

Truth-Telling and Accountability in Democratizing Nations: The Cases Against Chile's Augusto Pinochet and South Korea's Chun Doo-Hwan and Roh Tae-Woo

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In a democratizing nation, substantial questions of law and justice are bound to be paramount in the formation of the emerging nation. A legacy of human rights abuses under the former governments will undoubtedly magnify these questions. How does the nascent nation shake the tarnished associations of its governmental instruments? To what extent is the new government responsible for the transgressions of the past government, and by what measures can it alleviate these transgressions? When civilian populations have been victimized by the instruments of government—envisioned to protect and advance the interests of the people—fostering reconciliation and trust between the people and the government is a foremost measure in re-establishing the rule of law in the developing democracy.

To assuage the societal damage inflicted by human rights transgressions, the new government must provide both an official accounting of the crimes committed and accountability for those who were responsible for the crimes. In traditional means of justice, trials have fulfilled both of these roles. However, in transitional justice, the roles of truth-telling and accountability may not be best served by a trial. Despite the truth rendering required for effectively assigning the innocence or guilt of an individual at trial, this level of truth is insufficient to address the larger societal impacts of human rights transgressions.

The adjudication a single individual's, or even a group of individuals', involvement in segmented and delineated human rights violations is not significant enough to mollify the societal rifts rendered by the prior state abuses. Nor is it significant to establish the groundwork for transitioning to the rule of law. To reach these goals, a complete and official accounting of the full spectrum of crimes committed by human rights abusers is required. This Note will assess the effect of trials in the South Korean transitional justice process and the difficulties incurred in providing society with an adequate level of truth and accountability. The processes enacted in Chile, which also moved towards trials but additionally encompassed an

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independent truth-telling component, will be used as a counter-point to the South Korean processes.

These two countries are apt for comparison not only because they both took actions to prosecute leaders but also because of the comparative successes and failures in both the procedures employed and the goals achieved. South Korea's initial decision to prosecute its former leaders was hailed by commentators as a monumental step in bringing reprieve to sufferers of human rights abuses. It was thought that the South Korean trials would provide both accountability for the perpetrators of human rights crimes and an officially acknowledged accounting of the atrocities that occurred under the military regime. Despite these early predictions of success, the South Korean procedure ultimately failed to provide a comprehensive truth of occurrences or even to inflict a measure of accountability commensurate with the nature of the harms inflicted.

Where South Korea was initially thought of as a possible model for successful future trials of Chile's military regime, Chile instead promulgated, in its own fashion, a much more robust transitional justice regime. Through the institution of a thorough truth-telling procedure, Chile's foremost concern was to create an official accounting for its citizens. Following from this accounting, Chilean leaders eventually found the wherewithal, along with the legal and political means necessary, to demand actual accountability. The rapid movement towards truth-gathering and acknowledgement was an essential step in precipitating the indictment of military leaders for human rights abuses. As a result, Chile stands in position to offer a thorough truth-telling of atrocities committed under its military regime and a corresponding accountability, genuine in both name and effect. The comparison of these two processes demonstrates that a trial devoid of an accompanying and thorough truth-telling aspect is an inadequate means for instituting a transitional justice regime or for bringing the reconciliation and retribution hoped to be achieved in the justice process.

I. INTRODUCTION

On March 11, 1996, a trial began in South Korea—a trial that became known as the trial of the century.¹ The first two South Korean presidents to ever voluntarily step down from power were facing charges of insurrection, treason, and murder.² Two years later, proceedings would begin across the globe in London, England and Spain to try the former

¹ *Ex-Presidents Chun, Roh Defend Legitimacy of Gov'ts*, JAPAN ECON. NEWSWIRE, March 11, 1996, LEXIS, News Library, JEN file.

² *Id.* Chun Doo-Hwan ceded power in 1988 when Roh Tae-Woo was elected president. Roh then made way for Kim Young-Sam in 1993.

Chilean dictator, Augusto Pinochet, for human rights abuses.³ Adding further interest, the prosecutions of these leaders ensued despite previous awards of domestic impunity from prosecution and the fact that they peacefully turned over power to allow democratic reforms in their countries.⁴

The South Korean presidents Chun Doo-Hwan (Chun) and Roh Tae-Woo (Roh) had twice before been cleared of charges. In October 1994, prosecutors declared that the presidents would not be prosecuted for insurrection despite finding that Chun and Roh “engaged in a premeditated military rebellion” during the 1979 coup d’etat through which they seized power.⁵ A July 1995 prosecutorial decision declined to indict the pair for insurrection, treason, and murder surrounding the 1980 massacre of civilian protestors in the southern city of Kwangju. Although the prosecution confirmed that innocent civilians had been killed in Kwangju, it concluded that an effective coup legitimized the regime and rendered it non-justiciable by law and instead delegated the regime to the judgment of history.⁶

The impunity enjoyed by Augusto Pinochet’s military regime in Chile was likewise firmly enshrined. As a concession to allow free elections, the democratic parties challenging Pinochet agreed to accept the terms of the 1980 Chilean Constitution crafted under Pinochet.⁷ The democratic successors to Pinochet were likewise obliged to the terms of a 1978 Amnesty, granting impunity for criminal offenses committed between 1973 and 1978.⁸ The Chilean Supreme Court had previously affirmed this amnesty in a 1986 ruling that cases could be closed prior to a full investigation according to the amnesty provisions.⁹ The force of this ruling was upheld after democratization, resulting in the continued dismissal of

³ Maurice Chittenden, *Pinochet Held by London Police on Murder Charges*, SUNDAY TIMES (LONDON), Oct. 19, 1998, at Overseas News, LEXIS, News Library, TTIMES file.

⁴ See, e.g., Michael Gove, *Hate for One Killer, Tea for Another*, TIMES (LONDON), Oct. 20, 1998, at Features, LEXIS, News Library, TTIMES file (referring to Prime Minister Blair’s socializing with Pinochet while in custody as proper since Pinochet peacefully left power after democratic defeat and enriched his nation as ruler); Sam Jameson, *Embattled Ex-President Joins Ranks of South Korea’s Tarnished Leaders*, L.A. TIMES, Oct. 30, 1995, at A6, LEXIS, News Library, LAT file.

⁵ THE CONSTITUTIONAL COURT OF KOREA, *December 12 Incident Non-institution of Prosecution case, 7-1 KCCR 15, 94Hun-Ma246*, Jan. 20, 1995, in THE FIRST TEN YEARS OF THE KOREAN CONSTITUTIONAL COURT 161–63 (2001) [hereinafter *94Hun-ma246*] (affirming decision not to indict by reasoning it would be against national reconciliation); Andrew Pollack, *Seoul Bars Prosecution of Presidents*, N.Y. TIMES, Oct. 30, 1994, § 1, at 4, LEXIS, News Library, NYT file.

⁶ James M. West, *Martial Lawlessness: The Legal Aftermath of Kwangju*, 6 PAC. RIM L. & POL’Y J. 85, 107–08 (1997).

⁷ Jorge Correa S., *The Political Setting for the Transition*, in TRANSITIONAL JUSTICE 455, 456 (Neil J. Kritz ed., 1995) [hereinafter *Political Setting*].

⁸ *Id.* at 459; AMERICAS WATCH, *Human Rights and the Politics of Agreements: Chile During President Aylwin’s First Year*, in TRANSITIONAL JUSTICE 499, 500 (Neil J. Kritz ed., 1995).

⁹ AMERICAS WATCH, *Human Rights and the Politics of Agreement*, *supra* note 8.

homicide and torture cases, despite findings of state complicity in these cases.¹⁰

II. THE DECISION TO TRY FORMER LEADERS

Despite these grants of impunity, or perhaps because of them, the decision to try their former leaders makes South Korea and Chile unique among nations that experienced a bloodless transformation from an autocratic dictatorship to a democratic republic. The prosecution of democratically removed leaders is certainly an uncommon event, as most new regimes are typically apprehensive of setting a precedent allowing indictment and trial for acts ostensibly committed under the color of national office. The ephemeral nature of democratic politics readily suggests why such a precedent would be eschewed.¹¹ However, as already noted, this tendency did not hold true in these two nations. In both countries, nearly a decade after their release on power, former dictators were charged for acts committed under their rules.

A. *Parallels Between Chile and South Korea*

Although at face value these two nations may seem inherently disparate, examination of their relevant recent histories reveals that not to be the case. In reality, there exists great similarity between these two nations, not the least being that they both are relatively new democracies emerging from the grasps of autocratic, dictatorial regimes. Additionally, the dictatorial regimes in both countries acted under U.S. auspices and were known to commit massive human rights violations.¹² Corroborating this analysis, both nations took action to prosecute former leaders for human rights and other abuses after the peaceful transfer of power. The differing approaches these two countries developed in facing past abuses is a corollary to the respective levels of success achieved.

¹⁰ Amnesty International USA, *Legal Brief on the Incompatibility of Chilean Decree Law No. 2191 of 1978 with International Law*, available at <http://www.amnestyusa.org/countries/chile/document.do?id=67AE71F8BCE62128802569E400633F9C> (reporting the closing of a 1996 case after finding it an execution committed by agents of the state) (last visited Jan. 9, 2006) [hereinafter *Brief*].

¹¹ See, e.g., *A Dogfight Between Former Presidents*, KOREA TIMES, Feb. 17, 1999, LEXIS, News Library, KTIMES file (noting that the post-pardoned Chun Doo-Hwan quixotically recommended that the “Korean people set a new, beautiful tradition of revering former heads of state who should live free from fears of political reprisals after their retirement”).

¹² Stephen Kim Park, *Dictators in the Dock: Retroactive Justice in Consolidating Democracies*, *A Comparative Analysis of Chile and South Korea*, 25 WTR FLETCHER F. WORLD AFF. 127, 128 (2001); West, *supra* note 6, at 88. See also Tim Shorrock, *The U.S. Role in Korea in 1979 and 1980*, available at <http://www.kimsoft.com/korea/kwangju3.htm> (last visited October 7, 2005) (showing the U.S. Embassy in Seoul and the State Department in Washington were aware that Chun was planning to use the Special Forces to quash riots and restore stability). This assertion was supported by counselor cables declassified and obtained by Shorrock under the Freedom of Information Act.

B. *The Chilean Process*

The transitional justice regime implemented in Chile is best viewed as a two-fold procedure. First, a National Commission on Truth and Reconciliation was established to “investigate and report on the human rights violations of the previous period and to make recommendations for reparations and prevention of future abuses.”¹³ As the name of the commission indicates, this first prong of the Chilean approach seeks to foster official truth telling and reconciliation, but this was not the only action taken by Chile. Spain’s attempts to prosecute Pinochet abroad provided the impetus for renewed efforts to domestically try Pinochet for his past crimes.¹⁴ This later movement towards punishment and retribution, despite the self-awarded impunity that Pinochet and his regime enjoyed, complements Chile’s initial truth-finding procedures and creates a robust transitional justice regime which is more capable of providing justice and closure to victims of that nation’s authoritarian past.

C. *The Necessity for Truth in South Korea*

The process towards retribution in South Korea was much more direct, although tortuous in its own details, than that employed in Chile. After overcoming procedural hurdles and prosecutorial decisions not to indict, despite substantial evidence of wrongdoing,¹⁵ South Korea brought its former dictatorial leaders to trial for treason, insurrection, corruption, and homicide.¹⁶

The choice to go to trial in South Korea was initially met with great optimism that trial would result in a successful meting of post-conflict justice.¹⁷ It was also thought that truth-finding and a level of closure would be achieved by the process.¹⁸ However, the optimism surrounding the South Korean process was seemingly misplaced. Deficiencies in procedure, political manipulations, and later pardons of the convicted presidents resulted in South Korea’s experiment in dictatorial prosecution ultimately being viewed as political showmanship. Instead of providing justice, closure, or truth for the nation, the trial left a taste of

¹³ Neil Kritz, *Chile—Editor’s Introduction*, in *TRANSITIONAL JUSTICE* 454 (Neil K. Kritz ed., 1995).

¹⁴ Park, *supra* note 12, at 140.

¹⁵ See West, *supra* note 6, at 104 (citing *Dec. 12 Incident is Mutiny by Chun, Roh*, *KOREA TIMES*, Oct. 30, 1994, at 1) (announcing that Chun and Roh would not be prosecuted despite finding they committed treason and insurrection. The Seoul prosecutor asserted “that the two former presidents and others turned our constitutional history backwards by staging a rebellion, they should be prosecuted and the wrong past be corrected. But, their indictment is feared to revive national divisiveness and confrontation . . .”).

¹⁶ *Id.* at 128.

¹⁷ Park, *supra* note 12, at 128–29, 139.

¹⁸ *Id.* at 139.

opportunism.¹⁹

The South Korean trial demonstrates that for post-conflict trials to be successful, it is imperative that they be accompanied by a comprehensive truth-finding function. When such trials do not result in a complete and officially sanctioned truth of occurrences, they fail in their capacity to render transitional justice. This does not diminish the trial's ability to render criminal liability, but it does hamper the larger aim of national transition, conciliation, and healing. In describing the positive effects of trials, notwithstanding their shortcomings, Martha Minow states "[t]rials can create credible documents and events that acknowledge and condemn horrors. . . . [T]rials can air issues, create an aura of fairness, establish a public record, and produce some sense of accountability. Then claims for the rule of law can grow"²⁰ Ultimately, the South Korea trials of Chun and Roh failed to result in any of these aspects.

These trials did not accomplish the foremost goal stated by Minow—they did not provide a record or acknowledgement of events or atrocities. By refusing to address honestly the murder charges arising from the May 18 Kwangju Massacre and by centering the conviction and decision to prosecute on the less atrocious corruption charges, the South Korean court passed up the opportunity to acknowledge grievous government crimes and to hold accountable those responsible. Although Chun and Roh were convicted of treason, corruption, and insurrection, they were not convicted for the mass homicide in relation to the Kwangju Massacre.²¹ Additionally, neither a record nor authoritative facts regarding the Kwangju Massacre was established by the trial.²² Furthermore, significant constitutional and due process concerns surrounded the trial, greatly undermining any claims bolstering the establishment of the rule of law in South Korea.²³ Lastly, claims of accountability were destroyed when

¹⁹ *Id.* at 134–37; Park Won Soon, *Bringing Justice to an Unjustified Past in Korea*, TRANSITIONAL JUSTICE IN EAST ASIA AND ITS IMPACT ON HUMAN RIGHTS, CARNEGIE COUNCIL ON ETHICS AND INT'L AFF., HUMAN RIGHTS DIALOGUE, Series 1, Number 8 (May 5, 1997), available at <http://www.carnegiecouncil.org/viewMedia.php/prmTemplateID/8/prmID/551> (last visited Jan. 9, 2006).

²⁰ MATHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 50 (1998).

²¹ West, *supra* note 6, at 137–38.

²² *Id.* at 93. See also Joseph Manguno, *Kwangju Still an Issue in U.S.-South Korea Relationship, Bloody Uprising Was a Democratic Milestone, CNN In-Depth, Korea at 50—Kwangju at 20*, CNN INTERACTIVE (2001) (reporting that questions still exist as to the official death toll of the massacre, with Kwangju officials and witnesses detailing deaths much higher than the government's official number of 191 and suggesting a figure in the magnitude of 2,000) <http://www.cnn.com/SPECIALS/2000/korea/story/kwangju/> (last visited Jan. 9, 2006).

²³ THE CONSTITUTIONAL COURT OF KOREA, *The Special Act on the May Democratization Movement, etc. case, 8-1 KCCR 51, 96Hun-Ka2*, Feb. 16, 1996, in THE FIRST TEN YEARS OF THE KOREAN CONSTITUTIONAL COURT 168-172 (2001) (majority ruling of Korean Constitutional Court, but not the super majority required to overturn a legislative act, that the Special Act to prosecute was unconstitutional as retroactive law) [hereinafter *96Hun-Ka2*]. See generally David M. Waters, *Korean Constitutionalism and the 'Special Act' to Prosecute Former Presidents Chun Doo-Hwan and Roh*

President Kim Young-Sam pardoned Chun and Roh immediately prior to leaving office.²⁴

III. GOALS OF TRANSITIONAL JUSTICE

A transitional justice regimen faces massive struggles in not only bringing justice to divided and disrupted populations but also contending with and working in the background of the actual political transformation in place. Therefore, the decision of which mechanisms to be applied is multi-faceted. Of course, the foremost goal of the justice regiment remains centered on the dual purposes of retribution and reconciliation. Intrinsic in this dual purpose is the importance of preventing one aspect from overshadowing the other. However, the actual achievement of a balanced transitional justice procedure is often frustrated by the existing domestic situation. The reality of these constraints, be they economic, military, or political, may skew the justice process to one end or the other. Nevertheless, with time to perform fully its function, both facets must bear substantial and legitimate fruit.²⁵ Stated succinctly, transitional justice must provide both the truth-telling needed for reconciliation and the accountability needed for retribution.

A. Retribution

The retribution aspects of transitional justice are those commonly associated with courtrooms and trials and includes concepts of blame-laying and punishment, be it civil or criminal. This is the classic crime, punishment, and atonement that many look for after acts of wrongdoing. Minow describes this in the context of state atrocities as “a demand not only for accountability and acknowledgement of harms done, but also for unflinching punishment.”²⁶

B. Reconciliation

The reconciliatory aspects of transitional justice are perhaps less well established but are nonetheless necessary components. Reconciliation is

Tae-Woo, 10 COLUM. J. ASIAN L. 461 (1996).

²⁴ Park, *supra* note 12, at 136.

²⁵ It is worth noting that the Truth and Reconciliation Commission in South Africa remains unique in its successes as a transitional justice regime. This uniqueness and the corresponding success may be found in its strict requirement for a “full disclosure of all relevant facts” and the ability to decline Amnesty if full disclosure is not given or even a failure to show remorse or contrition. KADUR ASMAL, ET AL., RECONCILIATION THROUGH TRUTH, A RECKONING OF APARTHEID’S CRIMINAL GOVERNANCE 16–17 (1996). The level of disclosure and the suggestion of a requirement of contrition extend far beyond any requirements needed or produced in either the South Korean or Chilean procedures.

²⁶ MINOW, *supra* note 20, at 26.

built upon knowledge, forgiveness, and healing. In order to achieve this, it is necessary to establish an official, complete truth of occurrences that not only has the imprimatur of the state but is deemed acceptable by both the people and the state.²⁷ This is the essential first step in allowing the victimized population to begin forgiving the perpetrators of state repression. It is also an important step in establishing the legitimacy of the new government and in rebuilding the trust required in the social compound between the people and the government.

However, the process of reconciliation can be much harder to recognize or track than that of retribution. Whereas retribution can be objectively measured by looking at court proceedings and outcomes, reconciliation is not so easily objectified. Perhaps the best measure of reconciliation is a combination of assessing official procedures such as truth-telling apparatuses and reparations with the overall feeling of justice and peace within a society.

Truth Commissions or other truth-telling mechanisms are fundamental to advancing reconciliation after instances of collective violence. The essential nature of truth-telling in reconciliation is manifest from the nature of the truth aspired to in these truth-telling operations. In contrast to the narrow adjudicative truth sought at trial, truth commissions are tailored to “emphasize the experiences of those victimized; the development of a detailed historic record; and the priority of healing for victims and entire societies after the devastation to bodies, memories, families, friendships, and politics caused by the collective violence.”²⁸ Given the goals attributed to truth commissions, official truth-telling and acknowledgment processes provide powerful avenues for restoring victims’ dignity, fostering individual healing, and generally “promoting reconciliation across a divided nation.”²⁹

Reparations are likewise an essential component in achieving reconciliation. Similar to truth-telling enterprises, reparations allow the government an opportunity to officially acknowledge past wrongdoings. Inherent in the concept of reparations is an attempt to repair damage that has occurred. Reparations, when successful, alleviate the powerlessness felt by victims allowing them “to take control of their own lives.”³⁰ At the same time, reparations implicitly “acknowledge the facts of harm, accept some degree of responsibility, avow sincere regret, and promise not to repeat the offense.”³¹

²⁷ See ASMAL, *supra* note 25, at 14 (defining “a just and moral appraisal of the past . . . [as] the true life-blood of reconciliation”).

²⁸ MINOW, *supra* note 20, at 90.

²⁹ *Id.* at 88.

³⁰ *Id.* at 93.

³¹ *Id.* at 112.

C. *Fostering the Rule of Law*

Moreover, encompassing all these stated goals and restrictions is the most fundamental element of transitional justice: establishing a respect for and following the rule of law in the new society. However, neither the methodology to utilize when establishing the rule of law nor the actual parameters for defining the rule of law are settled precepts. There are two leading schools of thought for fostering the rule of law, the first of which is positivist, requiring full continuity with the existing and settled law to restore regularity in the law.³² The second school of thought is based on natural law and calls for a break with the prior law since the prior law “lacked morality and hence did not constitute a valid legal regime.”³³ Beyond these two schools, there is also the proposition that in transitional societies the rule of law is a transcendent notion that depends “in part on their distinctive political legacies, and in particular, on the role of law in the predecessor regime.”³⁴ In this theory, the rule of law in the new society is contingent on “the social understanding of the response to injustice” and how the previous regime wielded the law to their benefit.³⁵

IV. IMPEDIMENTS TO TRANSITIONAL LEGAL RESPONSES

The formula a nation develops when settling upon a transitional justice regiment is one that must be drawn out with great caution and awareness to several factors, including political, economic, institutional, and logistical restraints. As such, there cannot exist a per se method of justice to apply in a blanket manner. Each nation must evaluate its unique situation, being mindful of recent history and development along with social conditions. Tantamount in this consideration is the method through which transition occurred. Despite the singularity of all nations, there exist strong comparisons between South Korea and Chile as to why both were able to eventually progress with prosecutions and the respective restrictions faced in achieving transitional justice.

The comparison of the fundamental obstacles to procuring justice serves an additional, more instrumental purpose. Viewing each country side by side, it could be concluded that the obstacles facing Chile were

³² Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2020 (1997).

³³ *Id.* at 2021.

³⁴ *Id.* at 2025.

³⁵ *Id.* at 2025. Teitel elaborates that

[w]hereas the conventional understanding of tyranny is the lack of the rule of law and arbitrariness, the transitional rule of law on law in modern cases illuminates a distinctive normative response to contemporary tyranny. Where persecution was systematically perpetuated under legal imprimatur, the transitional legal response is the attempt to undo these abuses under the law.

Id. at 2025–26 (internal notes omitted).

much more severe than those in South Korea. The road to justice in Chile seemed much more fraught with peril than that of South Korea, yet Chile was able to produce a robust and ongoing justice mechanism. That Chile ostensibly faced greater obstacles to justice and persevered to continue seeking justice underscores the necessity of a truth-telling element to the transitional justice regiment.

A. Political

The political impediments faced by a transitional nation are likely to be both indigenous and external as well as both self-imposed and inherited. In the case of both Chile and South Korea, transition came gradually and through agreement with the dictatorial regime.³⁶ The culmination of both of these agreements was free and fair elections in each country, replacing military control with a civilian president.³⁷

In October 1988, General Augusto Pinochet was defeated in a plebiscite deciding on his continued rule.³⁸ The plebiscite removing Pinochet from office was precipitated by the agreement of the democratic political parties to accept the Chilean Constitution adopted by Pinochet's regime in 1980.³⁹ Inherent in this agreement was the further stipulation that accepting this constitution also entailed accepting the methods of change or amendment prescribed by the constitution.⁴⁰ After his removal, Pinochet and his military supporters further interpreted this agreement as one to respect and not interfere with the 1978 amnesty granted to abuses committed between 1973 and 1978.⁴¹ Elected in 1989, Patricio Aylwin worked against this backdrop in trying to preserve the peaceful political transition acquired and to bring truth and justice concerning the disappearances that occurred during the Pinochet regime.⁴² These initial political constraints led the new democratic government to seek a path of truth and reconciliation in the face of history's injustice.⁴³

Although internal political pressures lead President Aylwin to forego retribution, in its stead, striving for reconciliation and healing through a truth and reconciliation commission, international politics would later pave

³⁶ See Political Setting *supra* note 7; Park, *supra* note 12, at 135.

³⁷ See Park, *supra*, note 12 at 135. Free elections in Korea were initially held in December 1987, prior to the upcoming summer Olympics in 1988. Although these elections were considered free and fair, they nonetheless resulted in Chun Doo-Hwan's hand picked successor and military comrade, Roh Tae-Woo, being elected as the opposition party was split between Kim Young-Sam and Kim Dae-Jung. In 1992, Kim Young-Sam became Korea's first civilian president since Park Chung-Hee seized power in 1961.

³⁸ Kritiz, *supra* note 13.

³⁹ Political Setting, *supra* note 7, at 456.

⁴⁰ *Id.*

⁴¹ *Id.* at 459.

⁴² *Id.* at 458-59.

⁴³ *Id.* at 461.

the way for indictment of Pinochet for his crimes.⁴⁴ On October 14, 1998, Augusto Pinochet was arrested in London, England after Spain and three other nations requested that he be extradited for human rights violations.⁴⁵ Spain's extradition request was ultimately denied, as Pinochet was released to Chile on medical grounds. However, the situation in Chile would change for Pinochet.⁴⁶ On August 8, 2000, the Chilean Supreme Court removed Pinochet's immunity as a lifelong senator, allowing him to face trial.⁴⁷ Commenting on his objectives, President Frei announced that "[a]ll our efforts to bring Senator Pinochet home have had a sole objective: that it should be Chilean Courts not those of another country that apply the law."⁴⁸ Despite Pinochet's health concerns hampering progress in prosecuting him, the initial arrest in England led Chile to move towards justice and closure on the Pinochet years.⁴⁹ As of January 2005, the Chilean Supreme Court found Pinochet mentally competent to stand trial and confirmed an indictment against Pinochet for human rights crimes.⁵⁰

The South Korean transitional justice process stands in contrast to Chile's in that the decision to prosecute Chun and Roh, although not devoid of international impact,⁵¹ was one of primarily domestic politics.⁵² After his ascendancy to the Presidency, Kim Young-Sam initially resisted prosecution of the former leaders, holding that their guilt should be "left to the judgment of history."⁵³ Kim's reluctance to prosecute is easy to understand, considering that Kim joined Roh's ruling Democratic Leading Party (DLP) to obtain the financial and political backing needed to defeat Kim Dae-Jung in the December 1992 presidential election.⁵⁴ Although

⁴⁴ *But see* Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT'L L. 415 n.53 (2000) (suggesting the U.S. discouraged a trial of Pinochet in order to prevent disclosure of U.S. complicity in the overthrow of Allende and subsequent atrocities).

⁴⁵ HUMAN RIGHTS DEVELOPMENT IN CHILE, *from* HUMAN RIGHTS WATCH, ANNUAL REPORT, 2001, <http://www.hrw.org/wr2k1/americas/chile.html> (last visited Jan. 9, 2006) [hereinafter CHILE ANNUAL REPORT]. Spanish Magistrate Baltasar Garzon issued an arrest order charging, inter alia, murder and torture. Baltasar's extradition request was later joined by France, Belgium, and Switzerland. Byers, *supra* note 44, at 416, 423.

⁴⁶ *See* Byers, *supra* note 44, at 437-39.

⁴⁷ CHILE ANNUAL REPORT, *supra* note 45.

⁴⁸ *Id.*

⁴⁹ Byers, *supra* note 44, at 439.

⁵⁰ HUMAN RIGHTS WATCH, CHILE: SUPREME COURT CONFIRMS PINOCHET INDICTMENT, HUMAN RIGHTS NEWS, Jan. 4, 2005, <http://www.hrw.org/english/docs/2005/01/04/chile9943.htm> (last visited Jan. 9, 2006) [hereinafter Indictment].

⁵¹ *See, e.g.,* Frank Ching, *Korean Trial Sets Bad Precedent: Law Is Used as Instrument to Exact Vengeance By Those in Power*, 159 FAR E. ECON. REV. 40 (1996), http://www.feer.com/articles/archive/1996/9610_10/P035.html (noting that current dictators are less likely to step down and allow democratization to proceed if they feel they then will be persecuted).

⁵² West, *supra* note 6, at 103-13 (describing President Kim Young-Sam's policy change from letting history decide the fate of the two former leaders to rectifying history and prosecuting the former leaders).

⁵³ *Id.* at 105.

⁵⁴ *Id.* at 103. *See also* Pollack, *supra* note 5.

details of the merger between Roh's and Kim's parties have not been disclosed, it is widely speculated that barring prosecution of Chun and Roh was a quid pro quo concession by Kim Young Sam required for the necessary support.⁵⁵

However, ongoing public hostility towards the former presidents stirred up evidence that embroiled the country in a new controversy. In late October 1995, prosecutors announced that they found evidence of huge slush funds accumulated by Roh Tae-Woo during his presidency.⁵⁶ The scandal widened to include allegations that Kim Young-Sam benefited from this money as the subsequent leader of Roh's political party.⁵⁷

Faced with continued massive protests stemming from the prosecutorial impunity awarded to Chun and Roh and the new slush fund allegations, President Kim found it expedient to reevaluate his stance against prosecution.⁵⁸ At the end of October 1995, President Kim announced "a decision on whether to file criminal charges against Roh, which will be made on the basis of the outcome of the prosecution probe and in consideration of public opinion."⁵⁹ Following the strong public support for such action, President Kim allowed indictments to occur and pushed for enactment of a special law that would disable statute of limitations restrictions from halting attempts at prosecuting the Kwangju Massacre and an earlier coup d'etat.⁶⁰

The role played by politics in the move towards prosecution is overwhelming. It is worth more than passing notice that the decision to prosecute was made by the political branch, at the office of the president, and not in the prosecutor's office.⁶¹ It would be hard to surmise that the earlier prosecutorial decisions not to indict for treason and insurrection during the 1979 coup d'etat and mass murder during the 1980 Kwangju Massacre were not made on the same level, rather than by the actual prosecutors investigating the case. Also revealing is the tacit admission that "public opinion" would bear influence in the decision to prosecute

⁵⁵ West, *supra* note 6, at 103.

⁵⁶ Jameson, *supra* note 4.

⁵⁷ David Holley, *Serving Democracy Also Serves Himself, Kim Finds; Asia: South Korean President's Political Fortunes Rise as He Presides over the Downfall of Two of His Predecessors*, L.A. TIMES, Dec. 25, 1995, at A1, LEXIS, News Library, LAT file; Mary Jordan, *Seoul Plans New Probe of 80 Massacre; Ex-Presidents' Roles To Be Investigated*, WASH. POST, Dec. 1, 1995, at A32, LEXIS, News Library, WPOST file.

⁵⁸ See, e.g., West, *supra* note 6, at 108-09; Suvendrini Kakuchi, *South Korea-Outlook: Kim's Democracy Needs Face-Lift*, INTER PRESS SERVICE, Dec. 20, 1994, LEXIS, News Library, INPRES file; Reuters, *Seoul Protestors Clash with Police*, L.A. TIMES, Nov. 5, 1995, at A4; *South Korea's Opposition Democratic Party Assails Government*, THE XINHUA NEWS AGENCY, Dec. 10, 1994, LEXIS, News Library, XINHUA file.

⁵⁹ West, *supra* note 6, at 112 (quoting *Kim Denies Receiving Money From Roh; President Stands Firm on Thorough Investigation for Slush Fund*, KOREA HERALD, Oct. 31, 1995).

⁶⁰ *Id.* at 113.

⁶¹ *Id.* at 112.

instead of relying on the legal merits of the case.⁶² Lastly, Kim Young-Sam's decision to invoke a special law facilitating prosecution of the former presidents can be seen as a bold affront to the opposition party's efforts, headed by Kim Dae-Jung, to accomplish the same. Kim Dae-Jung's long efforts to investigate and punish those responsible for the Kwangju Massacre had been a great source of political capital.⁶³ By pushing for this legislation, Kim Young-Sam depleted Kim Dae-Jung's political strength. This measure was sorely needed, as Kim Young-Sam's approval ratings dropped greatly from the near eighty percent enjoyed upon entering office.⁶⁴

Furthermore, the decision to push through the special act to prosecute can be seen as choosing the lesser of two evils. By championing this act, and bowing to the public outrage over the corruption scandals, Kim Young-Sam paved the way for prosecution to go forward without necessitating the need to find the former South Korean leaders guilty of murder. The corruption charges provided a distraction from the original outcry demanding prosecution for the Kwangju Massacre and December 1979 coup d'état. By expediting the trial, Kim Young-Sam not only prevented the opposition party, headed by Kim Dae-Jung, from launching an investigation into the Kwangju Massacre, he also allowed for the trial to occur without ensuring a thorough accounting or acknowledgment of the political repression and atrocities committed under Chun and Roh. The corruption scandal surrounding the two former presidents allowed Kim Young-Sam a politically expedient exit to avoid investigating the full extent of the abuses committed under the two men.

B. Economic

The economic restraints on transitional justice may not be as aggrandizing as the political ones, but they nonetheless can place a major hamper on the type of justice regime that is viable to the transitioning nation. However, since democratization in both Chile and South Korea occurred through peaceful handovers, these nations were not economically limited in the ways a war struck nation may be. Nevertheless, the economic impact of the authoritarian regime would still play a role in the justice process.

⁶² *Id.*

⁶³ David Holley, *The Ghosts Hovering In S. Korea; At Least 240 People Were Killed in a 1980 Uprising Against Military Rule. But Many Contend the Toll Was Four Times That. Victims' Families, and the Nation, Are Watching Warily as a New Probe Begins*, L.A. TIMES, Dec. 16, 1995, at A1, LEXIS, News Library, LAT file. [hereinafter *Ghosts*].

⁶⁴ Kakuchi, *supra* note 58; John Burton, *Ghosts of Kwangju Return to Haunt Korea: John Burton on Events Leading to the Takeover in Seoul by Former President Chun in 1980*, FIN. TIMES (LONDON), Dec. 4, 1995, at 4.

The economic success of Chile and South Korea, especially in comparison to their regional counterparts, is often attributed to the policy reforms imposed by the respective leaders of these two countries during the seventies and eighties.⁶⁵ The economic growth and prosperity of these nations under dictatorship fostered a sense of performance legitimacy, allowing supporters to excuse the dictators' excesses as necessary for the good and growth of the country.⁶⁶ It would be exactly this legacy of growth that gave the Seoul High Court the rationale for commuting Chun's death sentence to life imprisonment.⁶⁷ Similar attitudes exist in Chile where some still consider Pinochet a "national savior" for his neo-liberal economic reforms and steering the nation away from mass socialization.⁶⁸

C. Institutional

In a transition from a military dictatorship to a civil democracy, the continued role of the military in the new society is one that necessarily must be met with great apprehension. The need for apprehension becomes double-fold when military duplicity in past human rights atrocities occurred. At this junction, the military would be bound to be viewed as an instrument of oppression and a haven of human rights transgressors among much of the population. At the same time, the military retains much of the physical strength it used to wield during the dictatorship. Despite skepticism towards the military's commitment to civilian rule and the knowledge of past abuses, any affront on the military is dangerous. If a new government sought too hard for direct punishment of human rights criminals it would surely result in "justice with ashes."⁶⁹

It was in such a difficult situation that both South Korea and Chile found themselves. Terms of the 1988 plebiscite resulted in the Chilean situation being the more precarious of the two. Perhaps the greatest obstacle faced by the emerging democracy was that Augusto Pinochet remained Commander in Chief of the Army.⁷⁰ In gaining the 1988 plebiscite, the new Chilean government found itself bound by the 1978 Amnesty and as such had little recourse at individual prosecution beyond attempts to invalidate this Amnesty. However, such propositions were met with strong opposition by Pinochet's military. Perhaps this impasse was summarized best with characteristic gusto by Pinochet himself, if "a single

⁶⁵ Park, *supra* note 12, at 128–29, 137.

⁶⁶ *Id.* at 137.

⁶⁷ West, *supra* note 6, at 165 (quoting the court's decision on leniency in consideration of Chun's "contribution to economic development" and "the peaceful transfer of the presidency to Roh in 1988").

⁶⁸ Park, *supra* note 12, at 139.

⁶⁹ ASMAL, *supra* note 25, at 18.

⁷⁰ David Weissbrodt & Paul W. Fraser, *Book Review: Report of the Chilean National Commission on Truth and Reconciliation*, in *TRANSITIONAL JUSTICE* 461, 463 (Neil J. Kritz ed., 1995).

hair of a single soldier” was touched, the rule of law would end.⁷¹

Although South Korea could have found itself in a similarly dire situation, several factors mitigated any such dangers from the military. The first is the South Korean policy of universal conscription for males. Since all males are subject to military service, conscription alleviates the sense of disconnect between the military and general society.⁷² Also favorable for South Korean democratization was that Chun Doo-Hwan had already been nationally disgraced when he appeared before the National Assembly and then entered a Buddhist exile in exchange for non-prosecution during the Roh tenure.⁷³ Furthermore, the Roh presidency served as a buffer of sorts, during which democracy continued to blossom while under the watch of the military. As such, when true civil government arrived under Kim Young-Sam it was not as abrupt as in Chile. Further adding to the military’s ease with this government was that Kim previously merged affiliations with Roh’s political party and, theoretically at least, was not a complete outsider. Lastly, the remaining military officials of Chun and Roh’s military clique, the Hanahoe (Society of One Mind), who had launched the coup with Chun, were eased into retirement by Kim Young-Sam in early 1994.⁷⁴ The combination of these factors greatly reduced the chance of military intervention during the prosecution of Chun and Roh.

The genuine threat posed by the Chilean military necessitated the adoption of a non-retributive justice procedure by President Aylwin. In response, Aylwin adopted a truth commission that, through official acknowledgment of the past, eventually fostered enough popular and institutional momentum to prosecute human rights violations under Pinochet’s reign. The lesser likelihood of a military coup in South Korea allowed the direct move to retributive justice without first enacting a method for peaceful reconciliation and acknowledgement of the past.

Although the military presents the most threatening institutional roadblock to transitional justice, it is not the only institutional remnant that may interfere with justice. Chile’s efforts at transitional justice were critically hindered on two further institutional fronts: the legislature and the judiciary. Although the democratic parties held a majority in the lower house of legislature which was popularly elected, they did not have control

⁷¹ Kritz, *supra* note 13, at 454; *Political Setting supra* note 7, at 459.

⁷² Interestingly, the system of universal conscription may have added to the outrage and shock felt by the victims at Kwangju. It was believed by some that the atrocities were actually being committed by North Korean Troops disguised in South Korean uniforms, because “[o]therwise, how could our own army do such brutal acts to Kwangju citizens?” *Ghosts, supra* note 63 (quoting Chon Kye-Ryang, head of the Kwangju Bereaved Families Assn.).

⁷³ West, *supra* note 6, at 103.

⁷⁴ *Id.*

of the senate.⁷⁵ Further exasperating attempts at legislative reform was the fact that the Senate was not entirely elected, but nine of its forty-six members were designated by the constitution in a manner that ensured these slots only to members of Pinochet's regime.⁷⁶ The designation of these senators not only ensured that Pinochet became a senator for life, but that the other eight designees from his government would be installed as senators for the first eight years of the restored democracy.⁷⁷ This conglomeration of factors ensured that no new legislative or constitutional reforms could be passed through the legislature without compromising with a right wing faction of government.⁷⁸ These factors would also bear heavily on President Aylwin's eventual decision to invoke the Commission on Truth and Reconciliation by presidential decree rather than with the full weight of law provided by legislative passage.⁷⁹

The limitations on the justice process in Chile imposed by the judiciary have been similarly stifling. The root of this judicial intransigence in Chile, not surprisingly, is the same as that of the legislative blockage. The Chilean Supreme Court is composed of lifetime members appointed by the President.⁸⁰ When acquiring power from Pinochet in 1990, Aylwin also adopted Pinochet's institutions and the respective appointees. By accepting the 1980 Constitution, President Aylwin was also bound to accept the Supreme Court as defined by the constitution.⁸¹ The

⁷⁵ *Political Setting*, *supra* note 7, at 461.

⁷⁶ CHILE CONST., art 45, §§ (a)–(f). In relevant part:

The Senate shall also be composed of:

(a) Former Presidents of the Republic who should have served for six consecutive years in that capacity, except for the occurrence of the situations described in paragraph 3 of No 1 of Article 49 of this Constitution. These Senators shall hold their positions in their own right for life, without prejudice that incompatibilities, incapacities and grounds for suspension described in Articles 55, 56 and 57 of this Constitution may be applied;

(b) Two former Ministers of the Supreme Court, elected by the latter in successive balloting and who should have held their office for, at least, two consecutive years;

(c) A former Comptroller General of the Republic who should have held the office for at least two consecutive years, also elected by the Supreme Court;

(d) A former Commander-in-Chief of the Army, one of the Navy, another of the Air Force, and a former General, Director of the Armed Police, who should have been in their office for at least two years, elected by the National Security Council;

(e) A former Rector of a State University or of a University acknowledged by the State, who should have held office for a period not less than two consecutive years, appointed by the President of the Republic, and

(f) A former Minister of State who should have held that position for more than two consecutive years in presidential periods prior to that in which the appointment is made, also designated by the President of the Republic.

Id.

⁷⁷ *Id.*

⁷⁸ *Political Setting*, *supra* note 7, at 459.

⁷⁹ *Id.* at 461.

⁸⁰ CHILE CONST. arts. 75, 77.

⁸¹ *But see Political Setting*, *supra* note 7, at 460 (suggesting that the 1980 Constitution did not

implications of this judicial make-up are readily apparent in two supreme court rulings validating and expanding the scope of the 1978 Amnesty law. A 1986 ruling held that cases investigating murders or disappearances should be closed before investigation, and defendants in such cases should be cleared of “criminal liability even before being found guilty.”⁸² This holding was reaffirmed and expanded in 1990. In a case involving illegal burial in mass graves at the Pisagua army camp, the supreme court allowed jurisdiction to be transferred to a military court which closed the case almost immediately upon transfer.⁸³ This ruling strengthened the military’s contention that military court jurisdiction extends to all acts involving military personnel or occurring on military premises, with such premises including “vehicle, vessel, or aircraft” in which military personnel function.⁸⁴ Victims’ hopes of judicial remedy were further quashed by the court’s continued reluctance to examine post-1978 crimes committed by the government.⁸⁵

These restraints also exist in South Korea, but analogous to the constraints imposed by the military, they are less strongly felt in South Korea. Where the judiciary did not so much impede the transition justice process, it nearly unwittingly derailed democratization efforts. In the process of trying Chun and Roh, both the prosecutor’s office and the judiciary acquiesced to presidential inclinations. The prosecutor’s October 1994 decision not to indict, despite confirming that Chun and Roh committed treason, was in harmony with Kim Young-Sam’s desire to let history be the judge of his predecessors, and his party-mate, Roh.⁸⁶ The Constitutional Court of January 20, 1995, likewise favored ideas of reconciliation and social balance to the retribution to be achieved by indictment.⁸⁷ A variation of this pattern reoccurred with the prosecution’s July 18, 1995 decision not to indict for the May 18 Kwangju incident and the Constitutional Court’s December 16, 1996 about-face determination that a coup d’etat may be prosecuted, with Roh Tae-Woo’s slush fund scandal breaking out in the interim and prosecution becoming more

differ from the earlier 1925 Constitution in this regard and, therefore, that the Justices were legitimately appointed regardless of the actual legitimacy of the 1980 constitution).

⁸² AMERICAS WATCH, *supra* note 9, at 500.

⁸³ *Id.* at 499.

⁸⁴ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES, REPORT ON THE SITUATION OF HUMAN RIGHTS IN CHILE, THE RIGHT OF DUE PROCESS AND MILITARY JURISDICTION IN CHILE, OEA/Ser.L/V/II.66, doc. 17, ¶¶ 130–132 (Sept. 9, 1985) (describing the expansion of military jurisdiction under law No. 18,342 passed in 1984), available at <http://www.cidh.org/countryrep/Chile85eng/TOC.htm> (Table of Contents, select Ch. VII, § D) (last visited Jan 9, 2006).

⁸⁵ *Political Setting*, *supra* note 7, at 460.

⁸⁶ West, *supra* note 6, at 105.

⁸⁷ 94Hun-Ma246, *supra* note 5 (affirming non implication of prosecution reasoning that Chun and Roh laid “the foundation of the present political, economic, and social order”).

politically palatable.⁸⁸

Lastly, in a final instance of judicial compliance with the president, the Seoul High Court found the leniency to reduce the initial sentences handed down to Chun and Roh.⁸⁹ The stilted reasoning for clemency, including a Chinese maxim that “a general who surrenders should not be put to death,”⁹⁰ led many to believe that there was a direct political intervention to commute Chun’s death sentence and to insulate Kim Young-Sam from the political backlash had he granted a reprieve himself.⁹¹ By delving into the realm of political beckoning, the South Korean judiciary came perilously close to losing any semblance of apolitical affiliation, a result disastrous to ambitions of establishing a rule of law. However, court proceedings maintained enough legitimacy to allay such concerns while the very fact that convictions were produced greatly lifted the reputation of the Korean judiciary and belied notions of mere cronyism.⁹²

The function of legislative continuity and Kim Young-Sam’s merging with Roh Tae-Woo’s political party cultivated a situation that nearly guaranteed that investigation and prosecution would be limited to a select few. However, the proposition is easily made that the entire martial law regime was illegal, starting with the December 1979 coup d’etat, and as such, much of the apparatus of government is now illegitimate along with many government officials being collaborators with traitors.⁹³ To venture too far down this path would quickly destabilize the government and economy past any sustainable threshold. Likewise, many of those who would be indicted are now members of Kim’s own party, and to prosecute them would impeach directly upon the office of the sitting president, not only former presidents. Upon arrest, Chun Doo-Hwan harkened as much, averring that “[i]f I am a chieftain of treason, President Kim should also bear appropriate responsibility for having cooperated with insurrectionists.”⁹⁴ These realities have greatly restricted the scope and extent of justice in South Korea, and without addressing them, may prove fatal to any hopes of a true revelation of human rights abuses.

⁸⁸ THE CONSTITUTIONAL COURT OF KOREA, *May 18 Incident Non-institution of Prosecution Decision case, 7-2 KCCR 697, 95Hun-Ma221*, Dec. 15, 1995, in *THE FIRST TEN YEARS OF THE KOREAN CONSTITUTIONAL COURT* 164, 166-67 (2001) [hereinafter *95Hun-Ma221*].

⁸⁹ Sentencing decision No. 96-1892 (Seoul High Court, Dec. 16, 1996); West, *supra* note 6, at 165.

⁹⁰ Sentencing decision No. 96-1892 (Seoul High Court, Dec. 16, 1996).

⁹¹ West, *supra* note 6, at 165-66.

⁹² *Id.* at 167.

⁹³ *Id.* at 100.

⁹⁴ *Ghosts, supra* note 63.

D. Logistical

Not all the restraints on transitional justice come in the form of persons. Many preventive elements are strictly a result of logistic constraints. Although some of these logistical problems are clearly the result of previous malfeasance, some merely arise from the physical reality of how much can properly be accomplished in a certain amount of time. The paucity of concrete evidence in human rights cases is an example of the former type of logistic restraint. Poignantly depicted by the father of a Kwangju victim, “[p]eople are forgetting that during the years of Chun Doo-Hwan’s authoritarian rule, they did everything they could to destroy evidence.”⁹⁵

Likewise, evidence was not forthcoming in the Chile investigation. The chief of staff and secretary of the Chilean National Commission on Truth and Reconciliation, Jorge Correa, detailed that “[i]n some thousand cases . . . there was not enough collaboration on the part of former human rights violators to find out exactly when and how the missing people were killed and where their remains could be found.”⁹⁶ Furthermore, after the initial outbreak of violence, killing operations were limited to a small number of extremely loyal and highly trained operators.⁹⁷

The Rettig Commission in Chile was also restricted by problems of scale. The abuses under Pinochet were so widespread, pervasive, and ongoing, that choices had to be made about what to investigate. The commission was limited to only the gravest of abuses, those that resulted in disappearances or deaths in which the state was morally responsible.⁹⁸ In addition to limiting the scope of the Commission, the Chilean government was also rushed to release the report before its importance diminished.⁹⁹

E. Timing

The extended continuation of prosperity and stability after the change to democratic elections is also a prerequisite to successfully bringing suit against former rulers in Chile and South Korea. Both nations needed a period of approximately ten years after the return of free elections before

⁹⁵ *Id.*

⁹⁶ Jorge Correa S., *Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship*, in 2 TRANSITIONAL JUSTICE 478, 480 (Neil J. Kritz ed., 1995) [hereinafter *Past HR Viol.*].

⁹⁷ *Id.*

⁹⁸ CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, ART. 1 OF SUPREME DECREE NO. 355, art. 1, ¶ 2 (April 25, 1990), Preambular Paragraph No. 2, Report (1991), http://www.usip.org/library/tc/doc/reports/chile/chile_1993_decree.html (last visited Jan. 9, 2006) [hereinafter SUPREME DECREE NO. 355].

⁹⁹ *Past HR Viol.*, *supra* note 96, at 484. The commission was given a six month period with an additional three month extension to deliver its work on human rights violations which occurred over seventeen years throughout the entire country. *Id.*

the new governments possessed the popular legitimacy to try former leaders.¹⁰⁰ In South Korea and Chile, the durational period between the transfer of power and ensuing prosecutions was needed to ensure that stability and democratization had taken hold and that the political and economic status quo did not undergo drastic upheaval during the democratization process.¹⁰¹

V. CONSTITUTIONAL ISSUES

Although the 1988 Korean transfer of power allowed Chun to escape prosecution in exchange for self-imposed Buddhist exile, democratization was not explicitly bound to retaining the existing constitution. Since Chun and Roh's actions were not constitutionally safeguarded, they were left vulnerable to prosecution. Ironically, their failure to enshrine protection under the constitution provides the opportunity for charges of treason against the constitution. As such, it is possible to see their entire regimes as affronts to the constitution and therefore not legitimized. Although due caution must be paid to how fine this thread is stretched, the Korean Constitutional Court recognized this sentiment in its December 15, 1995 ruling. It announced that treason can only escape punishment if it is ratified by the "free expression of the people" but realized that "denying the legitimacy of the treasonous government does not mean denying the legal effects of all its acts."¹⁰²

The determinations that the South Korean Constitutional Court made regarding the scope of presidential power and privileges were premised on Chapter 1, Article 1 of the Korean Constitution, designating the people as the sole source of sovereignty for the state.¹⁰³ The constitution additionally provides that "[a]ll public officials are servants of the entire people and responsible to the people."¹⁰⁴ Illuminated thus, the court's decision that presidential immunity was not a total bar to prosecution, but instead acted to delay the tolling of the statute of limitations until the termination of office, is not surprising.¹⁰⁵ The court reasoned that personal immunity from criminal acts is not enjoyed by the ordinary person, and therefore it would "contravene justice and fairness" to convey this privilege to the

¹⁰⁰ Democracy returned to South Korea in 1987, although Roh Tae-Woo, a military ruler, was elected to a five year presidency in this first election. In March 1996, trials started against the former rulers Roh Tae-Woo and Chun Doo-Hwan. Park, *supra* note 12, at 135-36. Pinochet was defeated in a plebiscite to discontinue his rule in October 1988 and arrest proceedings began against him in October 1998. See Political Setting, *supra* note 7, at 457; CHILE ANNUAL REPORT, *supra* note 45, at 1.

¹⁰¹ Park, *supra* note 12, at 130.

¹⁰² 95Hun-Ma221, *supra* note 88, at 167.

¹⁰³ S. KOREA CONST., ch. 1, art. 1, § 2 (stating "[t]he sovereignty of the Republic of Korea resides in the people, and all state authority emanates from the people").

¹⁰⁴ *Id.* at ch. 1, art. 7, § 1.

¹⁰⁵ 94Hun-Ma246, *supra* note 5, at 163.

president who should act as the people's servant and be responsible before them.¹⁰⁶

The same reasoning highlights the court's holding that the prosecution's decision not to indict for the incidents of May 18 (Kwangju Massacre) "for reason of immunity of a successful coup engenders misunderstanding of the ideals of the Constitution"¹⁰⁷ The court accepted the idea that treason could be justified after the fact when it was committed to restore the sovereignty of the people and was the accepted will of the people.¹⁰⁸ To this end, they held "a successful treason becomes not punishable under the exceptional circumstances that the people have ratified it through free expressions of their sovereign wills. . . . [T]he treasonous acts of the two former presidents were neither justified by the circumstances nor were ratified by free expression of the people"¹⁰⁹ Lacking the acquiescence of the people, Chun and Roh could not cloak themselves in full constitutional protection.

However, there was another constitutional issue to play out which was very much the creation of Kim Young-Sam. In attempting to prosecute Chun and Roh for incidents occurring in 1979 and 1980, victims were running into Korea's fifteen year statute of limitations.¹¹⁰ By promulgating a "let history judge" approach to Chun and Roh, actionable time was quickly dwindling away. If not for his continually waning support, Kim may have been content to allow this window to close. Nevertheless, the thirty-two months of stonewalling between Kim's inauguration and the decision to bring charges was sufficient to provide Chun and Roh a legitimate due process defense against prosecution.

On December 21, 1995, two special acts of the legislature were promulgated which allowed for prosecution regarding the May 18 Democratization Movement.¹¹¹ These acts had the relevant effects of first holding the statute of limitations non-applicable to crimes destructive of the constitutional order, such as treason or insurrection.¹¹² The second act, known as the "5.18 special act," directly relates to the incidents of December 12, 1979 and May 18, 1980 and suspends the statute of limitation from tolling until February 24, 1993, when Roh left office.¹¹³

¹⁰⁶ *Id.*

¹⁰⁷ *95Hun-Ma221*, *supra* note 88, at 167.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See West, *supra* note 6, at 98.

¹¹¹ Waters, *supra* note 23, at 468.

¹¹² Law No. 5,028, promulgated Dec. 21, 1995, available at <http://search.assembly.go.kr:8080/law/presentlaw/lawprint.jsp?lawid=2635&lang=K> (Korean text); West, *supra* note 6, at 120 nn. 169–70.

¹¹³ Law No. 5,029, promulgated Dec. 21, 1995, available at <http://search.assembly.go.kr:8080/law/presentlaw/lawprint.jsp?lawid=2636&lang=K> (Korean text); West, *supra* note 6, at 121 nn. 172–73; *Parliament OKs Special Law To Punish Chun and Roh*, JAPAN ECON. NEWSWIRE, Dec. 19, 1995, LEXIS, News Library, JEN file.

Expectedly, those charged under these laws objected that they were prohibited by the constitution's prohibition against ex post facto laws.¹¹⁴ In a unique quirk of the Korean Constitutional Court, the defendants challenge was able to carry the day legally but was insufficient to overturn a legislative act. The Korean Constitutional Court Act requires a super majority, or six of nine justices, and not just a simple majority to overturn a parliamentary act.¹¹⁵ In examining the issue, the court found the May 18 Special Act constitutional in and of itself but differed on its application. The non-prevailing majority held that the law could only be applied if the statute of limitations had not already run, where conversely considering it an unconstitutional ex post facto law if the ordinary running of the statute of limitations had expired prior to the enactment of the law.¹¹⁶ The Constitutional Court's apparent intention not to knock down this statute was further exemplified by its return to the district court to determine if the statute had indeed passed or not, which the district court apparently decided the statute had not run.¹¹⁷

The constitutional issues in Chile, at least superficially, were less complicated. The 1988 plebiscite in Chile gave at least a modicum of democratic ascension to the 1980 constitution instituted by Pinochet's regime. By accepting the terms of the plebiscite and enacting them in order to achieve a vote, the democratic parties, and, through them, the general population, tacitly approved of the 1980 constitution. This acceptance, although unspoken, nevertheless created a legitimate constitutional restraint, along with any military, political, or other restraints, to imposing retributive justice on Pinochet's regime.

VI. TRANSITIONAL PROCESSES

"Properly understood, a just and moral appraisal of the past is the true life-blood of reconciliation . . ." ¹¹⁸ As valid as this proposition is, there is also value in the idea that social repudiation or retribution of past human rights abuses plays a valuable role cementing law in the democratizing country and preventing future human rights abuses.¹¹⁹ Although the means of justice for these two paths may differ, they both strive for the same end. Both paths intend to prevent further human rights abuses and to provide closure and progress for their people. The fact that these implements ultimately desire the same goal helps dispel the idea that they cannot be mutually employed. Accordingly, it then becomes expedient to view how

¹¹⁴ S. KOREA CONST., ch. 2, art. 13; *see also* West, *supra* note 6, at 123.

¹¹⁵ *96Hun-ka2*, *supra* note 23, at 170-71.

¹¹⁶ *Id.*

¹¹⁷ West, *supra* note 6, at 124-25; *96Hun-ka2*, *supra* note 23, at 171.

¹¹⁸ ASMAL, *supra* note 25, at 14.

¹¹⁹ *Past HR Viol.*, *supra* note 96, at 487.

these processes work contemporaneously to realize a more robust transitional justice regiment. To achieve this goal of viewing the combined roles of these processes, three aspects of transitional justice will be examined, the first being retributive justice. The second and third represent the more tangible elements of reconciliation, which will be evaluated through the truth telling process and reparations to victims of human rights abuses.

A. *Retributive Justice*

Attempts at retributive justice have made great headway in Chile since the Carmelo Soria case in 1996.¹²⁰ In July 2001, the Chilean judiciary exerted a new found strength in pursuing post-1978 abuses and convicted military personnel for the 1982 murder of Juan Alegria Mandioca, who had been set up for the murder of another victim of extrajudicial execution, the union leader, Tucapel Jimenez.¹²¹

Even more remarkably, events began to touch on Pinochet himself. The first is a direct challenge to the terms of the 1978 Amnesty. In a 1999 case investigating the so-called Caravan of Death, instigated by Pinochet to “streamline the administration of justice” through the use of an army helicopter unit, the supreme court held that someone who continues to be missing will no longer be presumed dead but will be considered kidnapped, thus constituting a continuing crime outside the scope of the 1978 Amnesty.¹²² The year 2001 continued to be a bad one for Pinochet as a Santiago Appeals Court stripped him of his senatorial immunity.¹²³ Although investigation of Pinochet for the Caravan of Death would be terminated due to his diminished health in 2002, the supreme court would find in January 2004 that Pinochet was fit to face trial.¹²⁴ As of this publication, the supreme court confirmed Pinochet’s indictment for homicide and kidnapping relating to the inter-junta pact to smuggle, torture, and execute dissidents referred to as Operation Condor.¹²⁵

Any evaluation of South Korea’s retribution process would be mixed at best. From the start, it was out of sorts with international precedent. On first instance, the South Korean trial’s foremost deviation from international norms was the ground-breaking undertaking to indict presidents who stepped aside and peacefully allowed democratization. However, in a more unsettling departure, the trial veered away from the precedents set forth by the Nuremburg Tribunal. Kim Young-Sam’s

¹²⁰ See Brief, *supra* note 10.

¹²¹ CHILE ANNUAL REPORT, *supra* note 45.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Indictment, *supra* note 50.

¹²⁵ *Id.*

announcement that the trials would focus only on the masterminds of the December 1979 coup and the Kwangju Massacre, besides being politically convenient, contravened the prevailing principles of human rights law that “following orders” was not a legitimate exculpatory defense.¹²⁶

Additionally, little conclusive evidence about the Kwangju Massacre was revealed through the trial. Although a stated aim of the trial was to create an accurate factual record of the incidents in question, evasiveness, disingenuousness, and blatant self-righteousness on the parts of the defendants was not a fruitful combination of factors to reveal the truth.¹²⁷ Further frustrating claims of bringing closure or justice to the people of Kwangju is the fact that no convictions for murder relating to the May 18 Kwangju Uprising were handed down.¹²⁸

The role of retribution was further weakened by a series of reduced, suspended, or commuted sentences.¹²⁹ However, justice was not a complete wash in this case. Despite the impediment these clemencies imposed on the notion of fostering serious accountability, the trial did serve a constructive purpose. In the sense promoted above by Martha Minow, the trial acknowledged and condemned horrors and publicly aired issues forced quiet by the autocratic regimes.¹³⁰ Whereas ultimately the justice meted out was muted by Kim Young-Sam’s presidential pardon, this does not diminish the fact that this was a civilian president granting a pardon from a civil prosecution to two former military autocrats. The establishment of civilian authority over the country is intrinsically required to maintain democracy and to cultivate a respect for basic human rights.¹³¹

B. Truth-Telling

“Only upon a foundation of the truth will it be possible to meet the basic demands of justice and create the necessary conditions for achieving true national reconciliation.”¹³² The notion of establishing an official truth was the central tenet of Chile’s transitional justice scheme from its origin. With the realization that formal judicial mechanisms were unavailable and that political constraints were too great to bring about punishment, a truth commission presented the best option as it used full disclosure to

¹²⁶ West, *supra* note 6, at 99.

¹²⁷ *Id.* at 152.

¹²⁸ Sandra Sugawara, *South Korean Court Sentences Ex-Rulers to Prison, Death*, WASH. POST, Aug. 26, 1996, at A1, LEXIS, News Library, WPOST file.

¹²⁹ West, *supra* note 6, at 164–65.

¹³⁰ MINOW, *supra* note 20.

¹³¹ *But see* Chan Jin Kim, *Korean Attitudes Towards Law*, 10 PAC. RIM L. & POL’Y J. 1, 36 (2000) (arguing that revelations of corruption among Chun, and Roh and speculations and accusations surrounding Kim, his family, and allies “corroded the very foundation of the society and the economy,” even precipitating the IMF financial crisis).

¹³² SUPREME DECREE NO. 355, *supra* note 98.

demonstrate moral repudiation and to reestablish a new, more accurate consensus of history.¹³³ Through acknowledgment, Aylwin strove to

achieve the three moral objectives that the government perceived as its basic and unavoidable obligations: (1) to do as much as it could to build a solid and preventive barrier against future human rights violations; (2) to compensate, as much as possible, the survivors that had been most severely damaged; and (3) to bring about reconciliation.¹³⁴

The commission composed to heed these obligations needed to be conciliatory from its conception. The make up of the commission helped achieve this goal. Although it was chaired by Raul Rettig, a former ambassador under President Allende, the appointees were otherwise evenly distributed in political terms.¹³⁵ Additionally, a conscious decision was made to establish an even number of appointees, demonstrating good faith in the process and hoping to prevent partisan pursuits.¹³⁶

The work of the Commission was massive, and although it dealt only with the gravest incidents of human rights abuses that resulted in death or disappearance, the Commission studied 2920 cases, 2115 of which were considered victims of human rights violations.¹³⁷ However, given the scope and time limit of the Commission, its findings were not complete. Significantly excluded from investigation were those who were tortured or otherwise abused, yet survived.¹³⁸ The Commission also lacked judicial powers and as such could not assign individual blame to offenders.¹³⁹

Despite the voluminous extent of the Commission's efforts, information gathering was not the only function it played. The process of collecting and telling the truth proved a cathartic experience for many involved. The commission sought to "provide a beneficial exercise for the sanity of social conscience" by getting at the larger general truth via individual cases.¹⁴⁰ This allowed victims to receive the individual acknowledgment from the government they were denied through the non-receptive judicial process.

Conversely, the South Korean experience claimed objectives of truth, but largely failed to reach them. The political circus that the trial became greatly reduced the public's faith in the credibility of the results.

¹³³ See *Past HR Viol.*, *supra* note 96, at 487.

¹³⁴ *Political Setting*, *supra* note 7, at 456.

¹³⁵ Weissbrodt, *supra* note 70, at 462-63.

¹³⁶ *Id.* at 463.

¹³⁷ NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, REPORT, APPENDIX 2 (1991), available at http://www.usip.org/library/tc/doc/reports/chile/chile_1993_APPENDICES.html#II (last visited Jan. 9, 2006).

¹³⁸ Weissbrodt, *supra* note 70, at 464.

¹³⁹ *Id.* at 465.

¹⁴⁰ *Past HR Viol.*, *supra* note 96, at 478-79.

Furthermore, the prosecutor's continued reluctance to indict Chun and Roh, reversed only under extraordinary public pressure, "undermined public confidence in their dedication to uncovering the whole truth."¹⁴¹ Failure to come to a consensus as to the scale of casualties in the Kwangju Massacre or to seriously investigate the long string of abuses committed by Chun throughout his rule further eroded public confidence in the truth gathering process.¹⁴² These criticisms are placated by occasional attempts to assuage public indignation, yet little is done to implement any comprehensive plans. Such examples include "the Special Act on the Investigation of Suspicious Deaths and the Act on the Restoration of the Honor of and Compensation for Persons Engaged in the Democratic Movement."¹⁴³ However, revelations about suspicious deaths under the Chun regime have been sparse, although existent.¹⁴⁴

C. Reparations

The concept of reparations in the United States is too often linked with that of monetary remuneration. Yet in the context of human rights abuses, it is critical to view reparations in a broader sense. The South African Truth and Reconciliation Commission provides a suitable guide for considering reparations in such a context, defining reparations as "any form of compensation, ex gratia payment, restitution, rehabilitation or recognition."¹⁴⁵ With this definition as a guidepost, restoring the honor and good-names of the victims of past government persecution becomes one of the most basic functions of reparations in nascent democracies.¹⁴⁶

It is in this form of recognition that the new governments of Chile and South Korea experienced the most success and have the greatest similarities. Although the dictatorial regimes in both countries committed atrocities ostensibly under the pretense of suppressing pro-communist activities and maintaining order, these claims are now given credence by few.¹⁴⁷ This aim is clearly stated in the preamble of the founding decree of the Chilean Commission on Truth and Reconciliation. The Rettig Commission was mandated to "establish as complete a picture as possible

¹⁴¹ West, *supra* note 6, at 152.

¹⁴² West, *supra* note 6, at 152–53; *see also Ghosts*, *supra* note 63.

¹⁴³ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, REPUBLIC OF KOREA, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2002 (March 31, 2003), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2002/18250.htm> (last visited Jan. 9, 2006) [hereinafter STATE].

¹⁴⁴ *Id.* (determining that 11 of 68 cases reviewed in 2000 were deaths caused by the government).

¹⁴⁵ PROMOTION OF NATIONAL UNITY AND RECONCILIATION ACT, No. 34, SEC. I(I)(XIV)(1995), *available at* <http://www.doj.gov.za/trc/legal/act9534.htm> (last visited Jan. 9, 2006).

¹⁴⁶ *See, e.g., Ex-President Kim Gets His Honor Restored*, KOREA TIMES, Jan. 30, 2004, LEXIS, News Library, KTIMES file (court nullified prior treason conviction from Jan. 1981 of former president and Noble Peace Prize recipient Kim Dae-Jung).

¹⁴⁷ *See, e.g.,* West, *supra* note 6, at 87.

of these grave events as well as their antecedents and circumstances.”¹⁴⁸ Armed with this mandate, the “Rettig Commission reconstructed the collective memory of the Chilean people and produced a broadly endorsed, authoritative version of the history of Chile during the Pinochet period.”¹⁴⁹ Likewise, the trial of Chun and Roh helped cement a near-consensus in South Korea that the Kwangju Uprising was a “spontaneous and self-defensive” action provoked by Chun’s usurpation of power.¹⁵⁰

However, beyond recognition and the reconstruction of collective memory, Chile far surpasses South Korea in other measures of reparations. The existence of such a situation is unsurprising when viewing the objectives initially set by Chile. From the onset of its democratization process, the government of Chile had established truth-telling and reparations for victims to be among its highest goals.

The form of reparations taken in Chile reflects the wide range of damage brought by the military regime. As such, three categories of reparations are suggested, (1) “symbolic reparations to vindicate the victims;” (2) legal measures to solve the administrative difficulties resulting from disappearances; and (3) financial and social reparations.¹⁵¹ The two most significant aspects of these three forms of reparations are the symbolic and the financial/social. The symbolic gestures would include dedicating monuments, schools, parks, or other public area in honor of human rights victims and has also seen work commence on a monument in the main graveyard in Santiago.¹⁵²

The second unique feature is the wide range and duration of the financial and social measures. All immediate relatives, except children over the age of twenty-five, of the disappeared and dead identified in the Rettig Commission Report will be entitled to compensation from the state. The assistance provided will be permanent and would not only include financial reimbursement but also health and education benefits.¹⁵³

Furthermore, the reparation scheme takes cognizance of the fact that the Rettig Commission was not able to include all victims of the abusive regime in its findings. It therefore allows the corporation devised to oversee reparations and reconciliation to investigate cases which were not investigated by the commission.¹⁵⁴ This allows the corporation to compensate living victims of terror, torture, and abuse.

Although long lacking and not as extensive as the Chilean system,

¹⁴⁸ SUPREME DECREE NO. 355, *supra* note 98.

¹⁴⁹ Weissbrodt, *supra* note 70, at 473.

¹⁵⁰ West, *supra* note 6, at 94, 144; *Ghosts*, *supra* note 63.

¹⁵¹ Cecilia Medina Quiroga, *The Experience of Chile*, in TRANSITIONAL JUSTICE 502 (Neil J. Kritz ed., 1995).

¹⁵² *Id.* at 502 n.12; *Past HR Viol.*, *supra* note 96, at 491 n.74.

¹⁵³ Quiroga, *supra* note 150, at 504, 506–07.

¹⁵⁴ *Id.* at 503.

South Korea has invoked its own measures of reparation.¹⁵⁵ In a symbolic gesture, the “May 18 Cemetery” where more than 200 victims of the Kwangju Massacre lay has been designated as a national memorial cemetery.¹⁵⁶ Additionally, South Korea has taken steps forward in implementing its compensation act for those involved in the Kwangju democratization movement. However, rewards of compensation continue to be de minimis, as reflected by the United States Department of State report that “in the over 1,835 cases reviewed to date, compensation was due in 33 cases, the names of 1,600 activists should be cleared.”¹⁵⁷ These acts can be seen as steps in the right direction, especially the acknowledgment that those persecuted under Chun Doo-Hwan were democratic activists and not anti-state terrorists. Despite this, the continued reluctance to award financial reparation indicates that the government does not hold itself fully accountable to those injured in the democratization movement. Without giving official credence to these victims’ grievances, meaningful reconciliation will be hard to accomplish.

VII. CONCLUSION

In the process of providing justice to victims of human rights abuses, reconciliation and retribution are often seen as conflicting ends. On the other hand, this is not necessarily true, especially in light of countries where democratization occurred through peaceful transfers of power. In those nations, the foremost role of justice is to account for the official truth of what happened under the authoritarian regime and to institute procedures to ensure that such atrocities do not reoccur. These goals satisfy the most basic aims of government. They first serve to provide an accounting of the past, fulfilling society’s need for a sense of law and justice. Second, they grant the individual the fundamental right of security. Through fostering of the rule of law, the individual can feel secure atrocities will not reoccur and that transgressors will be brought before justice.

In fulfilling society’s dual needs of accounting and security, both retribution and reconciliation have roles to play in the justice regime of a democratizing country. The truth and closure needed to progress securely in a new society is on one hand provided by reconciliation. However, retribution furthers this new found sense of security by demonstrating that the rule of law does exist and those who step outside of it will be held

¹⁵⁵ Whereas reparations were elemental in the Chilean procedure from the onset, they were not implemented in the South Korean Process until after the completion of trial proceedings. See *supra* notes 131–33, 142–43 and accompanying text.

¹⁵⁶ Chon Shi-Yong, *President Promises To Seek Special Legislation for Kwangju Victims*, KOREA HERALD, May 19, 2000, LEXIS, News Library, KHERLD file.

¹⁵⁷ STATE, *supra* note 143.

accountable. It is the recognition of these two principles that ultimately brought the transitional justice system in Chile to not only embrace the healing and cathartic properties of truth, but also to embody a sense of protection and security for society by holding perpetrators of atrocities accountable for their actions.

Likewise in South Korea, the rule of law cannot be fully embraced until both of these aspects of transitional justice are implemented. The failure to produce an officially sanctioned and acknowledged version of the truth has prevented the rule of law from being firmly accepted by the nation. This reluctance to accept the rule of law is deepened through the ambivalence that is also shown to holding human rights abusers accountable. Without full implementation of both aspects, justice for the events of December 1979, May 1980, and the entire Chun regime will never be fully felt.