott, *supra* note 2, at 830.

¹⁸ The Goryeo Dynasty was formed in 918 and lasted until 1392 when General Yi Seonggye assumed the throne following his coup d'état and formed the Joseon Dynasty. See Korean National Comm'n, *supra* note 16.

¹⁹ See *Stolen Art: Who is the Rightful Owner of Works Looted Centuries*, ASAHI SHIMBUN (Japan), Dec. 2, 2004.

²⁰ See BUNGE, *supra* note 8, at 13.

ings and structures that dated from the beginning of the dynasty.²¹ In addition, much cultural property was consequently lost or plundered during the period.²²

Hideyoshi's second expedition to Korea faced more prepared Korean forces and dispatched Chinese forces. This is when the Japanese troopers launched more violent aggression against Koreans and Korean cultural property. In late 1596, Japanese officers were reported to have sent pickle barrels containing 38,000 Korean ears to Kyoto to demonstrate faith in Japanese military prowess. The ears are enshrined in the *Mimizuka*, or "Mound of Ears" in Kyoto.²³ In late 1597, in retaliation for the defeat of a fellow general, General Kato burned Gyeongju, the former capital of the Silla Kingdom, destroying the Bulguksa Temple, a prominent place of Korean Buddhism.

Furthermore, it has been estimated that between fifty and sixty thousand Korean captives were taken to Japan during the invasion. The captives include artisans, skilled craftsmen, potters, and ceramicists—their removal from Korea resulted in the depletion of intangible cultural property and knowledge.²⁴

C. Unrest in East Asia during the Late Nineteenth Century

The period from the late nineteenth century preluded another Japanese invasion in Korea that significantly impacted Korean cultural property. For centuries before this period, Japan had presumed a policy of isolationism.²⁵ With the start of the Meiji Period in 1868, however, Japan aspired to be a world power and desired an equal footing with the countries of the West by assimilating western civilization.²⁶ The late nineteenth and early twentieth centuries were noted by a perception that Korea was the "uncut gem of the East", and Japan, China, and Russia competed vigorously for its economic and strategic value.²⁷ Japan sent envoys to Korea in an attempt to exert its influence over the country but was refused as the Daewongun of Korea, the father of King Gojong who served as

²¹ See CARAWAY, *supra* note 14.

²² See Scott, *supra* note 2, at 833.

²³ See CARAWAY, *supra* note 14.

²⁴ See Scott, *supra* note 2, at 835.

²⁵ See Geoffrey R. Scott, *The Cultural Property Laws of Japan: Social, Political, and Legal Influences*, 12 PAC. RIM L. & POL'Y J. 315, 319 (2003).

²⁶ *Id.* at 326.

²⁷ Scott, *supra* note 2, at 836.

regent at the time, held Westernization adopted by Japan in open contempt.²⁸ In 1876, Japan dispatched a warship and troops to a fort on Ganghwa in Korea and subsequently sent an emissary to Korea to negotiate a resolution.²⁹ Thus, the Treaty of Ganghwa between Korea and Japan was signed and granted concessions including extraterritorial rights and the opening of three ports of trade in Korea to Japan. It also highlighted Korea's freedom from political influence of Qing China.³⁰ In addition, it signified the initial opening of Korea's borders to the outside world.³¹

In 1894, the issue of Chinese claims of sovereignty over Korea precipitated conflict between China and Japan, and the Sino-Japanese War of 1894-95 ensued.³² In the Treaty of Shimonoseki of 1895, which marked Japan's clear victory, China finally recognized Korea's political independence from its influence, and Japan acquired Taiwan, the Pescadores Islands, and the Liaodong Peninsula in southern Manchuria.³³ Most importantly, through this Treaty, Japan secured its dominance over the Korean peninsula. After the victory, however, Japan's ambition to exert influence in the Korean peninsula was met with challenges, as Russia, France, and Germany intervened and forced Japan to renounce its claim to the peninsula within a few days of the signing of the Treaty.³⁴ In 1904, Japan finally decided that it would not wait any longer for the negotiations with Russia over their respective positions and rights in Manchuria and Korea and it initiated military action in the Russo-Japanese War, which resulted in Russia's defeat.³⁵

Japan's claim over Korea was recognized by the United States in July 1905 through the Taft-Katsura Agreement between William Howard Taft of the United States and Prime Minister Katsura Taro of Japan. The Agreement confirmed that the United States would not question the Japanese protectorate over Korea, and in return, Japan would not question the United State's interest and activity in the Philippines.³⁶ This Agreement was followed in 1910 by a treaty

²⁸ See ROGER TENNANT, *A HISTORY OF KOREA* 207 (1996).

²⁹ See MICHAEL J. SETH, *A CONCISE HISTORY OF KOREA FROM THE NEOLITHIC PERIOD THROUGH THE NINETEENTH CENTURY* 223 (2006); see also TENNANT, *supra* note 28, at 209.

³⁰ See TENNANT, *supra* note 28, at 209.

³¹ See YOUNG-LOB CHUNG, *KOREA UNDER SIEGE, 1876-1945: CAPITAL FORMATION AND ECONOMIC TRANSFORMATION* 42 (2005).

³² BUNGE, *supra* note 8, at 28.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 29.

³⁶ Scott, *supra* note 2, at 841-42.

of annexation that made Korea an essential part of the Japanese empire. By the outbreak of World War I in 1914, Japan was unquestionably the dominant power in East Asia.³⁷

D. *Japanese Annexation/Colonization of Korea from 1910 to 1945*

During the period of colonization, it is believed that Japan had a “free hand in virtually every aspect of Korean life, both private and public.”³⁸ This of course includes Korean cultural properties. There is substantial evidence that cultural properties of Korea were adversely affected by the presence of Japan.³⁹ One example would be a pavilion on its ground supported by four stone pillars displayed in the Kyoto National Museum. The pillars originated from the front of Korean royal tombs and symbolize the power of the Korean kings buried there.⁴⁰ Japanese government officials also often seized the opportunity to amass personal collections of cultural objects such as, thousands of pieces of celadon, works of calligraphy, books, and celadon pottery.⁴¹ For instance, in 1913 the third Governor General, Terauchi Masataka, removed 760 volumes of the Annals of the Joseon Dynasty (*Joseonwangjosillok* – The Truthful Records of the Joseon Dynasty), which chronicled the daily activity of the 472 year Dynasty, and sent them to Japan. Until all but seventy-four volumes were lost in the Great Kanto Earthquake of 1923, they were placed in the Tokyo University library. In 1932, twenty-seven volumes were sent back to Korea, and were given to the predecessor of Seoul National University. The books had been designated a Korean National Treasure in 1973 and became a UNESCO World Heritage Property in 1997.⁴² Japanese businessmen who moved to Korea also contributed to the looting of Korean cultural objects. Takenosuka Ogura, the head of the Japanese Electric Power Company in Korea in 1903, accumulated over 1,100 objects ranging from celadon vases, bronze Buddhas, and a gold crown removed from the grave of a late fifth or early

³⁷ BUNGE, *supra* note 8, at 29.

³⁸ Scott, *supra* note 2, at 844.

³⁹ *Id.* at 845.

⁴⁰ See Donald MacIntyre, *A Legacy Lost*, TIME, Jan. 28, 2002, available at <http://content.time.com/time/arts/article/0859919770400.html>.

⁴¹ *Id.*

⁴² *Looted Historical Record Returns Home to Korea at Last*, YONHAP NEWS AGENCY, June 1, 2006; Scott, *supra* note 2, at 846.

sixth century king of the Gaya Dynasty.⁴³ The collection still remains in the Tokyo National Museum.⁴⁴

During the colonization period, Japan initiated efforts to identify and document Korean cultural property.⁴⁵ Kyoichi Arimitsu, one of the few surviving participants in the early stages of the Japanese investigating Korean cultural assets, stated that the Japanese sent scholars to Korea to itemize cultural properties and helped accumulate a fifteen volume series of books.⁴⁶ A series of laws and regulations were promulgated in Korea by the Japanese government that resembled Japanese Meiji and early Taisho period laws that were directed towards preserving the cultural heritage of Japan.⁴⁷ The laws were designed to deter individual ownership of cultural objects by yielding the ownership to the government, such as all discoveries, changes, and investigations be submitted to the local police.⁴⁸ The creation of the Committee for the Investigation of Korean Antiquities launched numerous excavations of locations such as the Leland Tombs from the second century, the Goguryeo painted tombs near Pyeongyang, and remains of Baekje, Silla, and Gaya from the third century Three Kingdom Kofun period.⁴⁹

III. DISCUSSION

A. Period after Korea's Independence from Japan from 1945

After Korea's independence from Japan in August 1945, the administration of cultural property in the peninsula was divided between the North and the South. The Office of Cultural Properties (Munhwajae Gwalliguk) was established in South Korea. The Office was responsible for the task of administering Korean culture within its jurisdiction.⁵⁰ The Office was to assume the responsibil-

⁴³ Suvendrini Kakuchi, *Many Korean Works of Art Looted by Japan Still Missing*, INTER PRESS SERVICE, Dec. 28, 2005.

⁴⁴ MacIntyre, *supra* note 40.

⁴⁵ See *id.*

⁴⁶ See *id.*; see also Scott, *supra* note 2, at 847, n.149.

⁴⁷ Scott, *supra* note 2, at 847; see also Hyung Il Pai, *The Creation of National Treasures and Monuments: The 1916 Japanese Laws on the Preservations of Korean Remains and Relics and Their Colonial Legacies*, 25 KOREAN STUD. 72 (2001).

⁴⁸ See Hyung Il Pai, *Nationalism and Preserving Korea's Buried Past: The Office of Cultural Properties and Archaeological Heritage Management in South Korea*, 73 ANTIQUITY 619, 619 (1999).

⁴⁹ Scott, *supra* note 2, at 849; see generally, Pai, *supra* note 47.

⁵⁰ See Pai, *supra* note 47, at 620–21.

ity of promulgating proper laws for the protection of cultural properties, selecting and ranking national treasures and other culture objects and sites, and of overseeing the use of funds for the preservation and conservation of cultural properties.⁵¹ North Korea has also created similar organizations to protect its cultural properties.⁵² North Korea has paid particular attention to the Goguryeo Tombs, primarily preserved by the Korean Cultural Preservation Center.⁵³ Other agencies such as the National Bureau for Management of Cultural Properties and the Hamhung National Research Institute of the Democratic People's Republic of Korea were also established.⁵⁴ Before we go further into discussion, it should be noted that for convenience, generally all references to "Korea" hereinafter are to South Korea or the Republic of Korea, while North Korea or the Democratic People's Republic of Korea ("DPRK") will be specifically referred to as "North Korea."

Japan, on the other hand, passed the Domestic Law for the Protection of Cultural Properties in 1950.⁵⁵ Under this Law, the national government could select and officially designate Japan's most significant cultural treasures.⁵⁶ The process of selection, designation, and registration of cultural properties is executed by an advisory panel labeled the Council for Cultural Affairs and was carried out by the Ministry of Education, Culture, Science, and Technology ("MEXT") through the Agency for Cultural Affairs.⁵⁷

B. *Repatriation Efforts and Relationship of Post-Colonization between Korea and Japan*

Little affirmative attention was given to the repatriation of objects taken by Japan from other countries during the Allied forces' occupation of Japan pursuant to the Potsdam Convention of 1945.⁵⁸ Instead, the concern was about stabilizing the political and cultural conditions of the country itself.⁵⁹ About two decades fol-

⁵¹ *Id.* at 624–25.

⁵² Scott, *supra* note 2, at 849.

⁵³ *Id.* at 849, n.158.

⁵⁴ *Id.*

⁵⁵ *Id.* at 850.

⁵⁶ *Id.* at 852.

⁵⁷ *Id.* at 852; see Agency for Cultural Affairs, <http://www.bunka.go.jp/english/index.html> (Japan) (last visited June 1, 2014).

⁵⁸ See Scott *supra* note 2, at 853.

⁵⁹ *Id.*

lowing Korea's independence from Japan's control in 1945, there were no diplomatic relations between the two nations. The period is especially punctuated by recriminations and enmity, which still continue to this day, particularly with respect to return of cultural assets and the issue of "comfort women"⁶⁰ during the period of colonization.⁶¹ For example, during the 1950s, South Korean President Syngman Rhee even refused to seek Japan's assistance during the Korean War.⁶² President Rhee even threatened to surrender the entire country to the communists rather than enlist Japanese support in 1950.⁶³ Allegedly tired of hearing claims of injustice during colonial times, Japanese representatives including Premier Yoshida Shigeru refused to meet with Korean representatives.⁶⁴

The circumstances started changing following the 1961 military coup in South Korea led by General Park Chung-Hee. Korea began to aggressively pursue industrialization based upon the export-led model employed by Japan; General-now-turned-President Park was eager for Japan's economic assistance.⁶⁵ In addition to the urging of the United States to bridge the considerable gap of disagreement in relations between the two countries, Korea and Japan finally signed the Japan-Korea Treaty of Basic Relations in 1965.⁶⁶ Although the agreement contained no reference to an apology by Japan for claimed atrocities, it was characterized as providing assistance to South Korea, not only with economic considerations, but also with purported consideration of the issue of the status of cultural assets taken from Korea to Japan during the colonial period.⁶⁷ Notably, the Agreement on Cultural Property and Exchange, which was also referenced as the Agreement on Art Objects and Cultural Cooperation, considered the status of allegedly misappro-

⁶⁰ "Comfort Women" is the euphemism for the women and girls subjected to the system of sexual servitude for the Japanese Imperial Army Soldiers. Typically, Korean, Chinese, Filipino, and Dutch women were coerced into providing the sexual services. See James Sterngold, *Japan Admits Army Forced Women Into War Brothels*, N.Y. TIMES (Aug. 5, 1993); see also Richard John Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 TUL. J. INT'L & COMP. L. 59, 66 (2003).

⁶¹ Scott, *supra* note 2, at 854, n.177.

⁶² *Id.* at 855.

⁶³ Victor D. Cha, *Defensive Realism and Japan's Approach toward Korean Reunification*, NBR ANALYSIS, June 2003, at 26, n. 53.

⁶⁴ See VICTOR D. CHA, *Alignment Despite Antagonism: The United States-Korea-Japan Security Triangle* 11 (1999).

⁶⁵ See MARK E. MANYIN, *NORTH KOREA-JAPAN RELATIONS: THE NORMALIZATION TALKS AND THE COMPENSATION/REPARATIONS ISSUES* 5 (2001).

⁶⁶ Scott, *supra* note 2, at 856.

⁶⁷ *Id.*

priated objects by Japan during the colonization period.⁶⁸ According to the treaty, the economic assistance by Japan was to be considered in order for Korea to abandon any claims it might have for the retrieval of cultural assets as well as other activities during the colonial period.⁶⁹ Of course, this enraged many Koreans—some political parties boycotted the ratification of the activities in the National Assembly and protests erupted in Korea. As a consequence, President Park imposed martial law to quell the national unrest.⁷⁰

Reportedly, however, Japan did “return” 1321 cultural artifacts at the time the Agreement was signed, including celadon porcelain and old documents.⁷¹ On the other hand, researchers believe that numerous Korean cultural objects such as the fifteenth-century painting *Mongyudowondo* (Dream of Playing in a Peach Orchard), Buddhist statues, and other objects remain in Japan while Korea continues to seek repatriation of them.⁷² Japan, on the other hand, has taken the position that the original transfer of cultural objects to Japan was lawful, and the 1965 treaty concluded the discussions about the return of any cultural properties removed prior to and during the colonial period.⁷³

In recent years, Japan, its institutions, and its people have made good efforts to return cultural objects claimed to have been removed illicitly to Korea. Notably, the Japan-North Korea Pyongyang Declaration in 2002 between Japanese Prime Minister Koizumi Junichiro and North Korea’s Kim Jong Il explicitly discussed the issue of cultural property and made repatriation a topic of diplomatic concern.⁷⁴ In addition to the numerous occasions alluded to above, such as the return of the tomes of the Goryo Dynasty recently given to Seoul National University, a Japanese businessman gave one-half of his collection of Korean roof tiles to the Korean National Museum in Seoul in 1987.⁷⁵ Yoo Hong-joon, the head of South Korea’s Cultural Properties Administration, stated that “the return of *Bukgwandaechaeopbi* also means efforts to heal our painful injuries from the shared past of Korea and Ja-

⁶⁸ *Id.* at 856, n.185.

⁶⁹ See *id.* at 857.

⁷⁰ Scott, *supra* note 2, at 857.

⁷¹ See MacIntyre, *supra* note 40; see also Eiji Yamamori, *Smugglers Blues: Japan will Sign a Convention to Return Stolen*, ASAHI NEWS SERVICE (Japan), Nov. 22, 2002.

⁷² See Kakuchi, *supra* note 43.

⁷³ Scott, *supra* note 2, at 857.

⁷⁴ *Id.* at 886.

⁷⁵ See Kakuchi, *supra* note 43.

pan,” signifying the start of repatriation of the stolen Korean cultural property from Japan.⁷⁶

C. International Legal Obstacles to Resolving Disputes

In 1970, the General Conference of UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property. One of the features of the 1970 UNESCO convention that has been particularly baffling to potential signatories is the treatment of bona fide purchasers of looted cultural objects.⁷⁷ Article 7(b)(ii) states that a State requesting return of an illegally or illicitly misappropriated cultural property must “pay just compensation to an innocent purchaser or to a person who has valid title”⁷⁸

However, the challenges come from different national policies “founded upon cultural dispositions which relate to defining ownership and the stability of title to property for commercial purposes,” and the fact that they “lack the uniformity of perspective required to carry out this charge.”⁷⁹ Most notably, the different treatments of bona fide purchasers under private law regimes in civil law countries such as Japan and Korea and that of common law countries such as the United States provide differing perspectives.⁸⁰ For example, civil law countries more readily recognize a bona fide purchaser, meaning that possession often equals title.⁸¹ Nonetheless, on the other hand, a fundamental principle of common law generally establishes that no one can acquire good title from a thief.⁸²

Whereas the UNESCO Convention on Illicit Art and International Institute for the Unification of Private Law (“UNIDROIT”) provides a view that cultural property is part of, and attached to, a particular location or group of people, the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage by The Hague Convention as well as some of Japan’s recent enactments have a different view that culture and its proprietary

⁷⁶ Stone Monument returned to S. Korea from Japan, KYODO NEWS INTERNATIONAL, INC., Oct. 20, 2005.

⁷⁷ Scott, *supra* note 2, at 866.

⁷⁸ *Id.* at 866–67.

⁷⁹ *Id.* at 867.

⁸⁰ *Id.*

⁸¹ *Id.* at 867–68.

⁸² *Id.* at 868.

by-products are to be considered the common heritage of mankind.⁸³ Accordingly, the Protocol for the Protection of Cultural Property in the Event of Armed Conflict of the Hague Protocol indicates that a contracting party whose duty it is to prevent the export of cultural property from a territory that it occupies, "shall pay an indemnity to the holders in good faith of any cultural property which has been returned."⁸⁴

Although UNIDROIT addresses the issue of bona fide purchase of stolen cultural artifacts, and its drafters decided to condition restitution of cultural property upon payment of fair and reasonable compensation by the victim to the successive holder, and thus reflecting a cultural bias in favor of a civil law tradition, certain civil law and common law countries such as Japan and the United States have not yet become signatories.⁸⁵ Nonetheless, the National Diet⁸⁶ of Japan ratified the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property in June 2002.⁸⁷ Then UNESCO Director-General Koichiro Matsuura lauded the country for ratification and for being an ally in the struggle against illicit looting of cultural property.⁸⁸ The legislation effectuates select aspects of the Convention that constrain both the importation and exportation of cultural property but only insofar as that property has been stolen.⁸⁹ However, the law does not apply to property lost or stolen prior to promulgation of the law—claims of illegally looted cultural properties in prior decades, if not prior centuries, are not remediable through the Convention.⁹⁰

Thus, dealing with issues of Korean cultural property taken by Japan under the provisions of conflicting UNESCO Convention presents a problem. Both UNIDROIT and UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage by The Hague Convention have differing interpretations of cultural property, not to mention cultural bias and different national policies. In addition, the fact that these UNESCO provi-

⁸³ Scott *supra* note 2, at 819.

⁸⁴ *Id.* at 867, n. 223.

⁸⁵ *Id.* at 869–70.

⁸⁶ Japanese Bicameral legislature. *See* BUNGE, *supra* note 8, at 41.

⁸⁷ Scott, *supra* note 2, at 870.

⁸⁸ Press Release, U.N. Educational, Scientific and Cultural Organization, UNESCO Calls for Universal Ratification on the 1970 Convention, Following the Example Set by Key Art Market Countries, No. 2002–60 (Sept. 9, 2002).

⁸⁹ Scott, *supra* note 2, at 870.

⁹⁰ *Id.*

sions are not unanimously adopted or ratified by many countries due to their possible conflicts with the nations' existing laws demonstrates that these laws would not be the best way to resolve the issues between Korea and Japan. This Note will now turn to a possibility of conventional ADR methods practiced in both countries that could be utilized to resolve the issue at hand.

D. Treatment and Difficulties of ADR in Korea and Japan

Conflict resolution can be engendered through a variety of new governance processes, which are alternative quasi-judicial and quasi-legislative processes with varying names such as alternative dispute resolution (“ADR”), consensus-building, dialogue, and deliberative democracy.⁹¹ These processes have been utilized increasingly at all levels and sectors of governance including emerging international governance structures.⁹² These range from sovereign nations negotiating treaties that present conciliation and dispute settlement to arbitration before new international courts.⁹³ Nonetheless, the processes have not been adequately studied in any of the contexts or sectors including but not limited to countries like Korea and Japan.⁹⁴

If a culture disfavors adversarial litigation, meaning that the society is less litigious, one theory is that ADR would flourish in such a society.⁹⁵ Particularly, in East Asia it is known that countries like Korea and Japan are less litigious than other industrialized nations, and there may be a cultural explanation for this.⁹⁶ In Korea, there is generally a strong aversion to litigation.⁹⁷ An empirical study done in the mid-1990s on the perception of law in Korea indicated that Koreans had attitudes of non-litigiousness.⁹⁸ During the period of Japan’s colonization of Korea, Japan had tremendous control over Korean law to the extent that some proceed-

⁹¹ Lisa Blomgren Bingham et al., *Participatory Governance in South Korea: Legal Infrastructure, Economic Development, and Dispute Resolution*, 19 PAC. MCGEOGE GLOBAL BUS. & DEV. L.J. 375, 377 (2007).

⁹² *Id.* at 378.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Nari Lee and Marcus Norrgard, *Alternatives to Litigation in IP Disputes in Asia and in Finland*, 43 CAL. W. INT'L L.J. 109, 110 (2012).

⁹⁶ See John O. Haley, *Litigation in Japan: A New Look at Old Problems*, 10 WILLIAMETTE J. INT'L L. & DISP. RESOL. 121, 123 (2002).

⁹⁷ See Lee & Norrgard, *supra* note 95, at 111.

⁹⁸ *Id.*

ings had to be conducted in Japanese before Japanese judges—this made Koreans understandably reluctant to initiate legal suits for redressing wrongs.⁹⁹ However, the disputing patterns have changed dramatically especially during the 1990s. For example, while approximately 1.5 million cases were filed in 1991, over 4 million cases were filed in 1998.¹⁰⁰

In Korea, there is a cultural tradition of deference to authority dating from the Confucian Era, which has an impact on how the country uses dispute resolution processes.¹⁰¹ This approach could, for example, inhibit party empowerment in mediation.¹⁰² On the other hand, there are also forces that support the use of dispute resolution in Korea because the nation has a rich tradition of informal conciliation in communities that again stems from its Confucian heritage.¹⁰³ The tradition dictates that elders, superiors, and family clan members may informally intervene to effect reconciliation, believing that conflicts disrupt the harmony of the community.¹⁰⁴ Such de facto, informal mediators will dictate to both parties that the other is at fault, then chide, criticize, suggest solutions, educate, threaten, and urge reconciliation and compromise in the interest of community harmony.¹⁰⁵ In other words, Korea does not have dispute resolution in the same form of joint private ordering as the United States, other than limited use of commercial arbitration,¹⁰⁶ called the Korean Commercial Arbitration Board (“KCAB”).¹⁰⁷ While Korea does not have a tradition of independent mediation practice,¹⁰⁸ the KCAB offers mediation services as well as commercial arbitration services.¹⁰⁹ Interestingly, although Korea follows the civil law tradition, Korea’s arbitral practice is

⁹⁹ Bingham et al., *supra* note 91, at 388; see also Tom Ginsburg, *Japanese Law Symposium: Dismantling the “Developmental State”? Administrative Procedure Reform in Japan and Korea*, 49 AM. J. COMP. L. 585, 596–97 (2001).

¹⁰⁰ See Bingham et al., *supra* note 91, at 389.

¹⁰¹ See *id.* at 381.

¹⁰² *Id.*

¹⁰³ Nam Hyeon Kim et al., *Community and Industrial Mediation in South Korea*, 37 J. CONFLICT RESOL. 361 (1993); Dong-Won Sohn & James A. Wall, Jr., *Community Mediation in South Korea: A City-Village Comparison*, 37 J. CONFLICT RESOL. 536 (1993).

¹⁰⁴ Bingham, *supra* note 91, at 381.

¹⁰⁵ See *id.*; Kim et al., *supra* note 103, at 369.

¹⁰⁶ Kwang-Rok Kim, *How Do You Settle Business Disputes with Koreans?: The Advent of a New Amendment to the Korean Arbitration Act*, 15 TRANSNAT’L L. 227 (2002).

¹⁰⁷ See The Korean Commercial Arbitration Board, http://www.kcab.or.kr/jsp/kcab_eng/ (last visited Dec. 1, 2013).

¹⁰⁸ Bingham, *supra* note 91, at 383; Kwang-Taeck Woo, *A Comparison of Court-Connected Mediation in Florida and Korea*, 22 BROOK. J. INT’L L. 605, 608 (1997).

¹⁰⁹ *Id.*

strongly influenced by American arbitration practices, namely for production of documents and cross-examinations.¹¹⁰ The arbitration institution proactively seeks to keep up with international arbitration standards.¹¹¹ Nonetheless, there is no professional body of mediators in dispute resolution practice, indicating that there are limited institutions and infrastructures to support an ADR system,¹¹² other than judges who supervise mediation.¹¹³

On the other hand, Japan has only recently begun to embrace arbitration.¹¹⁴ The number of arbitrations conducted in Japan is still relatively low¹¹⁵, although this may change as evidenced from a survey conducted by the Japan Commercial Arbitration Association (“JCAA”) in 2007.¹¹⁶ According to the survey,¹¹⁷ 66% of international business agreements entered in to by Japanese corporations include arbitration clauses, 39% of which designate Japan as the seat of arbitration.¹¹⁸ Similar to Korea, one of the reasons of the low use of arbitration system in Japan could be explained by a cultural aversion to adjudicative processes, which symbolize a disruption in social harmony.¹¹⁹ To the Japanese people who have a strong preference for negotiated settlements, arbitration, like litigation in court, is not considered to be a negotiation process; rather, it is comparable to a “full-out war.”¹²⁰ Another reason could be attributed to the antiquity of Japan’s arbitration law.¹²¹ The arbitration law in Japan, which was based on an outdated German arbitration law, was over a century old and is thus unsuited for modern disputes.¹²² In 2003, however, Japan enacted

¹¹⁰ Christopher Lau & Christin Horlach, *Commentary: Arbitration in Asia? Yes—But Where?*, 23 INT’L. PRACTICUM 43 (2010).

¹¹¹ *Id.*

¹¹² Bingham, *supra* note 91, at 385–86.

¹¹³ Woo, *supra* note 108, at 605.

¹¹⁴ See David E. Wagoner, *Japan Becomes a Friendly Place for International Arbitration*, 61 DISP. RESOL. J. 52, 54 (2006).

¹¹⁵ In 2000, for example, the Japanese Commercial Arbitration Association (“JCAA”) received only nine cases, while the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange accepted 15 shipping cases. Moreover, the new Japan Intellectual Property Arbitration Center dealt with only five cases. See Luke Nottage, *Japan’s New Arbitration Law: Domestication Reinforcing Internationalization?*, INT. A.L.R. 7(2), 54, 55 (2004).

¹¹⁶ Lau & Horlach, *supra* note 110, at 43, n.13.

¹¹⁷ Chris Boehning et al., *Finding the Courts, Slowly*, <http://www.paulweiss.com/media/1517702/pw-alawmar09.pdf> (last visited June 1, 2014).

¹¹⁸ Lau & Horlach, *supra* note 110, at 43, n.13.

¹¹⁹ Wagoner, *supra* note 114, at 54; Nottage, *supra* note 115, at 54–55.

¹²⁰ Wagoner, *supra* note 114, at 54.

¹²¹ *Id.*

¹²² *Id.*

the new Arbitration Law, which adopted the provisions in the Model Law on International Commercial Arbitration developed by the United Nations Commissions on International Trade Law (UNCITRAL).¹²³ The enactment of an arbitration statute along with amendments to the JCAA rules that extensively followed the UNCITRAL Arbitration Rules reflects that Japan has “warmed up” to international arbitration.¹²⁴

However, studies on Japan’s arbitration law and practice remain limited.¹²⁵ After the new Arbitration Act in Japan came into effect on March 1, 2004, an official English translation had not been available until 2004.¹²⁶ The major reason for the dearth of information is attributed to the fact that few international disputes are arbitrated in Japan.¹²⁷ Further, very few arbitration cases involve purely domestic disputes.¹²⁸ The Japanese government’s lack of enthusiasm toward arbitration services as well as its lack of information about arbitration services, especially for the general public, could also explain this lack of use of arbitration in Japan.¹²⁹

Professor Luke Nottage points out that Japan’s new Arbitration Act will likely be much more significant in encouraging arbitration of purely domestic disputes, rather than cross-border disputes.¹³⁰ He points out that in order for Japan to succeed in broader reforms to the ADR environment, especially at the international level, the government needs to be prepared and establish a more modern and functional legislative framework to develop a variety of dispute resolution processes.¹³¹ Although that could be developed “over decades rather than years,” it could “well feed back into considerably more scope for arbitrating at least some types of international cases in Japan.”¹³²

As discussed above, both Korea and Japan are still in a relatively nascent stage in terms of use of the ADR systems. Given the two nations’ lack of established ADR systems especially in dealings with international conflicts, the conventional ADR methods would not be suitable to facilitate the peaceful return of artifacts from

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Nottage, *supra* note 115, at 54.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 55.

¹²⁹ *Id.*

¹³⁰ *Id.* at 60.

¹³¹ Nottago, *supra* note 115, at 60.

¹³² *Id.*

Japan to Korea. It is questionable how the current stage of conventional ADR environment in the two East Asian nations could effectively resolve the issue without solidified mechanisms within their own countries. Rather, other unconventional ADR mechanisms deserve more attention in peacefully resolving the issue.

IV. PROPOSAL

A. Apology as a Formal Remedy

In contrast to many national legal systems, international law recognizes apology as a formal remedy for violations of international law.¹³³ However, its formal role is downgraded or auxiliary to the role of other remedies such as restitution or the provision of monetary compensation.¹³⁴ The role of apology as a formal remedy for internationally wrongful conduct has been most recently described in the U.N. International Law Commission (“ILC”)’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, which the Commission adopted and referred to the U.N. General Assembly in 2001.¹³⁵ Article 37 requires the responsible State to give “satisfaction” including a formal apology for the injury caused by the wrongful act.¹³⁶ The Article specifically states:

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.¹³⁷

The ILC Commentary on Article 37 states that requests for, or offers of, an apology are a quite frequent feature of diplomatic prac-

¹³³ Richard B. Bildner, *The Role of Apology in International Law and Diplomacy*, 46 VA. J. INT'L L. 433, 449 (2006).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 450.

¹³⁷ DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, pt. 2, art. 37, in REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION, UN GAOR, 56th Sess., Supp. No. 10 at 43, U.N. Doc. A/56/589 (2001).

tice and a timely apology can do much to resolve a dispute.¹³⁸ In addition, Professor Dinah Shelton in a recent discussion of the ILC's Articles on reparations noted that like restitution and compensation, satisfaction focuses on the wrongful conduct of the responsible state so as to "provide for injuries that are not financially assessable, such as moral or legal injury."¹³⁹

However, the role of apology as a formal remedy in international law is limited as primarily reparational and supplementary—especially a "fallback" remedy if more conventional ways such as restitution or compensation are not available or appropriate.¹⁴⁰ Although a scholar comments that ILC's Commentary or other various reports do not indicate that the Commission seriously considered the broader possible role or relevance of apology as an instrument of dispute management, reconciliation, or restorative justice,¹⁴¹ the study of the role of apology in the international law context needs to be explored more extensively. However, the apology could work effectively as a remedial dispute resolution method in the context of relations between Korea and Japan.

B. *The Use and Significance of the Role of Apology in Korea and Japan*

Scholarly treatments of the role of the apology in dispute settlement have often revolved around the relations between the United States and Japan.¹⁴² Two scholars, Hiroshi Wagatsuma and Arthur Rosett, theorized that an apology made with sincerity and commitment is an effective form of dispute resolution across cultures.¹⁴³ Especially, East Asian countries such as Korea and Japan use apologies as a social lubricant.¹⁴⁴ Likewise, especially in the context of Japan, many scholars have argued that cultural norms explain the Japanese tendency to apologize when one's actions have resulted in the significant injury of another and the U.S. incli-

¹³⁸ Bilder, *supra* note 133, at 451–52.

¹³⁹ Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833, 844, 848–49 (2002).

¹⁴⁰ Bilder, *supra* note 133, at 453.

¹⁴¹ *Id.*

¹⁴² Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement (with Japan and the United States in Mind)*, 27 MICH. J. INT'L L. 1 (2005).

¹⁴³ See Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461, 487–88 (1986).

¹⁴⁴ Lee, *supra* note 142, at 16, n.92.

nation to refrain from apologizing or to deny responsibility.¹⁴⁵ Japanese culture indicates that the society including the bench and bar expects and demands an apology from a party causing harm or injury to another.¹⁴⁶ This is contrary to the United States where the “legal doctrine based on apology” is simply “underdeveloped.”¹⁴⁷ Japanese legal institutions have deepened the societal use of the apology¹⁴⁸ and integrated it into their justice system.¹⁴⁹ Scholars V. Lee Hamilton and Joseph Sanders argue that Japanese society typically mirrors a social network emphasizing hierarchy and solidarity with individuals existing “in a network of interlocked others.”¹⁵⁰ Because of this social context in Japan, when disputes arise, an apology is essential to “reinforce social harmony and others in groups.”¹⁵¹

The apology is not foreign in Korean society.¹⁵² With the emphasis on group harmony and hierarchy much alike Japan’s and still persevering effects of Confucianism on all aspects of Korean society,¹⁵³ litigation was to be avoided when a dispute arose; instead, the resolution came through conciliation.¹⁵⁴ Professor Pyong-Choon Hahm commented that a litigious man is a “warlike man to the Koreans. He threatens harmony and peace. He is a man to be detested. If a man cannot achieve reconciliation through mediation and compromise, he cannot be considered an acceptable member of the collectivity.”¹⁵⁵ According to Hofstede’s study, Korea, even more than Japan, is a society where harmony and consensus are ultimate goals.¹⁵⁶ In addition, along with this Confucian mindset, the emphasis on hierachal relations within Ko-

¹⁴⁵ See Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1012–13 (1999); Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 850 (2002).

¹⁴⁶ Lee, *supra* note 142, at 2.

¹⁴⁷ Wagatsuma & Rosett, *supra* note 143, at 494.

¹⁴⁸ John O. Haley, *Comment: The Implications of Apology*, 20 LAW & SOC’Y REV. 499, 506 (1986).

¹⁴⁹ Lee, *supra* note 142, at 1.

¹⁵⁰ *Id.* at 14.

¹⁵¹ *Id.*

¹⁵² *Id.* at 3.

¹⁵³ See Kyu Ho Youm, *Libel Law and the Press: U.S. and South Korea Compared*, 13 UCLA PAC. BASIN L.J. 231, 260 (1995); see also Chaihark Hahm, *Law, Culture, and the Politics of Confucianism*, 16 COLUM. J. ASIAN L. 253, 257 (2003).

¹⁵⁴ Wang Wenying, *The Role of Conciliation in Resolving Disputes: A P.R.C. Perspective*, 20 OHIO ST. J. DISP. RESOL. 421, 421 n.3 (2005).

¹⁵⁵ See Lee, *supra* note 142, at 22.

¹⁵⁶ GEERT HOFSTEDE, CULTURES AND ORGANIZATIONS, SOFTWARE OF THE MIND: INTERCULTURAL COOPERATION AND ITS IMPORTANCE FOR SURVIVAL 73, tbl. 3.4 (1997).

rea could explain the importance and frequency of the apology in the nation relative to other societies.¹⁵⁷ Although Korea constitutionally abolished the class system by the late nineteenth century,¹⁵⁸ the residue of Confucian hierarchy very much persists in modern Korean society.¹⁵⁹ In interpersonal relations within the family, in school, in the workplace and in virtually any setting that involves interaction with others, Koreans have a “keen awareness of their status relative to that of others” at all times.¹⁶⁰

In societies like Korea with unique features discussed above, the prominence of apology reflects the tendency for disputes to be cast as challenges to one’s position in the status hierarchy such as one’s reputation.¹⁶¹ Thus, in a survey of multiple cultures, anthropologist Letitia Hickson concluded that apology “is an important dispute management mechanism in societies . . . in which hierarchical relationships and a hierarchical ethos take precedence over egalitarian relationships.”¹⁶² Hickson reasoned that by apologizing, the moral superiority is acknowledged and reaffirmed by the offender’s confessing and expressing regret for the offending actions thereby acknowledging the wrongness of his or her position and the correctness of the offended’s position.¹⁶³ She also added that the structural superiority of the higher-status individual is acknowledged and reaffirmed by the offender’s requesting forgiveness, thereby placing himself or herself in the position of the petitioner who is at the mercy of the petitionee.¹⁶⁴

Another social feature that contributes to the emphasis of the apology in Japan is shaming.¹⁶⁵ Korea, too, has a shaming culture, which can work to encourage apologies.¹⁶⁶ Viewing the indications that Korea meets and even surpasses the Japanese emphasis on

¹⁵⁷ Lee, *supra* note 142, at 24.

¹⁵⁸ S. KOREA CONST. art. 11(2) (“No privileged caste shall be recognized or ever established in any form.”). The abolition of class system occurred in 1894. Below the king and the royal family, Korean society was stratified into classes: the *yangban* representing the ruling class and the societal elite at the very top, followed by, in descending order, *joong-in* (literally, “middle people”), *sang-in* (the commoner class), and *chun-min* (literally, “low-people”). See ANDREW C. NAHM, INTRODUCTION TO KOREAN HISTORY AND CULTURE 105–06 (1993).

¹⁵⁹ Lee, *supra* note 142, at 24.

¹⁶⁰ *Id.*

¹⁶¹ Letitia Hickson, *The Social Contexts of Apology in Dispute Settlement: A Cross-Cultural Study*, 25 ETHNOLOGY 285, 286 (1986).

¹⁶² *Id.* at 285.

¹⁶³ *Id.* at 286.

¹⁶⁴ *Id.*

¹⁶⁵ See Bailey Kuklin, *You Should Have Known Better*, 48 U. KAN. L. REV. 545, 560 n.48 (2000).

¹⁶⁶ Lee, *supra* note 142, at 29.

harmony, hierarchy, and collectivism, one could argue that in Korea and Japan, the apology is frequently used to facilitate the resolution of disputes.¹⁶⁷ In both countries, the institution of the court-ordered apology for damages such as defamatory damages has been an integral part of the judicially enforced legal system since the modern legal system was introduced from the West.¹⁶⁸

C. A Possibility of the Use of Apology as a Dispute Resolution Mechanism Between Korea and Japan

Any discussion of the apology in Korea cannot exclude Korea's continuing demand for an apology from Japan especially regarding Japanese occupation of the peninsula for the first half of the twentieth century.¹⁶⁹ Considering the influence of Confucian values with respect to harmony and conciliation in both Korea and Japan, the two countries' approach to the apology in dispute resolution appears to be much alike.¹⁷⁰ However, there are differences between the two societies, which is perhaps most vividly illustrated by the continuing social and political tensions between the neighboring countries.¹⁷¹

Growing legal commentary addresses the apology's role in facilitating the resolution of a dispute involving legal claims and liabilities.¹⁷² For example, an injured party who receives an apology may be more agreeable for settlement or to withdraw claims entirely.¹⁷³ Not only does an apology have emotional aspects such as a healing function, but it also offers non-financial compensation for the injured party, which in some cases is more important than monetary compensation.¹⁷⁴

Any survey of the apology including its relation to dispute resolution requires a scrutiny of culture since cultural differences

¹⁶⁷ *Id.*

¹⁶⁸ Dai-Kwon Choi, *Freedom of Conscience and the Court-Ordered Apology for Defamatory Remarks*, 8 *CARDOZO J. INT'L & COMP. L.* 205, 220 (2000).

¹⁶⁹ Lee, *supra* note 142, at 4.

¹⁷⁰ *Id.* at 5.

¹⁷¹ See Norimitsu Onishi, *Japan and South Korea Brace for a Tense Meeting*, N.Y. TIMES, June 20, 2005, at A6.

¹⁷² Lee, *supra* note 142, at 8–9.

¹⁷³ *Id.* at 9; See Cohen, *Legislating Apology*, *supra* note 145, at 820; Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 *WASH. L. REV.* 1121 (2002).

¹⁷⁴ O'Hara & Yarn, *supra* note 173, at 1125.

shape and affect the apology.¹⁷⁵ Scholars have stated that the role of apology in dispute resolution is better understood as part of a society's culture.¹⁷⁶ Differences in cultural norms may explain why the apology could resolve disputes more frequently in some countries than in others.¹⁷⁷ Social science scholars have often categorized societal orientations to the group and to the individual as the collectivism/individualism dichotomy, which explains behaviors in different societies.¹⁷⁸

Collectivism refers to a social pattern shaped by individuals who see themselves as parts of one or more collectives and who are primarily influenced by the norms and duties imposed by the collectives.¹⁷⁹ Individualism, on the other hand, is a social pattern consisting of individuals who view themselves apart from collectives and who prioritize their own needs, goals, rights, and such over others or collectives.¹⁸⁰ In other words, norms in collectivist societies are maintaining harmony and avoiding direct confrontations, while in individualist cultures, speaking one's mind is the norm.¹⁸¹ According to a survey, the United States is the most individualist society, as opposed to Japan, which is significantly more collectivist.¹⁸² This is evidenced by a study that concluded that collectivist Japanese prefer mitigating methods such as apology and excuse while individualist Americans prefer more assertive and aggressive methods like justification and denial.¹⁸³

Sincerity is a core requirement of an effective apology.¹⁸⁴ In the United States, the sincerity requirement must satisfy the societal preoccupation with the "problematics of wholeheartedness,"¹⁸⁵ whereas in Japan, it is more likely to "accept the external act of apology at face value and not to disturb the superficial concord by challenging the sincerity of the person apologizing."¹⁸⁶ Some of the studies show that the Korean approach regarding sincerity is more like that seen in the United States than in Japan.¹⁸⁷ The dif-

¹⁷⁵ Lee, *supra* note 142, at 9.

¹⁷⁶ *Id.* at 10.

¹⁷⁷ *Id.* at 13; Wagatsuma & Rosett, *supra* note 143, at 461.

¹⁷⁸ Lee, *supra* note 142, at 15.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*; HOFSTEDE, *supra* note 156, at 67 tbl. 3.3.

¹⁸² Lee, *supra* note 142, at 15; HOFSTEDE, *supra* note 156, at 53.

¹⁸³ Lee, *supra* note 142, at 17.

¹⁸⁴ Wagatsuma & Rosett, *supra* note 143, at 462.

¹⁸⁵ *Id.* at 473.

¹⁸⁶ *Id.* at 472–73.

¹⁸⁷ Lee, *supra* note 142, at 38, n.209.

ferent approach in respect to sincerity of the apology in Korea might be explained by Koreans' feelings towards Japan's apology related to its military occupation in the past.¹⁸⁸ This is evidenced from the fact that there is some disagreement on whether Japan has sufficiently apologized to Korea.¹⁸⁹ A survey indicated that two out of three Koreans do not believe Japan has sincerely apologized for its victimization of Korea during the colonial period between 1910-1945.¹⁹⁰ In contrast, it is reported that some Japanese resented stating, "How many times must we have to apologize for historical issues?"¹⁹¹ A series of comments made by Japanese politicians who were trying to justify Japan's war conduct aggravated the impression held by Koreans that the Japanese have no sincere remorse for the past¹⁹² whereas many Japanese believe that they have already apologized on many occasions.¹⁹³ Especially recently, regarding the issue of "comfort women,"¹⁹⁴ Japan's current prime minister Shinzo Abe signaled his intent to retract apologies issued by the government in the past as part of an effort to rewrite Japan's wartime history, stating that the previous administration had found no evidence that the women who served as sex slaves to Japanese soldiers during the war had, in fact, been coerced.¹⁹⁵

In this victim-aggressor context of international conflict, money alone would not be enough to fulfill a true reparative effect.¹⁹⁶ According to Lisa Laplante, reparations awards, if any, must be accompanied by symbolic acts of remorse, such as public statements by officials that "both explicitly recognize the government's legal responsibility for rights violations and make the link explicit between the responsibility and the reparations payments."¹⁹⁷ Through this process of recognition, economic reparations then create a reparative effect.¹⁹⁸ Without the symbolic

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 3, n.20.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See also Norimitsu Onishi, *Koizumi Apologizes for War: Embraces China and South Korea*, N.Y. TIMES, Aug. 16, 2005, at A4.

¹⁹³ Lee, *supra* note 142, at 38, n.209.

¹⁹⁴ "Comfort women", *supra* note 60.

¹⁹⁵ Tara J. Melish, *Implementing Truth and Reconciliation: Comparative Lessons for the Republic of Korea*, 19 BUFF. HUM. RTS. L. REV. 1, n.116 (2012); see also Editorial, *Another Attempt to Deny Japan's History*, N.Y. TIMES (Jan. 2, 2013).

¹⁹⁶ Melish, *supra* note 195, at 35.

¹⁹⁷ *Id.*; see also Lisa Laplante, *Negotiating Reparation Rights: The Symbolic and Participatory Quotients*, 19 BUFF. HUM. RTS. L. REV. 217, 235–36 (2012).

¹⁹⁸ Laplante, *supra* note 197, at 235–36.

aspect, victim groups are likely to question and even reject economic damages.¹⁹⁹ For example, Japan's unwillingness to apologize about the "comfort women" during World War II has been said to "depreciate the economic value of the compensation it offered and made it valueless."²⁰⁰

Likewise, the issue surrounding Japan's taking of Korean cultural property is analogous to Japan's aggression toward Korea and Koreans during the colonization period. To the victim group, Koreans, monetary compensation alone is not sufficient, if not impossible to measure. Although Japan has officially apologized for its past aggressions toward other East Asian countries including Korea, many Koreans are not convinced that Japan has apologized with sincerity. This doubt is reinforced by the fact that the current Japanese prime minister's intent to retract past official apologies and denial of Japan's wartime activities as mentioned above. This Korean sentiment is represented by a Korean citizen's CNN interview comment regarding boycotting Japanese products, stating "we will continue this boycott until we get a sincere apology from the Japanese government."²⁰¹

Some scholars comment that with respect to more serious international disputes, while apology may often be used as a necessary and important component of settlement, the eventual resolution of the matter will need more concrete measures such as restitution, the payment of money damages.²⁰² However, much of this is speculation since there is relatively less empirical data or scholarly studies regarding either the use or consequences of apology in diplomatic practice.²⁰³ Not only can apology serve the important function of reaffirming the continued validity of international norms and reinforcing the integrity of the international legal order, it can help resolve international differences²⁰⁴ and set an effective precedent of a valuable and effective alternative way of dispute resolution.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 235; Melish, *supra* note 195, at 35–36; see also Editorial, *supra* note 195.

²⁰¹ Pamela Boykoff & Soo Bin Park, *South Korea Boycott of Japanese Goods Over Island Dispute*, CNN, Mar. 2, 2013, available at <http://edition.cnn.com/2013/03/01/business/south-korea-japan-boycott/>.

²⁰² Bilder, *supra* note 133, at 470.

²⁰³ *Id.*

²⁰⁴ *Id.* at 473.

V. CONCLUSION

An apology could be the best way to resolve the centuries-old conflicts between Korea and Japan, especially with respect to stolen Korean cultural property taken by Japan during the sixteenth century and the Japanese annexation of Korea during the first half of the twentieth century. An apology is a traditional, culture-bound means of remedying the damages at least in the Far East Asian countries such as Korea and Japan.²⁰⁵ Culture influences the prevailing values and beliefs, including the form of an apology in remedying conflicts.²⁰⁶ Given the fact that these nations culturally share similarities such as Confucian values, collectivism, and aversion to conflicts, conventional international dispute resolution mechanisms that are suitable to the West would not work effectively. The two nations' tendency to avoid litigation, as well as a dearth of established national and international ADR systems within the countries, further necessitate the determination of other dispute resolution methods unique to them. A sincere apology by Japan regarding its past atrocities victimizing Korea including looted Korean cultural artifacts would be the most anticipated and effective way to dissolve the persisting tensions between the two neighboring nations. It would diffuse the difficulties of untangling politically, historically, and emotionally charged Korea-Japan relations. It is thus believed that the apology would lead to more concrete ways of resolving the issue, such as actual physical returns of some of the Korean artifacts remaining in Japan.

²⁰⁵ Choi, *supra* note 168, at 224.

²⁰⁶ *Id.*